REPORTABLE (76)

Judgment No SC 75/05
Civil Application No 16/05

ROY LESLIE BENNETT

v (1) EMMERSON DAMBUDZO MNANGAGWA (in his capacity as the SPEAKER OF THE PARLIAMENT OF ZIMBABWE) (2) PAUL MANGWANA (3) JOYCE MUJURU (4) CHIEF MANGWENDE (5) WELSHMAN NCUBE (6) TENDAI BITI (7) THE ATTORNEY-GENERAL

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, SANDURA JA, CHEDA JA, MALABA JA & GWAUNZA JA
HARARE, MAY 26, 2005 & MARCH 9, 2006

J. J. Gauntlett, SC., with him *A.P. de Bourbon SC*, for the applicant

S.J.Chihambakwe, with him *J Mhlanga*, for the first, second, third and fourth respondents

R. Gatsi, for the seventh respondent (intervener)

CHIDYAUSIKU CJ: This application is brought in terms of s 24 of the Constitution of Zimbabwe. Section 24 of the Constitution provides that any person who alleges that the Declaration of Rights has been, is being, or is likely to be, contravened in relation to him may apply to the Supreme Court for redress. The applicant, who was at the relevant time a Member of Parliament, assaulted Mr Patrick Chinamasa, MP, Minister of Justice, Legal and Parliamentary Affairs, and Leader of the House (hereinafter referred to as "Chinamasa"). The assault took place in Parliament while it was in session. He was charged with, and found guilty of, contempt of Parliament. He was sentenced, by

Parliament, to fifteen months' imprisonment of which three months' imprisonment was suspended on certain conditions.

The applicant challenges that conviction and punishment on the following four grounds -

1. The proceedings violated his constitutional and fundamental right to a fair hearing by an independent and impartial court or other adjudicating body protected by s 18(1),(2) and (9) of the Constitution of Zimbabwe ("the Constitution").

2. He was discriminated against on grounds of race and political opinion contrary to the provisions of s 23 of the Constitution.

3. The punishment imposed on him was inhuman or degrading and violated his fundamental right protected under by s 15(1) of the Constitution; and

4. That s 16 of the Privileges, Immunities and Powers of Parliament Act [*Chapter 2:08*] ("the Act"), in terms of which Parliament imposed the custodial punishment on the applicant is, *ultra vires* the Constitution, in particular s 49 of the Constitution.

The following are the facts of the case.

On 18 May 2004 and in the Parliament of Zimbabwe while Parliament was sitting the applicant (hereinafter referred to as "Bennett") assaulted Chinamasa while he was addressing Parliament by felling him to the floor.

Shortly after the incident, a motion raising the question of privilege on the conduct of Bennett was moved in Parliament. The motion was as follows:

> "Following the unfortunate events of this afternoon, whereby during a debate on the adverse report of the Parliamentary Legal Committee on the Stock Theft Amendment Bill, Honourable Bennett rose from his seat without leave of the Chairperson of the House, proceeded to the table where the Leader of the House Honourable Chinamasa was addressing the House and violently shoved him to the ground together with Honourable Mutasa who had risen to render assistance to Honourable Chinamasa thereby assaulting them. I move that a Privileges Committee be constituted to investigate the conduct of Honourable Bennett on allegations of contempt of Parliament as envisaged by section 21 of the Privileges, Immunities and Powers of Parliament Act [*Chapter 2:08*] as read with paragraph 16 of the Schedule."

The motion was carried and a Committee consisting of five Members of Parliament was appointed to enquire into the matter. The Parliamentary Committee (hereinafter referred to as the Committee) consisted of three members of the ruling party ZANU (PF) and two members of the MDC, the opposition party, and the party to which Bennett belongs.

The Committee was to conduct an enquiry and make recommendations to Parliament in accordance with the Act on whether or not the conduct of Bennett amounted to contempt of Parliament in terms of s 21 of the Act.

The Committee decided to conduct its proceedings in an inquisitorial as opposed to an accusatorial manner. The Committee first viewed the video extract of the events of 18 May 2004 and perused the *Hansard* of that day. The Committee also considered the following -

(a) the video clip of the events of 18 May 2004;

(b) the *Hansard* Report of 13 and 18 May 2004;

(c) the transcript of the Voice of America radio interview of the Honourable D. Mutasa ("Mutasa") on 20 May 2004;

(d) the Parliamentary Debate of 20 May 2004;

(e) the Committee directed that there be presented a full transcript of the video clip. The transcript was prepared and duly considered by the Committee;

The Committee was further supplied with and considered the following documents and video clips –

(i) extract from *The Standard Newspaper* of 23 May 2004 entitled "Bennett Speaks Out";

(ii) a bunch of documents on Charlesworth Farm and Delport Farm with attachments submitted by Bennett;

(iii) a video clip of Zimbabwe Broadcasting Corporation News Bulletins flighted after 18 May 2004;

(iv) a video clip of a speech by His Excellency The President on 23 June 2003; and

(v) a transcript of The Voice of America radio interview of Mutasa.

As a matter of guidance to itself the Committee decided that it would seek to establish the following -

(a) whether Bennett did assault Chinamasa and Mutasa;

(b) whether Bennett caused a disturbance in Parliament;

(c) whether Bennett willfully interrupted the orderly conduct of the business of the House;

(d) if any of the above was established, whether Bennett's conduct amounted to contempt of Parliament; and

(e) whether there was any defence available to Bennett.

At the commencement of the enquiry Bennett raised a number of legal objections and made certain submissions, namely -

(i) Bennett indicated that he wished to be represented by a legal practitioner of his choice and the Committee resolved that Bennett could be accompanied by his legal representative who could give him advice and that the legal representative could lead him when he gave evidence to the Committee.

(ii) Bennett enquired whether the proceedings were going to be adversarial or inquisitorial and was advised that the enquiry would be inquisitorial but the Committee would avail to him all the evidence received by it, including the transcripts of *viva voce* evidence from witnesses.

(iii) Bennett also raised the issue that he was being discriminated against because he alone was being summoned before the Committee while both Chinamasa and Mutasa, who conducted themselves in a manner contemptuous of Parliament, were not being called upon to appear. The Committee overruled this objection and concluded that there was no breach of Bennett's constitutional rights.

(iv) Bennett also requested the recusal of the Chairperson of the Committee on the grounds that he had moved the motion for the establishment of the Committee on Privileges on this matter and therefore had an interest or was biased against him. The Committee ruled that no grounds of bias or conflict of interest had been established to warrant the Chairperson recusing himself from the proceedings.

(v) Bennett also raised the issue of the stay of the Committee's proceedings pending the finalization of an application he had filed with the High Court to review Parliament's decision to appoint the Committee. This request was turned down.

(vi) Bennett further requested that his wife be in attendance, which request was granted.

(vii)He further requested that a journalist from *Agence France Press* be present and the Committee advised that the journalist should make application to the Committee, which application was never made and the matter fell by the wayside.

The Committee heard oral evidence from three witnesses – Honourable Mutasa MP,(hereinafter referred to as Mutasa) Bennett and Chinamasa in that order. The evidence of these witnesses was to the following effect:

Mutasa stated that he witnessed the incident of 18 May 2004. He saw Bennett move from his seat and confront Chinamasa after he appeared to have been offended by what Chinamasa was saying about him. Bennett assaulted Chinamasa by violently shoving and pushing him to the ground. He observed the Minister of Home Affairs trying to restrain Bennett who intended to further assault Chinamasa while he was lying on the floor. At that stage he kicked Bennett from behind in order to divert his attention away from Chinamasa and in the process stop any further assault on Chinamasa.

Bennett tried to assault him, but he dodged by sitting down and kicking out at him. At no stage did Bennett connect a blow on Mutasa's body. He alleged he kicked Bennett in defence of the assault on Chinamasa. The Committee accepted this evidence. The Committee's acceptance of this evidence is not challenged.

The next witness to give evidence to the Committee was Bennett. He produced to the Committee bundles of documents on Charlesworth Farm and Delport Farm. He produced these documents in support of his contention that he underwent trials and tribulations at the hands of the State and its agents when his farm Charlesworth in Chimanimani was acquired by the Government. He also stated that he was harassed by the State at Delport Farm in Ruwa.

Bennett stated that he had not intended to be disrespectful to the House and that the incident occurred when he reacted to insults from Chinamasa and the years of harassment he had endured at the hands of the State. He admitted pushing, thus assaulting, Chinamasa, who had provoked him.

In respect of Mutasa he admitted pushing him in self-defence. Bennett admitted causing a disturbance in the House, but denied that he did so willfully.

Bennett also gave evidence of his background and his response to Chinamasa's remarks. His evidence in this regard was summarised by the Committee as being to the following effect:

"i) He did not inherit any farm from his parents or forefathers but bought them through his own efforts after obtaining certificates of no present interest from the State.

ii) He had an altercation with Chinamasa and Honourable Made at one meeting of the Portfolio Committee on Lands, Land Reform, Rural Resources and Water Development.

iii) He had been subject(ed) to persistent harassment from the members of the Defence Forces, State Security, and ruling party operatives since 2000 when he stood as a parliamentary candidate for the opposition MDC.

iv) He had taken up the matter of his harassment with the Speaker and Vice President Msika but to no avail.

v) He referred the Committee to the dossiers on Charlesworth and Delport Farms to sustain his defence of persistent harassment.

vi) He invited the Committee to view a video clip of a speech by His Excellency the President (in June 2003), which speech he alleged His Excellency incited people to continue to harass Honourable Bennett and his family.

(vii)Honourable Bennett showed the Committee clips of News Bulletins shown after the 18th May 2004 and the demonstrations held against him at Parliament and elsewhere in the country after this incident.

viii)He was praised and held with honour by his supporters in Mutare and Kuwadzana after he assaulted Honourable Chinamasa.

xi) On the day he assaulted Honourable Chinamasa he had acted on impulse in reaction to the insults. He felt that the Chairman of the Committee of the whole House had not protected him during the time he alleges Honourable Chinamasa was insulting him.

x) He admitted that he had not sought the protection of the Chairman before assaulting Honourable Chinamasa.

xi) He had not apologised to Honourable Chinamasa or to the Speaker on his conduct on the 18th May 2004."

The Committee heard evidence from Chinamasa, which it summarised as follows:

"i) That Parliament was an institution where members enjoyed freedom of expression and this was evidenced by robust debates including trading of harsh words and sometimes insults. In instances where it was perceived that the insults had overstepped the mark, the offended member had a right to seek the protection of the Speaker or Chairperson of a Parliamentary session. The Speaker will always protect the offended member in appropriate circumstances.

ii) That as Leader of the House he expected to be accorded the respect and dignity befitting his status by all Honourable Members of Parliament.

iii) That the utterances he made in relation to Honourable Bennett on 18th May 2004 were not any different from those made in any democratic Parliament. He then referred the Committee to the utterances made on 13th May 2004, relating to him by Honourable Job Sikhala in which he was alleged to be a thief. When those words were uttered by Honourable Sikhala Honourable Chinamasa sought the protection of the Speaker and the matter was resolved.

iii) That what he said on that day was a factual statement of history that land was stolen from the indigenous people of Zimbabwe by white colonialists. That Honourable Bennett like all offsprings (offspring) of colonialists was a beneficiary of this evil system of colonialism. That the government of Zimbabwe was determined to correct the wrongs of the past through the acquisition of hitherto white owned land including Charlesworth Farm owned by Honourable Bennett and redistribute this land to the black majority. That such utterances did not amount to provocating the assault.

iv) That in order to preserve the dignity of the House if a member felt verbally insulted, he or she should respond verbally and not physically.

v) That whites in Zimbabwe still believe that they were superior to blacks and this explained why he was assaulted by Honourable Bennett during a Parliamentary session notwithstanding that he is Leader of the House and a Cabinet Minister.

vi) That Honourable Bennett appeared on a British Broadcasting Corporation interview boasting over the incident and saying that he had no apologies to make. That a rally had been held in Kuwadzana by the MDC with the participation of Honourable Bennett to celebrate the assault.

vii) That the MDC leadership in Parliament had apologised to Honourable Chinamasa for the unfortunate incident but Bennett had not apologised even as Honourable Chinamasa gave evidence to the Committee."

After hearing the evidence the Committee made the following factual findings:

"a) Honourable Chinamasa made robust submissions regarding the history of colonialism and that Honourable Bennett had benefited out of his privileged relationship with those who colonized this country.

b) That Honourable Bennett felt offended by Honourable Chinamasa's remarks during those submissions.

c) That Honourable Bennett did not seek the protection of the Chair when he felt offended by the remarks of Honourable Chinamasa.

d) That Honourable Bennett without leave of the Chair stood up from his position, used threatening language as he moved towards Honourable Chinamasa, got to where Honourable Chinamasa was standing and with considerable force pushed him to the ground thereby felling him.

e) A number of Members of Parliament intervened and restrained Honourable Bennett.

f) The Committee observed movements from Honourable Mutasa towards Honourable Bennett during the scuffle. At that stage it was not clear if Honourable Mutasa had kicked Honourable Bennett or if Honourable Bennett had indeed pushed Honourable Mutasa to the ground or if he had connected a blow to the body of Honourable Mutasa.

g) The Committee observed from the video clip that indeed there was a disturbance in the House and the business of the House was interrupted. There was disorder in the House with a lot of confusion and commotion until Honourable Bennett was taken out of the House by the Sergeant at Arms. Order was eventually restored after the intervention of the Deputy Speaker."

The factual findings of the Committee are not challenged. On the basis of these facts the Committee concluded that Bennett was guilty of contempt of Parliament. Their reasoning in coming to that conclusion was as follows:

"Decision of the Committee on culpability

From the reading of these debates it was clear that during the debate on the Adverse Report on the Parliamentary Legal Committee:

i) There was use of robust and sometimes offensive language by Members of Parliament from both sides of the House.

ii) At one stage Honourable Chinamasa had to seek the protection of the Chair after he felt that he was being called a thief by Honourable Sikhala.

iii) It was still not clear if Honourable Bennett had indeed assaulted Honourable Mutasa or if it was Honourable Mutasa who had kicked Honourable Bennett.

The Committee analysed the submissions made by Advocate *Matinenga* on behalf of Bennett on the defence of provocation. The Committee came to the following conclusion that:

The defence of provocation was not sustainable in this case. The legal authorities in this country do not support a defence of provocation on a charge of contempt.

In any event, evidence brought before the Committee does not support the defence of provocation.

The language used by Honourable Chinamasa was robust but that was expected in Parliamentary debates. If Honourable Bennett had felt offended by the language he should have sought the protection of the Chair. In this instance he did not seek the protection of the Chair. He rose from his seat without the permission of the Chair, advanced towards Honourable Chinamasa, attacked him and pushed Honourable Chinamasa thereby causing him to fall.

Regarding an assault on Honourable Mutasa, the Committee found that from the evidence brought before it, Honourable Bennett had not assaulted Honourable Mutasa.

The Committee accepted that Honourable Bennett was guilty of a single act of contempt which manifested itself in a number of events in Parliament that afternoon.

Honourable Bennett rose from his seat without permission from the Chair and assaulted Honourable Chinamasa. It was that assault on Honourable Chinamasa which invited the reaction of Honourable Mutasa. It was that assault which led to

> a commotion in Parliament with Members of Parliament reacting to the unusual event. Some managed to restrain Honourable Bennett after he had floored Honourable Chinamasa with others rising from their seats and Honourable Mutasa kicking Honourable Bennett."

As already stated after examining all the evidence the Committee unanimously found Bennett guilty of contempt of Parliament.

The evidence of contempt of Parliament by Bennett is overwhelming. A verdict of guilty of contempt of Parliament was inevitable. That verdict was unanimous and is not challenged on the basis that the evidence does not support the verdict reached by the Committee.

Having found Bennett guilty of contempt of Parliament, the Committee recommended that Bennett be imprisoned for a period of fifteen months of which three months' imprisonment be suspended on certain conditions. The minority members of the Committee felt a custodial sentence was inappropriate and suggested community service or a fine coupled with a suspended custodial sentence. I shall revert to the reasons for sentence later on in this judgment.

On the 26th, 27th and 28th of May 2004 the report of the Committee was tabled before the Parliament of Zimbabwe and duly debated. The recommendation of the Committee was accepted by Parliament through a majority vote. The ruling party's Members of Parliament voted in support of the Committee's recommendation, while the

opposition Members of Parliament voted against the report. The applicant was found guilty and duly punished.

The facts outlined above, in my view, reveal that the proceedings of the Committee were thorough and conducted in an eminently fair and impartial manner. Indeed, Bennett did not criticize the manner in which the proceedings were conducted. His complaint related to the composition of the Committee and the composition of Parliament itself. The contention being that the Committee and Parliament were judges in their own cause and therefore biased.

I now turn to deal with the four grounds of challenge.

Was the applicant's right or entitlement to a fair hearing by an independent and impartial court or other adjudicating authority, as guaranteed by s 18 of the Constitution, violated?

The main submission in this regard is that the majority members of the Committee were members of the ruling party, ZANU (PF), whilst only two members of the Committee were members of the MDC, the opposition party to which Bennett belonged. It was argued for the applicant that the majority of the Committee members were judges in their own cause as ZANU (PF) was the aggrieved party. It was also argued that Parliament consisting of a majority of ZANU (PF) Members of Parliament

was equally a judge in its own cause. In short it was argued that both the Committee and Parliament could not adjudicate in this matter without violating the principle of natural justice that nobody should be judge in his own cause.

Mr *Chihambakwe*, for the first respondent, on the other hand, argued that the complainant in this case was Parliament and not ZANU (PF). The offence Bennett was charged with was contempt of Parliament and not contempt of ZANU (PF). On this basis, he submitted, that Members of Parliament belonging to the ZANU (PF) party were competent to adjudicate upon a matter of contempt of Parliament by the applicant. He submitted that there was no conflict of interest.

There is substance in Mr *Chihambakwe's* submission. The applicant was charged with contempt of Parliament and Parliament is a separate and distinct entity from ZANU (PF). In fact, if the applicant's contention were correct, then Members of Parliament from his own party could not adjudicate as they, on the applicant's argument, would be the committers of the contempt. The MDC Members of Parliament, on Bennett's argument, are the assailants and ZANU (PF) Members of Parliament the assaulted, accordingly both ZANU (PF) and MDC Members of Parliament would have a conflict of interest. This argument, in my view, is absurd. I do not accept that the appointment of three out of five members of the Committee from ZANU (PF) to enquire into the alleged contempt of Parliament by the applicant *per se* constitutes a violation of the rules of natural justice that nobody should be a judge in his own cause.

In considering the issue of a fair hearing in this case, it has to be borne in mind that when Parliament sits as a court it is not sitting as a court of law or an adjudicating authority. It is a court of its own kind, created by law, namely by the Constitution itself. See *Mutasa v Makombe NO* 1998 (1) SA 397 (ZSC) at 402E-G wherein it was stated:-

> "A finding of guilt by Parliament on a contempt offence is not a crime in the conventional sense. When dealing with these contempt offences Parliament, though sitting as a court, does not sit as a court of law. Its proceedings are not in the nature of a public criminal trial as envisaged in s 18(2) of the Constitution; for Parliament is not 'an independent and impartial court established by law'. It exercises its own jurisdiction and powers conferred upon it by the Privileges, Immunities and Powers of Parliament Act. That it does so is recognised in the Constitution. Section 13(2)(b) thereof provides that no person shall be deprived of his personal liberty save, *inter alia*, as may be authorised by law 'in execution of the order of a court punishing him for contempt of that court or of another court or tribunal or *in the execution of the order of Parliament punishing him for a contempt*'"

Consequently failure by Parliament, when sitting as a court, to follow certain procedures that are followed in a court of law does not necessarily mean that such hearing is not fair or impartial. The procedures in the two courts are fundamentally different. In a court of law, the court hears evidence, evaluates the evidence, and makes findings of fact. Thereafter a court of law applies the law to the facts it finds established by the evidence. The outcome of that process constitutes the determination of the court of law. Failure to follow this procedure by a court of law is an irregularity constituting a violation of the right protected by s 18 of the Constitution. In the court of Parliament,

the procedure is fundamentally and totally different. In the court of Parliament due process is satisfied by the mere moving of a motion setting out the allegation, debate and voting on the motion. At the end of the debate the question of a verdict and punishment is determined by a majority vote of the Members of Parliament. More often than not, either by design or otherwise, the vote to determine the outcome of any debate is along party or partisan lines. This Court, in *Mutasa's* case, *supra*, held that s 18(2) and s 18(9) of the Constitution do not apply to a trial by Parliament.

The facts of the *Mutasa* case *supra* are as follows: Upon a motion being passed and carried in the Zimbabwe Parliament, Mutasa had been ordered to attend the House, stand in his place and be reprimanded by the Speaker. The reprimand was given for certain remarks which Mutasa had made outside Parliament which had been adjudged to be in contempt of Parliament. Mutasa thereupon brought proceedings in the High Court of Zimbabwe for an order setting aside the finding that he was guilty of contempt of Parliament, alleging that the procedure which had been adopted by the Select Committee of Parliament, which had been appointed to investigate the utterances made by Mutasa outside Parliament, had violated Mutasa's fundamental right under s 18 of the Constitution to be afforded a fair hearing. He also contended that the utterances he had made outside Parliament were protected by his right to the enjoyment of freedom of expression as enshrined in s 20 of the Constitution. Mutasa also complained that his entitlement to a fair hearing by an independent and impartial court was violated by the Committee's refusal to allow him to be legally represented at the hearing. Mutasa's contentions were dismissed.

GUBBAY CJ, delivering the judgment of the full Bench of this Court, had this to say at p 402I - 403A:

> "The line drawn in the Constitution between punishment for contempt under an order of court or tribunal, and that imposed by Parliament, is significant and important. It indicates plainly, to my mind, that, in utilizing its powers under the Privileges, Immunities and Powers of Parliament Act in dealing with contempt offences, Parliament is not exercising a criminal or civil jurisdiction. Rather one *sui generis*, being the jurisdiction expressly authorised by law.
>
> Thus in respect of contempt offences s 18(2) of the Constitution, which stipulates that every person charged with a criminal offence is to be afforded a fair hearing by an independent and impartial court, is of no application. Nor is s 18(9). It concerns the determination of the existence of civil rights and obligations and provides that in respect thereto every person is entitled to be afforded a fair hearing by an independent and impartial court or other adjudicating authority. Parliament is not such a court or authority."

The facts of *Mutasa's* case, *supra*, may not be identical to the facts of this case but they are sufficiently similar to make *Mutasa's* case, *supra*, applicable, with equal force to this case. In both cases the applicants complained that their right to a fair hearing protected under s 18 of the Constitution had been violated. In the *Mutasa* case, *supra*, by reason of him having been denied legal representation, and in the present case, by the violation of the principle that no man should be a judge in his own case. The principle enunciated in *Mutasa's* case, *supra*, that when Parliament sits as a court it is not an adjudicating body but court *sui generis* established by the law, the Constitution and, consequently s 18 of the Constitution is not applicable applies to this case. The applicant has not argued that *Mutasa's* case *supra* was wrongly decided. It was argued for the applicant that *Mutasa's* case, *supra*, is distinguishable. Counsel for the

applicant's submissions in this regard are found in paragraphs 15-18 of his heads of argument:

"15. It must be recognised immediately that GUBBAY CJ in *Mutasa supra* suggested that s 18(2) and s 18(9) of the Constitution did not apply when Parliament found a member guilty of contempt. Whether this approach was correct is, with respect, open to significant doubt. However, for purposes of this case, it is not necessary to decide whether *Mutasa* was correctly decided.

16. This is because *Mutasa* did not involve the deprivation of liberty – it involved a suspension from Parliament. In contrast, the present case involves a severe deprivation of liberty – a sentence of fifteen months in jail (three months suspended).

17. Because the present case involves the deprivation of liberty, s 18 of the Constitution must be read in the light of the guarantee of individual liberty, which is contained in s 13 of the Constitution. Whatever the correctness of the decision in *Mutasa*, we submit that any deprivation of liberty may take place only as a consequence of a procedurally fair hearing in accordance with natural justice. The matter must therefore be approached differently to *Mutasa*. Indeed, in his decision, GUBBAY CJ recognised that the circumstances of a particular case of contempt could nevertheless produce a violation of constitutional rights:

> 'Of course, in Zimbabwe … [contempt] jurisdiction must be exercised in a manner not inconsistent with or offensive to the Declaration of Rights in the Constitution. For instance, the courts would not tolerate a situation in which the Speaker decreed that a member guilty of a contempt was to stand before the House chained and gagged to receive his punishment.'

18. Moreover, *Mutasa* is additionally distinguishable on the grounds that the applicant in that matter expressly abandoned his allegations of bias on the part of the committee which enquired into his contempt (see *Mutasa* at 404A). Had these allegations been persisted in, and found as a fact by the Court, the logical corollary would have been that the proceedings were nullified, because bias (or the reasonable perception of bias) in law has that effect (per CORBETT CJ in *Council of Review, SADF v Monnig* 1992 (3) SA 482 (A) at 495 B-D). In this regard, moreover, it is inconceivable that the Constitution could countenance the deprivation of liberty through a process which did not meet the requirements of natural justice. By way of comparison, the South African Constitutional Court has two inter-related constitutional aspects:

> '… the State may not deprive its citizens of liberty for reasons that are not acceptable, nor, when it deprives its citizens of freedom for acceptable reasons, may it do so in a manner which is procedurally unfair.'

De Lange v Smuts NO and Ors 1998 (3) SA 785 (CC) at para 18;

S v Coetzee and Ors 1997 (3) SA 527 (CC) at para 159.

Crucially, this holding of the Constitutional Court was sustained under both the 1993 and 1996 Constitutions, despite the fact that neither section which protected liberty expressly referred to the notion of procedural fairness. The Court described the right to procedural fairness as being 'implicit' in the constitutional guarantee of freedom.

> '[T]he requirement of "fairness" or "due process" or "natural justice" … however one wishes to label it, is implicit in this right.'

Nel v Le Roux NO and Ors 1996 (3) SA (CC) at para 12.

See also *De Lange supra* at para 22."

While I accept as I have already stated that the facts of *Mutasa's* case, *supra*, are not identical to the facts of this case they are sufficiently similar to make *Mutasa's* case, *supra* applicable to this case with equal force. The basis upon which we are urged to make a distinction has no substance. *Mutasa's* case, *supra*, clearly states that s 18 of the Constitution does not apply to proceedings of Parliament when sitting as a court. The proceedings being impugned herein are of Parliament sitting as a court, accordingly s 18 of the Constitution has no application.

In the result, I am satisfied that, on the authority of *Mutasa's* case *supra*, this ground of challenge cannot succeed.

Was the applicant discriminated against on the grounds of race or political opinion contrary to the provisions of s 23 of the Constitution?

The Constitution in s 23 prohibits discrimination on the grounds of race or political opinion. The relevant part of s 23 provides as follows:

> "**23 Protection from discrimination on the grounds of race, etc**
>
> (1) Subject to the provisions of this section –
>
> (a) no law shall make any provision that is discriminatory either of itself or in its effect; and
>
> (b) no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority."

The applicant's contention that he was discriminated against on the grounds of race and political opinion seems to be based upon the following allegations –

1. That Chinamasa made remarks to the effect that if Bennett were a black person he would have been ready to forgive and forget; and

2. That Chinamasa and Mutasa also committed contempt of Parliament but because they were black and belonged to the ruling party, ZANU (PF), no action was taken against them.

I am not satisfied on the record that Bennett was discriminated on the basis of race or political opinion.

Whilst the remarks of Chinamasa could give rise to an inference of racism, those remarks can only reflect the views or attitude of Chinamasa. They cannot be ascribed to or attributed to either members of the Committee or to Parliament. The Committee and Parliament adjudicated in this matter not Chinamasa. There is no evidence on the record to suggest that the views of Chinamasa were shared by or, in any way, influenced the Committee or Parliament in their determination of this matter.

This allegation cannot, in my view, form the basis of a violation of the applicant's right, as guaranteed under s 23 of the Constitution.

The second basis of the allegation of discrimination is that both Chinamasa and Mutasa committed contempt of Parliament but no action was taken against them. The Committee was appointed in terms of a motion passed by Parliament. The terms of reference of that motion specifically directed the Committee to investigate the allegation of contempt of Parliament by Bennett. The motion which constituted the terms of reference of the Committee did not authorise an investigation of either Chinamasa or Mutasa. The Committee had no mandate to enquire into the question of whether Chinamasa or Mutasa committed contempt of Parliament. Indeed, if Bennett or his colleagues in the MDC wanted an inquiry into the conduct of Chinamasa and Mutasa with a view to establishing whether or not they too had committed contempt of Parliament, then Bennett or his colleagues should have moved for an amendment to the motion that established the Committee to widen its mandate to include an inquiry into the

conduct of Chinamasa and Mutasa. In the absence of any attempt to get Parliament to determine the issue of Chinamasa and Mutasa's conduct an accusation of discrimination on this basis is not sustainable.

It is on this basis that I am satisfied that the second ground of challenge also fails.

Does the punishment imposed on Bennett constitute inhuman or degrading punishment, prohibited by s 15(1) of the Constitution?

Section 15 of the Constitution prohibits the imposition of inhuman or degrading punishment. The relevant part of s 15 of the Constitution provides as follows:-

> "**15Protection from inhuman treatment**
>
> (1) No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment."

Bennett contends that the punishment imposed upon him was inhuman or degrading and is prohibited by s 15 of the Constitution. The issue that falls for determination is what constitutes inhuman or degrading punishment and whether the punishment imposed on Bennett constitutes inhuman or degrading punishment.

I pause here to point out that the Attorney-General, in his written heads of argument, submitted that the punishment in this case was inhuman or degrading. That submission was, however, withdrawn by the Attorney-General before the Attorney-General was called to address the Court. The court is not privy to the reasons for the withdrawal. I will, therefore, proceed on the basis that no such concession was made.

The issue of what constitutes inhuman or degrading punishment was considered by this Court in the case of *S v Ncube; S v Tshuma; S v Ndhlovu* 1988 (2) SA 702. In that case this Court departed from the concept that inhuman or degrading punishment is primarily aimed at the quality or the nature of the punishment. Hitherto it had been held in *Gundu v Sheriff of Southern Rhodesia* 1965 RLR 301 (SRA) and *R v Runyowa* 1966 (2) SA 495, that the words "inhuman or degrading punishment" were to be restricted to the modes and types of punishment which were in themselves inhuman or degrading.

This Court, following a line of American cases, departed from the above limited concept of what constitutes inhuman or degrading punishment. GUBBAY JA (as he then was) at 715I-716E expressed the unanimous view of this Court in the following terms:

> "There are many decisions of the Federal Supreme Court of the United States which lay down unequivocally that, under the protection afforded the individual by the Eighth Amendment to the Constitution, any punishment imposed upon him by the State must be graduated and proportionate to the crime he has committed. His constitutional right will have been infringed if, having regard to the nature and quality of the offence committed, the sentence is so unfit

as to be grossly disproportionate. In other words, although the State may impose punishment the effect of that punishment must not be grossly disproportionate to what would have been appropriate. See, for instance, *Weemes v United States* 217 US 349 at 367 (54 L Ed 793 at 799); *Gregg v State of Georgia* 428 US 153 at 173 (49 L Ed 2d 859 at 875); *Ingraham v Wright* 430 US 651 at 667 (51 L Ed 2d 711 at 727-8); *Hutto v Finey* 437 US 678 at 685 (57 L Ed 2d 522 at 531); *Solem v Helm* 463 US 277 at 284 (77 L Ed 2d 637 at 645).

In citing these authorities in support of the principle of proportion in punishment, I am aware of its rejection in *Gundu and Anor v Sheriff of Southern Rhodesia and Anor* 1965 RLR 301 (SRA) and *R v Runyowa* 1966 (2) SA 495 (PC) (1966 RLR 42 (PC)) ([1966] 1 All ER 633).

In both these cases it was held that the words 'inhuman or degrading punishment' are to be restricted to modes or types of punishment which are in themselves inhuman or degrading and are not to be construed in the wider sense of including punishment which, though not necessarily inhuman or degrading *per se*, may become so when it is excessive in relation to the offence for which it is prescribed.

With due deference, that to me is an unjustifiably narrow interpretation of a fundamental right. I do not regard it as unreasonable to suggest that the inhumanity or degrading nature of a punishment may well depend on the context in which, and the reasons why, it is imposed. Albeit capital punishment is not *per se* unconstitutional (see s 12(1)) it would be inhuman or degrading if arbitrarily imposed for, say, theft, fraud, or indecent assault. A good example of the working of this principle is afforded in the case of *Rummel v Estelle* 445 US 263 (63 L Ed 2d 382). See also Corwin and Peltason's *Understanding the Constitution* 10 ed at 213-14."

I respectfully agree with the view that a punishment that is "grossly disproportionate" to the transgression constitutes a violation of s 15(1) of the Constitution, that is to say, is inhuman or degrading.

In my view, it makes no difference whether the punishment is imposed by a court of law or by Parliament. As long as it is grossly disproportionate to the offence, it is prohibited by s 15(1) of the Constitution.

In arriving at the punishment that the Committee considered appropriate to recommend to Parliament, the Committee reasoned as follows:

"8 SENTENCE

In terms of the Privileges, Immunities and Powers of Parliament Act [*Chapter 2:08*] s 21, Parliament has power to either impose a level seven fine or imprisonment up to two years. In terms of s 16(1) of this Act, as read with s 3 of (the) same, to impose any penalty which was not inconsistent with sentences which the House of Commons of the Parliament of the United Kingdom could impose on 18 April 1980.

In the light of the above the Committee considered the appropriate punishment. The majority of the members of the Committee felt that:

a) Honourable Bennett's conduct was the worst attack on the dignity of Parliament known in the history of Parliament.

b) Assaulting another Member of Parliament, worse still a Cabinet Minister, who is also Leader of the House, could not be tolerated at all and Parliament has to express its displeasure by imposing a deterrent sentence.

c) The speech by Honourable Chinamasa cannot be said to have provoked Honourable Bennett as to morally justify his conduct on that particular day. The Land Reform Programme has been going on for four years. Whatever happened on Honourable Bennett's farms (if it is true) cannot be used as justification for the morally reprehensible conduct he displayed towards Honourable Chinamasa and Parliament itself.

d) Honourable Bennett did not show any remorse or even attempt to apologise to both the Speaker and Honourable Chinamasa. The Committee was not favoured with any reasonable excuse for that failure. Honourable Bennett held himself out as a hero after the event from the Press statement he made thereafter and even from his testimony to the Committee.

e) The appropriate sentence should send a clear message to would-be offenders that Parliament shall never be used as a boxing arena but a Chamber for debates. Any member who feels offended by the statements of another member or the conduct of another member should seek the protection of the Chair or the Speaker. Only a

> custodial sentence would meet the justice of this matter. The minority members of the Committee felt that the moral blameworthiness of Honourable Bennett was not so high as to warrant a custodial sentence. Community service was suggested. A level seven fine coupled with a suspended sentence was suggested.

> The Committee voted on the appropriate penalty. **The majority voted in favour of a custodial sentence of fifteen months with three months suspended on condition of good behaviour.**
>
> The other two members voted against the custodial sentence, being in favour of the other lesser forms of punishment.
>
> **Committee's Recommendation**
>
> That Honourable Bennett, having been found guilty of contempt, be sentenced to fifteen months' imprisonment with labour of which three months are suspended on conditions (condition?) that he does not commit a similar offence within five years and for which he is sentenced to imprisonment."

It is quite clear from the above that in arriving at an appropriate punishment the Committee took into account all the relevant factors, that is, the mitigating and the aggravating factors. The reasoning process of the Committee cannot be faulted. Despite that correct approach the majority of members of the Committee differed with the minority as to what was an appropriate punishment. The majority voted for the punishment imposed while the minority thought a much more lenient punishment set out above was appropriate. Whether the aggravating features, as weighed against the mitigating features, justify the harsh punishment recommended by the majority members of the Committee or should have led to the imposition of the overly lenient punishment recommended by the minority members of the Committee is, to a large extent, a matter of value judgment.

It admits very little doubt that the punishment imposed on Bennett is severe even when one takes into account as did both the Committee and Parliament that this was the worst case of contempt of Parliament in the history of Zimbabwe and that there was need for deterrence of such conduct. It certainly is not a punishment that this Court would have imposed on the facts of this case. However, it is not a question of what this Court considers to be an appropriate punishment. This Court can only set aside a punishment imposed by Parliament if such punishment is "grossly disproportionate" to the contempt of Parliament committed. In my view the punishment imposed in this case, though severe, is not grossly disproportionate to the offence.

Parliament can impose a maximum punishment of two years' imprisonment for contempt of Parliament. That is its maximum jurisdiction in terms of the Act. The punishment imposed in this case, which Parliament considered the worst case of contempt of Parliament in the history of Zimbabwe, is way below the maximum penalty permissible under the law.

In coming to the conclusion that the punishment imposed in this case is not grossly disproportionate I have taken into account all the factors that Parliament took into account both mitigating and aggravating, and, in particular, the fact that an assault on a Minister of Government and the Leader of the House during Parliamentary proceedings must rank amongst the worst cases of contempt of Parliament. It is akin to assaulting a judge during court proceedings. It is not the degree of force used in the assault that is critical in determining an appropriate punishment but the circumstances of the assault.

In this case it is the occasion, the status of the assailant and the assaulted and the gross violation of the dignity of Parliament. Bennett is not contrite. He never apologised for his appalling conduct. Evidence on record suggests that he bragged and boasted about what he had done. This, in my view, is totally unacceptable.

I am also mindful of the fact that there was an element of provocation in this case but in assessing what weight is to be attached to this provocation, I have borne in mind the unchallenged evidence that allegations of land thefts by the descendants of settlers and colonialists was nothing new and had been traded between and amongst politicians for quite a while before this incident. These allegations could not have come as a surprise to Bennett. It is quite clear that if Bennett had sought protection from the Chair against Chinamasa such protection would have been readily afforded.

In the result I am satisfied that the punishment imposed on Bennett, while severe, was not grossly disproportionate punishment for the contempt of Parliament which he committed.

Consequently his right protected by s 15(1) of the Constitution was not violated.

Is s 16 of the Privileges, Immunities and Powers of Parliament Act [*Chapter 2:08]* *ultra vires* the Constitution?

The fourth and last ground on which the applicant challenges the proceedings is that s 16 of the Act is *ultra vires* the Constitution.

Section 16 of the Act provides as follows:

"**16 Jurisdiction of Parliament**

(1) It is declared for the avoidance of doubt that Parliament has all such powers and jurisdiction as may be necessary for inquiring into, judging and pronouncing upon the commission of any act, matter or thing in this Part declared to be an offence without derogation from the powers and jurisdiction exercisable by Parliament by virtue of paragraph (b) of section three with respect to the commission of any act, matter or thing, whether or not in this Part declared to be an offence, which is or may be adjudged by Parliament to be a contempt.

(2) Parliament shall have power to award and execute the punishments provided by this Part for the commission of any act, matter or thing which in this Part is declared to be an offence.

(3) Subsection (2) shall not be construed as precluding Parliament from awarding and executing any punishment for the commission of any act, matter or thing referred to in that subsection which Parliament has power and jurisdiction to award and execute by virtue of paragraph (b) of section three in addition to or instead of any punishment provided by this Part for the commission of that act, matter or thing.

(4) Parliament sitting as a court shall have all such rights and privileges of a court of record as may be necessary for the purpose of summarily inquiring into and punishing the commission of any act, matter or thing which in this Part is declared to be an offence."

Section 16 of the Act quite clearly confers upon Parliament power to impose the punishment it imposed in this case.

I did not understand the applicant to take issue with this, consequently once it is established that s 16 of the Act is *intra vires* the matter ends there.

It was argued that s 16 of the Act is *ultra vires* the Constitution because the Constitution of Zimbabwe does not confer on the Zimbabwean Parliament the power to make a law providing for punishment for past misconduct such as contempt of Parliament. It was argued that only the Parliament of the United Kingdom has such punitive powers, or power to punish for past misconduct such as contempt of Parliament. All other Parliaments do not have such power. It was argued that Parliaments other than the United Kingdom Parliament can only impose custodial punishment to prevent disruption of Parliamentary proceedings. They have no power to punish past misconduct such as contempt of Parliament. They have preventive as opposed to punitive powers to punish for contempt of Parliament.

It was further submitted that the punitive powers of the United Kingdom Parliament are derived from the historical incident that it once upon a time was the High Court of Parliament. The punitive jurisdiction is peculiar to the Parliament of the United Kingdom because of this historical fact. It is a jurisdiction derived from common law.

In support of this proposition, we were referred to Erskine May, who describes this power as follows:

> "The power to punish for contempt has been judicially considered to be inherent in each House of Parliament not as a necessary incident of the authority and function of a legislature (as might be argued in respect of certain privileges) but by virtue of their descent from the undivided High Court of Parliament and in right of the *lex et consuetude parliamenti*. In this, the position of the United Kingdom Parliament differs from that of independent Commonwealth or colonial legislatures."

See *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* 21 ed at p 69-70.

Counsel for the applicant also cited a number of cases in support of this proposition. In particular he cited the case of *Kielley v Carson* [1842] 13 ER 255 wherein their Lordships had this to say at p 253:

> "Their Lordships see no reason to think that in the principle of the common law, any other powers are given (colonial legislatures) than such as are necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute. These powers are granted by the very act of its establishment … In conformity to this principle we feel no doubt that such an assembly has the right of protecting itself from all impediments to the due course of its proceedings To the full extent of every measure which it may be really necessary to adopt, to secure the free exercise of their legislative functions, they are justified in acting by the principle of common law. But the power of punishing anyone for past misconduct as a contempt of its authority, and adjudicating upon the fact of such contempt, and the measure of punishment as a judicial body, irresponsible to the party accused, whatever the real facts may be, is of a very different character, and by no means essentially necessary for the exercise of its functions by a local legislature, whether representative or not. All these functions may be well performed without this extraordinary power, and with the aid of the ordinary tribunals to investigate and punish contemptuous insult and interruptions …
>
> It is said, however, that this power belongs to the House of Commons in England; and this, it is contended, affords an authority for holding that it belongs as a legal

incident, by the common law, to an assembly with analogous functions. But the reason why the House of Commons has this power, is not because it is a representative body with legislative functions, but by virtue of ancient usage and prescription; the *lex et consuetude parlimenti*, which forms part of the common law of the land, and according to which the High Court of Parliament, before its division and the Houses of Lords and Commons since, are invested with many peculiar privileges, that of punishing for contempt being one."

Reliance was also placed on the Canadian Supreme Court case of *Landers v Woodworth* (1878) 2 SCR 158 (SC) wherein Ritchie said:-

"I think a series of authorities, binding on this court, clearly establish that the House of Assembly of Nova Scotia has no power to punish for any offence not an immediate obstruction to the due course of its proceedings and the proper exercise of its functions, such power not being an essential attribute, nor essentially necessary, for the exercise of its functions by a local legislature, and not belonging to it as a necessary to legal incident …"

I accept the above cases are authority for the proposition that the United Kingdom Parliament derives its jurisdiction to punish past contempts of Parliament from its unique historical position of having been at one time the High Court of Parliament of the United Kingdom. That jurisdiction is clearly derived from common law.

I do not accept, however, that these cases are authority for the proposition that Parliaments in jurisdictions other than the United Kingdom cannot have punitive jurisdiction conferred on them by their own Constitutions and/or domestic legislation. I have no doubt that Parliaments other than the United Kingdom Parliament can derive power to punish past misconduct such as contempt of Parliament conferred on them by

the Constitutions or domestic statutes of their own countries. The issue therefore is whether the Constitution of Zimbabwe and/or Zimbabwean legislation confers such power on the Zimbabwean Parliament.

In fact, I did not understand the applicant to argue that the Constitutions and domestic statutes of a country cannot, as a matter of law, confer on a Parliament punitive jurisdiction for contempt of Parliament. Indeed the applicant's submission on the relevance of the authorities he cited is set out in paragraph 96 of the Heads of Argument wherein it is submitted:-

> "For present purposes, the importance of this line of authority lies, not in what is said about the inherent powers of representative legislatures, but in the basis upon which it does so. An elected legislature has to have protective powers to defend itself against disruption and obstruction of its proceedings. But punitive powers are not necessary for the proper performance of its functions. This is why Chapter V111 of the Constitution can best be reconciled with sections 49 and 13(2)(b) by recognizing that a protective parliamentary contempt jurisdiction is consistent with the constitutional separation of powers but a punitive parliamentary jurisdiction is not. See *Speaker of the National Assembly v De Lille* 1999 (4) SA 863 (SCA) at para 17."

The applicant's argument in this regard therefore seems to be that the court should give effect to the doctrine of separation of powers and deny the Zimbabwean Parliament punitive power in order to reconcile Chapter VIII of the Constitution which vests judicial authority in the courts and sections 49 and 13(2)(b) of the Constitution which vests some judicial authority in Parliament.

I am not persuaded by this argument for the simple reason that I see no conflict in between Chapter VIII of the Constitution and sections 49 and 13(2)(b) of the Constitution. Section 79 clearly vests judicial power in the courts. Sections 49 and 13(2)(b) clearly vests some very limited judicial power in Parliament. In a way one could say sections 49 and 13(2)(b) vests concurrent judicial power on Parliament in respect of contempt of Parliament. This clearly was the intention of Parliament when it enacted the Constitutional provisions in question.

I accept that the Constitution provides for the doctrine of separation of powers. I do not accept, however, that that doctrine should be used as a basis for overriding the explicit language of s 49 and s 13(2)(b) of the Constitution. I find support for this approach in the case of *The Queen v Richards Ex parte Fitzpatrick and Browne,* Commonwealth Law Reports Vol. 92 - 54 – 55 p 157. In that case the Australian High Court was seized with the issue of the meaning that should be ascribed to s 49 of the Australian Constitution. An argument almost identical to applicant's counsel in this case was proffered to the Australian High Court. DIXON CJ dismissed that argument in the following terms:-

> "Then it was argued that this is a constitution which adopts the theory of the separation of powers and places the judicial power theory of the separation of powers and places the judicial power exclusively in the judicature as established under the Constitution, the executive power in the executive, and restricts the legislature to legislative powers. It is said that the power exercised by resolving upon the imprisonment of two men and issuing a warrant to carry it into effect belonged to the judicial power and ought therefore not to be conceded under the words of s 49 to either House of the Parliament. It is correct that the Constitution

> is based in its structure upon the separation of powers. It is true that the judicial power of the Commonwealth is reposed exclusively in the courts contemplated by Chap III. It is further correct that it is a general principle of construction that the legislative powers should not be interpreted as allowing of the creation of judicial powers of authorities in any body except the courts which are described by Chap III ties in any body except the courts which are described by Chap III of the Constitution. Accordingly, it is argued that a strong presumption exists against construing s 49 in a sense which would enable the particular power we have before us to be exercised by the Senate or the House of Representatives. It was pointed out that in the case of the Inter-State Commission s 101 had received a construction which made it impossible to invest the Inter-State Commission with the character of a court and confide to it judicial functions, because it was not a body which fell within Chap. III. That was relied upon as an instance or example of the kind of construction or interpretation which we were urged to adopt in the case of s 49.
>
> The consideration we have already mentioned is of necessity an answer to this contention, namely, that in unequivocal terms the powers of the House of Commons have been bestowed upon the House of Representatives. It should be added to that very simple statement that throughout the course of English history there has been a tendency to regard those powers as not strictly judicial but as belonging to the legislature, rather as something essential or, at any rate, proper for its protection. This is not the occasion to discuss the historical grounds upon which these powers and privileges attached to the House of Commons. It is sufficient to say that they were regarded by many authorities as proper incidents of the legislative function, notwithstanding the fact that considered more theoretically – perhaps one might even say, scientifically – they belong to the judicial sphere. <u>But our decision is based upon the ground that a general view of the Constitution and the separation of powers is not a sufficient reason for giving to these words, which appear to us to be so clear, a restrictive or secondary meaning which they do not properly bear</u>." (underlining is mine)

Richards case, *supra,* is clear authority for the proposition that the language of the statute is the critical consideration in determining whether Parliament has punitive jurisdiction or not.

The issue in this case therefore is what meaning is to be ascribed to s 49 and s 13(2)(b) of the Constitution. Do these sections confer on the Parliament of

Zimbabwe power to make laws that provide for the punishment of past misconduct such as contempt of Parliament.

Section 49 of the Constitution provides as follows:-

> "**49 Privileges of Parliament and members and officers thereof**
>
> Subject to the provisions of this Constitution, an Act of Parliament may make provision to determine and regulate the privileges, immunities and powers of Parliament and the members and officers thereof, including the Speaker, and to provide penalties for a person who sits or votes in Parliament knowing or having reasonable grounds for knowing that he is not entitled to do so."

Section 13(1),(2)(a) and (b) of the Constitution provides as follows:-

> "**13 Protection of right to personal liberty**
>
> (1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the cases specified in subsection (2).
>
> (2) The cases referred to in subsection (1) are where a person is deprived of his personal liberty as may be authorized by law –
>
> (a) in consequence of his unfitness to plead to a criminal charge or in execution of the sentence or order of a court, whether in Zimbabwe or elsewhere, in respect of a criminal offence of which he has been convicted;
>
> (b) in execution of the order of a court punishing him for contempt of that court or another court or tribunal or in execution of the order of Parliament punishing him for a contempt;".

Section 49 of the Constitution is an enabling provision. It gives power to Parliament to make laws that determine and regulate the privileges, immunities and

powers of Parliament. This power is conferred on Parliament in the first segment of s 49 up to the word “Speaker”. I see nothing in the wording of that first segment of s 49 that limits the power of Parliament to provide for a punishment. The power to make laws and regulations includes the power to provide for punishment in the laws and regulations.

There is nothing in the language of s 49 that prohibits Parliament either expressly or by implication from making a law providing for punitive punishment for contempt of Parliament. If there is any doubt lingering in this regard it is put to rest by the explicit language of s 13(2)(b). Section 13(1) of the Constitution guarantees the individual’s right to liberty. Section 13(2)(b) is derogation of that right. It provides for the deprivation of liberty in execution of an order of Parliament punishing a person for contempt of Parliament. There is nothing equivocal in s 13(2)(b). It explicitly states that Parliament can issue an order for imprisonment as punishment for contempt of Parliament which is precisely what was done in this case.

There is nothing in the language of s 13 which suggests that the punishment referred in s 13(2)(b) of the Constitution is preventive and not punitive. If anything, the context points in the opposite direction. The section authorises the derogation on the right to liberty in execution of an order of a court punishing a person for contempt of that court or tribunal. There is no doubt that the punishment referred to in respect of the court or tribunal is punitive and relates to past conduct which constitutes contempt.

The same language is used in respect of the contempt of Parliament. On what possible basis can it be said that the word "punishment" in respect of contempt of court or tribunal means one thing while the word "punishment" in respect of contempt of Parliament means another thing, namely punitive, in respect of the Court and preventive in respect of Parliament.

I do not see any conflict between Chapter VIII and sections 49 and 13(2)(b) of the Constitution that requires conciliation by resorting to the doctrine of separation of powers as contended for by the applicant.

Sections 49 and 13(2)(b) clearly authorise Parliament to make laws that provide for the punishment of past acts of contempt of Parliament and s 16 of the Act is a law authorised by s 49 and 13(2)(b) of the Constitution. On this basis the fourth ground of challenge cannot succeed.

There is the further point of law which is very relevant to this case but was not raised on the papers or in argument. I simply raise it but it is not the basis of any conclusion I have reached in this case.

Section 3 of the Act provides as follows:

"3. **Privileges, immunities and powers generally**

Parliament and members and officers of Parliament shall hold, exercise and enjoy –

(a) the privileges, immunities and powers conferred upon Parliament respectively, by this Act or any other law; and

(b) all such other privileges, immunities and powers, not inconsistent with the privileges, immunities and powers referred to in paragraph (a), as were applicable in the case of the House of Commons of the Parliament of the United Kingdom, its members and officers, respectively, on the 18th April 1980."

The constitutionality of s 3 has not been challenged. In the case of *Richards, supra*, the Australian High Court considered the meaning of s 49 of the Australian Constitution which provides:

> "The powers, privileges and immunities of the Senate and the House of Representatives and of Members and the Committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom and its members and Committees, at the establishment of the Commonwealth."

The Australian High Court concluded that the above s 49 of the Australian Constitution transferred to the Australian Parliament identical powers enjoyed by the United Kingdom Parliament on a particular date. There is a striking resemblance between the two provisions.

Similarly I have no hesitation in concluding that as of 18 April 1980 the privileges, immunities and powers of the Parliament of the United Kingdom including the

punitive power to punish for contempt were conferred on the Zimbabwean Parliament by s 3 of the Act.

As I have already stated s 3 of the Act has not been impugned and remains operative until successfully impunged. In the result and for the foregoing reasons s 3 conferred on the Zimbabwean Parliament identical powers enjoyed by the United Kingdom Parliament, which include punitive powers for contempt of Parliament.

In the result the application fails on all the four grounds raised and is, accordingly dismissed. As has become the practice of this Court in these matters there will be no order as to costs.

CHEDA, JA: I agree.

MALABA JA: I agree.

GWAUNZA JA: I agree.

SANDURA JA: I have read the judgment prepared by CHIDYAUSKU CJ, but respectfully disagree with it. Although a number of issues were argued by counsel, this application may be disposed of on the basis of a determination of the main issue, which was whether the sentence imposed on Bennett contravened s 15(1) of the Constitution.

In my view, there can be no doubt that the sentence was grossly disproportionate to the seriousness of the offence committed by Bennett and was, therefore, unconstitutional in terms of s 15(1) of the Constitution.

In order to facilitate an appreciation of the disproportionality of the sentence I shall set out the relevant background facts in the matter. They are found in paragraphs 4,5,6 and 7 of Bennett's founding affidavit, and were not seriously challenged by the respondents. Because of the relevance of the background facts in the assessment of the appropriate sentence I shall set out paragraphs, 4,5,6 and 7 *in extenso.* They read as follows:

> "4.1 I was elected as a Member of Parliament for the Chimanimani Constituency during the general elections of 2000. I have therefore been in Parliament since that time and from the time that I entered Parliament, I have had to endure the kind of torment and abuse from members of the ruling party that I believed was impossible before I entered Parliament. As a Member of Parliament belonging to the opposition Movement for Democratic Change, I am able to say that there exists incredible acrimony between the ruling party and members of the opposition and this has been particularly heightened against me as I represent a rural constituency where the ruling party is deemed to be generally strong and as a white

Member of Parliament coming from a rural constituency, I have generally been treated with disdain and outright animosity by members of the ruling party.

4.2. Despite being a Member of Parliament, and despite being a representative of my constituency, I have been treated as though I have no right to live in this country and all my attempts to assert these rights have been met with abuse, intimidation, threats and infractions of the law that one can only imagine.

4.3 I am a commercial farmer that operated Charleswood Estate which farm has been targeted for compulsory acquisition for quite some time and has been taken over before the process of lawful acquisition has been exhausted in the courts where the matter remains pending. Senior members of the ruling party have stated over and over again that I should not be allowed to remain on the farm and I confirm that even before incarceration, I had been forced out of the farm through various unlawful acts.

4.4 The police, army and Central Intelligence Officers have invaded my farm illegally on numerous occasions and some of them still unlawfully remain on the farm to date. During such illegal invasions these State agents have committed numerous crimes on the farm against my employees and myself and property has also been looted to an extent where my own personal clothes and effects have been stolen.

4.5 Many of these incidents have been reported to the police but regrettably as the local police are part and parcel of these illegalities, I have had no joy at all in having my rights protected by the law. Some of my employees who have been beaten up, tortured and generally harassed have also not received any joy at all as and when they have reported these abuses to the local police.

4.6 In addition, these operatives and government agents have also unlawfully removed farm equipment from the farm and some of my livestock on the farm has been killed, sold or rebranded or subjected to other forms of cruelty by these government agents. Some of the produce such as the coffee that I had grown at the farm has since been sold through the

government owned Arda despite the fact that this had been presold to overseas buyers who have since instituted proceedings against me for non-delivery.

4.7 To demonstrate the seriousness of these incidents which have caused me immense pain, suffering, heartache and a sense of powerlessness have been the extra judicial execution of two of my employees being Stephen Tonera who was executed in May 2003 and Shanie Manyenyeka who was executed in February 2004. Stephen Tonera was beaten to death by an operative from the President's Office while Manyenyeka was shot to death at point blank range in cold blood by a member of the defence forces at the farm. The two perpetrators of these heinous extra judicial executions are well known but regrettably, the police have not even arrested one of them.

4.8 In an endeavour to assert my rights and to stop these unlawful activities, I have approached the High Court on a number of occasions and obtained court orders but such court orders have been wantonly ignored and defied by the State and I give the following examples:

a) On 25th February 2004 the High Court granted me a Provisional Order which gave my company leave to remain and carry on business on Charleswood Estate and that all State functionaries and operatives were interdicted from interfering in any way with the farming and business operations at Charleswood Estate and that all those State agents and functionaries who were unlawfully occupying the farm at the instance of the State were to vacate the farm immediately. Although this order was served on the State, the concerned State operatives have completely disregarded it.

b) On the 18th November 2003 the Magistrates Court at Mutare issued a Provisional Order against the functionaries of the State led by Sergeant Nasho and the Agricultural Rural Development Authority interdicting them from setting foot or entering Charleswood Estate, from harassing or assaulting the employees at Charleswood Estate, and directing that those State functionaries who were in occupation of the farm vacate it forthwith and again this order has been defied and ignored by the State.

c) On 8 April 2003, the High Court once again granted an order by consent which provided that the State and its functionaries be interdicted from threatening, abusing, intimidating, harassing, assaulting or communicating with myself or other directors that operate Charleswood Estate, its employees and their family members and that the directors, their families and all employees were restored to their homes on the farm and again this order has been ignored.

d) In May 2002, the High Court at Harare issued an order that barred the State from acquiring Charleswood Estate but needless to say, this has continued to be ignored and to be defied by the State.

5. On the 9th April 2004 at approximately 0400 hours, members of the Zimbabwe National Army, the Zimbabwe Republic Police and the Support Unit once again invaded and surrounded Charleswood Estate despite the many court orders I have already referred to. The invading forces were under the leadership of one Dzapasi who was accompanied by a Major Zimbango of the Army and an Inspector Manyama of the police. The officers alleged that they were acting on instructions of the Provincial Governor of Manicaland, Retired Major General Michael Nyambuya and His Excellency the State President Robert G Mugabe and that these were the only two people from whom they would accept instructions to stop their activities. The army of invaders thereafter forcibly took possession of the keys to the properties on the farm including keys to my house and vehicles and helped themselves to such consumables as fuel that was being used for faming operations on the farm. After assembling the workers, the invaders demanded that those who wanted to continue working for me had to pack their bags and leave the farm immediately after which they recorded the identity details of the workers before ordering the farm management consisting of six people who were requested to vacate the farm forever. These six together with other farm workers who have subsequently been kicked out of the farm are now living as internally displaced persons. In effect, the army, police and the CIO were able to evict persons without recourse to the law and such persons have now been reduced to being refugees in their own country. What this has done of course is to stop the farming operations on Charleswood Estate as the members of management who were able to oversee the farming operations have been unlawfully evicted from the farm as I had been before them.

6. As a direct result of the said harassment, my family was effectively unlawfully evicted from our home despite the courts having asserted our rights over and over again. Following this unlawful eviction, I thereafter leased a farm in Ruwa and regrettably the same ruling party supporters, CIO members, army personnel and the police continued with the harassment whereby my rented home was raided on a regular basis with farming operations being disrupted to a point where it was pointless to continue. My landlord was also equally harassed for leasing the farm to me and I was once again forced to seek refuge elsewhere.

6.1 As it became apparent that I would not be able to farm at all in Zimbabwe, I resigned myself to a life where I have to consider starting a new profession altogether as I cannot farm even on leased premises as is clear from the incident on the Ruwa farm. Neither can I be employed as a farm manager as all landowners or lessors are aware that if I am seen on their land, they risk losing it through the various methods that were used to dispossess me of my farms and the farm I leased in Ruwa. It was with this background that the events that caused my being imprisoned occurred where I found myself in middle age, with a family to support but with no means of livelihood as farming had been my only means of livelihood. The fact that I have had to try and find a means of livelihood when I have been dispossessed of all my assets including equipment, livestock, produce with virtually nothing as I could not even raise capital by selling the movable assets has put me under severe stress particularly as the law has failed to protect me despite orders having been granted in my favour.

7. On the 18th May 2004 I was at Parliament when debate ensued on the Stock Theft Amendment Bill. During the debate I made a contribution chronicling the experiences that I have had particularly with the theft of livestock by known persons who have not been arrested and queried the rationale of making very tight stock theft laws when in fact these laws were not being implemented by the police as they have allowed stock thieves to go scot-free after stealing my livestock.

7.1 Instead of dealing with my contributions to the debate, the Honourable Patrick Chinamasa instead launched into a tirade of abuse towards me and my forefathers alleging that we were the thieves. He then went on to assure the nation and myself that notwithstanding the existence of court orders in my favour he would ensure that I never set foot on Charleswood Estate again. I was absolutely amazed at such threats coming as they did from the Minister responsible for Justice in the country who ought to be in

> the forefront in ensuring that the justice system works for the benefit of all Zimbabweans. As Minister of Justice, I expected the Honourable Chinamasa to commiserate with me and to reassure me that as Minister of Justice, he would do everything to ensure that the court orders were obeyed and that I was given the protection that every citizen is entitled to. Although I do not remember precisely what happened and only really saw the events that followed thereafter from the video clip that I later viewed, I believe that Honourable Chinamasa's words emphasizing the hopelessness of my position must have so blinded me that I reacted as I did under what was clear extreme provocation in circumstances where I had been under stress for quite some time."

As already stated, the above averments were not seriously challenged by the respondents. That is clear from the opposing affidavit deposed to by the first respondent with the authority of the second, third and fourth respondents.

Paragraphs 6 to 10 of the opposing affidavit deal with the averments made by Bennett in paragraphs 4,5,6 and 7 of his founding affidavit already set out in this judgment, and read as follows:

> "6. Ad paras 4.,4.1,4.2,4.3,4.4,4.5,4.6 and 4.7 of the Affidavit of Roy Leslie Bennett
>
> Save to say that the applicant was a white farmer and a white Member of Parliament representing Chimanimani, I have no knowledge of the rest of the allegations, I do not admit the same and I put the applicant to the proof thereof.
>
> 7. Ad paras 4.8(a),(b),(c) and (d) of the Affidavit of Roy Leslie Bennett

I have no knowledge of these allegations, I do not admit the same and I put the applicant to the proof thereof.

8. Ad paras 5,6 & 6.1 of the Affidavit of Roy Leslie Bennett

I have no knowledge of these allegations, I do not admit the same and I put the applicant to the proof thereof.

9. Ad para 7 of the Affidavit of Roy Leslie Bennett

These allegations call for no comment.

10. Ad para 7.1 of the Affidavit of Roy Leslie Bennett

(a) I deny that Hon. Chinamasa's utterances in this respect amounted to extreme provocation of applicant as such language is not unusual in the context of parliamentary debate.

(b) In any event, even if applicant had felt provoked by Hon. Chinamasa's utterances, he, as an honourable member, should have utilized the procedures and rules of Parliament that are available to any member who might feel that another member's contribution amounts to abuse.

(c) Further, given the apparently purposeful approach of applicant in this incident, I find it difficult to believe his assertion that he cannot remember carrying out the assault of Hon. Chinamasa."

In my view the opposing affidavit does not seriously challenge the averments made by Bennett. In spite of the fact that Bennett mentioned the names of various government officials who allegedly perpetrated numerous illegal acts on his farm, no affidavits from the officials in question were filed denying the very serious allegations made by Bennett.

In the circumstances, the sentence imposed on Bennett has to be examined on the basis that the allegations made by him in paragraphs 4,5,6 and 7 of his founding affidavit are true.

In addition, it has to be borne in mind that the offence committed by Bennett was essentially a common assault. Bennett pushed Chinamasa who, as a result, lost his balance and fell.

The principles to be applied in determining whether a sentence contravenes s 15(1) of the Constitution were set out by this Court in *S v Ncube; S v Tshuma; S v Ndhlovu* 1988 (2) SA 702 (ZSC) at 715G-I, where GUBBAY JA (as he then was) said:

> "But s 15(1) is not confined to punishments which are in their nature inhuman or degrading. It also extends to punishments which are 'grossly disproportionate'; those which are inhuman or degrading in their disproportionality to the seriousness of the offence, in that no one could possibly have thought that the particular offence would have attracted such a penalty – the punishment being so excessive as to shock or outrage contemporary standards of decency."

Applying those principles to the facts of the present case there can be no doubt that the sentence of 15 months' imprisonment with labour of which 3 months' imprisonment with labour was conditionally suspended, is grossly disproportionate to the seriousness of the offence committed by Bennett.

In my view, no one could possibly have thought that the offence committed by Bennett, which was essentially a common assault, deserved a term of imprisonment. Any term of imprisonment imposed for such an offence would be a sentence which is "so excessive as to shock or outrage contemporary standards of decency."

It must be remembered that the sentence of imprisonment is a rigorous and severe form of punishment which should be resorted to only when it is absolutely necessary to do so. As REYNOLDS J said in *S v Ngombe* HH-504-87 (unreported) at p 2 of the cyclostyled judgment:

> "It has been repeatedly stressed that a sentence of imprisonment is a rigorous and severe form of punishment, often bearing drastic and destructive consequences for the accused and the members of his immediate family. This form of penalty should be resorted to only if absolutely essential in the circumstances of the case, and only if no other available form of punishment would be preferable and appropriate."

In the present case Parliament, by imposing an effective prison sentence, when other forms of punishment would have been preferable and appropriate, failed to guard against an excessive devotion to the cause of deterrence. In that regard it erred.

As GUBBAY JA (as he then was) said in *S v Gorogodo* 1988 (2) ZLR 378 (SC) at 382H – 383A:

> "What is to be guarded against is such an excessive devotion to the cause of deterrence as may so obscure other relevant considerations as to lead to a punishment which is disparate to the offender's deserts. I cannot conceive of any principle which can justify, for the sake of deterrence and public indignation, the imposition of a sentence grossly in excess of what, having regard to the crime and to the degree of the offender's moral reprehensibility, would be a fair and just punishment."

In addition, in assessing the appropriate sentence Parliament must have overlooked or ignored what Bennett had experienced on the farm as already set out in this judgment, and the fact that on the day in question Bennett acted in the heat of the moment and in response to severe provocation, factors which greatly reduced Bennett's moral blameworthiness. Had Parliament taken these factors into account and accorded them due weight it would have appreciated that any effective prison sentence imposed on Bennett would be grossly disproportionate to the offence committed by him.

In the circumstances, it was not surprising that in the heads of argument filed on behalf of the Attorney-General the concession was made that the sentence imposed on Bennett was grossly disproportionate to the offence committed by him. The relevant paragraph of the heads of argument reads as follows:

> "It is submitted that although Parliament is entitled to commit its members for contempt, the sentence it pronounced herein is disproportionate to the offence committed, considering it was committed in the heat of the moment. See also *S v Musa* 1997 (2) ZLR 149 (HC) where the court held that committal for 60 days for contempt of court was retributive and not acceptable."

In addition to that concession, it was conceded in the heads of argument filed on behalf of the Attorney-General that when Parliament imposed the prison sentence on Bennett it had voted on party political lines to impose that sentence. The relevant part of the heads of argument reads as follows:

> "Parliament was supposed to exercise its jurisdiction to deal with contempt in a manner that is not inconsistent with or offensive to the Declaration of Rights. It is submitted that the Speaker of Parliament should have made it clear to Parliament in general that they were sitting as a court of record and were supposed to decide the matter taking into consideration (the) Applicant's rights, and that they should put politics aside and objectively look into the matter. This was not done and clearly Parliament voted along party lines… The only injustice, if any, that occurred was when the question of sentence was raised … The proceedings of the first to (the) sixth respondent(s) should be declared null in as far as sentence only is concerned."

In view of the above concessions made on behalf of the Attorney-General, at the commencement of the hearing of this application Mr *Gauntlett*, who appeared for Bennett, submitted that it was no longer necessary for this Court to determine all the other constitutional issues, raised by Bennett, and that this Court should simply declare that the sentence imposed on Bennett contravened s 15(1) of the Constitution, and order that Bennett be released from prison.

Mr *Chihambakwe*, who appeared for the first, second, third and fourth respondents disagreed and submitted that the sentence imposed on Bennett was fair.

Mrs *Gatsi*, who appeared for the Attorney-General, informed the Court that she was abiding by the heads of argument she had filed on behalf of the Attorney-General. As already stated, it was conceded in those heads of argument that the sentence imposed on Bennett contravened s 15(1) of the Constitution.

The Court then adjourned in order to consider the submissions made by counsel. Regrettably, the decision of the majority of the members of this Court was that the Court should hear argument on all the constitutional issues raised by Bennett.

The hearing of the application was then resumed in the afternoon. After Mr *Gauntlett* and Mr *de Bourbon* had made full submissions on behalf of Bennett, Mrs *Gatsi* informed the Court that she was withdrawing the concessions she had made in the heads of argument she had filed on behalf of the Attorney-General. She stated that she had been instructed to do so by the Director of the Civil Division of the Attorney-General's Office ("the Director"), who had previously authorised her to make the concessions. No reason whatsoever was given for the Director's instruction. In the circumstances no valid reason was given to justify the withdrawal of the concessions.

In my view, and without determining whether a concession made by a legal practitioner in his/her heads of argument may be withdrawn, the failure by Mrs *Gatsi* to advance any valid reason for the withdrawal of the concessions must inevitably

lead to the conclusion that no valid reason justifying the withdrawal of the concessions existed. That conclusion greatly strengthens the submission made by Mr *Gauntlett* that the sentence imposed on Bennett contravened s 15(1) of the Constitution.

In the circumstances, I would have granted the application on the basis that the sentence imposed on Bennett contravened s 15(1) of the Constitution, and ordered that Bennett be released from prison on the day the application was heard, without hearing submissions on the other constitutional issues raised by him.

Kantor & Immerman, appellant's legal practitioners

Chihambakwe. Mutizwa & Partners, first, second, third and fourth respondents' legal practitioners

Coghlan Welsh & Guest, fifth respondent's legal practitioners

Honey & Blanckenberg, sixth respondent's legal practitioners

Civil Division of the Attorney General's Office, (intervener)seventh respondent's legal practitioners