COMBINED HARARE RESIDENTS ASSOCIATION (1)
and
ALLAN NORMAN MARKHAM (2)
and
ZIMBABWE ELECTORAL COMMISSION (1)
and
THE PRESIDENT OF ZIMBABWE (2)

HIGH COURT OF ZIMBABWE
DEMBURE J
HARARE, 10 April & 2 May 2025

Opposed Court Application

T Biti, for the applicants
T M Kanengoni, for the 1st respondent
No appearance for the 2nd respondent

DEMBURE J:

1. This is a constitutional application filed in terms of rule 107(1) of the High Court Rules, 2021. The application was filed on 25 July 2024. The applicants seek the following declaratory and consequential relief:

> "IT IS DECLARED THAT:
> 1. The Delimitation Report prepared by the 1st Respondent and published by the 2nd Respondent on 20th February 2023 through Proclamation No. 1 of 2023, was prepared *ultra vires* the provisions of the Constitution of Zimbabwe.
> 2. The Delimitation Report prepared by the 1st Respondent and published by the 2nd Respondent on 20th February 2023 through Proclamation No. 1 of 2023, be and is hereby set aside.
> 3. That the 1st Respondent pays cost of suit."

2. The application was opposed by the first respondent.

FACTUAL BACKGROUND

3. The first applicant is the Combined Harare Residents Association, a voluntary association or common law *universitas* which represents the interests of the residents of Harare in political and civil matters. The second applicant is Allan Norman Markham, an activist and former member of Parliament for Harare East constituency. The first respondent is the Zimbabwe Electoral Commission, a constitutional commission established in terms of s 238 of the Constitution of Zimbabwe, whose functions include the conducting of elections in Zimbabwe and the obligation to delimit constituencies, wards and other electoral boundaries. The second respondent is the President of the Republic of Zimbabwe, cited in his official capacity.

4. The applicants approached this court in terms of s 2(1) of the Constitution, seeking to declare invalid and *ultra vires* the Constitution, the Delimitation Report prepared by the first respondent and gazetted by the second respondent on 20 February 2023 as Proclamation No. 1 of 2023.

5. It is common cause that the electoral boundaries for constituencies and council wards as set out in the Delimitation Report, which the applicants seek to impugn, were applied to the 2023 harmonised elections. The said elections ushered in a new government at both national and local levels. In the same elections, the second applicant was duly elected as a member of Parliament for Harare East Constituency but was later recalled from Parliament.

6. The applicants argued that the first respondent in the preparation of the Delimitation Report failed to comply with s 161(1) and 161(6) of the Constitution and that the said Report did not contain the names and boundaries of the wards and constituencies nor did it include the maps and coordinates for the constituency boundaries in breach of s 161(7) as read with s 161(12) of the Constitution. It was also the applicants' argument that the first respondent in preparation of the Delimitation Report failed to base its delimitation work on the final census report that has to be prepared in terms of s 161(1) of the Constitution. They averred that reliance on a Preliminary Census Report renders the final Delimitation Report a nullity.

7. It was further argued that the report prepared by the first respondent is *ultra vires* the provisions of s 155(1)(c) of the Constitution, which requires that elections must be based

on universal adult suffrage and equality of votes. It was, therefore, averred that all the above defects render the Delimitation Report void.

8. The application was only opposed by the first respondent, which raised two points *in limine*, namely:

    1. That there is no application before the court by virtue of the provisions of rule 58(14) and (15) of the High Court Rules, 2021, and
    2. That the matter is moot.

9. On the merits, the first respondent argued that the Delimitation Report was prepared in compliance with the relevant provisions of the Constitution and was valid. It contended that the applicants incorrectly interpreted s 161(6) of the Constitution.

10. The parties filed heads of argument and at the hearing adopted the arguments advanced therein. The court shall deal with the points *in limine* raised first, as they are capable of resolving this matter without further consideration of the merits.

FIRST POINT *IN LIMINE*

ISSUE FOR DETERMINATION

WHETHER OR NOT THERE IS AN APPLICATION PENDING BEFORE THIS COURT

SUBMISSIONS MADE ON THE ISSUE

11. It was argued for the first respondent that there is no application that is pending by virtue of the provisions of rule 58(14) and (15) of the court rules. Counsel submitted that the applicants breached the peremptory provisions of the said rules in that they failed to file a certificate of service of the application within five days of the date of service, and the application was consequently deemed abandoned for that reason. The service of the application was effected on 26 July 2024, but the certificate of service was filed on 5 August 2024. It was due to be filed in terms of rule 58(14) on 2 August 2024. As a consequence of that failure to file the certificate of service as prescribed, the application was deemed abandoned by operation of the law, with the Registrar only needing to notify

the parties of that fact in terms of rule 58(15). It was argued that the point was properly taken and has merit.

12. It was further submitted that the provisions of rule 58(14) and (15) apply to constitutional applications filed under rule 107(1). These provisions, which are in terms of Part VIII, apply to all applications made in terms of the court rules or any other law in terms of rule 57(1). Rule 107 provides for certain specific issues relating to constitutional applications but does not provide for all issues that relate to a court application. Rule 107 does not relate in any manner to the service of a court application made under it and the filing of certificates of service. The rule does not specifically exclude the application of Part VIII of the rules. Rules 58(14) and (15) apply to govern the filing of a certificate of service of the application.

13. The argument was also that the principle *generalia specialibus non derogant* does not assist the applicants' case. The principle is designed to resolve conflicts in laws, that is, where a general provision and specific provision deal with the same issue as to create a potential conflict, the law resolves it in favour of the more specific provision. In all other instances, the general provisions apply. There are no provisions in rule 107 as to the procedure for the service of a court application and the filing of certificates of service. There exists no conflict in the provisions requiring the application of the principle.

14. Counsel also submitted that the applicants did not dispute that the certificates of service were filed outside the period set out in rule 58(14). By operation of law, their application was deemed abandoned under rule 58(15). The notification by the Registrar is not constitutive, it is administrative. It does not constitute abandonment. The abandonment takes place by operation of law, and then the Registrar is mandated to give parties notice of it. It merely notifies the parties of the fact. It was finally argued that the provisions of rule 58(15) are applicable, and that there is no longer any live application before the court for the court to exercise its jurisdiction.

15. *Per contra*, it was argued for the applicants that the point *in limine* was simply raised as a matter of fashion, as it had no merit. Counsel submitted that rule 107(1) is a comprehensive provision that provides a stand-alone procedure for the filing of constitutional applications.

There is no requirement for the filing of certificates of service within five days or within any other period in rule 107(1). The provisions of rule 58 do not apply to constitutional applications under rule 107(1). The reference to court application under rule 107(1) does not mean the incorporation or reference to the court application procedure under rules 57, 58 and 59.

16. It was further argued that the provisions of general application do not override specific provisions. This matter is a classic example of the maxim *generalia specialibus non derogant.* General provisions or rules, such as rules 58 and 59, cannot override or cancel out the specific provisions dealing with constitutional applications provided for in rule 107(1). It was also submitted that there appears to be a contradiction between rules 58 and 59, which are relevant to the present case, which simply emphasise that rule 107(1) should apply. Rule 58(14) and (15) do not apply in the instant application.

17. Counsel also argued that, assuming those provisions are applicable, for a matter to be deemed abandoned in terms of rule 58(15), two things must happen: the deeming provision and the consequential obligation of the Registrar to notify the parties. In the present matter, the Registrar did not notify the parties. The Supreme Court Rules, unlike rule 58(15), offer a remedy when an appeal has been abandoned and deemed dismissed. The absence of such a remedy in the High Court rules must render superfluous rule 58(15) or, better still, must demand an interpretation that affords a remedy. Rule 58(15) can only come into play when notice has been provided by the Registrar. This is because of the use of the word "and", which is a conjunction. It was also argued that rule 58(15) treads around the dangerous ground of unconstitutionality in that it breaches the right of access to the courts guaranteed by s 69(1) of the Constitution.

ANALYSIS OF THE LAW AND THE FACTS

18. The point *in limine* is centred on the provisions of rule 58(14) and (15) of the court rules. These provisions read as follows:

> "(14) Where an application made in terms of this Part is to be served on the other parties, the applicant shall, within 5 days of service of the application, file with the Registrar proof of service of the application on the other parties.

(15) Where, for any reason, proof of service is not filed with the Registrar in the manner and time specified, the application shall be deemed to be abandoned for that reason and the Registrar shall accordingly notify the parties."

19. What is clear from the provisions of rule 58 is that they are general provisions applicable to all applications made in terms of the High Court Rules or any other law. The Part referred to in subrule (14) of rule 58 is Part VIII of the High Court Rules. Part VIII of the court rules begins with rule 57(1), which states as follows:

> "57. (1) Subject to this rule, all applications made for whatever purpose in terms of these rules or any other law, other than applications made orally during the course of a hearing, shall be made—
> (a) as a court application, that is to say, in writing to the court on notice to all interested parties having a legal interest in the matter; or
> (b) as a chamber application, that is to say, in writing to a judge."

20. There is no doubt that a constitutional application made in terms of rule 107(1) is an application made in terms of the court rules. It shall be made as a court application in terms of rule 107(1). Rule 58 contains general provisions applicable to all applications as may be filed in terms of the court rules. These can either be a court application or a chamber application as mandated under rule 57(1). The general provisions under rule 58, as stated in subrule (1), shall apply to every written application made in terms of the rules. I fully associate myself with the remarks by MAFUSIRE J in *Gapa v Mahere* HH-633-22 at pp 5-6 of the judgment, as also very pertinent to this matter. He stated as follows:

> "Rule 94 has no provision relating to the filing of proof of service of the application for leave to appeal. Evidently, the applicant did not file the necessary proof of service of her chamber application. This prompted the Registrar to write to her as indicated before. That failure meant that the record would not be brought to me either expeditiously, or at all. When it was brought to my attention just before the commencement of the trial on 7 July 2022 that the applicant was alleging that she had filed an application for leave to appeal, I caused an investigation to be conducted on the whereabouts of the record. It was eventually located on the eve of the trial at the registry of the general division. But the trial had to be aborted for the second time running. It is said the applicant did not see the Registrar's letter. That is neither here nor there. The Rules require that once such an application has been filed, it ought to be served immediately. If proof of service has to be filed, then it ought to be filed regardless of whether the Registrar writes or not. The only difficulty that I perceive hereon is whether the Rules require that proof of service be filed, and if so, within what time frame. **Part VIII of the Rules deals with applications in general, encompassing chamber applications. Rule 58(15) provides that where, for any reason, proof of service is not filed in, among other things, the time specified, the application shall be deemed to be abandoned for that reason and the Registrar shall accordingly notify the parties.** In terms of r 58(14), the time specified is five days of the service of the

> application. However, this is in respect of an application made in terms of Part VIII under which this rule falls. An application for leave to appeal is made in terms of Part XVI. **But Part VIII begins by r 57(1)**. It provides that all applications made for whatever purpose in terms of the Rules or any other law, other than applications made orally during the course of a hearing, shall be made, *inter alia*, as a court application or a chamber application. **Rule 58 aforesaid is general provisions for all applications.**
> **The point is, in spite of the fact that r 94 which governs applications for leave to appeal does not refer to the filing of proof of service, it may be that on a proper consideration of the Rules as a whole, particularly r 58(14) and (15), proof of service is indeed required even despite that r 58(14) under Part III of the Rules refers to proof of service in respect of an application made in terms of that Part**." [My emphasis]

21. The above reasoning applies with full force in this matter. A proper construction of the rules of court is that the general provisions of rule 58(14) and (15), which are in terms of Part VIII, also apply to constitutional applications. However, where there are specific provisions under rule 107 which govern the procedure to be adopted, then in that case the specific provisions shall prevail due to the principle of *generalia specialibus non derogant.* This principle means that the specific governs the general and is part of our law. For this principle to apply, there must exist general and specific provisions governing the same issue, thereby creating a potential conflict. In that case, the specific provisions take precedence over the general provisions. This is clearly the import of the principle. In such a situation, the general provisions do not derogate from the specific provisions. In other words, the specific provisions would override the general provisions.

22. For the principle to be applicable, the specific and general provisions must all relate to the same matter and create a potential conflict in the law. This is how the principle has been applied in our law. See *Zimbabwe Revenue Authority v Trustus (Pvt) Ltd* HH 820/22. The principle was also similarly employed in *Bubye Minerals (Pvt) Ltd v Minister of Mines and Mining Development & Ors* 2011 (2) ZLR 384 (S), where the court had this to say:

> "The contention also ignored the fact that s 282 makes special provision in respect of mining locations where precious stones are mined. Section 274 makes general provision applicable to all minerals. The principle of *generalia specialibus non derogant* would apply. It refers to the effect that general provisions do not override special provisions. ln *Barker v Edger* [1898] AC 748 at 754, LORD HOBHOUSE said,
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> > "The general maxim is *generalia specialibus non derogant*. When the legislature has given attention to a separate subject and made provisions for it, the presumption is that a subsequent general enactment is not

> intended to interfere with the special provision, unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject-matter and its own terms."
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> So, s 282 of the Act must be construed according to its subject-matter which is the prohibition of the holder of a mining right relating to precious stones from ceding those rights without the permission of the Minister. ln this case the Special Grant related to precious stones (diamonds). Accordingly, s 282 applied to the cession of those rights. The cession would have required the permission of the Minister."

23. What is clear from the above is that the maxim *generalia specialibus non derogant* cannot be resorted to where there are no specific provisions governing the same issue covered by the general provision. The general provisions would, in that case, simply apply. In this case, while rule 107 generally contains specific provisions governing constitutional applications, there is no specific provision under rule 107 providing the procedure for the filing of certificates of service in respect of the court application. The relevant part of rule 107 reads:

> "107. (1) A party who intends to raise a constitutional issue before the court shall do so by court application filed with the registrar which—
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> (a) be supported by an affidavit deposed to by a person who can swear positively to the facts, which details the facts and the basis on which the applicant seeks relief together with any supporting documents which are relevant; and
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> (b) state a physical address at which the applicant shall accept service of all process and documents in the proceedings; and
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> (c) be addressed to the registrar and served on all the respondents; and
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> (d) request the respondent to file and serve his or her notice of opposition within ten days of being served with the application; and
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> (e) be signed by the party making it or his or her legal practitioner; and
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> (f) where leave is required and has been obtained, state the date when such leave was granted.
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> (2) The respondent shall, within the time stipulated in the application, file with the registrar and serve on the other parties a notice of opposition in Form No. 24."

24. While there are no specific provisions for the filing of a certificate of service of an application, there are specific provisions relating to the filing of a certificate of service of a notice of opposition within two days after service and of the answering affidavit within two days after service. See subrules (5) and (8) of rule 107, respectively. In the absence of the specific provisions under rule 107 relating to constitutional applications governing the filing of certificates of service of the court application, the general provisions of rule 58(14)

would apply. There is no specific exclusion of the general provisions applicable to all applications, or an indication that the general provisions in the absence of specific provisions would not extend to cover applications under rule 107. Subrules (14) and (15) of rule 58, as far as they govern the filing of certificates of service of court applications within the prescribed period of service, would, therefore, apply.

25. The peremptory provisions of rule 58(14) thus require that the applicants ought to have filed their certificates of service within five days after the date of service of the application on the respondents. In *Chirosva Minerals (Pvt) Ltd v Minister of Mines and Ors 2011 (2) ZLR 274*, the court held that the disregard of a peremptory provision in a statute is fatal to the validity of the proceedings effected. Thus, the non-compliance with the peremptory provisions of the rules or statute would render the pleading fatally defective and therefore, a nullity. See *Moyo & Ors v Zvoma & Anor* SC 28/10.

26. In this case, it is not in dispute that the certificates of service were filed on 5 August 2024. According to the said certificates of service (see pp 103-104 of the record), service of the court application was effected on the respondents on 26 July 2024. The peremptory requirement of rule 58(14) was that the certificates ought to have been filed within five days of such service. This means that the certificate should have been filed by 2 August 2024. The certificates were filed outside the permissible period and in defiance of the peremptory rule 58(14), rendering the purported certificates fatally defective or a nullity. The effect of a void pleading is that it is nothing on which nothing can stand or flow. Thus, in *Mcfoy* v *United Africa Co Ltd* [1961] 3 ALL ER 1169 at 1172, Lord DENNING observed that:

> "If an act is void, then, it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of court for it to be set aside. It is automatically null and void without more ado, although it is sometimes more convenient to have the court declare it to be so. **And every proceeding which is founded on it is also bad. You cannot put something on nothing and expect it to stay there. It will collapse."** [My emphasis]

27. The applicants, therefore, failed to file any certificate of service in terms of the rules. The legal consequences of such failure is provided for in peremptory language under rule

58(15): the application shall be deemed to be abandoned. I restate the said provisions which reads:

> "(15) Where, for any reason, proof of service is not filed with the Registrar in the manner and time specified, **the application shall be deemed to be abandoned for that reason** and the Registrar shall accordingly notify the parties." [My emphasis]

28. It is clear that the application shall be deemed to be abandoned by operation of law in terms of rule 58(15). The effect of the deeming provision is that the matter was automatically terminated the day the applicants failed to file a certificate of service of the court application within five days of service as prescribed under rule 58(14). The fact that the Registrar did not inform the parties of the abandonment does not detract from the automatic abandonment. The abandonment is by operation of law. It takes effect upon failure to comply and not upon notification by the Registrar. Thus, in *Southend Cargo Airlines (Pvt) Ltd* v *Chituku & Ors* SC 42/16 BHUNU JK remarked on this legal position as follows:

> "The appeal having lapsed or deemed to have been abandoned it follows that there is no appeal pending in this court. This prompted the applicant to apply for condonation of late filing of the notice of appeal together with the application to reinstate the lapsed or abandoned appeal."

29. This is the same position reiterated in *Nyeve & Anor* v *Sibanda & Ors* HB 31/24 where the court dealing with the now repealed rule 58(8) and (9) held that:

> "A failure to comply with this rule meant that the application was deemed abandoned and consequently deemed dismissed. There was therefore no application before the court."

Similarly, in *Zizhou* v *Sheriff of Zimbabwe N.O & Ors* HH 201/23, wherein the court, dealing with the effect of the now repealed rule 15(8) and (9), which also provided for applications being deemed abandoned, it was stated that:

> "The rule is clear that after complying with r15(8) the receipt of the deposit has to be furnished to the Registrar within 5 days of filing of the application failure of which the application shall be regarded as abandoned and shall be deemed dismissed…The sanction for failure to comply in this instance is that the matter is regarded as abandoned and is "deemed dismissed". This is by operation of the law hence nothing can be done at this stage to salvage the case. See *Watermount Estates v The Registrar of the Supreme Court & Ors* SC 135/21)."

30. In *casu*, the sanction for the non-compliance under rule 58(15) is that the matter is automatically terminated, and there is nothing that can be done to salvage the case. The matter is deemed to have been abandoned by operation of the law. I do not agree that the failure by the Registrar to notify the parties revives the matter or means that the abandonment does not take effect. It rather takes effect upon failure to comply with the peremptory rule 58(14), and the Registrar's failure to notify the parties does not assist the applicants' case as it has already been deemed to have been abandoned by operation of law. The meaning of the word "deemed" is a matter of settled law. Something is regarded as a fact. See the case of *Zimbabwe Football Association* v *Pickwell & Ors* HH 12/21 at p 8, MUSHORE J (as she then was) made the following remarks:

> "Mr Zhuwarara contended; and I accept his submission to be correct, that the respondents *"....failed to appreciate the full significance of the word* ***deemed****".* The cited passage in the *dicta* by CAVE J in *R v County Council of Norfolk (1891)* 65 LT NS 222 which was brought to my attention by him is well worth being specifically enunciated here:-
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> > "When it is said that a thing is to be deemed to be something, it is not meant to say that it is that which it is deemed to be. It is rather an admission that it is not what it is deemed to be, and that notwithstanding it is not that particular thing, nevertheless, for the purposes of the Act, it is deemed to be that thing"
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> And then for emphasis counsel for the Applicant went on to refer for my attention to the meaning given of the word "deemed" in *Pereira v Group Five (Pty) Ltd and others* [1996] 4 All SA 686 (SE) where it was held that deemed denoted *"something is a fact regardless of the objective truth of the matter"*."

31. The fact accepted at law is that the matter would have been abandoned following non-compliance with rule 58(14). The fact that the Registrar did not notify the parties does not change that fact. This is the position enunciated in *Gazi* v *Mbalabala Properties (Pvt) Ltd* SC 24/23, where the court stated:

> "A failure by the Registrar to notify a party in terms of r 70 does not in my view deprive a litigant a remedy provided for in r 70(2). Neither does it create a different legal status or consequence to the affected appeal… The striking of the matter off the roll was subsequent to and resultant of the deemed dismissal by operation of law. Non-notification by the Registrar does not alter the nature or character of the matter."

By parity of reasoning, the matter is deemed to be abandoned by operation of the law. The non-notification of that fact does not change the nature or character of the application. It

stands abandoned and is no longer before the court. The court cannot, therefore, exercise its jurisdiction over the matter unless it has been reinstated.

32. The applicants' counsel argued that there is no remedy for a reinstatement of the matter deemed to be abandoned in our law, and the court ought not to find as such, as the applicants would be left with no remedy. I disagree. This court has been handling chamber applications for reinstatement despite that there was no specific rule on such procedure until the promulgation of Practice Direction No. 1 of 2025, which took effect from 27 February 2025. The court exercised its power to grant the indulgence of condonation and reinstatement in terms of rule 7, which empowers this court to determine any application even in cases where there is no specific procedure provided for in the rules of court.

33. In any case, the Practice Direction No. 1 of 2025 now makes provisions for the procedure for the reinstatement of a matter deemed to have been abandoned and dismissed in terms of the court rules. The applicants are, therefore, not without a remedy. The perceived lack of a remedy to bring back the matter before the court is simply erroneous and ill-advised.

34. Further, I do not agree that enforcing the provisions of rule 58(15) would breach the applicants' constitutional right of access to the courts. Rules are essential in the administration of justice and are actually meant to aid parties in ensuring access to justice. They exist to regulate the court process and are essential for the proper administration of justice. See *Minister of Mines & Mineral Development & Anor* v *Fidelity Printers & Refiners (Pvt) Ltd & Anor* CCZ 9/22 at p 14, where the court stated:

> "The court's rules regulate access to this or any other court. The need to pay regard to the rules when instituting proceedings was emphasised in *Mupungu v Minister of Justice, Legal and Parliamentary Affairs* CCZ 07/21, where this court stated that:
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> > "One cannot institute an action or application in the High Court, or any other court, without due observance of and compliance with the Rules of that court. The Rules inform a litigant of what is required of him to access the court concerned. If he fails to observe or comply with those Rules, he will inevitably be non-suited. To conclude this aspect of the matter, I am satisfied that the proceedings *a quo* were fatally defective and constitute a nullity for failure to comply with r 18 of the High Court Rules…."

There is, therefore, no merit in the argument that the provisions of rule 58(15) are unconstitutional or that they deny litigants their right to access the courts.

35. Having found that the provisions of rule 58(14) and (15) are applicable and the consequences thereof, it means that it would be academic to consider the argument about the alleged contradictions between provisions of rule 58 and 59 as argued for the applicants. It also becomes unnecessary for me to consider the second point *in limine* on mootness. The matter is resolved on the first preliminary point.

DISPOSITION

36. The proceedings were, by operation of the law in terms of rule 58(15), automatically terminated as the matter is deemed to have been abandoned. The fact that the Registrar did not notify the parties or that he went on to set it down for hearing does not change the nature or character of the matter. The application having deemed to have been abandoned, it follows that there is no application pending in this court. There is nothing, therefore, for me to determine. There was no prayer for costs. In any case, generally, in constitutional applications, the courts usually refrain from penalising litigants with an award of costs. There is, therefore, good reason to depart from the general principle that costs shall follow the cause in this case.

37. In the result, it is ordered as follows:

    1. The point *in limine* that there is no pending application by virtue of the provisions of rule 58(14) as read with subrule (15) be and is hereby upheld.
    2. Consequently, the application be and is hereby struck off the roll with no order as to costs.

DEMBURE J: ……

Tendai Biti Law, applicants' legal practitioners
Nyika, Kanengoni & Partners, first respondent's legal practitioners