ALLISON CHARLES
and
COUNSELLING SERVICES UNIT
versus
THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE
and
MINISTER OF JUSTICE LEGAL, PARLIAMENTARY AFFAIRS
and
MINISTER HOME AFFAIRS & CULTURE
and
MINISTER OF DEFENCE SECURITY & WAR VETARANS
and
COMMISSIONER GENERAL OF THE ZIMBABWE
REPUBLIC POLICE
and
COMMANDER OF THE ZIMBABWE DEFENCE FORCES
and
THE ATTORNEY GENERAL OF ZIMBABWE
and
PROFESSOR LOVEMORE MADHUKU
and
PROFESSOR CHARITY MANYERUKE
and
THE ZIMBABWE HUMAN RIGHTS COMMISSION
and
THE NATIONAL PEACE AND RECONCILIATION COMMISSION

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 31 October, 2018 and 7 November, 2018

Opposed Application

E. Matinenga, for the 1st to 2nd applicants
Ms *F. Chimbaru,* for the 1st to 7th respondents
No appearance 8th to 11th respondents

MANGOTA J: The 30 July, 2018 election was, in many respects, different from elections which preceded it. The election atmosphere was good. People interacted well during the campaigning period. They accommodated each others' view points. They campaigned freely. They exercised their democratic right to vote, on voting day, without any hitches.

The electoral process proceeded calmly and peacefully. Peacefully largely because the authorities exhorted the nation to embrace nothing but peace. It was not only peaceful. It was also transparent.

The transparency of the election was evident. International observer teams which had not observed Zimbabwe's elections for decades were allowed into the country to observe the 30 July, 2018 electoral process. The European Union observer team which, for years, has remained critical of Zimbabwe, was also in the country for the purpose of observing the election. It states, in its post-election report which is captured in *The Herald* of 11 October, 2018 as follows:

> "The campaign period was largely peaceful, with freedoms of movement, assembly and expression respected, and both the main presidential candidates held numerous rallies across the country .....
>
> The right to stand was provided for, the elections were competitive and political freedoms during the campaign were respected. On election day, voters enjoyed the right to vote and both campaign and election day were largely peaceful .....
>
> The introduction of a number of legal and administrative changes was welcomed, including increasing the number of polling stations, limiting voters to voting only at registered stations and limiting the number of excess ballots to be printed."

Some of the sentiments which *The Herald* of 11 October 2018 attributes to the European Union observer mission are also replicated in the *News Day* newspaper of the same date. The relevant passage of the paper reads:

> "In the report , the (European Union) observer mission said the elections were competitive, the campaign was largely peaceful, and political freedoms during the pre-election campaign were respected."

Whilst newspaper reports may not necessarily capture all what the observer team stated, a common thread runs through them. The common thread is that the election of 30 July, 2018 had all the characteristics of a free, fair and transparent process.

Regional observer teams, it is noted, added their positive voice to the country's election of 30 July, 2018. Amongst these are the Southern Africa Development Community, the Common Market for Eastern and Southern Africa and the African Union. They, it is reported, endorsed the election as having been a free expression of the people of Zimbabwe's will.

The violence of 1 August, 2018 marred an otherwise very good election. It erupted in an unprecedented manner in the central business district of Harare. It came as a shock to many. It descended as a bombshell on the nation whose attention was focused on the

announcement and outcome of the presidential election results. It claimed the lives of six persons. A number of persons who were caught in the middle of the same suffered various injuries.

Following the unexpected violence of 1 August, 2018 the first respondent who is the President of the Republic of Zimbabwe made a statement. He did so on 29 August, 2018. He advised Zimbabwe and the world that he, as earlier promised, had set up a commission of inquiry which he charged with the responsibility of inquiring into the causes of the violence and making recommendations to him. He announced, in the statement, the names of persons who constituted members of the commission and their terms of reference.

On 14 September, 2018 the first respondent formalised his statement of 29 August, 2018 in terms of the law. He published proclamation Number 6 of 2018. He published it in terms of s 2 (1) of the Commissions of Inquiry Act [*Chapter 10:07*]

The applicants challenge the first respondent's decision of 29 August, 2018. They do so in this application wherein they cite the first respondent, the second to the fourth respondents who are Ministers in the first respondent's government, the fifth and sixth respondents who are government functionaries who respectively head the Zimbabwe Republic Police and the Zimbabwe Defence Forces, the seventh respondent who is Government's principal legal advisor, the eighth to ninth respondents whom the first respondent included in the seven-member commission of inquiry; and the tenth to eleventh respondents which are State institutions which respectively have the mandate of protecting and promoting human rights in Zimbabwe *and* developing as well as implementing programmes which promote national healing, unity and cohesion in Zimbabwe and the peaceful resolution of disputes.

The applicants raise issue with everything which relates to the Commission of Inquiry which the first respondent constituted. Their statement is that:

1. the first respondent's decision of 29 August, 2018 in terms of which he appointed the commission of inquiry is unconstitutional and should, therefore, be set aside.
2. the Zimbabwe Human Rights Commission or the National Peace And Reconciliation Commission should be appointed to conduct investigations into the 1 August, 2018 violence;

3. the Zimbabwe Human Rights Commission or the National Peace And Reconciliation Commission be, in the alternative to paragraph 2 above, authorised to appoint members of the Commission of Inquiry;
4. the Zimbabwe Human Rights Commission or the National Peace And Reconciliation Commission be authorised to formulate the commission's terms of reference;
5. the appointment into the Commission of Inquiry of professors Charity Manyeruka and Lovemore Madhuku be set aside on the ground that they are biased in favour of Government or ZANU (PF).
6. the Commission's terms of reference be substituted with the applicants' terms of reference.

The abovementioned matters which have been stated in a paraphrased manner are the applicants' bone of contention. They, in substance, constitute the relief which they are moving the court to grant to them. A reading of their draft order is reflective of the stated position.

The applicants made every effort to show that all the parties who are cited in this application have a direct and substantial interest in the relief which they seek. The first applicant anchors her *locus standi* upon her brother one Gavin Dean Charles whom she says was shot and killed by members of the Defence Forces of Zimbabwe during the post-election violence of 1 August, 2018. She states that she has an interest and the right to know the circumstances under which her brother met his death. That knowledge will put closure to the issue of her brother's death, according to her. The second applicant which is a non-governmental organisation states that it derives its *locus standi* from its work. It alleges that it advances human rights. It claims that it deals with human rights within a political process. It says it provides medical and psychological treatment as well as rehabilitation services to victims of organised violence, intimidation and torture. It insists that it has the right to apply as it did.

The first to the seventh respondents oppose the application. The remaining respondents do not. My assumption is that they intend to abide by my decision.

The respondents' *in limine* matter is that the applicants' cause of action is misplaced. It is misplaced, they state, in the sense that their founding affidavit preceded the coming into existence of the Commission of Inquiry. They aver that the affidavit was deposed to and commissioned on 13 September, 2018 which is one day before the first respondent published

proclamation number 6 of 2018. They state that the proclamation which was made under statutory Instrument 181 of 2018 was issued on 14 September, 2018. They allege that a review of the first respondent 's decision of 29 August, 2018 cannot affect the validity of the proclamation which was issued, on 14 September 2018, in terms of the Commissions of Inquiry Act. They insist that the Commission of Inquiry which the first respondent established under the proclamation lawfully and validly exists. It cannot, they assert, be affected by any review of the decision of the first respondent to establish the Commission of Inquiry. The first respondent, they state, has, as the President and Head of State of Zimbabwe, the prerogative power to set up the Commission of Inquiry. He has that power in terms of the common law as read with relevant statutory legislation, according them. The first respondent, they insist, did not require the advice of cabinet when he appointed the commission. They state that s 110 (2) (d) of the constitution of Zimbabwe as read with s 2 (1) of the Commissions of Inquiry Act allows him to appoint the Commission of Inquiry without the involvement of cabinet. They deny, on the merits, the allegation which is to the effect that the inquiry is about the conduct of the first respondent. They insist that the commission's mandate is to look into a whole range of issues and to make suitable recommendations. The first respondent, they state, is the only person who has the power, at law, to appoint a commission of Inquiry into any matter which, in his view, must be investigated. They insist that neither the Zimbabwe Human Rights Commission nor the National Peace And Reconciliation Commission has the mandate to appoint a Commission of Inquiry or to recommend to the first respondent names of persons who should be appointed into the same. They move the court to dismiss the application with costs which are on a higher scale.

The applicants are commended for their resourcefulness. They filed this application on 14 September, 2018. They manged to have the same heard in record time. The skill with which they weaved their way into the roll of the court cannot escape notice. They realised, at the time that they filed this ordinary opposed application, that the Commission of Inquiry which came into existence on 14 September, 2018 would most probably complete its work before the application is heard. They deviced a way of getting around the observed challenge. They filed an application through the urgent chamber book on 3 October, 2018. They filed it under HC 9091/18. The application was, to all intents and purposes, not meeting the requirements of urgency. Because of its importance to Zimbabwe and the world, the same was set down for hearing on 10 October, 2018.

On the day of hearing of HC 9091/18, counsel for the applicants and the respondents agreed between them that HC 9091/18 be withdrawn and that the current application be heard instead. Time lines were, therefore, set for the parties to file such process as the applicants' answering affidavit, their heads and the respondents' heads. An agreement which was to the effect that the application would be heard on 31 October, 2018 was reached. The applicants, in contemplation of the agreed position, withdrew HC 9091/18 on 11 October, 2018. The withdrawal put the urgent chamber application to rest. It effectively achieved the purpose for which it had been intended. The ordinary opposed application which had been filed was turned into one of urgency through the above stated process.

One was left to wonder as to why the application was not file in terms of r 223A of the High Court Rules, 1971. That approach would, in my view, have achieved the same result which the applicants obtained in a circuitous manner.

Whatever dissuaded the applicants from following the suggested route which was clearer than otherwise is now a matter for academic discourse. What is of importance is that the approach which they pursued enabled them to achieve their desired end-in-view in a speedily manner and, most certainly, before the commission of inquiry which was set up completes its work. It is for the mentioned reason, if for no other, that their ingenuity remains commended.

The respondents state, in my view, correctly, that no law confers authority on the Zimbabwe Human Rights Commission or the National Peace and Reconciliation Commission to:

(i) conduct investigations of the violence of 1 August, 2018; or

(ii) appoint persons into the commission of inquiry; or

(iii) formulate terms of reference for the commission of inquiry.

The statement of the respondents is well made. There is, indeed, no law which confers power on the mentioned state institutions to act as per the proposal of the applicants. The work of each of those institutions is cut out in the Constitution. None of them is clothed with the power or authority to turn itself into a commission of inquiry or to appoint persons into such a commission or to formulate the commission of inquiry's terms of reference.

The applicants must have re-examined their proposal in a more critical manner than was the case when they made the same. They must have done so after they read the respondents' statement. They conceded that the proposal which they made in paragraphs (2),

(3) and (4) of their draft order does not enjoy the support of law. It is for the mentioned reason that they do not address that aspect of the application in their Heads. The proposition which they made on that matter stands on nothing. It is legally unsustainable and is, therefore, devoid of merit.

The applicants' assertion is clear and straightforward. They seek to impugne the first respondent's statement of 29 August, 2018. Paragraph 54 of the founding affidavit confirms the observed matter. It reads:

> "54. The first respondent has not yet gazetted the commission of inquiry as required of him by section (*sic*) of the Commissions of Inquiry Act."

The fact that the founding affidavit was deposed to and commissioned on a day which precedes the coming into being of the commission of inquiry constitutes further confirmation of what has already been observed.

The applicants state that the first respondent's statement of 29 August, 2018 is the latter's decision. They aver that the decision in question violates the Constitution of Zimbabwe Amendment (No. 20) Act of 2013. The violation, they allege, consists in that the first respondent made the decision without the advice of cabinet. He, to the stated extent, violated the principle of legality, they insist.

The applicants attached the first respondent's statement of 29 August, 2018 to their application. They marked it Annexure D. The annexure appears at p 52 of the record. Its heading reads:

> "STATEMENT BY HIS EXCELLENCE (*SIC*) THE PRESIDENT, COMRADE E.D. MNANGAGWA ON THE ESTABLISHMENT OF A COMMISSION OF INQUIRY TO INQUIRE INTO THE POST-ELECTION VIOLENCE ON THE FIRST OF AUGUST 2018."[emphasis added]

A reading of the above cited heading shows that the first respondent's statement of 29 August, 2018 is nothing but that. It is a statement which he made to the nation and to the world. It is nothing more than that.

The applicants operate upon an apparently genuine but mistaken view. They think that the first respondent's statement of 29 August 2018 is the same as the legal process which he put into motion on 14 September, 2018. Their view in the mentioned regard is a serious misdirection on their part. That is so as the two matters are separate and distinct from each other.

The view which the applicants take, as gleaned from a reading of paragraphs (i) and (i) of the annexure, is understandable. The paragraphs convey, to a lay person, the mistaken

impression which is to the effect that the statement of 29 August, 2018 established the commission of inquiry. They read:

> "(i). In fulfilment of what I have earlier on undertaken to do,.... I have appointed a seven member commission to inquire into the post-election violence.
>
> (ii) The commission is made up of Local, Regional and International members who have been appointed in terms of the Commission (*sic*) of Inquiry Act [*Chapter 10:07*][emphasis added].

It is accepted that the statement was, to the above-stated extent, not elegantly drafted. That notwithstanding, however, it cannot, by any stretch of imagination, be suggested that the commission was set up on the basis of the first respondent's statement of 29 August, 2018.

Further reading of the annexure confirms that what the first respondent said on 29 August, 2018 was a statement of intent. It states what he would do in the foreseeable future. He, for instance, refers to the membership of the commission in these words:

> "The following members will constitute the commission of Inquiry." [emphasis added].

The above as read with the last sentence of the annexure says it all. It reads:

> "A notice to the above effect, will be gazetted in accordance with the law." [emphasis added].

As he committed to do in the last sentence of the annexure, the first respondent set into motion the legal process which gave birth to the commission of inquiry. He, on 14 September 2018, published proclamation number 6 of 2018. It is that proclamation, as the respondents correctly state, which legally brought the commission of inquiry into existence. It was published in terms of s 2 (1) of the Commissions of Inquiry Act [*Chapter10:07*] ["the Act"].

It requires little, if any, debate to state that the commission was born on 14 September, 2018. Section 20 of the Act confirms the stated matter. It reads:

> "Every proclamation made in terms of section (2) shall be published in a statutory instrument and shall take effect from the date of such publication". [emphasis added]

The applicants are excused for entertaining the view which they took. They are but mere mortal lay persons. They confuse the statement with the legal process which flows from the same.

The same excuse cannot, however, be extended to their legal practitioners. These know, as much as any legally-trained mind does, that persons who take public office are not installed into office by statements. They know that certain legal processes must be conducted

as a way of clothing a person with the power and authority to perform a function or functions which relate(s) to the office which he is called upon to assume.

The legal practitioners, for instance, know that a person who is elected to the office of president of a country is referred to as the president-elect. They are alive to the fact that he is not the president of the country until he is sworn into the office of president in terms of that country's laws. They know that one who is earmarked for the position of head of a country's judicial system is not Chief Justice until he takes the oath of office for the position. They know, further, that one who is elected speaker of a country's parliament is not such until he is sworn into that office. They know that the list cascades itself down to ministers of government or religion, members of parliament, councillors etc. They know too that laws which place persons into public offices exist and must be adhered to.

It is, in view of the foregoing, difficult, if not impossible, for me to comprehend why such able minds as argued this case failed to distinguish the statement of the first respondent from the legal mechanisms which he employed to bring the commission of inquiry into existence. They suffered a serious misdirection in the mentioned regard. They should have properly advised their clients of the impropriety of moving the court to review and set aside a statement which has no effect on the legal process of 14 September, 2018. They took the court and the respondents along a garden path which leads to nowhere.

The application is a complete waste of the time, energy and resources of the court, the applicants themselves and the respondents. The first respondent did not, and does not, require the advice of his cabinet to make the statement. He properly made it as a statement of intent. He, therefore, violated no law when he issued the same.

The applicants should have known, from the respondents' *in limine* matter, that the latter were making a clear distinction between the statement and the legal process which followed the statement. Their legal practitioners should have advised them of the futility of what they had set upon to achieve. The unwholesome conduct of their legal practitioners cannot be condoned. A *fortori* when regard is had to the fact that the legal practitioners are not new to the profession. They command such a wealth of experience as would have told them that their clients had embarked upon a wild goose chase, as it were.

I will, for academic purposes, sing with the applicants on the constitutionality or otherwise of the first respondent's conduct which they seek to impugne. I will, in this regard, proceed on the hypothetical situation which is that, if the first respondent was acting on some

recognised legal process as opposed to the statement which he made on 29 August, 2018, did he have to act on the advice of his cabinet.

The applicants' position is that the first respondent should have involved his cabinet. They anchor the same on sections 88 (2) as read with s 110 (6) of the Constitution of Zimbabwe Amendment [No. 20] Act 2013["the Constitution"]. They submit that he requires the advice of cabinet when he appoints a commission of inquiry such as the one which he appointed on 14 September, 2018.

Section 88 falls under Chapter 5 of the Constitution. It deals with the President's executive authority. It reads, in the relevant part, as follows:

"88 EXECUTIVE AUTHORITY

(1) .....
(2) The executive authority of Zimbabwe vests in the President who exercises it, subject to this Constitution, through the cabinet." [emphasis added]

The executive functions of the President are spelt in Part 4 of the Constitution. Section 110 (6) falls under the same. It reads:

"110 (6) In the exercise of his or her executive functions, the President must act on the advice of cabinet...." [emphasis added]

The subsection places an obligation on the President to act on the advice of his cabinet. The question which begs the answer is does he have to do so in all cases in which he acts as the President of Zimbabwe.

The respondents provide an answer to the same. They state, in so far as the commission of inquiry which the first respondent established on 14 September, 2018 is concerned, that he exercised his executive functions in terms of s 110 (2) (d) of the Constitution. The subsection places a responsibility on the President to carry out any of the matters which are mentioned in paragraphs (a) to (j) of the same. He performs those matters subject to the Constitution.

The applicants did not read in-between the lines of subsection (6) of s 110 of the Constitution. Their attention escaped the *exception* which is contained in the same. The exception states that, when he or she is acting in terms of subsection (2) of s 110, the President does not require the advice of Cabinet.

It is pertinent for me to cite the whole subsection so that the exception which appears in it is placed into context.

It reads:

"(6) In the exercise of his or her executive functions, the President must act on the advice of cabinet, except when he or she is acting in terms of subsection (2) above" [emphasis added]

It is in terms of subsection 2 (d) of s 110 that the President appointed the commission of inquiry. Paragraph (d), which falls under the exception, allows the President to make the appointments which the constitution or legislation requires him to make alone. The President, therefore, properly acted in terms of s 110 (2) (d) of the constitution as read with s 2 (1) of the Commissions of Inquiry Act to appoint the commission of inquiry. His conduct cannot, accordingly, be impugned. He violated no law.

Both parties are *ad idem* on the point that the constitution confers power on the President to deploy members of the Defence Forces in Zimbabwe. They also agree that, once the deployment has occurred, the President has a duty to account to Parliament for such deployment. They state that he must, in terms of s 214 of the constitution, cause Parliament to be informed promptly and, in appropriate detail, the reasons for the deployment and further, where they are deployed in Zimbabwe, the place where they are deployed.

The parties' point of departure centres on whether or not the deployment of members of the Zimbabwe defence forces of 1 August 2018 was legally valid. The applicants' position is that it was not. The respondents maintain a view which is contrary to that of the applicants on the same.

The applicants' narrative is that the first respondent deployed members of the defence forces on to the streets of Harare on 1 August 2018. They anchor their statement on s 213 (1) (a) as read with subsection 2 (b) of the constitution. The section reads, in the relevant part, as follows;

"213 Deployment of Defence Forces

(1) subject to this constitution, only the President , as Commander-in-Chief of the Defence Forces, has power.....

(a) to authorize the deployment of the Defence Forces, or

(b) .....

(2) with the authority of the President the Defence Forces may be deployed in Zimbabwe

.....

(a) .....,

(b) in support of the Police Service in the maintenance of public order; or

(c) ....." (emphasis added).

It is on the basis of the above cited provisions of the constitution that the applicants maintain the position that the President deployed members of the Zimbabwe Defence Forces on to the streets of Harare on 1 August, 2018. They allege that, because of the stated matter,

the President cannot set up a commission of inquiry which inquires into his conduct. They aver that he is conflicted. They state that his conflicted position precludes him from appointing into the commission members who are more likely than not to be biased in his favour. They, as an alternative, suggest that the Zimbabwe Human Rights Commission or the National Peace and Reconciliation Commission be authorized to turn itself into the commission of inquiry or be given the mandate to recommend to the first respondent names of persons who should constitute the commission of inquiry as well as to formulate its terms of reference.

The applicants, it has already been observed, abandoned the above-mentioned proposal midstream. They found no law which supports the same. The abandoned proposal leaves the issue which relates to the establishment of the commission of inquiry hanging in the air, as it were. If the President cannot establish one and the proposed state institutions cannot do so owing to an absence of the supportive legislation, the question which begs the answer is who should establish the commission and draw up its terms of reference.

The applicants do not offer any alternative solution. They do not mention the person or authority who can do so. Their suggestion in the mentioned regard is as good as suggesting to Zimbabwe and the world that the commission should not have been set up let alone be given the mandate to inquire into the circumstances of 1 August 2018. Their submissions leaves a *lacuna* which must, in some way or other, be addressed.

The respondent state, in my view correctly, that no one else other than the first respondent has the power to establish the commission of inquiry. They premise their proposition on section 2 (1) of the Commissions of Inquiry Act. It reads:

> "2. Power to appoint commission of inquiry into matter of public nature
> (1) The President may, when he considers it advisable by proclamation, appoint a commission of inquiry consisting of one or more commissioners and may authorize the commissioner or commissioners or any quorum of them specified in the proclamation to inquire into the conduct of any officer in the Public Service…., the conduct or management of any department of the Public Service…., or into any matter in which any inquiry would, in the opinion of the President, be for the public welfare"

It is evident, from the foregoing, that the power/authority to establish a commission of inquiry is reposed in the President. He exercises the same at his discretion. No person or authority has such power.

An effortless reading of s 213 of the Constitution shows that the President has the power to deploy members of the defence forces within or without Zimbabwe. The question which begs the answer is did he exercise the power which the constitution confers upon him

on 1 August, 2018. If he did, then the applicants' assertion which is to the effect that he is conflicted holds. If he did not, the applicants' statement contains a fallacy which must be unearthed, examined and disposed of.

Whether or not the first respondent is conflicted as the applicants allege does, in a large measure, depend on a reading of the application as a whole. The reading cannot leave out the annexures which the applicants attached to the application. One such annexure is the media report of the *Newsday* newspaper of 2 August, 2018. The report appears at p 49 of the record.

The report tells a story which is markedly different from the statement which the applicants project. It explains the circumstances under which members of the defence forces came to be on the streets of Harare on 1 August 2018. It reads, in the relevant part, as follows:

> "Along the way, the protesters sang and danced claiming they were protecting MDC Alliance leader Nelson Chamisa's alleged victory. They queried the high votes that ZANU PF got in rural areas.
> Trouble stated after police blocked them from entering Rainbow Towers Hotel, used by Zec as their base to announce the results.
> The protesters then retreated and started throwing missiles at the ZANU (PF) headquarters damaging several vehicles in the parking area before police fired gunshots and teargas canisters to disperse the crowd, leading to fierce running battles.
> In the process, the protesters barricaded some roads with boulders, burning tyres and stoning some buildings as police, who apparently appeared outnumbered, called for reinforcement from the military.
>
> Military trucks rolled into the city centre, with helicopters hovering over, leading to total clashes, as they sealed the MDC -T and MDC Alliance headquarters.
> Charamba confirmed that the police decided to engage the military allegedly due to the magnitude of the protests.
> The Commissioner- General of Police [Godwin Matanga] has invoked the provisions of section 37 (1) of the Public Order and Security Act [*Chapter 11:17]* and approached the Minister of Home Affairs and Culture to request for the assistance of the defence forces for the suppression of the commotion and disturbance in Harare central business district." (emphases added)

Whilst the above-cited is part of a newspaper report, the same offers an insight into how the defence forces ended up on the streets of Harare on 1 August, 2018. It is a matter for argument for another day for someone to suggest that the Police Commissioner-General and the Minister under whose supervision he operates violated s 214 (a) of the constitution.

A statement is made in the report to the effect that the Police Commissioner-General invoked s 37 (1) of the Public Order and Security act [*Chapter 11:17*]. A reading of the section postulates a dimension which is different from what the applicants are suggesting.

The section refers to circumstances under which the defence forces may assist the police force under the Public Order and Security Act. It reads:

> "(1) If, upon a request made by the Commissioner of Police, the Minister is satisfied that any regulating authority requires the assistance of the defence forces for the purpose of suppressing any civil commotion or disturbance in any police district, he may request the Minister responsible for defence to authorize the defence forces to assist the police in the exercise of their functions under this Act in the police district concerned.
>
> (2) where authority is given under subsection (1) for the defence forces to assist the police-
>
> (a) every member of the defence forces who has been detailed to assist the police in any police district in the exercise of their functions under this Act shall be under the command of the regulating authority concerned; and
>
> (b) a member of the defence forces who is assisting a police officer in the exercise of his functions under this Act shall have the same powers, functions and authority, and be subject to the same responsibilities, discipline and penalties as a member of the police force, and liable in respect of acts done or omitted to be done to the same extent as he would have been liable in the same circumstances if he were a member of the police force, and shall have the same benefit or any indemnity to which a member of the police force would in the same circumstances be entitled." [emphasis added].

Section 2 of the Act defines the phrase "regulating authority" in relation to any area, to mean the police officer who, in terms of s 4 (of the Act), is the regulating authority of the area. An example which appears in s 4 makes reference to a police officer who is in command of each district. Such an officer is the regulating authority for that district.

The circumstances of the events of 1 August 2018 unfold themselves in a manner which is as clear as night follows day. They run in the following order:

a) a commotion started in the central business district of Harare;
b) the officer who commands the district assessed the magnitude of the commotion as measured against the strength of the personnel which was then at his disposal;
c) he approached the Police Commissioner-General whom he appraised of what was obtaining;
d) the Police Commissioner-General approached the Minister under whose supervision he operates;
e) the Minister, in turn, approached his counter-part in the Ministry of Defence;
f) he in turn, dispatched members of the defence forces who worked under the command of the regulating authority of the district of Harare.

The above stated matters expose the incorrectness of the applicants' syllogism. They proceed on the premise that, because the constitution confers power on the President to deploy, he deployed members of the defence forces on 1 August, 2018. The correct position of the matter is that he did not.

Because the President did not deploy, he is not conflicted as the applicants would have the court believe. He also did not violate s 214 of the Constitution. He, in other words, did not owe a duty to report to Parliament matters which did not arise out of the power which the Constitution confers upon him. His moral duty which arises out of what occurred on 1 August, 2018 was / is to set up the commission of inquiry which he established on 14 September, 2018. He remained alive to the fact that Zimbabwe and the world deserve a clear statement of the causes of the violence and the need on the part of the country to define as well as prevent such unfortunate occurrences in all future elections. The commission which he set up will, the fullness of time, unearth those.

The applicants left no stone unturned in their effort to derail the work of the commission. They raise issue with the commission of inquiry's terms of reference. They state that the same are biased in favour of the first respondent. They move the court to substitute the terms of reference which the first respondent crafted with their own terms of reference. They allege that their terms of reference are more objective than those of the first respondent.

The respondents' statement is to the contrary. They deny that the first respondent's terms of reference are biased. They aver that the applicants are giving their own understanding of the first respondent's terms of reference. The commission, they insist, has been mandated to look into a whole range of issues.

The applicants' line of argument derives from the erroneous position which they had taken of the matter. The position was that the first respondent:

a) deployed members of the defence forces onto the streets of Harare on 1 August, 2018;
b) because of the stated allegation, the commission of inquiry which he set up, would inquire into his conduct;
c) because of that, he is conflicted;
d) because he conflicted, the persons whom he nominated into the commission's membership are bound to exonerate him;
e) because of that, he crafted the terms of reference in such a manner that the commission will not find him wanting.

A finding has already been made to the effect that the first respondent did not deploy members of the defence forces on to the streets of Harare. The same puts to rest the incorrect syllogism of the applicants. It was based on assumptions as opposed to correct facts. It emanated from their mis-application of the law to the events which had occurred.

The first respondent's intention to delve into the circumstances of the events of 1 August, 2018 cannot be glassed over. The commission of inquiry which he established is meant to achieve nothing else but that.

The commission of inquiry commenced its work in mid-October, 2018. It has a duration of three (3) months within which it should complete the same. It invites the public to come forward and present evidence to it on any matter which has a bearing on the inquiry. The applicants, as interested persons, have every right to testify before the commission on any matter which is of interest to them. It is when they give testimony before the commission that they avail to themselves the opportunity to raise with it what they refer to as their terms of reference. Nothing prevents them from proceeding along the suggested route. Paragraph (8) of the commission's terms of reference allows them to move in the stated direction. It is open-ended. It does not restrict the commission on what it will, or will not, receive in the form of evidence – it reads:

> "To investigate any other matters which the commission of inquiry may deem appropriate and relevant to the inquiry."

The commission of inquiry has, therefore, a wide discretion which the first respondent placed at its disposal to work upon. The door remains open to the applicants to pursue their desired end-in-view in terms of the mentioned paragraph.

The applicants state, correctly so, that members of the commission of inquiry were drawn from local, regional and international spheres. This fact alone demonstrates the first respondent's intention to have the truth of the events of 1 August 2018 unearthed for the benefit of Zimbabwe and the world. If he had appointed only Zimbabweans into the commission of inquiry, many would have questioned the genuiness of his intention to uncover the truth of what occurred.

The issue which the applicants raise in respect of some local members of the commission falls into the realms of conjecture more than it does in the area of fact and/or law. They are, for a start, not suggesting that only persons from the region and the international world should constitute the commission's membership. If they are saying that,

their position is, in my view, totally misplaced. A blending of ideas is a *sine qua non* aspect of the magnitude and importance of the commission's membership.

The fact that professor Lovemore Madhuku was a presidential aspirant in the election of 30 July, 2018 shows that he cannot be biased in favour of anyone let alone the first respondent. As a contender who did not make it to the highest office on the hand, he has nothing to benefit or lose when he works with the commission. That is so his alleged previous statements notwithstanding.

The applicants make a statement about Professor Charity Manyeruke's alleged membership of ZANU (PF) party. They produce no evidence which supports the same. Nor do they state with sufficient particularity how her alleged earlier views-announced or unannounced-would detract her from her work as a commissioner.

I remain satisfied that the applicants were trying their luck on what they knew could not hold. Their aim and object were to derail the work of the commission of inquiry. They remained oblivious to the fact that the commission which comprises men and women of repute as well integrity and, to a large extent, of international character cannot be influenced by anyone to follow a person's line of thinking other than to discover what they were constituted to achieve.

I mention, in conclusion, that the applicants do not criticise the law through which the commission of inquiry was born. The commission is legally in place. The conduct of the authority which constituted it is above reproach. The commissioners whom the applicants seek to impugn cannot be impugned. At the end of the day, the commission will table the results of its work to Zimbabwe and, by extension, the world.

The applicants' case stands on nothing. It was a very good academic exercise which resulted from their legal practitioners' ineptitude. It is devoid of merit. It is, accordingly, dismissed with costs.

Atherstone & Cook, 1st & 2nd applicants' legal practitioners
Civil Division of the Attorney General's Office, 1st 7th respondents' legal practitioners