IN THE MAGISTRATES' COURT CASE NO.CRB: 9156/06 & 9146-57/06
FOR THE PROVINCE OF
MASHONALAND
HELD AT HARARE

In the matter of:-

THE STATE

Vs.

WELLINGTON CHIBEBE & 30 OTHERS
(See Annexure A) ACCUSED

APPLICATION FOR REFERRAL OF MATTER TO THE SUPREME COURT

A. **PRELIMINARY**

1. This is an application for a referral of the matter to the Supreme Court in terms of section 24(2) of the Constitution of Zimbabwe.

2. It is submitted that the accused have not committed any offence and their arrest and subsequent detention in Police custody was unlawful.

3. Further, the Accuseds' fundamental rights provided for in the Bill of Rights in the Constitution of Zimbabwe, the universal Declaration of Human Rights, the international Covenant on Civil and Political Rights and the African Charter on Human and people's rights have been violated.

4. In particular we submit that Accused persons' rights in terms of

   Sections 13(1)(2)(e) of the Constitution of Zimbabwe
   &

   Sections 18 (1) of the Constitution of Zimbabwe have been breached.

5. We request that these questions be referred to the Supreme Court for determination in terms of Section 24(2) of the Constitution.

6. Applications of this nature are now well-known see for example

(a) **MARTIN VS. ATTORNEY GENERAL AND ANOTHER** 1993 (1) ZLR 153(S).

(b) **ATTORNEY GENERAL VS. BLUMEARS AND ANOR** 1991 (1) ZLR 118(S).

(c) **BULL VS. ATTORNEY GENERAL AND ANOR** 1987 (1) ZLR 36(S).

(d) **IN RE MLAMBO** 1991 (2) ZLR 339 (S).

7. The authorities are clear that the arrest or placement on remand even out of custody is a restriction on the right to liberty.

8. four main submissions are made;

8.1 The Law under which Accused were arrested and charged is unlawful. The Act is the Criminal Law (Codification & Reform) Act (Chapter 9:23). (The Act)

Alternatively

8.1(a) Section 3 of the Criminal Law (Codification and Reform) Act (chapter 9:23) is unlawful.

8.2 Even if the Act was lawful the section under which the Accused were charged is unlawful.

8.3 It is also submitted that the facts upon which the State sought to have Accused placed on remand do not give rise to a reasonable suspicion that they committed the offence.

8.4 Further Accused's other rights as protected by the Constitution were also violated.

B. **DETAILED SUBMISSIONS**

1ST SUBMISSION

9. The Act in terms of section 3 says Roman-Dutch law no longer to apply. Section 3 provides that "Roman-Dutch criminal law no longer to apply

- "The non-statutory Roman-Dutch criminal law in force in the Colony of the Cape of Good Hope on the 10th June, 1891, as subsequently modified in Zimbabwe, shall no longer apply within Zimbabwe to

the extent that this Code expressly or impliedly enacts, re-enacts, amends, modifies or repeals that law.

- Subsection (1) shall not prevent a court, when interpreting any provision of this Code, from obtaining guidance from judicial decisions and legal writings on relevant aspects of:-

    a) The criminal law referred to in subsection (1); or
    b) The criminal law that is or was in force in any country other than Zimbabwe"

9.1. If one is a doubt that section 3 of the Act expressly repeals Roman-Dutch Criminal Law refer to section 284(1) of the Act which says:

- *"subject to subsection (2), the repeal of the Roman Dutch Criminal Law by section three shall not ……"*

10. Further section 89 of the Constitution as amended by Section 13 of the second amendment of the Constitution (Act 25 of 1981) specifies that, the common law of Zimbabwe shall be Roman-Dutch Law.

10.1 Section 89 stipulates the laws to be administered by the Supreme Court and the High Court shall be Roman Dutch Law as modified by subsequent legislation. Section 89 provides as follows:-

- **'Law to be administered**

  Subject to the provisions of any law for the time being in force in Zimbabwe relating to the application of African customary law, the law to be administered by the Supreme Court, the High Court and by any courts in Zimbabwe subordinate to the High Court shall be the law in force in the Colony of the Cape of Good Hope on 10th June, 1891 as modified by subsequent legislation having in Zimbabwe the force of law.'

11. It is submitted that in order to lawfully codify criminal law the legislature needed to amend the constitution and in particular to amend section 89 thereof.

12. The purpose or objective underlying the amendment was to replace the existing common-law based system recognized by the Constitution with a codified system of criminal law.

13. Section 89 only allowed Parliament to 'modify' and not to re-enact or repeal existing Roman-Dutch Law.

14. Introducing a criminal code was not just a modification of the Roman-Dutch Criminal Law and the legislature needed to amend Section 89 of the Constitution before codifying criminal law. Its failure to do so rendered the codification process invalid.

15. Section 3 of the Constitution provides that the Constitution shall be the Supreme Law of Zimbabwe and the codification thus falls foul of Section 3.

16. The Republic of Zimbabwe is a constitutional democracy. The republic is predicated on the doctrine of Constitutional Supremacy. Section 3 of the Constitution reads as follows:

    - "*This constitution is the Supreme Law of Zimbabwe and if any other law is inconsistent with this constitution that other law* ***shall*** *to the extent of the inconsistency,* ***be void.***"

17. One does not need Solomonic Wisdom to read and *properly* apply this provision. It means what it literally means. Even in constitutional construction one does not depart from the literal meaning of the words used by the framers of the Constitution unless the same are vague or a literal reading thereof will culminate in an absurdity so glaring that it was never intended by the framers of the Constitution.

18. The clear thing about section 3 of the Constitution is that it is clear. It requires no interpretation. It means what it literally means, *id est*. The constitution is the yardstick by which the validity of any other law is measured. If that other law or conduct[1] predicated thereon is inconsistent therewith, it is void *ab initio* and not from the day of declaration of nullity. The declaration of nullity where it is necessary to have it, is with retrospective effect. To adopt any other approach is to render the unequivocal "shall" as "may" and "void" as "voidable."

19. In *Mugwebie v Seed Co Ltd*[2] Sandura JA remarked, albeit in a different but pertinent context, that[3]-

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1 It is submitted that "conduct" includes the conduct of Parliament in re-enacting the roman-Dutch common law.

2 2000 (1) ZLR 97

3 at 97C.

- *"As the appellant's suspension was a nullity, there was really no need for a court order to set it aside, though it was convenient to have the court declare it null and void so that the parties knew their respective positions."*

20. Earlier on, the learned Judge of Appeal had quoted with approval the often cited dictum of Lord Denning in *Macfoy v United Africa Co Ltd*[4]*:*

- *"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, although it is sometimes convenient to have the court declare it to be so. And every proceeding, which is founded on it, is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."*[5]

21. Section 3 of the Supreme law of Zimbabwe is thus clear. If the impugned Act of Parliament is unconstitutional, it unconstitutional *ab initio*. It is not the law.

22. To modify is not to completely do away with.

23. Webster's **New International Dictionary of the English Language**, 2nd edition defines "modify" or "modification" as connoting the power to limit something, to reduce it in extent or degree or to limit or restrict its meaning i.e. in general a diminution of something.

23.1 The code certainly does not limit or reduce our criminal law.

23.2 Instead, it seeks to introduce a whole range of new crimes and hence does not modify the Roman-Dutch Law of the Cape within that ordinary or primary meaning of modifying.

24. A power to modify does not include a power to extinguish anything.

See Lord Justice Lindlay's remarks in **Mechanic Investment & General Trade Company vs. International Company of Mexico** (1891) TLR 616.

25. The word "modify" or "modification" in statutory interpretation means "any alteration which does not change the essential nature or character of a repealed provision, despite the fact that the word can have the more

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4 [1961] 3 ALL ER 1169 (PC) at 1121I.

5 See also *Mugumbate v Dorowa Mine, Master of the High Court v Turnert*

limited meaning which does not include an extension or enlargement of the scope of the law." **Per C. J Claassen, Dictionary of Legal words and Phrases, Volume 2, Butherwoths 1976**.

26. If judicial authority be required see **D v Minster of the Interior 1960 (4) SA 909; D v Minister of the Interior 1962 (1) SA 659 and in our jurisdiction see Nkomo v Minister of Justice 1965 (1) SA 498 (R) and on appeal 1966 (1) SA 357 (RA).**

27. All authorities are clear that a power to modify does not include a power to do any more than make partial changes. See Butterworths **Words and Phrases Legally Defined** 3rd edition and cases cited therein.

27.1 See also Webster op cit – '4 to change somewhat the form or qualities or to alter somewhat.

28. The code thus falls outside the type of changes to the country's basic law – the grundnorm as permitted by Section 89.

29. Willies **Principles of SA Law** 2nd edition says that the natural law of SA is founded almost entirely upon a system or law known as Roman-Dutch Law, a fact which is usually referred to by simply saying that Roman-Dutch Law is the common law of SA. On page 41 the author adds that the national law of SA, like that of all other States, is divided into two branches, the Civil Law and Criminal Law.

30. It is beyond dispute that what the code seeks to do is not to modify but to replace the legal system recognized by the Constitution for one of the two above branches, i.e. Criminal Law.

31. In enacting the code, the legislature should not have ignored the fact that it had earlier on decided to specifically protect this system by incorporating its recognition into the Constitution.

32. Accordingly, the legislature needed to amend the constitution in a manner provided for under Section 52 of the Constitution and its failure to do so *prima facie* is fatal to its attempt to codify the criminal law, i.e. to its enactment of the code only by normal legislative process.

33. It is thus submitted that the code falls out of section 3 of the Constitution and therefore Accused persons' rights to the protection of the law has been violated. (refer to Section 18(1)(2) and (5)).

Refer to section 18(1), (2) and (5) of the Constitution, Article 7 of the Universal Declaration of Human Rights, Article 3 of the African Charter on Human and Peoples' Rights and Article 14 of the International Covenant on Civil and Political Rights. The International Instruments referred to have been deseeded to and ratified by Zimbabwe.

See also - **CLAUDIUS MARIMO AND ANOTHER VS MINISTER OF JUSTICE LEGAL AND PARLIAMENTARY AFFAIRS AND OTHERS** SC 25/06.

C. **S37 (1) (b) OF THE CODE UNLAWFUL**

34. It is also submitted that the section under which the accused was charged is unlawful.

S 37 (1) (b) provides as follows –

(a) Any person who acts together with one or more other persons present with him or her in any place or at any meeting with the intention or realising that there is a real risk or possibility of forcibly-

(i) disturbing the peace, security or order of the public or any section of the public; or

(ii) invading the rights of other people; or

(b) acting together with one or more other persons present with him or her in any place or at any meeting performs any action, utters any words or distributes or displays any writing, sign or other visible representation that is obscene, threatening, abusive or insulting, intending thereby to provoke a breach of the peace or realising that there is a risk or possibility that a breach of the peace may be provoked; or

(c) acting together with one or more persons present with him or her in any place or at any meeting utters any words or distributes or displays any writing, sign or other visible representation-

(i) with the intention to engender, promote or expose to hatred, contempt or ridicule any group, section or class or persons in Zimbabwe solely on account of the race, tribe,

nationality, place of origin, national or ethnic origin, colour, religion or gender of such group, section or class of persons; or

(iii) realising that there is a risk or possibility that such behaviour night have an effect referred to in subparagraph (i);

"shall be guilty of participating in a gathering with intent to promote public violence, a breach of peace or bigotry, as the case may be, and be liable to a fine not exceeding level ten or imprisonment for a period not exceeding five years or both."

35. It is submitted that the section is couched in language that is too wide so as to make it impossible for an accused to know what is the case that is being brought against him.

36. The section talks of doing actions uttering words, distributing or displaying writings, signs or representations that is obscene, threatening abusive or insulting…intending to provoke a breach of peace.

37. In a gathering it is difficult to ascertain who has done what and to simply lump persons who might have done different activities each with a possible different meaning and made with a different intention is tantamount to a fishing expedition.

38. It is therefore submitted that the section is couched too widely and is not reasonably expected in a just and democratic society.

39. Further there is no-one against whom the crime is intended to protect. In other words, the object of the provocation is not identified.

40. The person or persons to whom the offence is directed is not mentioned. Is it general members of the public? Is it the person who hears or perceives the actions? Is it any person who himself or herself may not have seen or heard the signs of the utterances? In other words whose peace is being prevented from being breached?

41. It is submitted that the breach should not be in "air" or in a vacuum. The breach must not be directed against unnamed and unidentified persons or objects. The breach must not be in general such as to make it possible for any person to claim that the breach was directed at them. Let alone to make it possible for self appointed persons to judge these breaches as against others who themselves may not be present and perceiving.

41.1 For example an utterances against the police and soldiers in general cannot be a cause of arrest because it would be impossible for every soldier and every police officer to be a complainant.

41.1(a) It is submitted that this was not the intention of the legislature.

42. More absurd will be remarks or signs directed at the President or other public officials. The police cannot suddenly start feeling angry on behalf of the President or these Public Officials.

43. It is submitted that the person whose peace is to be breached must be identified in the Act.

44. It must be possible to consider whether subjectively the identified person could have reacted adversely to the signs or utterances likely to provide the breach of peace.

45. And because the section does not identify any person whose peace might be breached as a result of the actions cited in the section, that section is unlawful to that extent.

46. Section 37 falls under crimes against Public Order. It was necessary to spell out that the breach of peace be against any member of the public a or specified person. In the absence of a specific mention of the same, it cannot be said that this is the case. The legislature ought to have put it in clearer and unambiguous terms.

D. **CIRCUMISTANCES OF ACCUSED ARREST**

47. Further it is also submitted that the circumstances cited are too wide and violate the accused persons' right to freedom of expression in violation of section 20 of the constitution.

48. It is also submitted that the Accuseds' rights to the protection of the law have been violated.

49. The facts used by the State to arrest, detain and arraign them before the court do not disclose a reasonable suspicion that the Accused had committed any offences.

50. Copies of the request for remand from 242 (in respect of accused number 1) and summary jurisdiction and outline of the case used to place the Accused persons on remand are attached hereto marked respectively A1-A3.

51. It is submitted that the form 242 and the State outline are so deficient as to be meaningless. There is no knowing who among the Accused committed what offence. It is not clear who did what.

52. It is not clear what offence was committed.

53. There were 32 people arraigned initially. It was necessary to outline what each of them did. Without that it was improper to have accused placed on remand.

54. It does not matter that subsequently the State put another outline. What is important is that at the stage of the initial remand the State must place facts which disclose a reasonable suspicion that they committed an offence as per *AG v Bluemears and others authorities (supra)*

55. It is also submitted that it is incompetent to attempt to try accused persons who ought not be before the court in the first place. If the Accused were not supposed to be placed on remand, it means they were not supposed to be remanded. If they were not supposed to be remanded they are not supposed to be in court and cannot be facing trial.

56. It is submitted that the placing of Accused on remand must be determined first to see whether it did not violate their rights as protected in terms of section 18 (1) of the Constitution.

57. If it is found that indeed Accuseds' rights in terms of section 18 (1) of the Constitution were violated, it means that any process meant to try them is simply a furtherance of the Accuseds' violation of their rights to the protection of the law see *Claudius Marimo and Another vs. Minister of Justice, legal and Parliamentary Affairs and 2 Others* S C 25/06.

58. It is also submitted that even the later charges filed of record by the State and the facts outlined still do not disclose a reasonable suspicion that the Accused committed any offences.

59. The attempt to put more facts is a realisation that the initial facts were woefully inadequate.

60. The Accused were arrested on the 13th of September 2006. None of them were advised of their charges. The Accused were only advised of the charges on the 15th of September when warned and cautioned statements were being recorded from them. A copy of the standard statements attached hereto marked "B".

61. It is clear from the statements that the arrest and detention was unlawful. Even at the first opportune time the police were unable to justify their arrest and detention of the Accused.

E. **FURTHERS VIOLATIONS OF ACCUSED FREEDOMS**

62. The Accused will also submit that the police's actions in thwarting their demonstration and the whole manner in which they were treated subsequently violated their rights as enshrined in the Constitution.

63. The Accused were arrested pursuant to a ZCTU organised demonstration. The demonstration was meant to highlight the plight of workers. The ZCTU's concerns are captured in a letter notifying the Police of their intended demonstration. This letter is attached hereto marked "C"

64. The police replied contenting that the application was being turned down. A copy of the reply from the police is attached hereto marked "D"

65. The police then started treating the intended ZCTU demonstration as illegal. Thus on the 13th of September, the police's actions were driven by the conviction that the ZCTU demonstration was illegal. Even to date the Police and the State continue to regard the demonstration as illegal.

66. It is submitted that ZCTU is an amalgamation of trade unions whose aims and objectives are to advance workers rights. A copy of the extract of the aims and objectives from the ZCTU constitution is attached hereto marked "E"

67. It is therefore contented that in terms of the schedule of sections 24(5) and 41 of the Public Order And Security Act (chapter 11:17) ZCTU did not need to notify the police of the said demonstration. The notification was out of courtesy.

68. Even the fliers that they were carrying show that they were all worker related. The fliers were inscribed the following;

"ZCTU demands –Reduction and Review of Income Tax; ZCTU National Protest Operation Tatambura Usadherere Mushandi (do not underestimate workers); Arrest Economic Meltdown; Stop Harassment of Informal Economy Workers; ZCTU National Protest – Operation sesihluphikile

Ungideleli Isisebenzi (we are suffering do not underestimate workers); ZCTU demands a living wage".

The courts have ruled that in its activities the ZCTU does not need to apply to the police for permission to hold its meetings.

69. It is submitted that the police simply arrested the Accused because they considered their demonstration to be unlawful. Yet it was not. It is contented that the police action on the 13th of September 2006 violated the Accuseds' rights to freedom of assembly and association as protected in terms of section 20 and 21 of the constitution.

    See also Article 20 of the Universal Declaration of Human Rights, Article 11 of the African charter and Article 21 of the International Covenant on Civil and Political Rights.

70. After their arrest Accused were denied immediate access to lawyers. In this case the Accuseds' lawyers went to see the Accused as soon as they were arrested. They could not see them until after 24 hours and on the following day viz, 14 September 2006.

71. There was no plausible reason for the police's denial. The most probable reason for those Accused detained at Matapi was that they were still being tortured. The other was that the police were bend on punishing the Accused.

72. It is submitted that upon arrest the accused are entitled to legal representation including during questioning by the police.

73. It is therefore contended that the Accuseds' rights in terms of section 13 (3) of the Constitution were also violated.

    See also the **State v Sonny Nicholas Masera, Fletcher Dulini Ncube and 4 other HH 50/04 at 44; State v Wood 1993(2) ZLR 258 at 263H-266B.**

74. The accused were also denied food. The lawyers and well-wishers tried to get food to the Accused soon after their arrest. This was denied. At Matapi food was only allowed at about 22:00hrs on the 13th of September 2006

75. The Accused were also subjected to torture, inhuman and degrading treatment in violation of section 15 of the constitution.

Those detained at Matapi were severely assaulted copies of the medical reports are attached hereto marked "F1-F20. The assaults went beyond the ordinary and can rightly be defined as torture.

7.6 Torture is defined as the international infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the Accused.

See **Article 7(2) of the Rome Statute of the International Criminal Court (ICC)**, which provides the above definition of torture.

76.1 A more comprehensive definition of Torture is given in Article 1 of the convention against Torture and other civil, inhuman or Degrading Treatment or Punishment. It provides as follows:

- *"Torture means any act by which severe pain or suffering, whether physical or mental, is internally inflicted on a person of such purposes as obtaining information from him or a 3rd person information or a confession, punishing him for an act he or a 3rd person has committed or is suspected to having committed or intimidating or coercing him or a 3rd person, or for any reason based on decriminalise of any kind, when such pain or suffering is inflicted by or at eh instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity……"*

76.2 The guidelines and Measures for the Prohibitions and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines) recognise definition of Torture provided in Article 1 of the U.N Convention against Torture and other Cruel, Inhuman Degrading Treatment or Punishment.

77. Further fifteen of the Accused were detained at Matapi Police Station. Again this was a further way of torturing them. Matapi Police Station was contained as unsuitable for human habitation (see **the case of Nancy Kachingwe and Wellington Chibebe v Minister of Home Affairs and others)**

77.1 There are several other cells all over Harare. The Accused could easily have been detained at these cells.

78. Even the cells at Harare Central are equally uninhabitable. Detaining accused thereat is as unlawful as detaining them at Matapi. The Accused deserved to be treated as humanely.

79. The cells at Harare Central Police Station are described by the Accused who were detained there as filthy, the floors are not cleaned, the toilets do no flush, there is no running water, sewage flows all over the place, they are crowded, there are no mattresses or blankets and they slept on the hard floor, during the night it was very cold. Mosquitoes bit Accused at will there are a lot of bedbugs and lice among other ills. The Accused challenges the State to prove otherwise and request the court to carryout an inspection in loco to see for itself the above conditions.

80. In light of the torture and conditions of detention we submit that our client's rights as protected in terms of section 15 of the Constitution, Article 5 of the U D H R, Article 5 of Africa Charter and Article 7 of the International Convention on Civil and Political rights were violated.

F. **BILL WAS ENACTED WITHOUT PROPER CONSULTATIONS**

81. It is also submitted that there were no widespread consultations before the Act was promulgated.

82. The functions of Parliament in terms of section 50 of the constitution of Zimbabwe are to make laws for peace, order and good governance of the country.

83. It is submitted that the principles of a good law are as follows:-

a) Is Constitutional
b) Complies with all elements of the Rule of Law
c) Is in accordance with the Separation of Powers
d) Provides for implementation and enforcement in accordance with all elements of Due Process
e) Is implemented and enforced in accordance with Good Governance principles, including adequate human and non-human capacity (resources, skills, budgets, etc), and management and administrative structures and procedures ("institutions") that are fair, accountable, reasonable and (where appropriate) transparent
f) Has effective Access to Justice for all affected by it, namely justice that is independent, fair, expeditious and affordable (preferably free)
g) Is drafted according to all the elements of Good Drafting: clarity, objective criteria, unambiguous objectives, consistency with other laws, proper delineation of departmental functions, etc.
h) Is preceded by adequate opportunity for Public Participation consultation with targeted interest groups, and inputs by experts-

which process must not be merely cosmetic in the sense that *bona fide* attention must be given to substantive inputs

i) Is preceded by independent and accurate Impact Assessment which is quantifiable.

84. It is submitted that for the majority of Zimbabwean's the code came as a bolt from the blue.

85. The Act has far-reaching consequences for the laws of Zimbabwe and to pass it without widespread consultations is unlawful. This is not reasonably expected in a democratic society.

a) Compare Mataitiele Municipality and 10 Others vs. President of the Republic of South Africa and 17 Others Case No. CCT 73/05 handed down on 18 August 2006 see for example pages 25 and 27 of the cyclostyled judgment.

b) See also Doctors for Life International VS. The Speaker for the National Assembly and others Case No. CCT 12/05 handed down on 17/08/06.

86. The history of the Act shows that there is a lot of mystery over the creation, adoption and commencement of the Act/Bill. The process of its creation, drafting and its consolidation of crimes was obscure.

87. The Bill was fast tracked (contrary to parliament's own adopted reforms), the Bill was not to our knowledge referred to the Parliamentary Portfolio Committees. Parliament did not call for public hearings or for evidence and input of the multi-sectoral representatives of society. The house ignored the advice of its own legal committee on the Bill's constitutionality and Members of Parliament had little time to debate such a complex and lengthy piece of legislation, whose effect was to change the completion of the Criminal Law System in Zimbabwe.

88. The ideal situation would have been that parliament and the Ministry of Justice, as sponsors of the Codification Bill, present a **Green Paper** on the Codification Bill for scrutiny and debate by the public. Tentatively, a program of public awareness on the Criminal Law Code should have been carried out by both Civic Society and Government.

89. The Codification Bill reached its final reading stage in the year 2004, and was voted for by parliament in that same period. It was assented to by the President 21days after. However, it could not take effect from then on since a date stating its commencement had not been published by the

President in a statutory instrument as per the requirements of section 1(3). It only commenced operation on 1 June 2006, more than a year after it became legislation.

G. MATTERS THE SUPREME COURT WILL BE ASKED TO DETERMINE

90. In light of the above it is submitted that the matter be referred to the Supreme Court so that it decides on the issues raised.

91. Among other aspects we will be asking the Supreme Court to declare the Criminal Law (Codification and Reform) Act (chapter 9:23) unlawful to the extent that it seeks to completely oust Roman-Dutch law and in particular that sections 3 and 284 of the said Act are unlawful.

92. We will also ask the court to declare that section 37 of the Act is unlawful to the extent that it is too wide and not reasonably justified in a just and democratic society.

93. And because the Act and section 37 thereof are unlawful, we want the Supreme Court to declare the arrest and detention of the accused to be unlawful and that their rights in terms of section 13 and 18 of the constitution were violated.

94. We will also seek to have the Supreme Court declare that the Act was unlawfully enacted to the extent that no wide- spread consultations were made before the Act was promulgated. This is important because the Act seeks to amend the law in a very fundamental way and with far-reaching consequences.

95. The Accused persons also want the Supreme Court to declare that the arrest and detention of the Accused were in violation of their freedom of assembly and expression as enshrined in terms of sections 20,21 and 15 of the Constitution.

95.1 The Accused also want the Supreme Court to declare their treatment at the hands of the police as amounting to torture, inhuman and degrading and in contravention of section 15 of the Constitution and other international instruments referred to above.

95.2 The Accused also ask that the Supreme Court reassert the Accused persons rights to access to their services of a lawyer at all times, from the time of arrest, during interrogation up to the time an accused appears in court.

H. **THE APPROACH OF THE SUPREME COURT**

96. It is submitted that the Supreme Court has always approached the question of the constitution with an open mind.

97. Supreme Court of Zimbabwe will always construe constitutional provisions widely and liberally. *Per contra*, the court will narrowly construe any statutory provision or conduct derogating from the fundamental rights enshrined in the Constitution of Zimbabwe.[6] In *Smyth v Ushewokunze & Anor* 1997(2) ZLR 544, Gubbay CJ said that:

> - *"In arriving at the proper meaning and content of the right guaranteed … it must not be overlooked that it is a right designed to secure a protection, and that the endeavour of the court should always be to expand the reach of the fundamental right rather than to attenuate its meaning and content. What is to be accorded is a generous and purposive interpretation of the provision; one that takes full account of changing conditions, social norms and values, so that the provision remains flexible enough to keep pace with and meet the newly emerging problems and challenges. The aim must be to move away from formalism and make human rights provisions a practical reality for the people."*[7]

98. The constitution embodies fundamental rights and freedoms and protections. It should be interpreted so as to best carry out its objectives and promote its purpose. It should be interpreted widely and purposively and should not be given a narrow, artificial or pedantic interpretation.[8] In *Minister of Home affairs v Fischer*[9] Lord Wilberforce observed that the correct approach to constitutional construction was:

> - *"to treat a constitutional instrument such as this as sui generis calling for principles of interpretation of its own, suitable to its character … without necessary acceptance of all presumptions that are relevant to legislation of private law."*

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[6] *Hewlett v Minister of Finance & Anr* 1981 ZLR 571 at 595A; *Catholic Commission for Justice and Peace in Zimbabwe v Attorney General* 1993 (1) ZLR 242 at 252-253; *Rattigan & Others v Chief Immigration Officer &Others* 1994 (2) ZLR 54 at 57-58.

[7] At 553A-C.

[8] *Minister of Home Affairs v Fischer* [1979] 3 ALL ER 21 at 26A; *In re Munhumeso & Others 1994(1) ZLR 49 at 59.*

[9] Ibid. see also Lovemore Madhuku, *Constitutional Interpretation and the Supreme Court as a Political Actor: Some Comments on United Parties v Minister of Justice, Legal & Parliamentary Affairs* in Legal Forum, Vol. 10 Number 1, March 1998.

99. When a constitutional challenge to conduct or legislation is launched, the duty of the court is firstly to properly construe the meaning of the constitutional provision allegedly infringed. The impugned legislation or conduct must then be examined.[10]

100. The court has a duty to make the constitution grow and develop to meet the needs of an ever-changing society, which is part of the wider human society.[11] Dickson J in *Hunter v Southam Inc* (1984) 11 DLR 4ed 641 (SCC) put it in this way:

- *"The task of expounding a constitution is crucially different from that of construing a statute. A statute defines rights and obligations. It is easily enacted and easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and when joined by a bill or Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind."*

101 It is this broad and liberal spirit that should inspire constitutional construction, bearing in mind the need to narrowly construe any statute, law or conduct derogating there from.

102. It is submitted that it is just and proper that the matter be referred to the Supreme Court.

I. APPLICATION NOT FRIVOLOUS AND VEXATIOUS

103. It is also submitted that the application is not frivolous and vexatious, a ground upon which the court can refuse the referral. In terms of section 24(2) of the constitution once an accused asks the court to refer his matter to the Supreme Court, then the court has no choice but to so refer unless the court considers the application to be frivolous and vexatious.

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10 *In re Munhumeso supra, Rattigan supra and Madhuku ibid*

11 *Rattigan Supra*

104. In the case if *Martin v AG (supra)* it was held that frivolous connotes the raising of a question marked by a lack of seriousness, inconsistent with logic and good sense and clearly so groundless and devoid of merit that a prudent person could not expect any relief.

104.1 Vexatious was defined in the same case as causing annoyance in the full appreciation that the Accused will not succeed and it is not raised *bona fide*. It was further held that if the application is vexatious, it should be such as to cause the person opposing it to be vexed under a form of legal process that was baseless.

See also *Dyson v AG* 1911 1KB 410.

105. In this case it is submitted that the questions being referred to the Supreme Court are not frivolous and vexatious. The aspects raised are of fundamental importance to the Accused, to the Constitution itself, to the Act, to the Criminal Justice System in Zimbabwe and to Zimbabwe as a whole. Stakeholders in the Justice delivery system in Zimbabwe are eagerly awaiting the Supreme Court's clarification of the Law of the Land.

106. Wherefore it is prayed that the matters raised be referred to the Supreme Court for its determination.

THUS DONE AT HARARE THIS 30TH DAY OF OCTOBER 2006

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MBIDZO, MUCHADEHAMA AND MAKONI
Accused's Legal Practitioners
8th Floor St. Barbara House
Cnr N Mandela/L Takawira Avenue
HARARE

TO: THE AREA PUBLIC PROSECUTOR
Harare Magistrate's Court
HARARE *(Attention: Mr Zvekare)*

AND

TO: THE CLERK OF CRIMINAL COURT
Harare Magistrate's Court
HARARE*(Attention: Mr Bhilla esq)*