THE STATE
versus
MOSES MPOFU
and
MIKE CHIMOMBE

HIGH COURT OF ZIMBABWE
KWENDA J
HARARE, 16 January 2025

Request for referral of constitutional matters at a criminal trial

T Dzvetero, for the 1st applicant
L Madhuku, G Sithole & A Mugiya for the 2nd applicant
W Mabhaudhi & L Masuku, for the respondent

KWENDA J: The two above named applicants are first and second accused persons in a criminal trial before me and two assessors on a charge of fraud as defined in s136 of the Criminal law (Codification and Reform) Act *[Chapter 9.23]*. The fraud charge emanates from the alleged use, by Blackdeck Livestock & Poultry (Pvt) Ltd (Blackdeck), of falsified documents as supporting documents, in a bid to secure a tender to supply 500 000 goats to the Ministry of Agriculture, Water, Fisheries and Rural Development for a Presidential Empowerment Scheme. The allegedly falsified documents, allegedly submitted with the bid for the purposes of meeting the requirements of the tender were, a Zimbabwe Revenue Authority Tax Clearance Certificate and a National Social Security Authority Compliance Certificate, both in the name of Blackdeck Livestock & Poultry (Pvt) Ltd. The State alleges that the applicants connived to and did submit the falsified documents well knowing that Blackdeck Livestock & Poultry (Pvt) Ltd was not registered in terms of the laws of Zimbabwe. The State was allegedly misled into accepting the bid believing that the said Blackdeck was a juristic person and that documents submitted with a bid submitted in Blackdeck's name were genuine, culminating in the acceptance of the alleged bid and a subsequent award of the tender to Blackdeck, to the prejudice of the State and other bidders. The State counsel has listed and summarised the evidence of State witnesses who will testify that they interacted with the applicants during the tender processes that culminated in the State awarding the tender to Blackdeck Livestock & Poultry (Pvt) Ltd, which, the State alleges, was falsely characterised

as a registered company. Other state witnesses will say that the applicants falsely gave out and pretended that Blackdeck Livestock & Poultry (Pvt) Ltd, had either tendered performance or performed in fulfilment of the tender and that payment was due to it, intending the State to act on such misrepresentations. Other witnesses will testify that the State disbursed the sum of US$7 712 197.00 into bank accounts provided by the applicants following such misrepresentations, to the loss and prejudice of the State.

At the commencement of their trial on the 2nd October 2024 the accused persons submitted a written joint request, to me, to refer seventeen issues, which they submitted, were constitutional matters arising at their trial, for determination by the Constitutional Court in terms of s 175(4) of the Constitution. The application was made against the following background: -

The applicants were arrested in June 2024 and appeared in the magistrates court jointly facing the fraud charge for which they are on trial before us. They made a joint application for bail which was dismissed by the presiding magistrate on the 16th of July 2024.They noted appeal against the refusal of bail on the 30th of July 2024. The appeal was set down for hearing on the 6th of August 2024 but could not be heard on that date because record of appeal containing proceedings before the magistrate was incomplete, whereupon the hearing was postponed to the 8th of August 2024 to allow applicants' counsel to attend to the record and for the State to file a response. On the date of hearing the appeal was opposed by the State both on a point of law and on the merits. On a point of law, the State placed it on record that the applicants had, on the 7th of August 2024, been served with indictment papers, to be tried on the fraud charge on the 1st of October 2024. The Registrar had been notified of the development. The State submitted that the legal implications of the indictment were, among others, that it was no longer necessary for the appeal to be heard on the merits because the outcome, even assuming it was in favour of the applicants, was not going to affect the fact that the magistrate had issued a warrant for the applicants' detention until they appeared before the trial court on the 1st October 2024. The detention was mandatory in terms of s 66 (2) of the Criminal Procedure and Evidence Act. The State's objection was upheld by the judge who dismissed the appeal. The applicants accepted the decision. Following the dismissal of their appeal, the applicants filed an application in this court, on 22 August 2024, for bail pending trial, under case number HACC 148/24. The State objected to the hearing of the bail application before the trial court had been constituted and the trial judge had been identified. The State argued that the applicants' detention was in terms of a warrant that had not been cancelled. The objection

was upheld whereupon the bail application was removed from the roll on the 11th day of September 2024 pending setting down before the trial judge. The applicants accepted the outcome.

When the applicants appeared before us on the 1st of October 2024, the trial did not start because the accused's counsel required more time to prepare. On the following day, 2nd of October 2024, both accused persons pleaded not guilty to the charge marking the commencement of their trial. Generally, in terms of s 167 of the Criminal Procedure and Evidence Act, when a trial is postponed or adjourned, the court may direct that the accused be detained until liberated in accordance with law or release him on bail or extend his bail if he has already been released on bail, and may extend the recognizances of the witnesses. In terms of s169of the Criminal Procedure & Evidence Act an accused person who was on bail and such bail is not reinstated, following termination, by operation of law when he pleads, shall be detained in custody until the conclusion of the trial in the same manner in every respect as if he had not been admitted to bail. The underlining is for emphasis. The effect of ss 167 and 169 combined was that the warrant in terms of which the applicants were being held since being indicted, lapsed and, unless granted bail, they would remain in detention until the finalisation of their trial.

Submitted with their bail application are the following annexures: - the notice of indictment, the charge, summary of the state case, the summary of the anticipated testimonies of the state witnesses, the record of the bail proceedings before the magistrate in the Magistrates court in June and July 2024. The record reveals the evidence that was led, the respective submissions by the applicants and the State and the decision of the magistrate. The documents were placed before me by the applicants as annexures to their bail statements. The applicants' have given their defences to the charge. The first applicant dwelt at length on his defence in his bail statement. The second applicant did not burden me with a detailed exposition of his defence. I think that was informed by the realisation that, at this stage the judge is concerned, more, with the gravity of the crime charged and the strength of the state case. The applicants benefit from the presumption of innocence. The applicants are only required to place the facts required in terms of s 117A of the Criminal Procedure and Evidence Act and rule 90 of the High court rules, and in the case of a further application, the new facts on which the further application is based, as contemplated in s 116 (c) (ii) of the Criminal Procedure & Evidence Act.

At the commencement of the trial on the 2nd day of October 2024, Mr *Dzvetero,* for the first accused, objected to the reading of the charge on the ground that the accused persons were not required to plead to the indictment before the referral and determination, by the Constitutional Court, of the constitutional issues raised by them. He described the raising of the issue as a preliminary objection. He submitted that the accused had, in their defence outlines filed of record, intimated that they would seek, among other constitutional matters for referral to the Constitutional Court, the constitutional validity of s 6(1) of the High Court Act [*Chapter 7:06]* [hereinafter called the High Court Act], which provides for the qualifications of assessors. Section 3 (b) of the High Court Act provides that the High Court shall be duly constituted for the purpose of hearing a criminal trial, if it consists of one judge of the High Court and two assessors. He submitted that s 6(1) of the High Court Act is inconsistent with s186 of the constitution to the extent that it did not preclude the appointment of assessors who are above 70 years to be assessors at the accused persons' trial. In his estimation, Messrs *Chakuvinga* and *Chimonyo*, the assessors sitting with me, were above the age of 70 years and therefore, ineligible for appointment because the accused persons had raised the issue of the constitutional validity of the law in terms of which they had been appointed to preside. The issue was, therefore, preliminary and was supposed to be resolved before putting the charge to the accused. The objection was opposed by the State. After hearing opposing submissions on the issue, I overruled the objection and ordered the accused persons to plead to the charge which they did. Even after abiding by my ruling, Mr *Madhuku,* for the second accused, also placed on record his client's objection to the composition of the court. He submitted that the assessors had been appointed to members of the court to try the accused in terms of an invalid law. He also held the view that assessors aged above the retirement age of High Court judges, currently pegged at 70 years were not eligible to be members of the High Court bench in a criminal matter the age limit imposed on judges in s180 of the constitution s 180 should apply to the appointment and tenure of assessors in criminal matters. He submitted that the accused persons had pleaded before a body which is not a criminal court. He submitted that, upon referral, the constitutional matter is likely to be resolved in the accused persons' favour. He submitted that he was confident that his opinion was likely to hold sway in the Constitutional court and the likelihood meant that we were already not properly composed as the High Court to preside at the accused persons' trial. The only official recognised by the accused, as having been duly appointed, was the judge.

I overruled the objection for two reasons. The law is that, in terms of s 180 (1) of the Criminal Procedure and Evidence Act, generally, if an accused person who has been arraigned before a court for trial in the High Court, does not, object that he has not been duly served with a copy of the indictment or apply to have it quashed under s178 of the Act, he shall either plead to it or except to it on the ground that it does not disclose any offence cognizable by the court. The choice of the word 'shall', means that the requirement to plead is peremptory. The High Court Act [*Chapter 7:06*] describes itself as the Act of Parliament which provides for the exercise of jurisdiction by the High Court in terms of s 171 (2) of the constitution. The objection to our composition as the High Court could only be properly raised by entering the special plea that the court had no jurisdiction to try them for the offence as contemplated in s180 (j) of the Criminal Procedure and Evidence Act. In terms of s185, upon a plea to the jurisdiction of the court, the court shall proceed to satisfy itself, in such manner and upon such evidence as it thinks fit, whether it has jurisdiction or not. The accused persons did not enter the plea to the jurisdiction of the court but entered pleas of not guilty. Secondly, we had been constituted in terms of a valid law. In the event that I acceded to the request to refer the issue of the constitutional validity of s6(1) of the High Court Act as a constitutional matter to be determined by the Constitutional Court, and the opinion held by the accused persons was confirmed, it was up to the Constitutional to decide on the appropriate remedy regarding the proceedings that had commenced.

The State then read the summary of the State case as well as the abridged testimonies for the witnesses. After that Mr *Dzvetero* refused to read the accused persons' defence outlines. He argued that I was supposed to hear and dispose of the request for referral of issues which they said were constitutional matters to be determined by the Constitutional Court. I overruled the objection because, in raising the objection, Mr *Dzvetero* failed to appreciate that the accused persons had, formally, through their defences filed of record three days before the date of trial in terms of s66(4) of the Criminal Procedure and Evidence Act, given notice of their intention to make the request for referral. It was only proper that the notice given to the Sate be read out in an open court and, additionally, for the purpose of the electronic record, in the interests of completeness. Mr *Dzvetero's* objection was self-defeating because he was essentially resisting the reading of the written notice he had given to the State and placed on record. Mr *Dzvetero* also failed to realise the issues for referral had to be properly raised and that could only be done in the defence outline. In terms of s180 (5) it was up to the accused persons to, together with his plea, offer an explanation of their attitude in relation to the charge or statement indicating

the basis of their defences and such explanation or statements shall be recorded and shall form part of the record of the case. The underlining is for emphasis. The requirement to place the accused persons' explanations for their attitude to the charge is peremptory. I, therefore, overruled Mr *Dzvetero,* and ordered that the defence outlines be read into the electronic record in an open court. See *Prince* v *President, Cape Law Society & Ors* 2001 (2) SA 388 (CC), at para 22:

> "Parties who challenge the constitutionality of a provision in a statute must raise the constitutionality of the provisions sought to be challenged at the time they institute proceedings. In addition, a party must place before the court information relevant to the determination of the constitutionality of the impugned provisions. …….. I would emphasise that all this information must be placed before the court of first instance.
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> …….. It is not sufficient for a party to raise the constitutionality of a statute only in the heads of argument, without laying a proper foundation for such challenge in the papers or in the pleadings. The other party must be left in no doubt as to the nature of the case it has to meet and the relief that is sought. Nor can parties hope to supplement and make their case on appeal."

The Application

I have considered it prudent to reproduced the request below: -.

> **"TAKE NOTICE** that pursuant to the oral requests made at the hearing of this matter on 2nd and 3rd October 2024, the Accused hereby put in writing their joint request in terms of section 175(4) of the Constitution of Zimbabwe, 2013, for a referral of constitutional issues to the Constitutional Court.
> **TAKE FURTHER NOTICE** that the constitutional issues sought to be referred to the Constitutional Court are as follows:
>
> a. Whether or not by not providing for a maximum age limit of seventy (70) years for an assessor, section 6(1) of the High Court Act (chap 7:06) is inconsistent with section 186(5) of the Constitution of Zimbabwe, 2013 which, by necessary implication, imposes a maximum age limit of seventy (70) years on every judicial officer sitting as a member of the High Court.
> b. If it is found that section 186(5) of the Constitution necessarily imposes a maximum age limit of seventy (70) years for every member of a High Court bench, whether or not the current trial of the accused by a High Court bench with two out of three members being persons above seventy (70) years of age is consistent with the right of the accused persons to a fair trial enshrined in section 69(1) of the Constitution of Zimbabwe, 2013.
> c. If it is found that section 186(5) of the Constitution necessarily imposes a maximum age limit of seventy (70) years for every member of a High Court bench, whether or not the current trial of the accused by a High Court bench with two out of three members being persons above seventy (70) years of age is consistent with the right of the accused persons to the equal protection and benefit of the law enshrined in section 56(1) of the Constitution of Zimbabwe, 2013.
> d. Whether or not the reconstitution of the court by replacing the assessor who sat on the first day of the trial with another assessor who only started sitting from the second day with neither the involvement nor consent of the accused or their legal practitioners is consistent with the right of the accused persons to a fair trial enshrined in section 69(1) and right to protection of the law per s 56 (1) of the Constitution of Zimbabwe, 2013.

e. Whether or not the accused persons' right to a fair trial and right to protection and benefit of the law as enshrined in the constitution, are infringed by the decision of the learned judge to allow trial proceedings to be broadcast live / livestreamed on various media platforms, considering that the determination was arrived at without the participation and consent of the state and the accused persons.
f. Whether or not the fundamental right of the accused to a "public trial" before "an independent and impartial court" protected by section 69(1) of the Constitution of Zimbabwe, 2013 is infringed by subjecting them to a criminal trial.
g. Whether his detention at the Magistrates Court on his initial appearance coming not from state custody on the 20th of June, 2024, the subsequent unilateral issuance of a warrant for his continued detention on the 7th of August, 2024 and his continued detention to date amounts to a violation of;

i. his rights as an accused person as enshrined in sections 50 (1), 70 (3) of the Constitution of Zimbabwe Amendment (No.20) Act 2013,
ii. his right to be heard before any adverse decision is made

j. Whether the refusal of this Honourable Court to entertain his appeal under HCH ACC126/24 on the basis that his indictment rendered his appeal moot amounts to a violation of the following constitutional rights;

    i. as an accused person as enshrined in sections 50 and 70 (3) of the Constitution of Zimbabwe Amendment (No.20) Act 2013; and
    ii. to challenge the correctness of Magistrate Court's decision relating to his liberty and bail
    iii. to equal protection and benefit of the law as enshrined in section 56 (1) of the Constitution of Zimbabwe Amendment (No.20) Act 2013.

k. Whether the refusal of this Honourable Court to entertain his bail application under HCHACC 183-4/24 on the basis that his indictment precluded him to make a bail application until the trail date or unless if he anticipated the trial date amounts to a violation of his rights;

    i. as an accused person as enshrined in sections 50 and 70 (3) of the Constitution of Zimbabwe Amendment (No.20) Act 2013 and
    ii. to equal protection and benefit of the law as enshrined in section 56 (1) of the Constitution of Zimbabwe Amendment (No.20) Act 2013.

l. Whether these charges in so far as they relate to the failure to supply goats as per contract with the Ministry amounts to a violation his right not to be imprisoned on the ground of inability to fulfil a contractual obligation as provided for under section 49(2) of the Constitution
m. Whether his selective prosecution in respect of these cherry picked charges not being instigated in the quest of justice but a punishment being meted out wrongly on the accused by certain individuals who believe incorrectly that the accused is responsible for leaking certain texts, audios, pictures and videos wherein one Wicknell Chivhayo is seen and heard discussing about how he intended to bribe certain government officials and the total disregard of other charges the basis upon which the current charges were instigated amounts to a violation of his right to equal protection and benefit of the law as enshrined in section 56 (1) of the Constitution of Zimbabwe Amendment (No.20) Act 2013.
n. Whether sections 66 (1) and (2) as read together with section 137 and 169 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] in respect of an accused person indicted such as the accused person in *casu* and as interpreted by this Honourable Court in HH359/24 (HCH ACC 126/24) and HH 409/24 (HC ACC 183-4/24) amount

to a violation of his right;

i. as an accused person as enshrined in sections 50 and 70 (3) of the Constitution of Zimbabwe Amendment (No.20) Act 2013 and
ii. to equal protection and benefit of the law as enshrined in section 56 (1) of the Constitution of Zimbabwe Amendment (No.20) Act 2013.

o. Whether the prerogative afforded to the State in section 160 of Criminal Procedure and Evidence Act [*Chapter 9:07*] and respective prejudice suffered by an in-custody accused erroneously denied bail by a lower court whose such determination is pending appeal does not amount to a violation of his right to equal protection and benefit of the law as enshrined in section 56 (1) of the Constitution of Zimbabwe Amendment (No.20) Act 2013.
p. Whether the conduct of the Anti-Corruption Commission in vetoing the bail consent granted by the acting Director Prosecution on the 20th of June 2024 Amounted to a violation of his right to equal protection and benefit of the law as enshrined in section 56 (1) of the Constitution of Zimbabwe Amendment (No.20) Act 2013.

i. as an accused person as enshrined in sections 50 and 70 (3) of the Constitution of Zimbabwe Amendment (No.20) Act 2013 and
ii. to equal protection and benefit of the law as enshrined in section 56 (1) of the Constitution of Zimbabwe Amendment (No.20) Act 2013

q. Whether the violations listed above amount to a violation of his right to a fair trial as enshrined in section 69 (1) of the Constitution of Zimbabwe Amendment (No.20) Act 2013.
r. Whether or not the fundamental right of the accused to the protection of the law protected by section 56(1) of the Constitution of Zimbabwe, 2013 is infringed by subjecting them to a criminal trial.
WHEREFORE, the accused pray for the following order:

1. That the application for referral to the Constitutional Court in terms of section 175(4) of the Constitution, be and is hereby granted.
2. That the constitutional issues or questions stated in form CCZ4 attached hereto be referred to the Constitutional Court for its determination.
3. That pending determination of the above issue by the Constitutional Court, this matter be and is hereby stayed."

Issues abandoned

The application was opposed by the State, in writing. I will not reproduce the initial grounds of the State's opposition to the request for referral because the State counsel later filed very detailed written submissions which he read and motivated in court, repeating the grounds of opposition and expunging his earlier submissions which had become unnecessary following the abandonment, by the accused persons of some of the issues raised by their application. I will, therefore, dispose of the issues which were abandoned by the accused.

The accused persons abandoned the prayer submitted with their defence outlines, to apply for a declaratory order of the constitutional invalidity of s6 (1) of the High Court Act and other ancillary relief in terms of s 85(1) (a) of the Constitution 'and the common law'. The

accused persons conceded that I did not have, before me, a constitutional application filed in terms of s 85 as read with s 175 (1) of the Constitution a constitutional application for such relief. Section 175 (4) of the constitution states in unambiguous terms, that when requested by the accused persons to refer a constitutional matter arising at their criminal trial I must do so and no more it is my considered view that the request to be merely frivolous or vexatious. The is no room for me to determine the constitutional matter(s) and issue a declaratory order of constitutional invalidity. The accused persons also abandoned their intention, stated in the defence outline, to apply for an order permanently staying their criminal prosecution. They conceded that such a relief could only be considered by the constitutional court, as consequential relief, flowing from any determination of any of the constitutional matters in their favour. In addition to the above, the accused abandoned the following: --

Item (d)

> *"Whether the reconstitution of the trial court by changing replacing one assessor with another assessor without consent of the accused or their legal practitioners was inconsistent with the accused persons' right to a fair trial enshrined in section 69(1) and right to protection of the law per s 56 (1) of the Constitution of Zimbabwe, 2013."*

The issue was abandoned at a meeting held in chambers at the instance of counsel for the accused persons, following my protestations in open court that the allegation that the judge had replaced the assessor, who had fallen ill before the trial was factually incorrect. Counsel apologised for making the incorrect assertion part of the statement of agreed facts without the knowledge of the State counsel. The draft statement of agreed facts had somehow, been tempered, printed and signed, on behalf of Mr *Mabhaudhi,* for the State, by a prosecutor who was unaware of the alteration. The correct position was that court had been reconstituted by the Registrar before the commencement of the trial and the Registrar had no obligation to consult the judge, the State and the accused. The incorrect statement of agreed facts earlier was withdrawn and replaced by a correct one which makes no reference to the issue.

Item (e)

> "Whether the accused persons' right to a fair trial and right to protection and benefit of the law as enshrined in the constitution, are infringed by the decision of the learned judge to allow trial proceedings to be broadcast live / livestreamed on various media platforms, considering that the determination was arrived at without the participation and consent of the state and the accused persons."

This issue had been raised by counsel, as it turned out, without receiving proper instructions. This became apparent in argument whereupon counsel sought and I granted leave to take instructions. As it turned out, the accused persons wanted the trial proceedings live

streamed. In fact the accused persons had not objected when the judge announced that he had received the request to live stream the proceedings and that he shared the view that livestreaming the proceedings was in the public interest.

Item (f)

> *"Whether the fundamental right of the accused persons to a "public trial" before "an independent and impartial court" protected by section 69(1) of the Constitution of Zimbabwe, 2013 had been infringed by subjecting them to a criminal trial."*

The accused persons abandoned this issue without giving reasons.

Item (j)

> "*Whether the fraud charge, in so far as it related to the failure to supply goats as per contract with the Ministry, amounts to a violation the accused persons' right not to be imprisoned on the ground of inability to fulfil a contractual obligation as provided for under s 49(2) of the Constitution."*

This was abandoned and counsel did not give reasons.

Item (m)

> *"Whether the prerogative given to the Prosecutor General in s 160 of Criminal Procedure and Evidence Act [Chapter 9:07] to determine that the accused shall be tried before the High Court and the date of trial, infringed upon the accused persons' right to equal protection and benefit of the law as enshrined in section 56 (1) of the Constitution."*

This was abandoned without giving reasons.

Item (p)

> *"Whether or not the fundamental right of the accused to the protection of the law protected by section 56(1) of the Constitution of Zimbabwe, 2013 was infringed by subjecting them to a criminal trial."*

This was abandoned, perhaps, because it was a repetition of item (f), already abandoned

<u>Oral submissions on behalf of the accused persons</u>

Counsel for the accused persons submitted oral argument on the issues persisted with. Mr *Dzvetero* submitted that s 186(5) of the Constitution of Zimbabwe, 2013 provides that judges of the High Court hold office until they reach the age of seventy years, when they must retire. A judge who has retired may only continue to sit to deal with proceedings commenced before him or her while he was a judge. This is so in terms of section 186(7) of the Constitution. The seventy (70) year maximum age limit is both mandatory and inflexible. Section 6(1) of the High Court Act [*Chapter 7:06*] which provides for qualifications of assessors does not provide for a maximum age limit for assessors. It therefore permits persons above seventy years to be assessors and members of a High Court bench conducting a trial. By employing settled principles of constitutional interpretation, including the doctrine of 'necessary implication', s

186(5) of the Constitution imposes a maximum age limit of seventy (70) years on every judicial officer sitting as a member of the High Court. When s 186(5) is interpreted as submitted in the foregoing paragraph, s 6(1) of the High Court Act would be inconsistent with it. Accordingly, a purported court consisting of assessors above seventy years would be a nullity. Section 56(1) of the Constitution entitles every person to the equal protection of the law. All persons in Zimbabwe accused of criminal offences of the nature faced by the accused are tried by either the magistrates' court or the High Court. There are no over seventy-year-old. The intended criminal trial would, therefore, infringe the Accused`s right enshrined in section 56(1) of the Constitution. Mr *Madhuku* emphasised that the accused persons recognised that the trial court had been properly constituted in terms of an existing law, namely, s 3 (*b*) of the High Court Act. The accused persons were, therefore not objecting to the participation of Messrs Chakuvinga and Chimonyo, in their individual capacities, but to a law, namely s 6 (1) of the High Court Act, which did not preclude the appointment of the assessors who are both above the retirement age of High Court judges.

Mr *Dzvetero* submitted that there was no doubt that the constitutional issues raised were not frivolous and vexatious but had substance and are of public importance. He cited *Martin* v *AG* 1993(1) ZLR 153(S) at 157. Under s 175(4) of the Constitution, Mr *Dzvetero* submitted that I had no discretion in this matter. I was required to refer the constitutional matters to the Constitutional Court because the accused persons had requested me to do so unless it was considered view that the request is "merely frivolous or vexatious". When asked to refer, I could not just drop an opinion that the request is merely frivolous or vexatious from a hat. I was required to demonstrate the basis of my opinion based on a specific criterion. He cited *Williams & Anor* v *Msipha NO & Ors* 2010(1) ZLR 552(S). Mr *Dzvetero* urged me to observe an objective procedural and substantive standard, that is, analysing the facts the facts and the constitutional provisions that may be violated. He submitted that the constitutional issues raised herein cannot, by whatever stretch, be characterised as frivolous or vexatious.

The State's opposition to the issues persisted with

The State opened its opposition to the application by submitting that it was disquieting the applicants had raised a mammoth number of issues (seventeen (17)) in number as constitutional matters for referral to the Constitutional Court yet the matter had hardly progressed beyond the pleas of not guilty entered by the applicants.

Issues (a) (b) (c)): The composition of High Court

The State submitted that the clarification by Mr *Madhuku* that the accused persons recognised that the assessors and I are duly constituted in terms of an existing law, namely, s3 (*b*) of the High Court Act and that the accused are not objecting to the participation of Messrs Chakuvinga and Chimonyo, in their individual capacities, but to a law, namely s 6 (1) of the High Court Act, which does not preclude the appointment of the assessors who are both above the retirement age of High Court judges means that the accused are raising the issue as a matter of public interest. Section 175(4) of the Constitution was, therefore, not the proper route to be taken by the accused persons. The constitutional issue being raised could not preclude the court from proceeding with the criminal trial before it. This is an issue that was supposed to be pursued by way of a court application before this High Court or through direct access to the Constitutional Court. The State submitted that the raising of the constitutional challenge to the law which has no direct bearing on the trial before the court was meant to frustrate the court in proceeding with the trial. The accused had confirmed that they could challenge up to two assessors in s 6(4) of the High Court Act, but they were not interested in that remedy. They were more concerned with challenging the legislation. What that meant was that there was a remedy available to the accused persons in s 6(4) of the High Court Act which they were not willing to utilise without resort to challenging the constitutionality of s 6 (1) of the High Court Act. There was, therefore, room for constitutional avoidance. The need to contest s 6 (1) of the High Court would only become necessary, according to the doctrine of ripeness, if the issue of assessors was not resolved by simply objecting to the assessors. The application of the doctrine of mootness precluded the court from giving advisory opinions on abstract propositions of law. The determination of an issue that is of no practical significance, as things stand and should not delay the trial. The request for the referral of this matter to the Constitutional Court was, therefore, frivolous and vexatious.

Item [g]: Alleged detention at magistrates court whilst coming from home

The State did not dispute the testimony of the accused persons that having presented themselves at the offices of the Zimbabwe Anti-Corruption Commission [hereinafter ZACC]. They were then arrested and taken to Harare Magistrates Court. The Acting Provincial Public Prosecutor had initially consented to bail. Before the parties left the prosecutors' set down office, the chairman for the Zimbabwe Anti-Corruption Commission arrived. There were further deliberations leading to the withdrawal of the consent to bail. The State submitted that the record of proceedings in the magistrates court shows that those occurrences were brought

to the attention of the Magistrate presiding at the accused persons' initial appearance where they were placed on remand and denied bail. Any constitutional matter arising from the denial of bail arose at the accused persons' initial appearance and bail application before the magistrate. The magistrate had the jurisdiction to deal with the request of referral of the constitutional matters arising at the bail proceedings in terms of s175(4) of the Constitution. The accused persons failed to seek referral to the Constitutional Court by the magistrate. They can still take steps to enforce their rights through a direct application other than seeking referral by this Honourable Court in terms of s 175(4) of the Constitution because it is not a matter arising at this trial. Not at this trial. Timing is critical, when it comes to referral of a constitutional matter, arising from an alleged violation of a right, to the Constitutional Court. The trial before this court should not be detained by constitutional issues that arose in the lower court. The State submitted, except in circumstances the constitutional issues which arose during proceedings in a lower court ought to and must not be brought to this court. *Chihava & Ors* v *Mapfumo N.O & Anor* CCZ 6/2015 at pages 10-11. The request for referral at this juncture was therefore frivolous and vexatious.

Items [h & i]: Dismissal of the accused persons' appeal against refusal of bail and the striking off of the accused persons' application for bail pending trial by this court

The State submitted that reasons for a judgment do not raise a constitutional issue and cited the case of *Chani* v *Justice Mwayera & Ors* CCZ 2/20 where it was held that the findings by the trial Judge, whether correct or not, do not result in the infringement of any constitutional rights of the applicant. In *Williams and Another* v *Msipha N.O. and Others* 2010 (2) ZLR 552 (S) the court held at 567B-C that the Constitution guarantees, to any person, the fundamental right to the protection under a legal system that is fair but not infallible**.** Judicial officers, like all human beings, can commit errors of judgment. It is not against the wrongfulness of a judicial decision that the Constitution guarantees protection. A wrong judicial decision does not violate the fundamental right to the protection of the law guaranteed to a litigant because an appeal procedure is usually available as a remedy for the correction of the decision. See also, *Everjoy Meda* v *Maxwell Matsvimbo* 2016 (2) ZLR 232 (CC) at p 236E.

Counsel for the accused persons had conceded that the decisions by this court, one, dismissing their appeal against denial of bail by the magistrate and the other, removing their bail application from the roll were correct. The accused persons had not impugned the applicable law at those bail proceedings despite the fact that the issue of the constitutionality of the law which applied to the bail matters was a matter arising at those bail proceedings. If

the accused persons were minded to challenge the constitutional validity of the applicable law, they should have requested for referral of the matter to the constitutional court at the bail proceedings. The validity of the legislation which applied to the bail matters do not affect the matter to be determined at the accused persons' trial. This is an inopportune time to seek referral of the matter. The request is, therefore, frivolous and vexatious.

Item [k]: Whether there was selective prosecution resulting in the exclusion of one Wicknell Chivhayo from prosecution.

The State noted that the judge had initially, *mero motu* declined to hear a challenge which invited him to interfere with the prerogative of the Prosecutor General**.** Despite such intimation by the judge, the accused persons persisted with their application for the referral of the issue to the Constitutional court. The State submitted that both accused persons had given *viva voce* evidence on the issue and had subpoenaed Wicknell Chivhayo to come to court to talk about social media leaks pertaining to their alleged fights with Wicknell Chivhayo over money due to them. Chivhayo, who was among the four witnesses who the accused persons wanted called to give evidence in court had nothing to do with the charge which the accused persons were facing. The accused persons had refused, failed or neglected to comply with the order by the judge compelling them to submit a summary of the evidence to be adduced from the witnesses. The complaint by the accused persons regarding the alleged non-prosecution of Chivhayo was said, by the accused persons, to do with a tender over some election material, and the issue of election material had no relevance to the trial before the trial judge. In any event, there was no evidence that anybody had been arrested in connection with the any election material. Despite conceding that the matter before this court only concerned the two of them, the accused persons insisted on calling Chivhayo. The insistence on the part of the accused persons to pursue this point was therefore, frivolous and vexatious.

Item [l]: Challenging section 66(1) and (2) of the Criminal Procedure and Evidence Act

The State submitted that the issue of s 66 (2) of the Criminal Procedure and Evidence Act arose during the bail appeal proceedings. That was the opportune moment when the accused persons should have sought for a referral. The referral should have been sought before a decision was made in the respective bail appeal and application. The accused persons failed to do so. Section 175(4) of the Constitution is meant for questions that arise during the course of proceedings before the court. The constitutional validity was not an issue of s 66 (2) has no bearing to the criminal trial. The judge could not be expected to refer the issue which has not arisen at the trial proceedings before it. The issue has not arisen before the trial court as

presently constituted. The request for the referral of the issue to the Constitutional Court made to this court was, therefore, frivolous and vexatious.

Item [n]: The alleged interference by the ZACC Chairperson with the National Prosecuting Authority leading to the withdrawal of the consent to bail.

The State submitted that the issue had not arisen during the criminal trial before this court. The alleged interference by the ZACC Chairperson was part of the accused persons' testimonies during the joint bail application before the magistrate. Had the accused persons been desirous of enforcing their rights, they were expected to seek for a referral to the Constitutional Court before the finalisation of their bail application in the lower court. The request to the trial judge, instead of the magistrate who presided at the bail application was therefore, frivolous and vexatious.

The Statement of Agreed facts

The accused persons gave oral evidence in support of their application. Following their testimonies the parties must have realised that the facts relevant to the determination of the application were not in dispute. Counsel for the accused persons notified me, in court, that they were abandoning the calling of further witnesses and that they had agreed with the State to proceed on the basis of a statement of agreed facts. The first document placed before me as the statement of agreed facts was withdrawn in circumstances explained earlier in this judgment. The corrected statement of agreed facts is short and precise. It has ten paragraphs. It makes no reference to the historical events which I have summarised above as the background to this application, perhaps on the realisation that all that is common cause. The statement of agreed facts is as follows: -

1. The two assessors who constitute part of the High Court bench in the Accused persons' trial are above seventy (70) years of age.
2. On the 16th of June 2024, The Chairperson of the Zimbabwe Anti-Corruption Commission (ZACC) Honourable Mr. Reza conducted a press conference wherein he indicated that ZACC wanted to interview Moses Mpofu, Mike Chimombe and Wicknell Chivhayo concerning audios that had been leaked and invited the trio for interviews.
3. On the 16th of June 2024 ZACC released a press statement in which ZACC invited Messrs. Mpofu, Chimombe and Chivhayo concerning audio recordings as well as letters which raised issues to do with money laundering and abuse of office as well as the Presidential Goats Scheme.

4. Moses Mpofu and Mike Chimombe were in China when the press statement as well as the video were released by ZACC. On the 17th of June 2024 they addressed a letter to ZACC through their lawyer Messrs. Antonio Dzvetero and Company expressing their willingness to co-operate with ZACC.
5. Wicknell Chivhayo never presented himself for the interview at the Zimbabwe Anti-Corruption Commission, up to date.
6. Moses Mpofu and Mike Chimombe returned to Zimbabwe from China on the 20th of June 2024 they attend to ZAAC offices in the company of their lawyers on the 24th of June 2024 and they were then excused.
7. Moses Mpofu and Mike Chimombe returned to ZACC offices on the 26th of June 2024 and they were advised that they were facing allegations of fraud related to the goats' scheme and that they were to appear in court on the same day.
8. When the two accused persons appeared for the initial appearance at the Magistrate Court on the 26th of June 2024, they were coming from home and they were not at any point incarcerated prior to the initial appearance, neither were they put in detention or have their liberty restrained.
9. On that same date the 26th of June 2024 when the accused persons arrived at the Criminal Magistrates Court, the state through the Provincial Public Prosecutor consented to bail.
10. Mr. M. Reza of the ZACC later arrived at court and held a meeting with the Provincial Public Prosecutor the result of which was that the state withdrew the consent and was now opposed to bail.

The law to be applied

There is convergence on the law to be applied.

The statutory framework governing applications for referral of constitutional matters for determination by the Constitutional Court is as follows: -

Section 175(4) of the constitution

> **"175 Powers of courts in constitutional matters**
> ……..
> (4) If a constitutional matter arises in any proceedings before a court, the person presiding over that court may and, if so requested by any party to the proceedings, must refer the matter to the Constitutional Court unless he or she considers the request is merely frivolous or vexatious."

> **"*RULE 108 OF THE HIGH COURT RULES, 2021.***
> ***Referral to the Constitutional Court***

(2) Where the court or a judge is requested by a party to the proceedings to refer the matter to the Constitutional Court and it or he or she is satisfied that the request is not frivolous or vexatious, it or he or she shall refer the matter to the Constitutional Court.
(3) …….
(4) Where there are factual issues involved, the court or judge seized with the matter shall hear evidence from the parties and determine the factual issues:
Provided that where there are no disputes of fact, the parties shall prepare a statement of agreed facts.
(5) ……
(6) Where there is a statement of agreed facts in terms of the proviso to subrule (4), it shall suffice for the statement to be incorporated on the record in place of the evidence and the specific findings of fact."

"*Rule 24 of Constitutional Court Rules*
Referral of Constitutional matter in proceedings before a court

(2) Where the person presiding over a court of lesser jurisdiction is requested by a party to the proceedings to refer the matter to the Court and he or she is satisfied that the request is not frivolous or vexatious, he or she shall refer the matter to the Court.
(3) ……..
(4) Where there are factual issues involved, the court seized with the matter shall hear evidence from the parties and determine the factual issues:
Provided that where there are no disputes of fact, the parties shall prepare a statement of agreed facts.
(5) ……
(6) Where there is a statement of agreed facts in terms of the proviso to sub rule (4), it shall suffice for the statement to be incorporated in the record in place of the evidence and specific findings of fact."

A plethora of decided cases were placed before me by counsel on either side. I am grateful to counsel for the extensive research. I have distilled the following legal principles from decided cases which I consider pertinent to the resolution of the issues before me.

1. A constitutional matter is defined in s 322 of the Constitution, as "a matter in which there is an issue involving the interpretation, protection or enforcement of the Constitution".
2. The timing of the referral is important. The notion that a constitutional issue can be raised anytime cannot be correct. No referral lies to the CCZ once the court presiding over proceedings has already made a determination. In such circumstances, the relief available to the applicant is direct access either to the CCZ where 'interest of justice' demands or an application in the HIGH COURT. See *Muchero & Another v Attorney-General* 2000(2) ZLR 286 (SC).
3. The purpose of the exercise of the jurisdiction of a subordinate court under s 175(4) of the Constitution is to protect the process of the Court against frivolous or vexatious litigation. See *Loverage Makoto* v *T.K. Mahwe N.O.* & Anor CCZ 03/20.

"Regarding the procedure under s 175(4) of the Constitution, the Court in *Nyagura* v *Ncube N.O. and Ors* CCZ 7/19, at pp 9-10 of the cyclostyled judgment, stated that there must be a moment when the presiding person must address his or her mind to the factors that answer a number of questions*, including whether the request to refer the matter to the Court is frivolous or vexatious*, and whether the determination by the Court is necessary for the purposes of the proceedings before him or her. Pg 6 para 1

> The purpose of the exercise of the jurisdiction of a subordinate court under s 175(4) of the Constitution is to protect the process of the Court against frivolous or vexatious litigation. The standard by which the facts on which the raising of a question is based must be measured is put so high so as to enable the person presiding in the lower court to stop legal proceedings that should not have been launched at all."
> "More importantly, the determination of a question must be of benefit to a party. It would be absurd for the Court to pronounce on the constitutionality of section of the Act and then state that, in the circumstances of the case, the finding is unnecessary. This approach would render the whole determination an advisory opinion or a mere academic opinion. The Court is loath to offer opinions which at the end of the day do not assist in the resolution of disputes in the lower courts"

4. It is the duty of the party who wants a question as to the contravention of the Declaration of Rights arising in the proceedings in the High Court, or in a court subordinate to it, referred to the Supreme Court for determination. see *Chihava & Ors* v *(1) Mapfumo N.O & Anor* CCZ 6/2015.
5. An accused person who is of the view that the decision by the court in a criminal matter is wrong, has the remedy of appeal for the redress of the decision. A wrong judicial decision does not give rise to a ground for an alleged violation of the right to equal protection of the law. No law provides protection to a litigant against the possibility of a judicial officer making a wrong decision. See *Chani v Justice Mwayera & Ors* CCZ 2/20.
6. Reasons for a judgment do not raise a constitutional issue and cited the case of *Joseph Chani v Justice Hlekani Mwayera & Ors* CCZ 2/20 and *Williams and Another* v *Msipha N.O. and Others* 2010 (2) ZLR 552 (S).
7. The law provides a clear remedy of an appeal where an applicant is not content with a decision of a court. An appeal procedure is a protection in itself. See *Everjoy Meda* v *Maxwell Matsvimbo* 2016 (2) ZLR 232 (CC) at p 236E.
8. A constitutional matter cannot arise for the first time on appeal when it was not available or in existence in the subordinate court. See The *Vela* v *Auditor General of Zimbabwe & Ors CCZ 10/24.*

9. Only a constitutional issue with a bearing on the dispute before the lower court deserve referral. See *Dengezi* v *Nyamururu* CCZ 13/23 per GARWE JCC where the full bench held that:

> "It seems to me that the matter ought to be struck off the roll for two reasons. The first is that the referral was improperly made. I say this because, the issue of prescription not having arisen in proceedings before the court *a quo*, that court could not have properly referred the matter to this Court for determination in terms of s 175(4) of the Constitution."

10. If a constitutional matter arises in non-constitutional proceedings before a lower court, the lower court has no jurisdiction to itself determine the constitutional matter but must refer the matter to this Court.

    See *Dengezi* v *Nyamururu, supra.*

11. In respect of a request for referral of a constitutional matter made in terms of s 175(4) of the Constitution, the judge, must determine whether a referral was properly made. If a referral is not properly before the Court, it will be disposed of, without further ado, on that ground alone. See *S* v *Nyathi* CCZ–16–19 at 7; *Muhala & Others* v *Mukokera* 2019 (1) ZLR 294 (CC); *Nyagura* v *Ncube & Others* 2019 (1) ZLR 521 (CC) at 529C-E;

In *S* v *Mwonzora & Others* CCZ 9/15 at p. 6, paras. 19 – 20. Para 21 the court stated as follows: -

> "The resolution of the question whether the instant referral was properly made requires this Court to examine whether there was a valid plea of prescription before the court *a quo,* taken on the basis of the prescriptive period set out in s 70 of the Police Act. There would have been a need for the court *a quo* to have decided whether the validity of s 70 of the Police Act had been engaged by the facts that were before it the moment a request to refer a constitutional matter to this Court was made. If the constitutionality of s 70 had not arisen before the court *a quo,* there would have been no basis to refer a constitutional matter to this Court."

12. The person presiding at the proceedings where a constitutional matter arises is obliged to refer the matter to the Constitutional court if he or she is of the view that the determination of the constitutional matter by the Court is necessary for the purposes of the proceedings and that the request for a referral is not frivolous or vexatious. *See Nyagura* v *Ncube, N.O. & Ors* CCZ 7/19.

> "If the presiding person is of the view that the determination of the constitutional matter by the Court is necessary for the purposes of the proceedings and that the request for a referral is not frivolous or vexatious, he or she is obliged to refer the matter to the Court for determination. If the presiding person is of the opinion that the request for a referral is frivolous or vexatious, he or she shall refuse the request.

> It is the request to refer a constitutional question to the Court which must have been found to be frivolous or vexatious. It is not the constitutional matter itself that has to be found to be frivolous or vexatious"

13. Where it is possible to decide any case without resort to any possible constitutional question or remedy, then that is the course and procedure that must ordinarily be followed. See *S* v *Mhlungu & Ors* 1995 (3) SA 867 (CC); *Chawira & Ors* v *Minister of Justice, Legal and Parliamentary Affairs & Ors* CCZ 03-2017; *Moyo* v *Sgt. Chacha & Ors* CCZ 19-2017.
14. If a remedy is available to a party, whether it is a factual or a legal remedy, courts will not normally consider a constitutional question unless the existence of a remedy depends on it.
15. *The words* 'frivolous or vexatious' were defined in the case of *Martin* v *Attorney General and Anor* 1993 (1) ZLR 153 (S) where it was held as follows GUBBAY CJ at 157 said:

> "In the context of s 24(2) the word "frivolous" connotes, in its ordinary and natural meaning, the raising of a question marked by a lack of seriousness; one inconsistent with logic and good sense, and clearly so groundless and devoid of merit that a prudent person could not possibly expect to obtain relief from it. The word "vexatious", in contra–distinction, is used in the sense of the question being put forward for the purpose of causing annoyance to the opposing party in the full appreciation that it cannot succeed; it is not raised *bona fide* and a referral would be to permit the opponent to be vexed under a form of legal process that was baseless …."
>
> Note: Section 24(2) of the constitution in force at the time has now been replaced by s175(4) of the current constitution

Application of the law to the facts

Issues (a), (b) and (c): Composition of the Court.

I agree with the applicants and the state counsel that issues(a), (b) and (c) should be considered together because they are all concerned with the constitutional validity of s 6(1) of the High Court Act. These are they: -

a. "Whether or not by not providing for a maximum age limit of seventy (70) years for an assessor, section 6(1) of the High Court Act (chap 7:06) is inconsistent with section 186(5) of the Constitution of Zimbabwe, 2013 which, by necessary implication, imposes a maximum age limit of seventy (70) years on every judicial officer sitting as a member of the High Court.
b. If it is found that section 186(5) of the Constitution necessarily imposes a maximum age limit of seventy (70) years for every member of a High Court bench, whether or not the current trial of the accused by a High Court bench with two out of three members being persons above seventy (70) years of age is consistent with the right of the accused persons to a fair trial enshrined in section 69(1) of the Constitution of Zimbabwe, 2013.

c. If it is found that section 186(5) of the Constitution necessarily imposes a maximum age limit of seventy (70) years for every member of a High Court bench, whether or not the current trial of the accused by a High Court bench with two out of three members being persons above seventy (70) years of age is consistent with the right of the accused persons to the equal protection and benefit of the law enshrined in section 56(1) of the Constitution of Zimbabwe, 2013."

The only evidence upon which I am expected to determine the application for referral of these issues is that the two assessors, who constitute part of the High Court bench at the accused persons' trial, are above seventy (70) years of age. The point of law taken by the accused persons is misconceived because it tests the constitutional validity of s 6 (1) of the High Court Act against constitutional provisions which are unrelated to it. Section 6 (1) of the High Court regulates the qualifications of a person to be eligible for appointment as an assessor yet s 186 is concerned with the Hugh Court judges' security of tenure of office. Assessors do not have a tenure of office which is constitutionally protected. As will be clearer below, the words 'the age of seventy years' stated in s 185 of the constitution only serve to protect the tenure of office of a High Court judge. Once a judge has been appointed, his office may not be abolished before he reaches the age of 70 years.

Section (6) (1) of the High Court Act reads as follows: -

"6 Assessors in criminal trials

(1) A person shall be qualified to act as an assessor in a criminal trial in the High Court if—

(a) he has experience in the administration of justice; or

(b) he has experience or skill in any matter which may have to be considered at the trial; or

(c) in the case of a trial involving a juvenile, he has experience or skill in dealing with juveniles; or

(d) he has any other experience or qualification which, in the opinion of the Chief Justice and the Judge President, renders him suitable to act as an assessor in a criminal trial."

Section 186 (5) as read with s186 (9) of the constitution which provide the security of tenure of High Court judge are couched as follows: -

"186 Tenure of office of judges

(5) Judges of the High Court and any other judges hold office from the date of their assumption of office until they reach the age of seventy years, when they must retire.

……...

(9) The office of a judge must not be abolished during his or her tenure of office.

The issue before me is not concerned with security of the tenure of office of an assessor. Mr *Madhuku* submitted that s 186 of the constitution which governs the tenure of office of a

judge should apply to assessors in criminal matters. If that was his intention then he should have identified and impugned the subordinate legislation which speaks to the tenure of office of an assessor. The attempt to link s6 (1) and s 186 of the constitution was, therefore, is frivolous and vexatious.

The qualifications for the appointment to the office of judge of High Courts are stated in s179 of the constitution. A person is qualified for appointment as a judge of the High Court if he or she is at least forty years old and, in addition is or has been a judge of a court with unlimited jurisdiction in civil or criminal matters in a country in which the common law is Roman-Dutch or English and English is an officially recognised language or for at least seven years, whether continuously or not, he or she has been qualified to practice as a legal practitioner in selected jurisdictions. The suggestion that, the failure to equate the qualifications of an assessor with those required for judges to be eligible for appointment, is a constitutional matter which should be referred the constitutional court for determination is clearly frivolous and vexatious. Assessors are not judges. An assessor does not require the legal qualifications and legal experience of a judge. A judge requires the stated legal qualifications and experience for the reasons stated in s10 of the High Court Act. These are that any question of law or question as to whether a question for decision is one of fact or of law lies with the judge. The question as to the admissibility of evidence arising for decision at a criminal trial in the High Court shall be decided by the judge and no assessor shall have a voice in the decision of any of those questions. The fixing of sentences at a criminal trial in the High Court is the sole responsibility of the trial judge. It is the judge at a criminal trial in the High Court who shall give reasons for his decision on any question of law and give reasons for the decision or finding of the court on a question of fact. It is only a question of fact arising at a criminal trial in the High Court that shall be decided by the majority of the members of the court. Determining a question of fact is largely a question of common sense based on life experiences or specialized knowledge or skill. See s6 (1) of the High Court Act.

Mr *Madhuku* also submitted that s180 of the constitution should apply to judges. If that was the intention then to properly raise that issue, he should have impugned s 6 (3) and 6 (4) of the High Court Act which deal with the appointment of assessors. It is inconceivable the process of appointment of assessors should follow the rigorous processes set out in s 180 of the constitution which involve that the Judicial Service Commission advertising, inviting the President and the public to make nominations and public interviews. I did not hear Mr *Madhuku* to argue that the appointment procedure of assessors must follow the procedure of appointing

judges set out in s180 of the Constitution. In fact, the factual basis of the request is the age of the assessors who are above 70 years of age. Reference to s 180 of the Constitution in argument could not have been *bona fide*.

Mr *Madhuku* submitted that s 6 (1) of the High Court Act results in an undesirable situation where a judge who cannot be above 70 years sits side by side with persons above 70 years of age. He said the term judge must be interpreted purposively to mean that no person above the age of 70 years can sit as a member of a court and make judicial decisions. The word judge must not be given a literal interpretation. It must be interpreted to mean, simply, a judicial officer of the High Court. He cited *In re Munhuweso* 1994 (2) ZLR 54 as authority for purposive interpretation. He said assessors were added to be part of the High Court by subordinate legislation (High Court Act) which must align with the constitution. He said the two assessors can override the judge. He submitted that if, say, the assessors are above 90 years old then we will end up with a situation where a judge who may not be above 70 years sits with persons above 90 years of age. He submitted that the role of a judicial officer at the level of the High Court is a very active one. He submitted that the situation where half of the court sleeps through proceedings is undesirable. As I have said above, Mr *Madhuku* misconceived the purposes of the age limit in s 186 of the constitution. It has nothing to do with the physical and mental decline that may be brought about by old age. It is simply a protection of the tenure of office of judges of the High court.

Mr *Madhuku* submitted while the upper age limit for judges of the Supreme Court and Constitutional judges is 75 years, same is subject to a clean bill of health. I drew his attention to 8 (1) of the High Court Act which stipulates that if at any time during a criminal trial in the High Court one of the assessors dies or becomes, in the opinion of the judge, incapable of continuing to act as assessor, the judge may, if he thinks fit, with the consent of the accused and the prosecutor, direct that the trial shall proceed without that assessor. Clearly, if either the accused or the prosecutor does not give consent or if both assessors become incapacitated then, the trial aborts. Therefore, if the applicants considered that the fitness of the assessors to preside at their trial had become affected by old age, they had only needed to invoke s 8 (1) of the High Court Act. The High Court Act therefore provides a remedy which the applicants could utilize at this trial. I also drew Mr *Madhuku's* attention to s 6 (4) of the High Court Act which provides that the Prosecutor-General or the accused person in any criminal trial in the High Court shall each have the right to challenge, without assigning any reason thereof, not more than two persons chosen to be assessors at the trial, and where any assessor has been so challenged he

shall recuse himself and the Registrar shall choose another person to act as an assessor from the list prepared by the Minister. If the applicants had genuine reservations about the fitness of assessors above 70 years at their trial, they had the simplest of tasks. They only needed to challenge the two assessors without giving reasons. Thereafter, before they are replaced, they would give notice to the Registrar that the appointment of an assessor above 70 years of age would be resisted. An issue would only arise if the Registrar persisted with appointing a person above 70 years. Mr *Madhuku* refused to utilise that remedy, telling me, pointedly, that the judge could not force the applicants to utilise a remedy. Indeed, I may not, but the position at law is that if a remedy is available to a party, whether it is a factual or a legal remedy, courts will not normally consider a constitutional question unless the resolution of the criminal trial depends on it.

I find the submissions by Mr *Madhuku*, that assessors above 70 years of age sleep through proceedings and are generally incapable of properly resolving disputes of fact, without empirical evidence, to be unnecessarily derisive. They underscore the down side of the phenomenon called ageism. Ageism is, among other things, a form of discrimination and mistreatment of people based on their age. It is rooted in prejudice or stereotypes. The issue of incapacity of an assessor is an issue that arises with respect to individual assessor and when it arises, the High Court Act provides a remedy. The persistence with the issue as a constitutional matter when a remedy is available in the High Court Act was not *bona fide.* Raising the issue without evidence of incapacity was frivolous. The refusal to utilise s 8 of the High Court Act is vexatious. For the purposes of their trial, the accused persons have a remedy in s8 of the High Court Act. The suggestion that persons above 70 automatically, become unfit for judicial office by virtue of, is actually inconsistent with the trajectory of our constitutional history. The age limit of the judges' tenure which was set at 65 years at independence was changed in 2013 when, after a referendum, the tenure was increased to 70 years. The approval of the constitution through a referendum is proof of the public sentiment. In 2021 the upper limit of the tenure of judges was increased to 75 years after debate by members of Parliament who represented their constituencies and our law mandates them to consult. What is actually changing is the tenure of office and not fitness for office.

I therefore find that the request for referral with respect to issues (a), (b and (c)) is frivolous and vexatious.

Item [g]: Alleged detention at magistrates court whilst coming from home

This is a historical event. It is common cause that the occurrence came up before the magistrate who presided at the accused persons' initial appearance in court on the charge of fraud and denied them bail. The issue therefore arose at those proceedings and a request for referral of the issue to the Constitutional Court as a constitutional matter ought to have been made at that time. It could not be raised for referral after the matter had concluded and the court had determined the cases. The magistrate had the jurisdiction to deal with a request of referral of any constitutional matters arising at the bail proceedings in terms of s175(4) of the Constitution. The accused persons failed to seek referral to the Constitutional Court by the magistrate. They can still take steps to enforce their rights through a direct application other than seeking referral by this Honourable Court in terms of section 175(4) of the Constitution. It is not a matter arising at this trial. The issue raised is not relevant to the charge of fraud.

The request for referral at this juncture was therefore frivolous and vexatious.

Items [h & i]: Dismissal of the accused persons' appeal against refusal of bail and the striking off of the accused persons' application for bail pending trial by this court

The accused persons expressly accepted the said decisions by this court, one, dismissing their appeal against denial of bail by the magistrate and the other, removing their bail application from the roll as correct. They accepted that they did not raise the issue of the constitutional validity of the law which applied to the bail matters at the bail proceedings. They may not seek referral at proceedings unrelated. The law which applied to their bail matters is not relevant to the charge of fraud. If the accused persons were minded to challenge the constitutional validity of the applicable law, they should have requested for referral of the matter to the constitutional court at the bail proceedings. I agree with the State counsel that this is an inopportune time to seek referral of the matter.

The request is, therefore, frivolous and vexatious.

Item [k]: Whether there was selective prosecution resulting in the exclusion of one Wicknell Chivhayo from prosecution.

The accused persons conceded that Wicknell Chivhayo is not implicated in this case. They agreed to have the subpoena issued at their insistence, cancelled and even offered to pay him wasted costs for his attendance at court in compliance with the subpoena.

The insistence on the part of the accused persons to pursue this point was therefore, frivolous and vexatious.

Item [l]: Challenging section 66(1) and (2) of the Criminal Procedure and Evidence Act

The issue of the warrant issued by the magistrate for their detention in terms of s 66 (2) of the Criminal Procedure and Evidence Act, pending appearance before the High Court for trial arose at the time of the indictment proceedings. That was the opportune moment when the accused persons should have sought for a referral. The accused persons failed to do so. The constitutional validity was not an issue of s 66 (2) has no bearing to the criminal trial. The request for the referral of the issue to the Constitutional Court made to this court was, therefore, frivolous and vexatious.

Item [n]: The alleged interference by the ZACC Chairperson with the National Prosecuting Authority leading to the withdrawal of the consent to bail.

This is another historical issue which is being raised after the remand proceedings before the magistrate were concluded. It has not arisen during the criminal trial before this court. The alleged interference by the ZACC Chairperson was part of the accused persons' testimonies during the joint bail application before the magistrate. Had the accused persons been desirous to enforce their rights, they were expected to seek for a referral to the Constitutional Court before the finalisation of their bail application in the lower court. The issue is not relevant to the charge of fraud.

The request is therefore, frivolous and vexatious.

In the result I order as follows:

1. The request for referral of all the issues raised as constitutional matters to be determined by the Constitutional Court is frivolous and vexatious.
2. The application be and is hereby dismissed with no order as to costs except the wasted costs tendered to a witness.

KWENDA J: ……

Dzvetero Law Chambers, first applicant's legal practitioners
Mugiya Law Chambers, second applicant's legal practitioners
National Prosecuting Authority, State's legal practitioners