

THE CONSTITUTIONAL COURT OF ZIMBABWE'S UNCONSTITUTIONAL APPROACH OF APPLYING RULES OF *LOCUS STANDI*

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(in loving memory of the late Blasio Zivengwa Mavedzenge)

ABSTRACT

This paper examines the rationality and legality of the rule of locus standi introduced by the Constitutional Court of Zimbabwe to the effect that no litigant is allowed to act in more than one capacity of locus standi in one matter. This rule was initially suggested in Mudzuru v Minister of Justice and was crystallised in Samuel Sipepa Nkomo v Minister of Local Government. When evaluated against the provisions of section 46 and section 85 of the Constitution, this rule is inconsistent with the liberal approach to determining locus standi and is therefore ultra vires the Constitution. At a conceptual level, this rule is untenable and irrational as it is contradictory to the theoretical foundations upon which the constitutional idea of judicial review is based. It is also inconsistent with the trajectory set by the same Court in its very first case of Jealous Mawarire v Robert Mugabe.

Keywords: *Constitution, locus standi, constitutional court, human dignity, ultra vires*

INTRODUCTION

Zimbabwe adopted a new Constitution in May 2013 which introduces and guarantees a range of progressive democratic principles, values and rights. These values and principles include constitutional supremacy (as opposed to parliamentary sovereignty),² the rule of

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² See section 2 (1) and 3 (1) (a) of the Constitution of Zimbabwe, 2013

law,³ separation of power,⁴ transparency, justice, accountability and responsiveness.⁵ A range of civil, political and socio-economic rights are guaranteed in Chapter Four of the Constitution.⁶ The intention is to ensure that the exercise of public power and conduct of private persons in Zimbabwe conforms and gives effect to these principles, values and fundamental rights.

In order to ensure the enforcement of fundamental rights, the Constitution provides for certain mechanisms which include the right to approach a court of law to seek remedies against violations or potential violations of specific rights that are enshrined in Chapter Four of the Constitution. This right is encapsulated in s 85 (1) of the Constitution. However, as is the case with most constitutional rights, it is not an absolute right.⁷ It is qualified to ensure that the courts entertain only those cases that entail “real, earnest and vital controversy” amongst litigants and not mere “hypothetical cases, or cases that are only of academic interest.”⁸ In order to distinguish between ‘hypothetical’ and ‘real’ cases, the Constitution provides for what are known as rules of *locus standi* which are basically rules that regulate the application of the right to approach a court of law or the right to bring an action before a court of law.⁹ These rules are set out in s 85 (1) of the Constitution as follows:

Any of the following persons, namely-

- (a) any person acting in their own interests; (b). any person acting on behalf of another person who cannot act for themselves; (c) any person acting as a member, or in the interests, of a group or class of persons; (d) any person acting in the public interest; (e) any association acting in the interests of its members;

³ Ibid, section 3 (1)(b)

⁴ Ibid, section 3 (2) (e)

⁵ Ibid, section 3 (2) (g)

⁶ Also called the Declaration of Rights

⁷ It is not listed as one of the rights that cannot be limited. See s 86 of the Constitution of Zimbabwe, 2013

⁸ This is a *dictum* of Brandeis J in *Ashwander v Tennessee Valley Authority* 297 US 288 (1936). For similar views, also see *Ferreira v Levin* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 at para 165. Also see Iain Currie and Johan De Waal *The Bill of Rights Handbook* 6 ed, Juta and Company 2013 at p. 72.

⁹ See Justice Alfred Mavedzenge and Douglas Coltart, A Constitutional Law Guide towards understanding Zimbabwe’s Social, Economic and Cultural Human Rights, *International Commission of Jurists* 2014 at p. 16

is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this Chapter has been, is being or is likely to be infringed, and the court may grant appropriate relief, including a declaration of rights and an award of compensation.

The significance of these rules cannot be gainsaid. They define capacities in which a person can bring an action or petition before the court, which is the *locus standi* or standing. If a litigant is unable to demonstrate that he or she fits in any of these capacities, then his or her case may not be heard by the court. Therefore, these rules are so important that they determine who can bring an action before the court for the vindication of constitutional rights.

Furthermore, these rules are also critical in the sense that they have a direct bearing on the right to access appropriate relief. This right is guaranteed in section 85 (1) which stipulates that any person who acts in the capacities or *locus standi* described above is entitled to appropriate relief if his or her petition succeeds in court. For a relief to be 'appropriate', it has to meet certain attributes.¹⁰ One of these is that the relief must be effective in the sense that it must adequately vindicate the right(s) in question.¹¹ For the court to give such a relief, it must be convinced that the applicant's case merits such kind of a relief in the first place. It is inevitable that, as part of this assessment, the court will consider the appropriateness of the relief sought in relation to the *locus standi* upon which the applicant founded his or her petition. Put differently, the court will inquire into the following question: Is the relief sought appropriate for an action brought on the basis of the particular *locus standi* invoked by applicant? Usually, for a petition brought by litigants acting in their own personal interest, the appropriate remedy would be a personal relief¹² rather than a public interest relief or a relief which affects the public.

Thus, rules governing *locus standi* do not determine only who can bring a petition before the court but they also determine the substantive nature of relief which a litigant can get from the court. It is therefore very important to critically engage with questions

¹⁰ For some of these, see *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at para 19

¹¹ See Mavedzenge and Coltart *supra* Note 9 at p. 15

¹² Relief which attaches to the litigant personally, as opposed to attaching to other persons who are not party to the case.

pertaining to how courts interpret these rules. In this paper, I examine the approach that has been taken by the Constitutional Court of Zimbabwe in applying s 85 (1) of the Constitution particularly on whether or not a litigant can act in more than one capacity (*locus standi*) in the same proceedings or in the same application. Decisions of the Constitutional Court are binding on all other courts¹³ and therefore, it is critical to engage with these decisions as they will affect litigants in other courts.

THE CONSTITUTIONAL COURT'S APPROACH IN APPLYING RULES OF *LOCUS STANDI*

The Constitutional Court seems to have suggested a curious application of the rules of *locus standi*, to the effect that a litigant cannot act in more than one capacity in a single matter. This proposition is encapsulated in *Mudzuru v Minister of Justice and Parliamentary Affairs*¹⁴ (*Mudzuru case*) where the learned Deputy Chief Justice Luke Malaba (as he then was) said:

What is in issue is the capacity in which the applicants act in claiming the right to approach the court on the allegations they have made. In claiming *locus standi* under s 85(1) of the Constitution, a person should act in one capacity in approaching a court and not act in two or more capacities in one proceeding. [My own emphasis]¹⁵

Although one could argue that by using the phrase “should act”, the learned Deputy Chief Justice was making a suggestion rather than laying out a rule regarding how provisions relating to *locus standi* should be applied, this seems to have crystallized into a rule when one takes into account the subsequent judgments made by the same Court. For instance, in *Samuel Sipepa Nkomo v Minister of Local Government, Rural and Urban Development*¹⁶ (*Samuel Sipepa Nkomo case*), the learned Ziyambi JCC said:

In so far as the applicant alleges an infringement of his fundamental right enshrined in Chapter 4 of the Constitution, he may, in the absence of the rules referred to in s 85(3), be permitted to access this Court directly. On this basis he has, *prima facie*, the *locus standi* to bring his application in terms of

¹³ See section 167 (1) (a) of the Constitution of Zimbabwe, 2013

¹⁴ [2015] ZWCC

¹⁵ *Ibid* at p. 8

¹⁶ CCZ 06-16 at para 8

s 85 (1) (a). But he cannot, as he has sought to do, act in his own interest as well as the public interest. This point was emphasized in *Loveness Mudzuru & Anor v Minister of Justice, Legal & Parliamentary Affairs N.O & 2 Ors* where Malaba DCJ, delivering the judgment of the Court, held that an applicant should confine himself to one of the capacities set out in s 85 (1). [My own emphasis]

Unlike the DCJ in the *Mudzuru case*, who uses the word “should” act in one capacity, Ziyambi JCC (with the concurrence of eight other judges) in *Samuel Sipepa Nkomo case*, uses the word “cannot” act in more than one capacity and she references the *Mudzuru case* in arriving at this interpretation. Thus, when one reads Ziyambi JCC’s judgment in *Samuel Sipepa Nkomo case*, it seems that the Constitutional Court has now laid it out as a rule that a litigant cannot claim more than one ground of *locus standi* in a single application. For instance, according to this approach (as suggested by the Constitutional Court) a litigant in a single proceeding cannot simultaneously claim to act in her own interest and in the public interest.

Through this paper, I question the rationality of this approach and contest its constitutionality. I take the position that, with respect, the Constitutional Court’s approach is wrong, irrational, unreasonable and unconstitutional. I advance my argument in two parts. First, I deploy the rules of constitutional interpretation in order to buttress my position. However, I refuse to restrict this discussion to a mere technical or legalistic review of how the Constitutional Court’s interpretation is *ultra-vires* s 85 (1) of the Constitution and certain values enshrined therein.¹⁷ To do so would be to miss the point entirely because the Constitutional Court’s interpretation is a tell-tale sign revealing the bench’s deep, underlying philosophical view of its own role in protecting the Constitution. For that reason, in the second part of the paper I discuss the theoretical and conceptual underpinnings of judicial review in order to show that the Constitutional Court interpretation of s 85 (1) of the Constitution is philosophically at variance with the spirit, purport and object of the Constitution which the Court is required to protect. First, I deal with the rules of constitutional interpretation.

¹⁷ Such as the rule of law and constitutional supremacy.

RULES OF CONSTITUTIONAL INTERPRETATION

Section 85 (1) of the Constitution is located within Chapter Four of the Constitution, which is the Declaration of Rights. Therefore, when interpreting how the rules of *locus standi* set out in s 85 should be applied, the Court must revert to section 46 (1) of the Constitution which provides that:

When interpreting this Chapter, a court, tribunal, forum or body—

- a) must give full effect to the rights and freedoms enshrined in this Chapter;
- b) must promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom, and in particular, the values and principles set out in section 3;
- c) must take into account international law and all treaties and conventions to which Zimbabwe is a party;
- d) must pay due regard to all the provisions of this Constitution, in particular the principles and objectives set out in Chapter 2; and
- e) may consider relevant foreign law;

Therefore, the rules of *locus standi* must be interpreted and applied in a manner that ensures that: the rights enshrined in the Declaration of Rights are given full effect,¹⁸ the constitutional values (including those enshrined in s 3) and relevant international law standards are implemented.¹⁹ The import of these rules of interpretation is that the right to approach the court must be interpreted generously but without distorting the grammar used in framing that right.²⁰ The first

¹⁸ *Mawere v Registrar General* (2015) ZWCC 04 at para 20, where the court adopted the ruling of the Supreme Court in *Rattigan v Chief Immigration Officer* 1994 (2) ZLR 54 (S) at 57 F-H where Gubbay CJ (as he then was) said: “[When interpreting constitutional rights] what is to be avoided is the imparting of a narrow, artificial, rigid and pedantic interpretation; to be preferred is one [an interpretation] which serves the interests of the Constitution and best carries out its objects and promotes its purpose. All relevant provisions are to be considered as a whole and where rights and freedoms are conferred on persons, derogations therefrom, as far as the language permits, should be narrowly and strictly construed.”

¹⁹ See supra note 15, *Mudzuru case* at para 25-26

²⁰ See supra note 18, *Mawere case* at para 20 where the Constitutional Court of Zimbabwe reproduced Kentridge AJ’s ruling in *State v Zuma* 1995 (2) SA 642 (CC) to caution that: “[When interpreting constitutional rights] it cannot be

aspect to consider then is the grammatical construction of the right.²¹ Section 85 (1) of the Constitution stipulates that any of the persons mentioned therein have the right to petition the court seeking protection of the right(s) guaranteed for them in Chapter Four of the Constitution. There is nothing in the grammatical construction of section 85 which shows that litigants are prohibited from acting in more than one capacity in a single proceeding. Thus, the scope of the right to approach the court is grammatically cast widely and therefore, is capable of a broad and purposive interpretation which takes within its sweep a range of relevant constitutional values and international law norms and standards.

The purpose of the rules of *locus standi* is to ensure that the right to approach the court is fully facilitated²² in order to bring about effective enforcement of constitutional rights.²³ Therefore, when interpreting and applying these rules, the court must seek to promote this purpose. A rule which prohibits applicants from acting in more than one capacity in a single matter is inconsistent with this constitutional goal. It has the effect of restricting an applicant from securing relief that is appropriate.

A relief is appropriate if it prescribes for the applicant remedies which best secure his or her rights while, at the same time, it protects the Constitution.²⁴ Under certain circumstances, a litigant may have to found her application on more than one capacity of *locus standi* in order to claim a relief that is effective for the protection of the

too strongly stressed that the Constitution does not mean whatever we might wish it to mean. We must heed Lord Wilberforce's reminder that even a Constitution is a legal instrument, the language of which must be respected...I would say that a Constitution embodying fundamental principles should as far as its language permits be given a broad construction."

²¹ See Zimbabwe Electoral Commission v Commissioner General, ZRP (2014) ZWCC 3 at para 8. Also see L Du Plessis Re-Interpretation of Statutes Butterworths 2002 p 96 and See GM Cockram Interpretation of Statutes 3 ed, Juta and Co 1987 at p 36

²² See 85 (3) of the Constitution of Zimbabwe, 2013

²³ See L Chiduzo and PN Makiwane 'Strengthening Locus Standi in Human Rights Litigation in Zimbabwe: An Analysis of the Provisions in the New Zimbabwean Constitution' in *PER/PELJ* 2016(19) at p 13

²⁴ See G Musila 'The Right to an effective remedy under the African Charter on Human and Peoples' Rights' in 2006 Vol 6 *African Human Rights Law Journal* at p 446. Also see *Jawara v The Gambia* (2000) *AHRLR* 107 (ACHPR 2000) at para 32. Also see *Fose case*, supra note 10.

Constitution and or vindication of her fundamental rights. For instance, Mrs X (an accused human rights activist) has been denied bail and is being held at Matapi police cells where the living standards are inhuman and degrading. Mrs X often gets arrested for engaging in public protests. She wants to bring an application to the Constitutional Court seeking an order which: (a) declares that the conditions at Matapi cells violate the right to human dignity and no accused person should be detained there until government fixes those conditions and, (b) that she be moved to cells with humane living conditions. It is necessary that Mrs X claim both (a) and (b) as part of the relief because she needs to be moved from Matapi cells in order to protect her right to human dignity which is being violated. Furthermore, as an activist who often participates in protests, she also needs to be assured that she will not be condemned to Matapi cells, should she be arrested again before government fixes the living conditions there. In order to claim a relief which declares the holding cells to be inhuman and unfit to hold any arrested person and that she is removed from there, Mrs X would have to approach the court acting both in her own interest and in the interest of the public. A relief which declares the cells to be inhumane and prohibits the state from detaining any accused person in those cells until they are fixed, is a public interest relief which Mrs X can only claim if she approaches the court on the basis of s 85 (1) (d) of the Constitution of Zimbabwe. On the other hand, Mrs X can only seek an order which compels the state to immediately move her from Matapi cells if she approaches the court on the basis of section 85 (1) (a) of the Constitution. Thus, Mrs X has to invoke both section 85 (1) (a) and (d) in order to get the appropriate relief which will see her being moved from Matapi cells while, at the same time, a guarantee that she will not be condemned to the same cells should she be arrested again before government fixes those cells.

Furthermore, a relief which would result in Mrs X being moved to better cells without the court condemning the inhuman cells as unfit for detention of any other person would not be an effective remedy. Such a remedy would temporarily protect Mrs X's rights but it leaves the Constitution vulnerable as other people may have their rights violated by being detained in the same cells. There are numerous examples where a litigant would have to invoke more than one ground of *locus standi* in order to seek an effective relief.²⁵ As would be the

²⁵ For instance, a parent who is threatened with arbitrary evictions has to act both in his own interest and in the interest of other persons – his children. A

case in Mrs X's situation, a rule which restricts litigants to choosing one ground of *locus standi* may constrain them from seeking effective relief, thereby undermining the effective protection of human rights and the Constitution. Such a rule undermines the purpose of the right to approach the court and is therefore *ultra vires* s 85 (3) (a),²⁶ which requires rules of procedure to fully facilitate the right to approach the court and the right to effective remedies.²⁷

This rule is also contrary to the cardinal values upon which the Constitution is based. These values include justice and respect for the rule of law²⁸ – values which demand that persons must have access to effective remedies in order to enforce the law-including their constitutional rights. As the Icelandic Human Rights Centre rightly observes:

Under the rule of law [and also constitutional supremacy], effective remedies, effectiveness of justice, notably in providing effective recourse to anyone who alleges that her or his rights have been violated, is essential. Without such recourse, justice is of little use.²⁹

The unconstitutionality of this rule becomes even more apparent when one applies s 46 (1) (c)³⁰ which requires provisions in the Declaration of Rights³¹ to be interpreted in a manner that is consistent with the relevant international law standards and principles. These are encapsulated in article 2 (2) of the International Covenant on Civil and Political Rights (ICCPR) which stipulates that:

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional

patient who is hospitalised in a clinic where the rights of patients are being violated may have to act in his own interest as well as that of other patients (who are in the same clinic) who are incapacitated to approach the court, yet their rights are equally in danger.

²⁶ Of the Constitution of Zimbabwe, 2013

²⁷ See section 85 (1) and (3) (a) of the Constitution of Zimbabwe, 2013

²⁸ See section 3 (1) and (2) (g) of the Constitution of Zimbabwe, 2013

²⁹ See <http://www.humanrights.is/en/human-rights-education-project/comparative-analysis-of-selected-case-law-achpr-iachr-echr-hrc/the-rights-to-due-process/what-is-the-right-to-an-effective-remedy> [accessed on 7 September 2018]

³⁰ Of the Constitution of Zimbabwe, 2013

³¹ Of which the rules of *locus standi* are part of the Declaration of Rights

processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant. [and]...

- (3) Each State Party to the present Covenant undertakes: (a) to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy...

The above provision has been interpreted as follows by the Human Rights Committee:

Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights. Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children. The Committee attaches importance to States Parties' establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law.³²

Rules of court procedure are part of the judicial mechanisms (contemplated in article 2 of the ICCPR) for addressing allegations of rights violations. As is mentioned by the Human Rights Committee above, these rules of procedure must ensure that persons not only get their cases heard by the court but they also get remedies that effectively address the alleged violations or threats of violation. As I demonstrated above, a rule which prohibits a litigant from invoking more than one grounds of *locus standi* undermines the litigant's ability to claim effective remedies and therefore, such a rule falls foul of Zimbabwe's international legal obligations- especially those arising from article 2 of the ICCPR.

By virtue of s 46 (1) (e) of the Constitution, courts may consider comparative foreign jurisprudence when interpreting provisions in the Zimbabwean Declaration of Rights. As I have argued elsewhere,³³ the Zimbabwean jurisprudence on the interpretation of certain constitutional provisions and principles is still shaping up and,

³² See United Nations Human Rights Committee (HRC) General Comment no. 31 [80] 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' 26 May 2004, para 15

³³ Mavedzenge and Coltart supra note 9 at p. 21. Also see Justice Mavedzenge 'Accessing the National Voters' Roll through the Right of Access to Information In Zimbabwe' in 2017 Vol 1 *Zimbabwe Rule of Law Journal* at p.4

therefore, courts should be keen to be persuaded by approaches taken by sister courts in jurisdictions which share contextual similarities with the Zimbabwean Constitution.

South Africa is one such comparative jurisdiction. The rules of *locus standi* in s 85 (1) of the Constitution of Zimbabwe mirror s 7(4)(b) of the Constitution of the 1993 Constitution of South Africa.³⁴ After its landmark decision in *Ferreira v Levin*,³⁵ where it held that these rules contemplate a liberal approach to *locus standi*,³⁶ the Constitutional Court of South Africa has gone on to allow litigants to invoke more than one *locus standi* in a single application. For instance, in *Albutt v Centre for the Study of Violence and Reconciliation*,³⁷ the Constitutional Court was confronted with an application which involved a number of Non-Governmental Organisations (NGOs) as litigants. Chief Justice Ngcobo had this to say about their *locus standi*:

The NGOs have standing on at least two grounds. First, they are litigating in the public interest under section 38(d) of the Constitution. The NGOs contend that the exclusion of victims from participation in the special dispensation process violates the Constitution, in particular, the rule of law. They submit that, as civic organizations concerned with victims of political

³⁴ Which provided as follows: "(a) When an infringement of or threat to any right entrenched in this Chapter is alleged, any person referred to in paragraph (b) shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights ... (b) The relief referred to in paragraph (a) may be sought by (i) a person acting in his or her own interest; (ii) an association acting in the interest of its members; (iii) a person acting on behalf of another person who is not in a position to seek such relief in his or her own name; (iv) a person acting as a member of or in the interest of a group or class of persons; or (v) a person acting in the public interest."

³⁵ Supra note 6

³⁶ For instance, in *Ferreira v Levin*, Chaskalson P said: "Whilst it is important that this Court should not be required to deal with abstract or hypothetical issues, and should devote its scarce resources to issues that are properly before it, I can see no good reason for adopting a narrow approach to the issue of standing in constitutional cases. On the contrary, it is my view that we should rather adopt a broad approach to standing. This would be consistent with the mandate given to this Court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled. Such an approach would also be consistent in my view with the provisions of section 7(4) of the Constitution on which counsel for the Respondents based his argument." [My own emphasis]

³⁷ 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC)

violence, they have an interest in ensuring compliance with the Constitution and the rule of law. Second, they are litigating in the interest of the victims under section 38(c). The victims whose interests the NGOs represent were unable to seek relief themselves because they were unaware that applications for pardons affecting them were being considered.³⁸

Thus, the Constitutional Court interpreted s 38 of the South African Constitution (which is similar to s 85 of the Constitution of Zimbabwe), to mean that a litigant can approach the Court on the basis of more than one ground of *locus standi*. In *Kruger v President of the Republic of South Africa*³⁹ – where the applicant was an attorney who was challenging the validity of certain regulations – the Court accepted to hear the matter on the basis that the applicant had approached the Court in both his personal capacity and in the interest of the public (members of the legal profession), whose work was similarly affected by the regulations. A similar approach was taken by the South African Supreme Court of Appeal in *Democratic Alliance and Others v Acting National Director of Public Prosecutions & Ors*⁴⁰ where the Court held that the political parties who were applicants in the matter were properly before the Court on the basis that they were acting both in public interest and in the interest of their membership who were keen to see the Constitution being upheld by the President when appointing the National Director of Public Prosecutions.

Kenya is another jurisdiction that is comparable to Zimbabwe. Article 22 of the Constitution of Kenya⁴¹ is analogous to s 85 (1) of the Constitution of Zimbabwe. The Court of Appeal in Kenya interpreted article 22 to imply that a litigant may rely on more than one ground

³⁸ Ibid at para 33-34

³⁹ 2009 (1) SA 417 (CC); 2009 (3) BCLR 268 (CC) at para 25

⁴⁰ 2012 (3) SA 486 (SCA); 2012 (6) BCLR 613 (SCA) at para 44-45

⁴¹ It provides as follows: "(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by- (a) a person acting on behalf of another person who cannot act in their own name; (b) a person acting as a member of, or in the interest of, a group or class of persons; (c) a person acting in the public interest; or (d) an association acting in the interest of one or more of its members. (3) The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that- (a) the rights of standing provided for in clause (2) are fully facilitated;

of *locus standi* in one proceeding. For instance, in *Randu Nzai Ruwa v The Secretary, Independent Electoral and Boundaries Commission*,⁴² the Court accepted to hear a case brought by litigants who were acting in their own personal interest as well as in the interests of the public. The Court of Appeal applied a similar approach in *Mumo Matemvu v Trusted Society of Human Rights Alliance*⁴³ by stating that:

It is our consideration that in filing the petition the 1st respondent [an NGO] was acting not only on behalf of its members and in accordance with its stated mandate, but also in the public interest, in view of the nature of the matter at hand. The 1st respondent, its members and the general public were entitled to participate in the proceedings relating to the decision-making process culminating in the impugned decision.

The reason why in these jurisdictions, the courts allow litigants to act in more than one capacity in a single application is precisely to honour the constitutional goal of affording individuals with wide and flexible locus standing, in order to allow them to seek relief that is effective for the protection of their rights and the Constitution.⁴⁴

Finally, on this point, it is critical to consider the part of the preamble to the Constitution of Zimbabwe which declares that:

We the people of Zimbabwe...Reaffirming our commitment to upholding and defending fundamental rights and freedoms...Resolve by the tenets of this Constitution to commit ourselves to build a united, just and prosperous nation, founded on values of transparency, equality, freedom, fairness, honesty...

The vision and aspirations set out above can be achieved only if “the tenets of this Constitution” are interpreted and applied in a manner that advances social justice. The majority of citizens live below the poverty datum line⁴⁵ and can rarely afford the costs of litigation. The propensity of the Constitutional Court (which I discuss elsewhere)⁴⁶

⁴² Civil Appeal Number 9 of 2013 at p. 10

⁴³ Civil Appeal Number 290 of 2012 at para 30

⁴⁴ Supra note 23 Chiduzza at pp.3-4

⁴⁵ See United Nations Economic Commission for Africa Zimbabwe Country Profile Report of 2018 at p. 19. Available at https://www.uneca.org/sites/default/files/uploadeddocuments/CountryProfiles/2018/zimbabwe_cp_eng_2017.pdf [Accessed on 7 September 2018]

⁴⁶ See Justice Mavedzenge ‘Punitive Costs and Deliberative Democracy’ (2018) accessible from <https://constitutionallythinking.wordpress.com/>

to award punitive costs against losing litigants has a chilling effect of making citizens hesitate to petition the court. To achieve social justice in such a socio-economic context, certain economically privileged individuals who can afford to bring an application before the court must seek more than just a personal victory. In line with the aspirations expressed in the Constitution's preamble, they must be free to seek the protection of the Constitution for their own personal benefit as well as for the benefit of those who may not have the money to file a petition in court. In that sense, the rules of *locus standi* cannot be applied restrictively. The broader aspirations of the Constitution, as captured in the preamble, require these rules to be applied in a manner that allow individuals who are committed to social justice and are financially privileged, to petition the court in their own interest but also in public interest, in order to utilize the law as a tool to achieve social change.

In this connection, the Constitutional Court's approach of restricting litigants to choosing one ground or capacity of *locus standi* (in one application) is irrational, worrisome and problematic as it is anachronistic and *ultra vires* the spirit and object of s 85 of the Constitution. Clearly, s 85 (1) gives an applicant five grounds of *locus standi*. The litigant should be allowed to choose one or more grounds to stand on, as long as he or she can demonstrate that the application meets the requirements demanded by each ground of *locus standi*. Admittedly, there is need for the court to protect itself against being inundated with frivolous applications. However, that should not be done by stipulating a rule which has potential consequences that are as disastrous as undermining the ability of a litigant to claim effective relief. Such a rule is unreasonable, irrational and unconstitutional.

It is worthy to note that the Constitutional Court, in its very first case – *Jealous Mawarire v Robert Mugabe*⁴⁷ – underscored the proposition that s 81 (5) of the Constitution contemplates a liberal approach to determining *locus standi*. If it is accepted that these rules contemplate a liberal approach to determining *locus standi*, then it should be accepted that they also allow a litigant to act in more than one capacity in a single matter as long as there is a legitimate reason for doing so. Sister courts in comparative jurisdictions have been consistent on this subject, as I demonstrated above. It is therefore worrisome to note that on one hand, the Constitutional Court of Zimbabwe accepts

⁴⁷ *Mawarire v Mugabe* [2013] ZWCC 1

that s 85 of the Constitution is meant to provide litigants with a wide and flexible ground to stand on but, on the other hand it suggests that a litigant must be confined to choosing only one ground to stand on, and cannot invoke more than one ground of *locus standi* in a single application.

Having demonstrated that this rule is *ultra-vires* the interpretative principles enshrined in the Constitution, I now turn to showing that the rule is at variance with the conceptual foundations upon which the power of the Constitutional Court-to conduct judicial review-is founded.

LOCUS STANDI AND THE CONCEPTUAL FOUNDATIONS OF JUDICIAL REVIEW

Rules enacted by the court to regulate *locus standi* are in a way reflective of the court's own attitude and perception towards its role in a constitutional democracy, particularly the power to review laws and government conduct. Where a court is ready to exercise its review powers in a robust manner, it applies the rules of *locus standi* liberally, of course subject to the Constitution and without opening floodgates for busy bodies to bring frivolous and vexatious motions or applications. As Lord Diplock rightly said in *Rex v Inland Revenue Commrs*⁴⁸

This broadening of the rule of locus standi has been largely responsible for the development of public law, because it is only the availability of judicial remedy for enforcement which invests law with meaning and purpose or else the law would remain merely a paper parchment, a teasing illusion and a promise of unreality. It is only by liberalizing the rule of locus standi that it is possible to effectively police the corridors of powers and prevent violations of law.

Limiting *locus standi* may be one way of avoiding to hear and determine certain sensitive cases that are likely to be brought before the court by the citizens, especially in politically charged jurisdictions. Therefore, in order to do justice to a discussion of the rationality and constitutionality of the approach taken by the Constitutional Court,⁴⁹ it is inevitable to pay attention to the philosophical hesitations which, potentially, the Court may have regarding the democratic legitimacy of its judicial review powers. Such an examination is necessary, especially given that Zimbabwe is a former English colony with a

⁴⁸ [1981] 2 WLR 722 at p. 740.

⁴⁹ In both *Mudzuru* (supra note 15) and *Samuel Sipepa Nkomo* (supra note 16).

tradition of parliamentary sovereignty, as opposed to constitutional supremacy.

1.1 Legitimacy of Judicial Review

The trend in contemporary constitution making processes is to create an independent judiciary and give the courts extensive powers to review all aspects to do with the exercise of public and private power.⁵⁰ Such powers are what are known as judiciary review powers and, as part of these powers the courts can review the constitutionality or legality of any legislation enacted by the legislative arms of government.⁵¹ They also have the power to review the legality of conduct by members or institutions of government.⁵² The essence of judicial review is that, if a law or conduct is found to be unconstitutional or unlawful by the court, then such a law or conduct should be declared to be invalid.⁵³ This, at times, creates the perception that the judiciary wields the ultimate authority (and perhaps too much power) to pronounce on the validity of any decision made by the executive and the legislative arms of government. Consequently, a debate has been raging amongst scholars regarding the legitimacy of judicial review in a constitutional democracy such as the one envisaged under the Constitution of Zimbabwe.⁵⁴ The question that has been asked in this debate is whether there is any democratically legitimate claim for judges to wield such power?

Considering that the Constitution of Zimbabwe unequivocally provides the judiciary with the power to review all laws and government

⁵⁰ See for example the Constitutions of: Kenya (2010), South Africa (1996), Namibia and Tanzania

⁵¹ See section 167 (3) of the Constitution of Zimbabwe, 2013. The judiciary also has the power to review the validity of subordinate legislation such as regulations or statutory instruments.

⁵² Section 2 (1) and section 68 of the Constitution are amongst the primary sources of judicial review powers

⁵³ To the extent that the law or conduct is inconsistent with the law or Constitution. See *Ibid*, section 2 (1)

⁵⁴ Samuel Freeman captures this debate in his article "Constitutional Democracy and the Legitimacy of Judicial Review" in 1990 Vol. 9 No. 4 *Law and Philosophy* pp. 327-370. Also see Barry Friedman. "The Birth of an Academic Obsession: The History of the Counter Majoritarian Difficulty" in 2002 *Yale Law Review Journal* at p. 153. Also see Jeremy Waldron "A Right-based Critique of Constitutional Rights" in 1993 *Oxford Journal of Legal Studies* at pp. 18, 20-28 and Ronald Dworkin, *Taking Rights Seriously*, Harvard University Press 1977 at p. 90-100 and p. 171-177.

conduct,⁵⁵ one would assume that there is no need to discuss the legitimacy of judicial review in Zimbabwe. One is tempted to assume that the judges themselves do not have doubts about the legitimacy of their review powers. I, however, argue that there still exists a need to discuss the concerns raised against the legitimacy of judicial review. My argument is based on the view that judicial review will not be conducted in an effective manner if there is no proper understanding of its legitimacy in a constitutional state. A litigant is likely to be confronted by restrictive rules on *locus standi*, if the court has hesitations about the legitimacy of its review powers.

Another reason why a discussion on the legitimacy of judicial review powers is relevant in Zimbabwe is that, as a former British colony, Zimbabwe has a long history of applying a Westminster system of government; which elevates parliamentary sovereignty and views judicial review with scepticism on grounds similar to those articulated by the 'anti-judicial review' scholars.⁵⁶ The introduction of the Constitution of 2013 may be viewed as an attempt to completely break away from the parliamentary sovereignty tradition.⁵⁷ This however, cannot succeed if there is no corresponding shift of judicial culture and philosophy, to view judicial review powers differently. Such a shift will not happen if the traditional and philosophical concerns regarding the legitimacy of judicial review are not addressed. Rather, what one is likely to see is the emergence of restrictive rules of procedure including those governing *locus standi*, which effectively shield the court from exercising its review powers.

Two main arguments have been advanced against the legitimacy of judicial review in a constitutional democracy. There is what I call the "democratic mandate argument". This argument can be summed up as follows: Democracy is based on the fundamental principle that every person has the right to equal participation in decision making processes.⁵⁸ In a representative democracy, citizens do not participate directly in decision making but, they delegate to their representatives (Legislature and Executive) the authority to make decisions on their

⁵⁵ Supra note 52 and 53

⁵⁶ For a discussion of the views expressed by these scholars, see Samuel Freeman supra note 54. Also see Michael Walzer's objections to judicial review in "Philosophy and Democracy" in 1981 Vol 9 *Political Theory* p. 379

⁵⁷ Although it must be acknowledged that the former constitution attempted to do this albeit in a restrictive manner.

⁵⁸ See Jeremy Waldron supra note 54 at p. 36

behalf.⁵⁹ Therefore, decisions should be made through the equal participation of the elected representatives. On the other hand, judges are few and unelected.⁶⁰ By giving judges the power to review and invalidate decisions made by those who are elected to act as the people's representatives, the concept of judicial review negates the fundamental principle of democracy because, the authority to make decisions is taken away from the elected representatives and is given to a few, unelected judges.⁶¹ For that reason, Thomas Jefferson forcefully criticised the concept of judicial review and characterised it as "*a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy.*"⁶² According to Jefferson, "*The people themselves are the only safe depositories of government [and this principle requires] absolute acquiescence in the decisions of the majority – the vital principle of republics, from which there is no appeal but force.*"⁶³ Thus, judicial review is perceived as an attempt to reverse the democratic principle that it is the people (through their elected representatives) who should make decisions.

The second argument is what I call the "democratic accountability argument" which can be summed up as follows: As the people's representatives, the members of the Legislature and the Executive arms of government are accountable to the citizens who elected them and on whose behalf they make decisions.⁶⁴ Therefore, the Executive and the Legislature must be allowed to make whatever decisions they want for it is them and not the judges who will account to the people for those decisions.⁶⁵

⁵⁹ For a detailed discussion on this, see Glen E. Thurow "Representative Democracy" in 1983 Vol 14 *St. Mary's Law Journal* pp. 937-956

⁶⁰ In Zimbabwe they are appointed by the President upon being recommended by the Judicial Services Commission. See section 180 of the Constitution of Zimbabwe, 2013

⁶¹ See Kirsty Mclean Constitutional Deference, Courts and Socio-Economic Rights in South Africa, *Pretoria University Law Press* 2009 at p. 65. Also see Ran Hirschl "Looking Sideways, Looking Backwards: Judicial Review vs Democracy in Comparative Perspective" in 2000 *University of Richmond Law Review* at p. 415-421. Also see Jeremy Waldron, *supra* note 54 at p. 36

⁶² See Letter to William Jarvis in P. L. Ford (ed), *The Writings of Thomas Jefferson*, Vol. 10, pp. 160-61.

⁶³ See Adrienne Koch and William Peden (eds), *The Life and Selected Writings of Thomas Jefferson* *New York: Random House* 1944 at p. 324.

⁶⁴ See the discussion by Kirsty Mclean, *supra* note 61.

⁶⁵ *Ibid*

The democratic mandate argument against the legitimacy of judiciary review has been addressed comprehensively by Samuel Freeman⁶⁶ and I align myself with his views for the reasons that I will explain. Freeman⁶⁷ argues that the legitimacy of judicial review hinges on what ought to be considered as the most appropriate conception of a constitutional democracy. Those who are opposed to the legitimacy of judicial review perceive constitutional democracy as rule by the majority.⁶⁸ This is sometimes referred to as the procedural conception of democracy.⁶⁹ However, I argue that constitutional democracy must be viewed as an extension of the theory of social contract. Put differently, I argue that the social contract theory rather than the procedural democracy theory is the most appropriate conceptual framework through which the democratic legitimacy of judicial review must be evaluated. In order to justify this claim, I must consider the work done by Thomas Hobbes, John Locke, Jean-Jacques Rousseau and John Rawls on the theory of the social contract. Although these four scholars had some differences⁷⁰ regarding their philosophical views on the idea of the social contract, they all reject the concept of “the divine right of kings”⁷¹ and, they suggest that the only justified authority is the authority that is generated out of agreements or covenants between people. On that basis, they suggest the theory of the social contract, as the idea that; in order to establish a civil society (meaning a peaceful and prosperous society), human beings must agree to live together under common laws encapsulated in a social contract.

⁶⁶ Supra note 54

⁶⁷ Supra note 54 at p. 331

⁶⁸ See Samuel Freeman’s discussion, supra note 54

⁶⁹ See Samuel Freeman, supra note 54 at p.332-336

⁷⁰ For example, Thomas Hobbes advocated for the monarchy as the administrator of the social contract, John Locke believed in the right of the people to revolt against the monarch if it fails to adhere to the terms of the social contract. On the other hand, Jean-Jacques Rousseau argued that the social contract in Locke’s conception sought to protect private property and therefore subordinated the poor to the authority of the property owners. He argued that the terms of the social contract must be changed so that the contract is based on the values of human equality and freedom. For a detailed discussion See David Gauthier “Hobbes’s Social Contract.” in 1988 *No_s* Vol. 22 at p 71-82. Also see David Gauthier, “Why Contractarianism?” in 1991 *Vallentyne* p. 13-30 and Jean Hampton, Hobbes and the Social Contract Tradition, *Cambridge University Press* 1986

⁷¹ The idea of rule by man. See Ibid, David Gauthier, “Why Contractarianism?” in 1991 *Vallentyne* p. 13-30

According to Rousseau and Rawls, the social contract must be negotiated and entered into by free and equal persons and, it must set out certain basic values and principles which are necessary for purposes of guaranteeing human equality and freedom.⁷² Thus, the social contract theory is not only a rejection of the concept of the divine rule of kings. It is also a realisation of the inherent inadequacy of procedural democracy particularly that, it is possible that the majority can make decisions that undermine democratic values such as individual liberty and equality. For instance, the majority can decide to deprive the minority of their right to equal political participation. In order to address this concern, the theory of the social contract (at least as conceived by John Rawls) suggests that the people must negotiate and agree to a social contract which guarantees every individual with minimum rights and liberties, which cannot be undermined through laws and decisions made by the majority.

I argue, as Samuel Freeman does⁷³, that a national constitution is a modern representation of the social contract. Freeman describes a national constitution as something that is established as:

- [a] result of an agreement, whose purpose is to define and set up political institutions to determine laws and institutions that are necessary for the effective exercise of the equal basic rights that secure persons in the free pursuit of their good. The procedures best designed to realize this end meet the democratic requirements of justice.⁷⁴

The people of Zimbabwe negotiated and through a referendum, agreed to establish a constitutional rule book which guarantees certain rights⁷⁵, bestows obligations and entrenches certain values⁷⁶ which are to be treated as the foundation of their society. One of these values is that Zimbabwe must be governed democratically and in accordance with established human rights norms and principles.⁷⁷ Thus, the Constitution of Zimbabwe is a form of a social contract through which the people have agreed to be governed according to certain democratic values, principles and procedures. In this context,

⁷² Jean-Jacques Rousseau. *The Social Contract* (1762) at p. 59

⁷³ *Supra* note 54

⁷⁴ *Supra* note 54 at p. 350

⁷⁵ See Chapter Four of the Constitution of Zimbabwe, 2013

⁷⁶ See section 3 of the Constitution of Zimbabwe, 2013

⁷⁷ *Ibid*, subsection (1) (c)

democracy cannot be viewed as limited to rule by the majority. It is not the right of the majority to do whatever they want. Rather it is the rule by the majority in accordance with certain procedures and substantive values that are articulated in the political constitution, which is the equivalent of a social contract. In that sense, the social contract theory can help us to evaluate and explain the legitimacy of judicial review in a constitutional democracy such as that envisaged under the Constitution of Zimbabwe.

As explained earlier, the social contract is underpinned by certain democratic values and principles which are meant to protect human freedom and equality. There must be a mechanism or institutions in place to interpret, protect and at times enforce these values and principles.⁷⁸ As part of the social contract, the people establish institutions unto which they freely delegate the authority to perform this role. In the Constitution of Zimbabwe, the people have given the judiciary, the power to interpret, protect and enforce the terms of their social contract which is the rights, values, procedures and principles set out in the Constitution.⁷⁹ Section 162 of the Constitution makes this point explicit where it declares that “*judicial authority derives from the people of Zimbabwe and is vested in the courts*”. As part of this judicial authority, the courts have the power to review and invalidate laws and conduct that is inconsistent with the terms of the social contract-the Constitution. The Constitutional Court of Zimbabwe in *re Prosecutor General of Zimbabwe on his Constitutional Independence and Protection from Direction and Control*,⁸⁰ affirmed this position when Patel J held that the role of the court is to interpret the law and, when it does so, “*it fulfils its role under the separation of powers framework. When it [the court] interprets a certain law to compel someone to do something, it is not the court but the law that compels that person to do so.*”⁸¹ The legitimacy of judicial review therefore resides in the fundamental belief under the social contract theory that, there is need to establish an independent institution which will protect the values and principles of the social contract in between the periodic elections.

⁷⁸ Samuel Freeman, supra note 54 at p. 357

⁷⁹ This principle was also affirmed in *re Prosecutor General of Zimbabwe on his Constitutional Independence and Protection from Direction and Control* [2017] ZWCC 13 2015 at p. 9

⁸⁰ Ibid, at p.10

⁸¹ Ibid

It could be counter-argued that the power to interpret and protect the values of the social contract should be exercised by the elected representatives of the people (the legislature and the executive) and not by the unelected judges.⁸² The response to that argument lies in the philosophical background of the doctrine of separation of powers which is the idea that: in order to protect the values underpinning the social contract (namely equality and individual freedom) the people through the social contract, must avoid delegating power to a single person or body.⁸³ Rather, different functions and powers must be delegated to different branches of the government and there must be checks and balances to protect the people from possible abuse of the delegated power.⁸⁴ For that reason, the modern social contract (the Constitution) delegates the power to make laws to the legislature, and the executive is delegated with the power to make and execute policies, while the judiciary is there to interpret the laws articulated in the social contract.⁸⁵ In that sense, the people could not delegate to the legislature the power to interpret the very same laws that it makes.⁸⁶ Such power is given to the judiciary as an effective mechanism of protecting the values of the social contract and, there lies the democratic legitimacy of judicial review in a constitutional democracy.

Judicial review is therefore democratically legitimate because such powers are given to the judiciary by the people through the Constitution, in order to protect the values and principles underlying democratic governance in a constitutional state.⁸⁷ It is a form of insurance against majority decisions (and sometimes decisions made by powerful minorities) which undermine the very basis of democracy. This is the reason why, in the Zimbabwean context, the Constitution requires Courts to ensure that their rules of procedure adequately facilitate the right of individuals to approach the Court and access effective remedies against such decisions. It is against this background that we should examine if (at a conceptual level) the rule established by the Constitutional Court to restrict litigants to acting in once capacity in each matter makes any rational sense. It does not because,

⁸² See Michael Walzer's objections to judicial review in "Philosophy and Democracy" in 1981 Vol 9 *Political Theory* p. 379

⁸³ *Supra* note 62

⁸⁴ See Samuel Freeman, *supra* note 54 at p. 353

⁸⁵ Malherbe Rautenbach, *Constitutional Law* 4th edition, *Lexis Nexis* 2003 at p. 78

⁸⁶ Samuel Freeman, *supra* note 54 at p. 336

⁸⁷ Samuel Freeman makes a similar argument at p. 328, *supra* note 54

the effect of such a rule (as I demonstrated above) is to prevent the citizens from accessing remedies which effectively protect and enforces the terms of their social contract.

2. CONCLUSION

The Constitutional Court's rule which prohibits litigants from acting in more than one capacity in a single matter has a disproportionate effect of undermining a litigant's access to effective remedies. The rule is inconsistent with the liberal approach to determining *locus standi* and is therefore *ultra vires* section 85 of the Constitution. At a conceptually level, this rule is untenable as it is contradictory to the theoretical foundations upon which the idea of judicial review is founded.

The emphatic views expressed by Chidyausiku CJ, Malaba DCJ in *Jealous Mawarire v Robert Mugabe* and by Patel JCC in *re Prosecutor General of Zimbabwe on his Constitutional Independence and Protection from Direction and Control*⁸⁸ create the impression that the Constitutional Court appreciates its role as a vibrant interpreter and enforcer of the social contract-the Constitution. However, when the Court establishes unreasonably restrictive rules of *locus standi*, it brings to the fore the question whether that Court genuinely believes it has a legitimate mandate, derived from the people, to review (without fear or favour) the exercise of public power? This is a question which must be engaged with critically and on a continuous basis.

⁸⁸ Supra note 80 at page 10 of his judgment where he emphatically declares that: "Where a court interprets a law, it fulfils its role under the separation of powers framework. When it interprets a certain law to compel someone to do something, it is not the court but the law that compels that person to do so. This application is founded on the wrong premise that the applicant must not be compelled to abide by the law, whether by an order of mandamus or otherwise. That premise is fundamentally flawed and patently untenable . . ."