FREEMAN CHARI
versus
THE MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS N.O (1)
and
THE ATTORNEY GENERAL OF ZIMBABWE N.O (2)

HIGH COURT OF ZIMBABWE
DEMBURE J
HARARE; 4 March & 9 May 2025

Opposed Court Application

O Chitowamombe, for the applicant
M Chimombe, for the 1st & 2nd respondents

DEMBURE J:

INTRODUCTION

[1] This is a court application for a declaratory order and consequential relief. The applicant approached the court in terms of s 85 of the Constitution of Zimbabwe, 2013 (*"the Constitution"*) as read with s 14 of the High Court Act [*Chapter 7:06*]. The applicant seeks an order in the following terms:

> "1. The application be and is hereby granted.
> a) Section 22A (2)(b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] is unconstitutionally vague.
> b) Section 22A (2)(b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] is unconstitutional and abrogates the provisions of Section 6[1] of the Constitution.
> c) Section 22A(2)(b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] is unconstitutional and abrogates the provisions of Section 67 of the Constitution.
> d) Consequently, that section 22A(2)(b) of the Criminal Law (Codification and Reform Amendment Act) is struck down.
> e) There shall be no order as to costs."

[2] The first and second respondents opposed the application. On 4 March 2025, the court, after hearing arguments from the parties' legal practitioners, reserved judgment *sine die*.

BACKGROUND

[3] The applicant, Freeman Chari, is a male Zimbabwean adult citizen who is a biomedical scientist and a software Engineer by profession. The first respondent is the Minister of Justice, Legal and Parliamentary Affairs, cited in his official capacity as the responsible authority for revising, reforming and reviewing the laws of Zimbabwe. The second respondent is the Attorney General of Zimbabwe, also cited in his official capacity.

[4] It is common cause that on 23 December 2023, the Government of Zimbabwe gazetted into law the Criminal Law (Codification and Reform Amendment) Act, Act 10 of 2023 (*"the Act"*). Its purpose was to amend the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (*"the principal Act"*) and to provide for matters connected therewith or incidental thereto. The principal Act was amended *inter alia*, by the insertion of the following section after s 22:

> "**22A Wilfully injuring the sovereignty and national interest of Zimbabwe**
> (1) In this section—
> "actively partake", in relation to any meeting, means partake therein with the intention of, or in the role of, promoting, advancing, encouraging, instigating or advocating for the object for which the meeting is convened (for the avoidance of doubt, no person contravenes this section who, at the meeting concerned, discourages or repudiates any object the promotion, advancement, encouragement or instigation of which, or advocacy for which, would have rendered that person liable to prosecution under this section);
> "agent, proxy or entity" in relation to an agent, proxy or entity of a foreign government, means any person that the accused knew or had grounds for believing was acting on behalf of, or with the knowledge, approval or acquiescence of, the foreign government concerned, or any person about whom it is reasonable to suppose that he or she was acting on behalf of, or with the knowledge, approval or acquiescence of, the foreign government concerned;
> "economic sanctions or trade boycott" means any law or binding direction by a foreign government prohibiting persons subject to its jurisdiction from investing in Zimbabwe or from engaging in any economic activity in or with Zimbabwe or with any entity of Zimbabwe, which investment or activity is beneficial to the people of Zimbabwe as a whole and makes or potentially may make a substantial contribution to their economic development (for the avoidance of doubt, but subject to subsection (6), an advisory or like nonbinding admonition by a foreign government discouraging persons subject to its jurisdiction from investing in Zimbabwe or from engaging in any economic activity in or with Zimbabwe or with any entity of Zimbabwe is not to be considered as falling within the scope of the phrase "economic sanctions or trade boycott");
> "meeting" means any communication between two or more persons, whether happening in person or virtually or by a combination of both, which involves, or is

facilitated or convened by, a foreign government or any of its agents, proxies or entities.

(2) **Any citizen or permanent resident of Zimbabwe (hereinafter in this section called "the accused") who, within or outside Zimbabwe actively partakes (whether himself or herself or through an agent, and whether on his or her own initiative or at the invitation of the foreign government concerned or any of its agents, proxies or entities) in any meeting whose object the accused knows or has reasonable grounds for believing involves the consideration of or the planning for**—

(a) military or other armed intervention in Zimbabwe by the foreign government concerned or another foreign government, or by any of their agents, proxies or entities; or

(b) **subverting, upsetting, overthrowing or overturning the constitutional government in Zimbabwe**; shall be guilty of wilfully damaging the sovereignty and national interest of Zimbabwe and liable to—

(i) the same penalties as for treason, in a case referred to in paragraph (a); or

(ii) **the same penalties as for subverting constitutional government, in a case referred to in paragraph (b**)." [Emphasis added]

[5] The applicant took issue with s 22A (2)(b) of the Act and averred that it is unconstitutionally vague and, therefore, void. He argued that it must have been expressed in clear and precise terms to enable the applicant and other Zimbabwean citizens to conform their conduct to its dictates. It was also stated that the words subverting, upsetting, overthrowing or overturning the constitutional government are not defined with sufficient clarity, rendering the Act void for vagueness.

[6] The applicant also averred that the provisions violate his right to freedom of expression and freedom of the media and political rights enshrined in terms of ss 61 and 67 of the Constitution, respectively.

[7] In their opposing papers, the first and second respondents denied that s 22A (2)(b) of the Act is unconstitutional, vague and violates ss 61 and 67 of the Constitution.

[8] In the applicant's answering affidavit, a point *in limine* was taken to the effect that there were no valid opposing papers from the first respondent in the absence of proof of authority attached by the deponent to the opposing affidavit. However, Mr *Chitowamombe*, counsel for the applicant, abandoned this point at the commencement of the hearing.

APPLICANT'S SUBMISSIONS

[9] Mr *Chitowamombe* submitted that this is an application for a *declaratur* that s 22A (2)(b) of the Act is unconstitutionally vague, and, therefore, void for vagueness and that it abrogates the provisions of ss 61 and 67 of the Constitution. The consequential relief is to

strike down the section. He further submitted that the application is brought in terms of s 85(1) of the Constitution as read with s 14 of the High Court Act. He also submitted that the requirements for an application for a *declaratur* are trite. They are set out in s 14 of the High Court Act and a number of authorities. They are that the applicant is an interested person having a substantial and direct interest in the matter, and such interest must relate to an existing, future, or contingent legal right.

[10] It was further argued that the applicant has a real and substantial interest in the sense that the impugned provisions directly violate his constitutional rights in terms of ss 61 and 67 of the Constitution. He also submitted that the respondents did not take issue with his *locus standi.* The applicant satisfied the first hurdle. On the second requirement, he argued that there was an infringement of the applicant's rights.

[11] Counsel also argued that s 22A (2)(b) of the Act is vague and, therefore, void. It does not allow or enable citizens to regulate their conduct, as they do not know what it is that is required to regulate their conduct. In the applicant's heads of argument, reference was also made to the cases of *Connally v General Construction Co.* 269 U.S385,391 (1926) and *Chimakure* v *Attorney-General* SC 14/13.

[12] It was submitted that the terms "subverting", "upsetting", "overthrowing" or "overturning" the constitutional government are not defined. The terms constituting a crime must be defined with sufficient clarity. There is a sharp contrast between s 22A (2)(b) and s 22. Section 22 defines what subverting a constitutional government means. Section 22A (2)(b) does not do so. It creates a challenge as s 22A (2)(b) is couched in sweeping terms. The section is couched so as to take away the applicant's rights as enshrined in ss 61 and 67.

[13] Mr *Chitowamombe* further argued that this section violates the applicant's political rights in s 67 to the extent that the applicant exercises his political rights to overthrow a constitutional government through constitutional means. That provision takes away the applicant's rights; he cannot form political parties or criticise the government. The section also violates the applicant's freedom of expression, as the applicant fears prosecution since it is couched in sweeping terms. He referred the court to the submissions made for the applicant at pp 59-62 of the heads of argument.

[14] It was also counsel's argument that the applicant's rights are not absolute but subject to limitations. Section 22A (2)(b) is not the kind of limitation envisaged. It is not the kind of law of general application in that it is not fair and justifiable in a democratic society. The applicant satisfies the requirements for the relief, and the application ought to be granted.

RESPONDENTS' SUBMISSIONS

[15] Mr *Chimombe,* for the respondents, submitted that the applicant takes issue with the fact that the words "subverting", "upsetting", "overthrowing" or "overturning" the constitutional government are not defined. He submitted that not all words that are used in a statute are defined. Where words are not defined, they carry their ordinary dictionary meaning or grammatical meaning. In essence, there is nothing vague about that section. Those words should take their ordinary dictionary meaning.

[16] In the respondents' heads of argument, it was further submitted that s 22A (22)(b) is very clear and precise and does not in any way violate political rights and the right to freedom of expression and freedom of the media as encapsulated under ss 67 and 61 of the Constitution. Any critical behaviour associated with or expected in a democratic society, such as participating individually or collectively as a gathering or groups, or in any manner in peaceful activities to influence, criticise or challenge the government, is not prohibited.

[17] It was also submitted that the offence is defined with sufficient clarity to enable citizens to regulate their conduct accordingly, and no one can claim to have a right to commit any of the acts mentioned in section 22A (2)(b). He submitted that the criminalised conduct in section 22A (2)(b) is not protected in terms of the Constitution. The offence created under the said section is actually one of active disloyalty to a constitutionally established government with a view to removing it through unconstitutional means. Therefore, no one can claim to have a right to do any of the four proscribed activities in that section. Section 22A (2)(b) is not vague.

[18] Mr *Chimombe* argued that if there is anything vague, it is the application itself. It is vague and defective. Throughout the founding affidavit and even the draft order, the applicant contends that s 22A (2)(b) abrogates the provisions of ss 61 and 67 of the Constitution. If you look at s 67 it contains so many rights. The applicant is not saying s

22A (2)(b) infringes any specific right and in what way. It is trite that when alleging a right, you have to be specific as to the constitutional right being infringed. He has not alleged how the right to vote is infringed by s 22A (2)(b).

[19] Counsel also submitted that the applicant purports to bring the application in terms of s 85. Section 85 provides for five capacities in which an application can be brought. The applicant says he is bringing an application under s 85 and ends there. On that basis, the application must be dismissed with no order as to costs. When the court queried the argument from counsel on *locus standi,* given how the applicant had pleaded such legal capacity in para 6 of the founding affidavit, Mr *Chimombe* submitted that para 6 is not enough. That when you allege that you are bringing an application, you have to specify in terms of which subsection you are bringing the application.

[20] Counsel also argued that it is common cause that the freedoms protected in terms of ss 61 and 67 of the Constitution are not absolute as they are limited in terms of our Constitution.

APPLICANT'S REPLYING SUBMISSIONS

[21] Mr *Chitowamombe,* in reply, submitted that he failed to appreciate the argument that the applicant did not state the subsection to which the applicant relates. He argued that there is no substance in that argument. Para 6 at p 7 of the record refers to that subsection. The respondents further take the issue that a particular right is not alleged to have been infringed. However, at p 12 in para 6 of the applicant's founding affidavit, the nature of the political rights infringed by the section are set out. The rights are stated.

ANALYSIS OF THE LAW AND THE DETERMINATION

THE LAW ON STATUTORY & CONSTITUTIONAL CONSTRUCTION

[22] It is a settled principle of law that when interpreting statutes, the golden rule of interpretation is the first canon of interpretation to be resorted to. This rule states that words used in a statute must be interpreted in their context and must be given their ordinary grammatical meaning unless doing so would lead to an absurdity or a repugnancy or an inconsistency with the intention of the legislature. See *Pwanyiwa v Shamva Gold Mine* SC 34/24. At pp 6-7, where MAVANGIRA JA restated the legal position as follows:

> "In *Godfrey Tapedza & 9 Ors v Zimbabwe Energy Regulatory Authority & Anor* SC 30/20, this Court, per HLATSHWAYO JA, as he then was, stated as follows at p 4:

> "It is an established principle of law that when interpreting a statute, the first canon of interpretation to be applied is the golden rule of interpretation. This rule is to the effect that where the language used in a statute is plain and unambiguous, it should be given its ordinary meaning unless doing so would lead to some absurdity or inconsistency with the intention of the legislature. A provision of a statute should be given a meaning which is consistent with the context in which it is found."

The learned Judge also aptly cited *Chegutu Municipality v Manyora* 1996 (1) ZLR 262 (S) at 264 D - E where MCNALLY JA stated the following:

> "There is no magic about interpretation. Words must be taken in their context. The grammatical and ordinary sense of the words is to be adhered to, as LORD WENSLEYDALE said in *Grey* v *Pearson* (1857) 10 ER 1216 at 1234, 'unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further.'"

[23] In relation to interpreting the Constitution, the law is that since the Constitution is but a statute, the ordinary rules or canons of interpretation of statutes apply to the interpretation of constitutional provisions. The proper constitutional construction is, however, that which "serves the interest of the Constitution and best carries out its objectives and promotes its purpose." *See Rattigan & Ors* v *The Chief Immigration Officer & Ors* 1994 (2) ZLR 54. It must also be restated that the presumption in favour of constitutionality is also applicable. Therefore, any person who alleges that a statute or statutory provision contravenes the Constitution bears the onus to establish that. The law on constitutional interpretation was remarkably restated in *Chikutu & Anor* v *Minister of Lands, Agriculture, Climate & Rural Resettlement & Ors* CCZ 03/23 pp 15 to 19 as follows:

> "[45] The Constitution is a statute. As such, it is subject to the established canons of interpretation. Accordingly, a court must construe the provisions of the Constitution literally to give effect to its ordinary meaning unless doing so would result in an absurdity. Where, however, this is not possible, a court is enjoined to construe the provisions in a manner that gives effect to the rights being protected…
>
> [47] With these principles in mind, the Court must then examine the constitutional provision to determine its meaning and interpret the challenged legislation to decide if the alleged violations have been established. This accords with canons of interpretation and has been emphasized time and time by the courts in this jurisdiction in a long line of authorities. The approach by the court was settled by GUBBAY CJ in In *Re Munhumeso & Ors* 1994(1) ZLR 49(S), at 59B-E, where the learned former Chief Justice said the following:

> "Two general interpretational principles are to be applied. The first was lucidly expressed by GEORGES CJ in *Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd* 1983 (2) ZLR 376 (S) at 382B-D; 1984 (2) SA 778 (ZS) at 783A-D, to this effect:
>
> 'Clearly a litigant who asserts that an Act of Parliament or a Regulation is unconstitutional must show that it is. In such a case the judicial body charged with deciding that issue must interpret the Constitution and determine its meaning and thereafter interpret the challenged piece of legislation to arrive at a conclusion as to whether it falls within that meaning or it does not. The challenged piece of legislation may, however, be capable of more than one meaning. If that is the position then if one possible interpretation falls within the meaning of the Constitution and others do not, then the judicial body will presume that the law makers intended to act constitutionally and uphold the piece of legislation so interpreted. This is one of the senses in which a presumption of constitutionality can be said to arise. One does not interpret the Constitution in a restricted manner in order to accommodate the challenged legislation. The Constitution must be properly interpreted, adopting the approach accepted above. Thereafter the challenged legislation is examined to discover whether it can be interpreted to fit into the framework of the Constitution.'

See also *Minister of Home Affairs v Bickle & Ors* 1983 (2) ZLR 431 (S) at 441E–H, 1984 (2) SA 39 (ZS) at 448F–G; *S v A Juvenile* 1989 (2) ZLR 61 (S) at 89C, 1990 (4) SA 151 (ZS) at 167G–H." ….

This court has on several occasions in the past pronounced upon the proper approach to constitutional construction embodying fundamental rights and protections. What is to be avoided is the imparting of a narrow, artificial, rigid and pedantic interpretation; to be preferred is one which serves the interest 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 or strictly construed. See *Min of Home Affairs & Ors v Dabengwa & Anor* 1982 (1) ZLR 236 (S) at 243G-244A, 1982 (4) SA 301 (ZS) at 306E-H; *Bull v Min of Home Affairs* 1986 (1) ZLR 202 (S) at 210E-211C; 1986 (3) SA 870 (ZS) at 880J-881D; *Nkomo & Anor v A-G, Zimbabwe & Ors* 1993 (2) ZLR 422 (S); 1994 (1) SACR 302 (ZS) at 309E-F. A recent reminder that courts cannot allow a Constitution to be "a lifeless museum piece" but must continue to breathe life into it from time to time when opportune to do so, was graphically expressed by Aguda JA in *Dow v A-G* [1992] LRC (Const) 623 (Botswana Court of Appeal) at 668f-h:

> … the Court must adopt an approach that results in an expansive and broad interpretation of the provisions that protect human rights. It is often said that the Constitution is a living document, and that the courts must strive to breathe life into its provisions. In this endeavour the court must have reference to language in the provision, and, the historical origins of the concept thus enshrined. The provision has be construed in a manner that must give meaning and purpose to any other rights associated with any particular provisions. Thus, it is construed to reflect the citizens' values and aspirations. See in this regard *S v Zuma* 1995(2) SA 642, (CC); *R v Big Mart Ltd* (1985) 18 DLR (4th) 321.
>
> … In interpreting the constitutional provisions, the ordinary rules of interpretation of statutes apply. The Constitution is but a statute. It is however settled that in interpreting constitutional provisions, the preferred construction "is one which serves the interest of the

> Constitution and best carries out its objects and promotes its purpose". (See *Rattigan and Others v The Chief Immigration Officer and Others* 1994(2) ZLR 54. See also *Smythe v Ushewokunze and Another* 1997(2) ZLR 544(S)). In particular, when interpreting provisions that guarantee fundamental rights, the widest possible interpretation is adopted to give each right its fullest measure or scope.
>
> After interpreting the appropriate provisions of the Constitution, one then presumes that the impugned law is constitutionally valid. The presumption of constitutional validity serves firstly to place the onus on whoever is alleging invalidity to prove such invalidity and, secondly and, equally important, to guide the court in interpreting the impugned law in favour of validity where the piece of legislation is capable of two meanings. The presumption holds that where a piece of legislation is capable of two meanings, one falling within and the other falling outside the provisions of the Constitution, the court must perforce uphold the one that falls within.
>
> The presumption in favour of constitutionality is entrenched in our law.
>
> As the next and final logical step, the Court must then examine the effect of the impugned law on the fundamental right or freedom in question. If the effect of the impugned law is to abridge a fundamental right or freedom or is inconsistent with the provisions of the Constitution providing for the right or freedom, the object or subject matter of the impugned law will be less important or irrelevant. (See *In re Munhumeso* 1994 (1) ZLR 49 (S)).
>
> If the court finds the impugned law to infringe upon a fundamental right or freedom or to be inconsistent with the provisions of the Constitution on a fundamental right or freedom, the court must proceed to determine whether the infringement or inconsistency is permissible in terms of s 86 (2) of the Constitution."

WHETHER THE REQUIREMENTS FOR A *DECLARATUR* HAVE BEEN MET

[24] The first issue to be determined is whether the applicant has satisfied all the requirements for a declaratory order. An application of this nature ought to be made, considered and ventilated in terms of the provisions of s 14 of the High Court Act, which provides that:

> "The High Court may in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination."

[25] The requirements of declaratory order are a matter of settled law. These were considered in the case of *Johnsen* v *Agricultural Finance Corporation* 1995 (1) ZLR 65. The court stated as follows:

> "The condition precedent to the grant of a declaratory order under section 14 of the High Court Act of Zimbabwe, 1981 is that the applicant must be an "interested person", in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court. The interest must concern an existing, future or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated thereto. But the presence of an actual dispute or

> controversy between the parties is not a pre-requisite to the exercise of jurisdiction. See *Ex P Chief Immigration Officer* 1993 (1) ZLR 122 (S) at 129F-G; 1994 (1) SA 370 (25) at 376G-H; *Munn Publishing (Pvt) Ltd v ZBC* 1994 (1) ZLR 337 (S) and the cases cited …"

[26] It is my view, the requirements for a declaratory order have been met. Firstly, the applicant has the *locus standi* to approach this court for such relief. The right to approach this court seeking relief arising from alleged infringement of a fundamental human right or freedom under Chapter 4 is granted to "any person acting in their own interests". See s 85(1)(a) of the Constitution. In *Mudzuru & Anor* v *Minister of Justice, Legal & Parliamentary Affairs N.O & Ors* CCZ 12/15 the provisions of s 85(1)(a) were further interpreted in the following terms:

> "The first part of the rule of standing under s 85(1)(a) of the Constitution needs no elaboration. Its content has constituted the meaning of the traditional and narrow rule of standing with which any common law lawyer is familiar. It is the rule which prompted CHIDYAUSIKU CJ to comment in *Mawarire* v *Mugabe NO and Others CCZ 1/2013* at p 8 of the cyclostyled judgment:
>
> > "Certainly, this Court does not expect to appear before it only those who are dripping with the blood of the actual infringement of their rights or those who are shivering incoherently with the fear of the impending threat which has actually engulfed them. This Court will entertain even those who calmly perceive a looming infringement and issue a declaration or appropriate order to stave the threat, more so under the liberal post-2009 requirements."
>
> That is the familiar rule of *locus standi* based on the requirement of proof by the claimant of having been or of being a victim of infringement or threatened infringement of a fundamental right or freedom enshrined in Chapter 4 of the Constitution.
>
> The second aspect of the rule is not so familiar. It needs elaboration. The Canadian cases of *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321 and *Morgentaler Smoling and Scott* v *R* (1988) 31 CRR 1 illustrate the point that a person would have standing under a provision similar to s 85(1)(a) of the Constitution to challenge unconstitutional law if he or she could be liable to conviction for an offence charged under the law even though the unconstitutional effects were not directed against him or her *per se*. It would be sufficient for a person to show that he or she was directly affected by the unconstitutional legislation. If this was shown it mattered not whether he or she was a victim."

[27] The applicant alleged that his fundamental right to freedom of expression and the media under s 61 and political rights under s 67 of the Constitution have been or are likely to be infringed by the provisions of s 22A(2)(b) as couched. Mr *Chimombe* argued that the applicant did not properly plead or set out his *locus standi* under s 85. I do not agree. A reading of the founding affidavit, in particular para 6, utterly defeats Mr *Chimombe*'s

argument. In para 6 of the founding affidavit, the applicant states that he is approaching the court in terms of s 85(1)(a).

[28] Section 85(1)(a) of the Constitution permits a person to approach this court acting in their own interests as the applicant did. The subsection relied on by the applicant is clearly set out in para 6 as subsection (1) para (a) of s 85. There should, therefore, be no issue here. The applicant's *locus standi* was properly and sufficiently pleaded. The applicant has direct and substantial interest in the matter. Secondly, there is no doubt that the applicant's interest in this case concerns an existing, future or contingent right. There is also no dispute that the court is not being called upon to decide abstract, academic or hypothetical questions in this matter. The determination of this matter concerns live issues on the constitutional validity of s 22A(2)(b) of the Act. This law is part of our statute books and is effective.

[29] The question that arises is whether this is a proper case for the court to exercise its discretion under s 14 of the High Court Act in favour of the applicant and grant the relief sought. I am mindful of the fact that this discretion must be exercised judiciously. I will, now, therefore, proceed to determine the questions that remain to be resolved.

WHETHER SECTION 22A (2)(b) OF THE ACT IS UNCONSTITUTIONALLY VAGUE

[30] In accordance with the fundamental principle of the rule of law, the law must be expressed in clear and precise terms, leaving no room for subjective interpretation. This allows individuals to conform their behaviour to the law and avoid unintended criminal liability. In *Mpofu & Anor* v *The State* CCZ5/16 ZIYAMBI JCC explained the above principles in the following words:

> "The right to protection of the law entails that the law be expressed in clear and precise terms to enable individuals to conform their conduct to its dictates. A law may not be so widely expressed that its boundaries are a matter of conjecture nor may it be so vague that the people affected by it must guess at its meaning. If it does it will fail to meet the test of validity. A subject must be able to foresee to a reasonable degree the consequences which his chosen course of conduct might entail. As it was put in *The Sunday Times* v *The United Kingdom*:-
>
> > "… a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows

> this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances."

[31] The rationale behind the principle of unconstitutional vagueness, which is part of the principle of legality, was further explained in *Chimakure* v *Attorney-General* SC 14/13 as follows:

> "The rationale underlying the principle of unconstitutional vagueness of a statute is clear. A law which does not meet the constitutional requirement of legality cannot be saved by s 20(2) of the Constitution. It is essential in a free and democratic society that people should be able within reasonable certainty to foresee the consequences of their conduct in order to act lawfully. The fact that one can on a fair warning about what is criminal, dependably calculate action in advance is a very fundamental element of law, order and therefore peace. On the fair notice component of the rule against unconstitutional legislative vagueness, it is not enough that a person of average intelligence has had notice of the legislation. He or she must on reasonable examination of its provisions be able to appreciate that the law proscribes certain conduct and what that conduct is. The Constitution insists that laws must give people of ordinary intelligence a reasonable opportunity to know what is prohibited so that they may act lawfully. The assumption is that man is free to steer between lawful and unlawful conduct. Once a person has a fair notice of what conduct is lawful, he or she is able to order his or her actions together with others thereby giving rise to order and stability in society."

[32] Accordingly, statutes creating crimes must define those offences with clarity and precision, ensuring citizens understand what conduct is prohibited and what is criminalised. This principle, as noted above, is rooted in the rule of law and the right to protection, ensuring fairness and predictability in the legal system. Thus, in *Connally* v *General Construction Co.* 269 U.S 385,391 (1926), the United States Supreme Court held that:

> "The terms of a penal statute creating new offence must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well recognised requirement consonant alike with ordinary notions of fairplay and the settled rules of law and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process."

[33] In *casu*, the applicant argued that s 22A (2)(b) is unconstitutionally vague or void for vagueness. He averred that this is so particularly in that there are no definitions for the terms "subverting, upsetting, overthrowing or overturning" the constitutional government. As alluded to above, words in a statute must be read in their context. See *Chegutu Municipality* v *Manyora supra*. The offence created by s 22A (2)(b) is under Chapter III, being crimes against the state, and as an additional crime to that of subverting constitutional

government provided under s 22. The same penalties for subverting a constitutional government under s 22 apply also for the offence created under s 22A (2)(b). The crime, therefore, falls within the same species as that under s 22.

[34] While the words "subverting", "upsetting", "overthrowing", or "overturning" are not defined, that *per se* does not render the section void for vagueness. It does not follow that all the words used in a statute must be defined by the legislature. The courts still have the role to interpret statutes and, in that regard, apply various canons and aids of statutory interpretation to find the meaning of the words used or the intention of the legislature. The ordinary grammatical meaning of those words can easily be ascertained with sufficient clarity or precision to dispel any notions of vagueness, as argued by the applicant. The Oxford English dictionary defines these words as follows: "subverting" means, "to undermine, destroy or overturn something, especially an established system or belief"; "upsetting", means, "causing someone to feel worried, unhappy or angry"; "overthrowing" means, "to defeat and remove someone from power, especially by force or to demolish or destroy something by force." and "overturning" means, "either turning something over on its side or reversing a legal decision."

[35] The said words are not, therefore, inherently vague. When these words are taken in the context of a crime against the constitutional government, their ordinary meanings, when read together, relate to the crime against the constitutional order of a government. They are very clear in that regard. Criminalised conduct is proscribed with sufficient clarity for men of common intelligence to regulate their behaviour and act lawfully. All the essential elements of the offence are also clearly set out. It is clear that criticising or challenging the constitutional government or order in a manner acceptable in a democratic society is not what is prohibited by s 22A(2)(b). The kind of behaviour that is criminalised under that provision goes beyond the normally acceptable and constitutional means of removing or changing a constitutional government.

[36] The objective of legislation of guiding conduct is achieved by the provisions of s 22A (2)(b). There is adequate demarcation of the area that constitutes criminal conduct, which renders the provisions clear and certain to meet the requirement of legality. It is clear that the applicant's counsel failed to appreciate the meaning and effect of the four words

read in the context. He erroneously considered them in isolation from the context of the whole provisions of s 22A. "It is trite that regard must be had to the text, context and purpose of the provisions and the broader architectural design of the Act. The relevant provisions must, per force, be construed as a whole and not in piecemeal fashion." (*per* KUDYA JA in *Ingalulu Investments (Pvt) Ltd & Anor* v *NRZ & Anor* SC 42/22 at p 5).

[37] I agree with Mr *Chimombe* that the failure to define the stated terms or words in the statute is not a basis for justifying vagueness and that the words are not inherently vague or imprecise. I find the provisions of s 22A(2)(a) to be sufficiently clear and valid. In other words, the section is formulated in clear, precise and adequate terms which enable a subject to foresee the consequences of his actions as enunciated in the case of *Mpofu & Anor* v *The State supra*. The applicant, accordingly, failed to discharge the onus upon him to show that s 22A(2)(b) of the Act is void for vagueness.

WHETHER s 22A (2)(b) VIOLATES SECTIONS 61 & 67 OF THE CONSTITUTION

[38] The applicant's case was anchored on the argument that s 22A (2)(b) is unconstitutionally vague and that, therefore, it infringes on the applicant's constitutionally protected rights under ss 61 and 67 of the Constitution. This is also what is further argued in para 30 of the applicant's heads of argument. Once I have found the provisions to be sufficiently clear and precise and, therefore, valid, the applicant's case would automatically collapse. It cannot stand.

[39] In any case, in my view, the applicant misread the provisions of s 22A (2)(b) and ascribed criminal conduct to activities which clearly do not constitute the crime under the said section. The relevant provisions of s 61 read as follows:

> "**61 Freedom of expression and freedom of the media**
> (1) Every person has the right to freedom of expression, which includes—
> (a) freedom to seek, receive and communicate ideas and other information;
> (b) freedom of artistic expression and scientific research and creativity; and
> (c) academic freedom.
> (2) Every person is entitled to freedom of the media, which freedom includes protection of the confidentiality of journalists' sources of information.
> (3) Broadcasting and other electronic media of communication have freedom of establishment, subject only to State licensing procedures that—
> (a) are necessary to regulate the airwaves and other forms of signal distribution; and
> (b) are independent of control by government or by political or commercial interests.
> (4) All State-owned media of communication must—

(a) be free to determine independently the editorial content of their broadcasts or other communications;
(b) be impartial; and
(c) afford fair opportunity for the presentation of divergent views and dissenting opinions.
(5) Freedom of expression and freedom of the media exclude—
(a) incitement to violence;
(b) advocacy of hatred or hate speech;
(c) malicious injury to a person's reputation or dignity; or
(d) malicious or unwarranted breach of a person's right to privacy."

[40] In turn, s 67, which provides for political rights, stipulates as follows:

"**67 Political rights**
(1) Every Zimbabwean citizen has the right—
(a) to free, fair and regular elections for any elective public office established in terms of this Constitution or any other law; and
(b) to make political choices freely.
(2) Subject to this Constitution, every Zimbabwean citizen has the right—
(a) to form, to join and to participate in the activities of a political party or organisation of their choice;
(b) to campaign freely and peacefully for a political party or cause; (c) to participate in peaceful political activity; and
(d) to participate, individually or collectively, in gatherings or groups or in any other manner, in peaceful activities to influence, challenge or support the policies of the Government or any political or whatever cause.
(3) Subject to this Constitution, every Zimbabwean citizen who is of or over eighteen years of age has the right—
(a) to vote in all elections and referendums to which this Constitution or any other law applies, and to do so in secret; and
(b) to stand for election for public office and, if elected, to hold such office.
(4) For the purpose of promoting multi-party democracy, an Act of Parliament must provide for the funding of political parties."

[41] On the right to freedom of expression and freedom of the media under s 61, the applicant argued that s 22A (2)(b) violates that right. He averred that he has the right to seek, receive and communicate ideas and information that might not favour the sitting government. The information may be criticising the sitting government and involve ideas on how that government should be removed. It is settled that freedom of expression is at the heart of a democracy and individuals should be able to hear, form and freely express their views and opinions on any matters in our society. Thus, MALABA DCJ (as he then was) in *Madanhire v Attorney General* CCZ 2/14 at p 7 remarked:

> "There can be no doubt that the freedom of expression, coupled with the corollary right to receive and impart information, is a core value of any democratic society deserving of the

> utmost legal protection. As such, it is prominently recognised and entrenched in virtually every international and regional human rights instrument."

[42] In my view, the respondents' argument is correct that nothing in s 61 guarantees the right to subvert, upset, overthrow or overturn a constitutional government. Section 22A (2)(b) does not violate the freedom of expression and freedom of the media. It does not criminalise or limit critical behaviour acceptable in a democratic society, such as criticising the sitting government or seeking to democratically challenge the government, nor partake in any activities meant to lawfully effect a constitutional change of government. The provision only extends to prohibit conduct that is meant to subvert, upset, overthrow or overturn the constitutional government. In the context of s 22A (2)(b), the prohibited conduct goes beyond the legitimate activities argued by the applicant. As correctly argued by the respondents, the offence is one of active disloyalty to a constitutionally established government with a view to removing it through unconstitutional means. This is also the reason why it falls under the species of crimes against the state and attracts similar punishment upon conviction to that of subverting a constitutional government under s 22 of the Act. In my considered view, the section is sufficiently clear and does not infringe upon any of the applicant's constitutionally protected right to freedom of expression and freedom of the media.

[43] On the political rights enshrined under s 67, the applicant argued that s 22A (2)(b) penalises peaceful activities to influence, challenge or support the policies of the government or any political cause. Clearly, pursuing peaceful means for a constitutional change of government cannot constitute overthrowing a constitutional government. The applicant is misreading the meaning of the words "subverting, upsetting, overthrowing or overturning the constitutional government" as read in the context of the whole provision. Participation in lawful activities meant to influence policy making, or an alternative system of governance or hold the government to account for its policies, does not fall within the conduct proscribed under s 22A(2)(b). The provision does not violate in any way the constitutionally protected political rights set out in s 67. The applicant cannot claim to have a right to do any of the four activities proscribed by the provisions of s 22A (2)(b).

[44] A proper construction of the provisions of s 22A(2)(b) shows that what constitute a crime is sufficiently clear and, therefore, they do not infringe upon the applicant's right

to freedom of expression and freedom of the media and his political rights set out in ss 61 and 67 of the Constitution, respectively, as alleged.

DISPOSITION

[45] The applicant has failed to discharge the onus to show that the provisions of s 22A (2)(b) of the Act are unconstitutionally vague and violate the applicant's fundamental rights or freedoms under ss 61 and 67 of the Constitution. The application is without merit and cannot succeed.

[46] In their opposing papers, the respondents moved for the dismissal of the application with costs. However, at the hearing, Mr *Chimombe* submitted that the application must be dismissed with no order as to costs. The settled position of the law is that the courts generally do not award costs in constitutional matters unless there is conduct warranting such costs. This principle was restated in *Bere* v *JSC & Ors* CCZ 10/22, where the Court said:

> "The respondents appear to have disregarded r 55 of the Rules which, in keeping with the established practice of this Court, provides that generally no costs are awarded in constitutional matters. This practice was recently reaffirmed in *Mbatha* v *Confederation of Zimbabwe Industries & Anor* CCZ 05-2021, at p. 11. In my view, there is no basis or justification in this case to depart from the norm of not awarding costs in a constitutional matter."

The remarks in the above judgment apply with equal force in this case. There is no reason or justification to depart from the same principle and mulct the applicant with an order for costs.

[47] Accordingly, it is hereby ordered as follows:

The application is dismissed with no order as to costs.

DEMBURE J: ……

Shava Law Chambers, applicant's legal practitioners
Civil Division of the Attorney-General's office, first and second respondents' legal practitioners.