

/ **MIDLANDS STATE UNIVERSITY**

FACULTY OF LAW



**THE APPLICABILITY OF THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE
TO CONSTITUTIONAL ADJUDICATION IN ZIMBABWE**

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CONSTITUTIONAL AND HUMAN RIGHTS LAW**

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DECLARATION

I Tawanda Rest Zvekare declare that “**THE APPLICABILITY OF THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE TO CONSTITUTIONAL ADJUDICATION IN ZIMBABWE**” is my own work and all the sources I have used and quoted have been acknowledged and indicated by referencing.

Signed

APPROVAL FORM

The undersigned strongly certify that they have read and made recommendations to the Midlands State University for acceptance of a research project entitled: **THE APPLICABILITY OF THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE TO CONSTITUTIONAL ADJUDICATION IN ZIMBABWE.**

The project was submitted in partial fulfilment of the requirements of a Masters Degree in Constitutional and Human Rights Law.

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ABSTRACT

This study looks at the doctrine of constitutional avoidance as well as the doctrines of subsidiarity and ripeness and their application in constitutional litigation in Zimbabwe especially as they relate to the fundamental rights and freedoms set out in Chapter 4 of the Constitution. The purpose of this research is to assess whether their application is in accordance with the duty placed on all institutions at every level to respect, fulfil, promote and protect the rights and freedoms in Chapter 4 in terms of section 44 of the Constitution of Zimbabwe. The study looks at justiciability and mootness in passing. The study assesses this duty in the context of courts of constitutional jurisdiction in applying the doctrines of constitutional avoidance, subsidiarity and ripeness. The study goes through a series of case law from Zimbabwe and concludes that the application of the doctrines in Zimbabwe is not consistent with the duty placed on the judiciary in terms of section 44 of the Constitution. It then looks at the approaches taken by the United States of America and South Africa in the application of the same doctrines. Recommendations are made from the approaches of these countries aimed at coming up with an application of the doctrines which is consistent with the constitutional duty placed on the judiciary at every level.

DEDICATION

I dedicate this research project to my wife, Fungai, and to my son, Mukundi, the two most important people in my life.

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CHAPTER ONE

INTRODUCTION AND BACKGROUND TO THE STUDY

1.1 Introduction

Constitutional avoidance has been defined as a preference of deciding a case on any other basis other than one which involves a constitutional issue being resolved.¹ As a principle, constitutional avoidance has been linked to the doctrine of justiciability.² In broad terms, justiciability governs the limitations on the constitutional arguments that the courts will entertain. It encompasses three main principles which are standing, ripeness and mootness.³ Standing refers to the relationship that the litigant in a case has to the relief that they seek.⁴ Standing in terms of our law is governed by section 85 (1) of the Constitution of Zimbabwe, 2013 and was well explained by the now Chief Justice in the case of *Mudzuru & Anor v Minister of Justice, Legal & Parliamentary Affairs N.O & Ors.*⁵ Mootness seeks to prevent a court from deciding a case when ‘it is too late’⁶ and this may relate to where there no longer exists a live issue between the parties.⁷ The principle of ripeness has been said to stem from the principle of avoidance and has as its main rationale: ‘to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements’.⁸ Therefore while ripeness avoids the hearing of a matter too early, mootness regards as unjusticiable the hearing of a matter too late.

As early as 1936, the United States courts had formulated the seven (7) famous rules in *Ashwander v. Tennessee Valley Authority*⁹. One of these seven rules was ripeness worded as that the courts would not ‘anticipate a question of constitutional law in advance of the necessity of deciding it.’¹⁰ In the United States, constitutional avoidance is also viewed as a canon of constitutional interpretation which postulates that where there are two possible readings of a statute and one is contrary to the Constitution, the one that is consistent with the

¹ S Woolman & M Bishop *Constitutional Law of South Africa* (2013) 3-21

² I Currie & J De Waal *The Bill of Rights Handbook* (2013) 72

³ Currie & De Waal n2 above 72

⁴ Currie & De Waal n2 above 72

⁵ CCZ 12/15

⁶ Currie & De Waal n2 above 87

⁷ *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others* 2000 (2) SA 1 (CC)

⁸ Currie & De Waal n2 above 85 citing *Abbot Laboratories v Gardner* 387 US 136, 148 (1967)

⁹ 297 U.S. 288, 345-48 (1936).

¹⁰ A Nolan *The Doctrine of Constitutional Avoidance: A Legal Overview* Congressional Research Service (2014)

Constitution is to be taken.¹¹ It encompasses a series of rules which govern how that end is achieved.¹² As noble as the idea sounds, it has been the subject of debate within that jurisdiction as to whether that does not open up the courts to the criticism of judicial legislation in the pursuit of the true intention of Congress.

The subject of this study, however, mainly revolves around constitutional avoidance as a doctrine and by extension, ripeness. This is so for two reasons. The first is that from a theoretical perspective, the two doctrines are related. The second is that their application by the Zimbabwean Constitutional Court has almost bundled them together. In fact in *Ruvunga v Portcullis (Pvt) Limited*¹³ the Constitutional Court per Mavangira JCC held of the doctrine of constitutional avoidance that:

In essence this application falls foul of the doctrine of constitutional avoidance as the relief sought could have been granted by the Supreme Court. The doctrine is closely related to the doctrine of ripeness which entails that the court should not adjudicate a matter that is not ready for adjudication. The court is prevented from prematurely deciding on an issue that could be decided on a basis other than a constitutional one.

This case was not the first to make this proposition. One sees this in the cases of *Katsande & Anor v Infrastructure Development Bank of Zimbabwe*¹⁴, *Chawira & Ors v Minister of Justice, Legal and Parliamentary Affairs & Ors*¹⁵ and *Berry (nee Ncube) & Anor v Chief Immigration Officer and Anor*¹⁶ among other cases of the Constitutional Court that have dealt with the same issue. The basis of the application of the principles in the Katsande case was on the basis of its application in 2001 in *Sports and Recreation Commission v Sagittarius Wrestling Club and Anor*.¹⁷

In recent times, the Constitutional Court has increasingly applied the principle of constitutional avoidance along with the principle of ripeness. The Court has also applied the principle of subsidiarity which it defines as holding that ‘norms of greater specificity should be relied on before resorting to norms of greater abstraction.’¹⁸ While the application of constitutional avoidance and related principles is based on certain rationales, the question that

¹¹E S Fish *Constitutional Avoidance as Interpretation and as Remedy* Michigan Law Review (2016)

¹²G P. Seaquist, *The Constitutional Avoidance Canon of Statutory Construction* (2015)

¹³CCZ 21/17

¹⁴CCZ 9/17

¹⁵CCZ 3/17

¹⁶2016 (1) ZLR 38 (CC)

¹⁷2001 (2) ZLR 501 (S)

¹⁸*Zinyemba v The Minister of Lands And Rural Resettlement & Anor* 2016 (1) ZLR 23 (CC) 27F

arises is whether this avoidance to deal with constitutional issues in favour of other remedies does not constitute an avoidance of what the Constitutional Court ought to deal with. This is more so apparent in section 85 (1) of the Constitution grounding an entitlement by persons in various capacities to approach the court alleging the actual or apprehended breach of any right in Chapter 4.¹⁹

The courts have been accused of deferring to the political branches of the State to fill out the substantive content of the rights where they opt to use the legislative provisions that govern certain rights over using the Constitution.²⁰ This has been termed political enforcement. Van Der Walt proposed a way out of this deference by ‘constitutionally driven interpretation of legislative measures as well as by accepting the possibility of direct constitutional challenges to legislation.’²¹ It has also been stated that ‘a rule that displaces direct constitutional enforcement and gives Parliament the lead in constitutional interpretation is counterintuitive’.²² The issue becomes whether our own Constitutional Court can dodge these views regarding adopting the doctrine of constitutional avoidance, ripeness and even subsidiarity.

1.2 Background to study

Recently, the Constitutional Court has increasingly applied the principles of constitutional avoidance, subsidiarity and ripeness resulting in cases not being determined on their merits. A newspaper article in the Herald acknowledged the prevalence of cases which have invoked the avoidance doctrine and sought to deal with the challenges of the doctrine from what it termed the ‘people’s perspective’.²³ This is notwithstanding that the Constitution makes available constitutional remedies that co-exist with the remedies in common law or under statute. The Court has stated that it gives precedence to non-constitutional remedies first

¹⁹ Section 85 (1) provides:

85. Enforcement of fundamental human rights and freedoms.

(1) Any of the following persons, namely –

(a) any person acting in their own interests;

(b) any person acting on behalf of another person who cannot act for themselves;

(c) any person acting as a member, or in the interests, of a group or class of persons;

(d) any person acting in the public interest;

(e) any association acting in the interests of its members;

is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this Chapter has been, is being or is likely to be infringed and the court may grant appropriate relief, including a declaration of rights and an award of compensation.

²⁰ B Ray *Evictions, Aspirations and Avoidance*, (2014) Constitutional Court Review 191

²¹ Ray n 20 above 192

²² Ray n 20 above

²³ ‘Avoidance doctrine and constitutional interpretation’ The Herald 25 October, 2017

before a constitutional matter can be said to be ripe for determination by it. In *Chawira & Ors v Minister of Justice, Legal and Parliamentary Affairs & Ors*²⁴ the Constitutional Court per Bhunu JCC stated that:

The doctrine of ripeness and constitutional avoidance gives credence to the concept that the Constitution does not operate in a vacuum or isolation. It has to be interpreted and applied in conjunction with applicable subsidiary legislation together with other available legal remedies. Where there are alternative remedies the preferred route is to apply such remedies before resorting to the Constitution.

While this may find good grounding in the fact that we have one legal order which is consistent of itself as the principle of subsidiarity seeks to propound, the question remains as to exactly which matters sections such as section 85 (1) of the Constitution was designed for. Questions arise as to whether the constitutional rights which have been further legislated in Acts of Parliament are defunct as regards their enforcement. This is so because constitutional avoidance does cover subsidiarity where the non-constitutional remedy is in legislation. Of course, one is cognisant of the fact that one may challenge the efficacy of legislation through the litmus test of the content of the very right it is enacted to protect. However, the question becomes therefore: what is wrong with approaching the Constitutional Court for relief upon a sound cause of action if a litigant elects not to enforce other remedies under common law or under statute? One must not lose sight of the separation of powers as one of the underlying reasons behind constitutional avoidance in the sense that the courts do not want to interpret constitutional rights where the legislature has created remedies already. This is the very issue that is central to this study in light of the judgments of the Constitutional Court of Zimbabwe. A further dimension is whether these principles have been consistently applied in all matters where constitutional avoidance is applicable.

1.3 Problem statement

It is not in dispute that, in adjudicating over constitutional matters, the courts are applying the doctrine of constitutional avoidance. Having established this, the question becomes whether the approach by the courts is consistent with the duty placed on every institution and every person including the courts to respect, promote and fulfil the rights and freedoms set out in

²⁴ CCZ 3/17

the Bill of Rights at every level.²⁵ This study seeks to interrogate the application of the doctrine of constitutional avoidance in light of this duty in section 44 of the Constitution.

1.4 Research questions

The research is based on the following research questions:

1. What is constitutional avoidance?
2. What is the justification for the application of constitutional avoidance and related doctrines in constitutional litigation? What does the application of the doctrine and related doctrines seek to achieve?
3. Whether the application of the doctrines in adjudication of constitutional matters has led to better enjoyment of the rights in Zimbabwe? Whether the application has achieved the desired results?
4. Whether the application of the doctrines in Zimbabwe is consistent with regional and international trends in constitutional adjudication?
5. Whether there is a need to change the approach in Zimbabwe?

1.5 Methodology

This research is essentially a desktop study which will look at primary and secondary literature. The study will employ the descriptive analysis method to show the current law as applied in constitutional matters regarding constitutional avoidance. Another research method to be adopted is theoretical and thus doctrinal analysis of primary literature including the Constitution, judicial pronouncements from this jurisdiction and beyond, text books and journals dealing with the subject matter.

1.6 Significance of the study

The study is important as constitutional litigation is at the core of enforcement of not only constitutional rights but generally the provisions of the Constitution. A constitutional matter has been defined by the Constitution and it is upon such matters that the Constitutional Court must adjudicate. This study interrogates how access to the Constitutional Court and remedies to be obtained therefrom is affected by the principle of constitutional avoidance and related doctrines. Essentially, it seeks to understand the rationale for these doctrines and how they affect the role of the Court as the custodian of the Constitution. This is a contribution to the

²⁵ Section 44 of the Constitution, 2013

jurisprudence that is already in existence except that this study seeks to discuss the concepts in the context of the Zimbabwean Constitution and from the conceptual aspects.

1.7 Limitations of the study

This study does not deal with the use of constitutional avoidance as a canon of interpretation. It limits its scope to understanding constitutional avoidance as it is being applied in Zimbabwe. This is how the Constitutional Court requires that remedies and recourse that is not strictly constitutional has been utilised before one seeks relief from it. Resultantly, the study will also look at ripeness and subsidiarity to the extent the principles interlink with constitutional avoidance so that the points to be made can be properly made as a result.

1.8 Chapter synopsis

The thesis will consist of five chapters which will be broken down as follows:

1.8.1 Chapter One: Introduction and background

This chapter will consist of the introduction of the study, the significance of the study and the problem statement. It will also set out the limitations of the study as well as give synopsis of the chapters of this study.

1.8.2 Chapter Two: Constitutional Avoidance and related doctrines

This chapter will define constitutional avoidance, ripeness and subsidiarity. It will deal with the doctrine of justiciability briefly as a general principle which accepts the limit of access to the Constitutional Court. The chapter will then deal with the rationale and theoretical basis of the constitutional principles of constitutional avoidance, ripeness and subsidiarity. It will look at what the application of constitutional avoidance and related doctrines seeks to achieve in the context of constitutional adjudication and litigation

1.8.3 Chapter Three: The approach of the Zimbabwean Constitutional Court

This Chapter will delve much into the case law that has emanated within the Zimbabwean jurisdiction. It will look at the provisions of the Constitution which provide for jurisdiction in respect of constitutional issues and whether there exists in the Constitution such limitations as those which result by the application of the doctrines of constitutional avoidance, ripeness and subsidiarity. It will also look at the consistency of application of the doctrines even in cases which have been disposed of by the Constitutional Court without applying the doctrine.

The point is to trace and track the trends by the Constitutional Court in applying the principles. The Chapter will also seek to ascertain whether the application of the doctrines in Zimbabwe achieves the desired results.

1.8.4 Chapter Four: A comparative analysis of the approaches in the region and internationally

This Chapter compares the regional and international approach with the Zimbabwean approach. It will look at the South African approach from 1995 up to today as well the approach by the United States of America.

1.8.5 Chapter Five: Findings, Conclusions and Recommendations

This Chapter will conclude and summarise the main findings made in the previous chapters. It will give recommendations on the best application of the constitutional avoidance doctrine regard being given to the comparative analysis with the international and the regional approaches to the issue.

CHAPTER TWO

CONSTITUTIONAL AVOIDANCE AND RELATED DOCTRINES

2.1 Justiciability

It is important to first address the doctrine of justiciability as its main concern is on the boundaries of law and adjudication.¹ As a broad principle justiciability encompasses ripeness which is a significant part of this study. The doctrine of justiciability is said to fall into two main categories: normative justiciability and institutional justiciability.² Normative justiciability concerns itself with whether there is a legal criterion which is sufficient to determine a legal dispute which confronts the court.³ Institutional justiciability deals with the appropriateness of the court to deal with the dispute before it, as opposed to another branch of the government which ought to deal with it.⁴ Generally, justiciability concerns itself with the question of which issues should be the subject of adjudication by the courts.⁵ Justiciability as understood in our law encompasses three concepts as a doctrine: standing, ripeness and mootness.⁶ It is a four pronged inquiry which asks four questions: whether the litigant has standing to claim relief; whether the dispute brought is ripe for resolution; whether the issue is moot and whether the subject matter of the dispute is appropriate for judicial action.⁷ The fourth inquiry of whether judicial action is warranted is embodied in institutional justiciability. Standing and mootness will be dealt with first and then ripeness will be dealt with in greater detail as related to constitutional avoidance.

2.1.1 Standing

As a subset of justiciability, standing focuses on the party bringing the case forward and not on the issues brought before the court. Standing therefore relates to the relationship between

¹ A L Bendor, 'Are there any limits to justiciability? The Jurisprudential and Constitutional Controversy in light of the Israeli and American experience' *IND. INT'L & COMP. L. REV.*, p 312

² Bendor A L (n 1 above) 314

³ Bendor A L (n 1 above) 315

⁴ Bendor A L (n 1 above) 316

⁵ Currie and De Waal, *The Bill of Rights Handbook* (2013) 72

⁶ Currie and De Waal (n 5 above) 72

⁷ C Loots, Access to the courts and justiciability

the applicant and the relief that he seeks.⁸ Put differently, whether or not the applicant is the right person at law to seek that relief that he seeks.

2.1.2 Mootness

The doctrine of mootness assesses justiciability based on the ‘timing of the application.’⁹ It seeks to prevent a court from hearing an application too late as distinguished from ripeness which seeks to avoid the hearing of a matter too early. In other words, a constitutional issue has to be resolved where there is a live controversy whose resolution is not merely academic. This means that where the prejudice to a party is no longer existent, the matter is moot and therefore not justiciable by the court.¹⁰ Heleba¹¹ finds that the doctrine is well developed in American constitutional law. He adopts a definition of the doctrine as:

Accordingly, a case is a moot one if it:

...seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has actually been asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical effect upon a then existing controversy.¹²

2.1.3 Section 85 of the Constitution, 2013

The best place to start in understanding the doctrines of constitutional avoidance and ripeness in the Zimbabwean Constitution is to understand the access provision whose application is somewhat impeded by these doctrines. Chapter 4 of the Zimbabwean Constitution sets out the Declaration of Rights. It binds the State as well as all executive, legislative and judicial institutions.¹³ Section 85 of the Constitution is the provision which grants access to the courts to persons in vindication of their fundamental rights. It provides:

⁸ C Loots (n 7 above)

⁹ Currie and De Waal (n 5 above) 72

¹⁰ Du Plessis M, G Penfold & J Brickhill, *Constitutional Litigation* (2013) 39

¹¹ S Heleba, ‘Mootness and the Approach to costs awards in Constitutional Litigation: A Review of *Christian Roberts v Minister Of Social Development CASE NO 32838/05 (2010) (TPD)*’ (2012) Vol 15 No. 5 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad (PER/PELJ)*

¹² S Heleba (n11 above) 569

¹³ Section 45 (1) of the Constitution, 2013

85. Enforcement of fundamental human rights and freedoms.

(1) Any of the following persons, namely –

(a) any person acting in their own interests;

(b) any person acting on behalf of another person who cannot act for themselves;

(c) any person acting as a member, or in the interests, of a group or class of persons;

(d) any person acting in the public interest;

(e) any association acting in the interests of its members;

is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this Chapter has been, is being or is likely to be infringed and the court may grant appropriate relief, including a declaration of rights and an award of compensation.

The persons who can approach the court are set out in (a)-(e) and their *locus standi* relates to either an alleged infringement, an actual infringement or a likely infringement of the fundamental rights. When one reads section 85 (1), all it requires is that a person approaches a court in one of the capacities set out in section 85 (1)(a)-(e)¹⁴ in vindication of infringement of rights. Section 85 (2) ousts the dirty hands principle from being a bar for a person seeking to vindicate fundamental rights in terms of section 85 (1). The approach that can be gleaned from the couching of section 85 as a whole is one that places the vindication of fundamental rights on a higher pedestal. It is in the context of section 85 (1) granting access to litigants in such wide terms that the doctrine of constitutional avoidance and ripeness comes in. The two doctrines seem to place an additional road block for section 85 (1) of the Constitution which the Constitution does not specifically provide for.

2.2 Ripeness and Constitutional Avoidance

Constitutional avoidance and ripeness are related such that whenever one is spoken of, the other comes into the conversation in constitutional issues. Gwaunza JCC (as she then was) held the same view in *Berry (nee Ncube) & Anor v Chief Immigration Officer & Anor*¹⁵ on the authority of *National Coalition for Gay and Lesbian Equality v Minister of Home*

¹⁴ *Mudzuru & Anor v Minister of Justice, Legal & Parliamentary Affairs & Ors* CCZ 12/15

¹⁵ 2016 (1) ZLR 38 (CC)

Affairs.¹⁶ She stated that the principle of ripeness encompasses the doctrine of constitutional avoidance.¹⁷ In the *National Coalition* case, Ackerman J held that concept of ripeness has not been precisely defined. This may perhaps be because of the way the application of the doctrine of ripeness has been linked with constitutional avoidance.

2.2.1 Definition

The court in *S v Mhlungu*¹⁸ laid out constitutional avoidance as a general principle in the following terms:

I would lay it down as a general principle that where it is possible to decide any case, criminal or civil, without reaching a constitutional issue, that is the course which should be followed.

In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*, the court defined ripeness in exactly the same terms as the *Mhlungu* case.

In Zimbabwe, both doctrines have been defined in a number of cases¹⁹ in the same terms as the South African cases. In summation, the doctrines of ripeness and constitutional avoidance

¹⁶ 2000 (2) SA 1 (CC) 22

¹⁷ 47D-F

¹⁸ 1995 (3) SA 867 (CC) 59

¹⁹ In *Katsande & Anor v Infrastructure Development Bank of Zimbabwe* CCZ 9/17, Gwaunza JCC (as she then was) quoted with approval *Sports and Recreation Commission v Sagittarius Wrestling Club and Anor* 2001 (2) ZLR 501 (S):

The doctrine of avoidance was fortified in *Sports and Recreation Commission v Sagittarius Wrestling Club and Anor* 2001 (2) ZLR 501 (S) in which Ebrahim JA said the following: -

“There is also merit in Mr Nherere’s submission that this case should never have been considered as a constitutional one at all. Courts will not normally consider a constitutional question unless the existence of a remedy depends upon it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of Rights” (my emphasis)

I find in the circumstances of this case, and based on the authorities cited above, that the doctrine of avoidance can properly be invoked against the applicants. A remedy was clearly available to them in the Labour Court, had they chosen to pursue the matters pending in that court, to their logical conclusion. In other words, they could

shun to deal with a constitutional issue where there exists another legal course which can give the litigant the relief he seeks. In other words, a constitutional issue is not ripe for determination until the determination of the constitutional issue is the only course that can give the litigant the remedy he seeks. Both constitutional avoidance and ripeness avert the determination of the constitutional issues until it becomes very necessary to the extent that it is the only course available to assist the litigant's cause.

Ray²⁰ talks of 'avoidance techniques' by a court as encompassing techniques which favour 'a strong preference for relying on legislative and executive measures to define the substance of these rights; creating or expanding procedural remedies (especially remedies that emphasise expanding political access); interpreting the socio-economic rights either at a highly abstract or factually specific level; and limiting direct interventions to cases featuring clearly unconstitutional conduct'

2.2.1.1 Constitutional avoidance as a canon of interpretation

In the United States of America, the doctrine of constitutional avoidance is viewed as both a canon of interpretation as well as a remedy.²¹ As a remedy, constitutional avoidance is understood as a 'tool of constitutional enforcement, by which a court changes a statute's meaning to protect a constitutional norm'.²² Constitutional avoidance as a canon of interpretation is best defined by Seaquist²³ in the following terms:

...the constitutional avoidance doctrine encompasses a series of rules of construction by which the judiciary avoids statutory interpretations that might create doubt as to the constitutionality of a legislative act. Through this doctrine the courts seek to maintain a careful, and sometimes uneasy, balance between protecting constitutional mandates and respecting the will and intent of democratically-elected legislators

have secured a determination of the issue in question in the lower court, without having to 'reach' the Constitutional Court in the manner they did.

²⁰ B Ray, 'Evictions, Aspirations and Avoidance' (2013) *Constitutional Court Review* 175

²¹ E S Fish 'Constitutional avoidance as interpretation and as remedy' (2016) *Michigan Law Review*

²² E S Fish (n 20 above)

²³ G P Seaquist, 'The Constitutional avoidance canon of statutory construction' (2015) *The Advocate Summer*

Put differently, the doctrine of avoidance ‘dictates to judges that when a statute has two plausible interpretations—one that would put it in an area of constitutional uncertainty and one that would not—the court should choose the latter.’²⁴ The doctrine is underpinned by the recognition of the so-called ‘counter-majoritarian dilemma’ which seeks to avert the seemingly anti-democratic nature of judicial review.²⁵ Constitutional avoidance is therefore advocated for as part of the passive virtues which include the doctrine of justiciability.²⁶ This is a level of judicial minimalism. Further, this use of the doctrine of constitutional avoidance in interpretation stems from the presumption in American constitutional jurisprudence that Congress’ intention is to enact laws which are constitutional.²⁷ The issue that arises in American constitutional jurisprudence is the conflict between the doctrine of constitutional avoidance as an interpretative canon and what is termed ‘chevron deference’.²⁸ Chevron deference refers to the principle that ‘courts must defer to an agency’s reasonable interpretation of an ambiguous statute it administers’.²⁹

2.2.2 Rationale

The Constitutional Court of Zimbabwe has noted that the use of doctrines of ripeness and constitutional avoidance result in the court ‘skirting’ the constitutional issue to be resolved. This was in *Chawira & Ors v Minister of Justice Legal and Parliamentary Affairs & Ors*³⁰ where the court held:

As we have already seen, in the normal run of things courts are generally loathe to determine a constitutional issue in the face of alternative remedies. In that event they would rather skirt and avoid the constitutional issue and resort to the available alternative remedies. This has given birth to the doctrine of ripeness and constitutional avoidance ably expounded by EBRAHIM JA in *Sports and Recreation*

²⁴ D N Boger, ‘Constitutional avoidance: the single subject rule as an interpretive principle’ (2017) *Virginia Law Review* 1258

²⁵ A Nolan, ‘The Doctrine of Constitutional Avoidance: A Legal Overview’ (2014) *Congressional Research Service*

²⁶ A Nolan (n 21 above)

²⁷ A Nolan (n 21 above)

²⁸ C J Walker, ‘Avoiding normative canons in the review of Administrative interpretations of law: A Brand X Doctrine of Constitutional Avoidance’ (2012) *Administrative Law Review* 140

²⁹ C J Walker (n 26 above)

³⁰ CCZ 3/17

Commission v Sagittarius Wrestling Club and Anor 2001 (2) ZLR 501 (S) at p 505 G where the learned judge had this to say:

There is also merit in Mr Nherere's submission that this case should never have been considered as a constitutional one at all. Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of rights. (See also *Zantsi v Council of State, Ciskei & Ors* 1995 (4) SA 615 (CC).

As a result, there must be a justification and rationale behind the doctrine. Currie and de Waal³¹ opine that the principle of constitutional avoidance is of crucial importance in the application of the Bill of Rights. The authors state:

When applying the Bill of Rights in a legal dispute, the principle of avoidance is of crucial importance. As we have seen, the Bill of Rights always applies in a legal dispute. It is usually capable of direct or indirect application and, in a limited number of cases, of indirect application only. The availability of direct application is qualified by the principle that the Bill of Rights should not be applied directly in a legal dispute unless it is necessary to do so.

An important and critical issue arises from the above statements by Currie and de Waal. It is the fact that every legal dispute is capable of either direct or indirect application of the Bill of Rights. Every dispute is essentially a constitutional issue when one looks at it. This arises necessarily because of the principle of constitutional supremacy.³² One needs to be aware however of the singleness of the legal system. This is embodied in the fact that the supremacy of the Constitution does not detract from the usefulness of the rest of the body of law. In

³¹ Currie & de Waal (n 5 above)

³² Section 2 (1) of the Constitution of Zimbabwe provides:

2 Supremacy of Constitution

(1) This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.

essence all other laws give full expression to the ideals of the Constitution until found to be inconsistent to it. Bhunu JCC underscored it in the *Chawira* case where he held:

The doctrine of ripeness and constitutional avoidance gives credence to the concept that the Constitution does not operate in a vacuum or isolation. It has to be interpreted and applied in conjunction with applicable subsidiary legislation together with other available legal remedies. Where there are alternative remedies the preferred route is to apply such remedies before resorting to the Constitution.

The possibility of the elevation of any dispute to a constitutional issue is what is sought to be averted by the doctrines of ripeness and constitutional avoidance. It is borne out of a realisation that all legislative or common-law remedies are part of the legal system.

Currie and de Waal found that the application of the principle of constitutional avoidance has three consequences.³³ The first is that even where the Bill of Rights are directly applicable, there is still a need to apply the ordinary law as it is intended to give effect to the Bill of Rights.³⁴ The second is that there is need to challenge conduct before attacking legislation where statute is applicable. The third dimension relates to the fact that the doctrine of constitutional avoidance is not an absolute rule.³⁵ The third dimension relating to the fact that the doctrine of constitutional avoidance is not of absolute application recognises that the elevation of such a doctrine into an absolute rule undermines the duty on the courts to interpret and develop the common law, customary law and enactment to promote the objectives and spirit of the Declaration of Rights.³⁶ Further, it has been opined that constitutional avoidance should not be applied as a rule which disposes of constitutional issues.³⁷ The exception to the application of the doctrine of constitutional avoidance is:

- where the constitutional violation is so clear and of direct relevance to the matter,
- in the absence of an apparent alternative form of ordinary relief and

³³ Currie & de Waal (n 5 above) 69

³⁴ Currie & de Waal (n 5 above) 70

³⁵ Currie & de Waal (n 5 above) 70 quoting *S v Mokoena* 2008 (5) SA 578 (T)

³⁶ Section 46 (2) of the Constitution

³⁷ S Woolman & M Bishop *Constitutional Law of South Africa* (2013)

- where it is found that it would be a waste of effort to seek a non-constitutional resolution of the dispute.³⁸

In *Zantsi v Council of State, Ciskei & Ors*³⁹ the court held that:

[2] In the United States of America, and as long back as 1885, Matthews J said:

‘(N)ever...anticipate a question of constitutional law in advance of the necessity of deciding it;...never...formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.’⁴⁰

This rule, though not absolute, has ordinarily been followed by Courts in the United States of America since then.⁴¹ Although the United States jurisprudence is influenced by the ‘case’ and ‘controversy’ requirement of art III of the US Constitution, the rule stated by Matthews J is a salutary rule which has been followed in other countries.

[3] It is also consistent with the requirements of s 102 of our Constitution and the decision of this Court in *S v Mhlungu & Ors* where Kentridge AJ said:

I would lay it down as a general principle that where it is possible to decide any case, criminal or civil, without reaching a constitutional issue, that is the course to be which should be followed.

[4] ...

[5] This rule allows the law to develop incrementally. In view of the far reaching implications attaching constitutional decisions, it is a rule which should ordinarily be adhered to by this and all other South African Courts before whom constitutional issues are raised. It is within that context that the provisions of s 102 (8) should be viewed.

The approach by Matthews J is consistent with judicial minimalism and with the court aligning itself with its place within the tripartite powers of State. This is by interpreting the

³⁸ Currie & De Waal (n 5 above) 70

³⁹ 1995 (4) SA 615 (CC) para [2]-[5]

⁴⁰ *Liverpool, New York and Philadelphia Steamship Co v Commissioners of Emigration* 113 US 33 (1885) at 39

⁴¹ *Burton v US* 196 US (1905) at 295; *Ashwander v Tennessee Valley Authority* 297 US 288 (1936) AT 342; *Joint Anti-Refugee Committee v McGrath* 341 US 123 (1951) at 154-5; *Kremens Hospital Director v Bartley* 431 US 119 (1977) at 133-4

law in the confines of the specific case brought before the court. This is supported by the doctrine of separation of powers which is one of our founding values and principles.⁴²

2.3 Subsidiarity

It would be incomplete not to add the doctrine of subsidiarity to the conversation of constitutional avoidance. The doctrine has been used extensively in this jurisdiction.⁴³ Subsidiarity was defined in the context of constitutional law by the Constitutional Court of Zimbabwe in *Moyo v Chacha & Ors*⁴⁴ in the following terms:

The principle of subsidiarity has been explained...It states that a litigant who avers that his or her constitutional right has been infringed must rely on legislation enacted to protect that right and may not rely on the underlying constitutional provision directly when bringing action to protect the right, unless he or she wants to attack the constitutional validity or efficacy of the legislation itself. Norms of greater specificity should be relied upon before resorting to norms of greater abstraction.

Subsidiarity compels a litigant to use the legislation enacted to give effect to a fundamental right. By extension it compels the litigant to make use of the remedies that are available in terms of the relevant legislation. By way of example, this means that where one is vindicating the right to administrative justice under section 68 of the Constitution, they necessarily vindicate such right through the Administrative Justice Act⁴⁵ and the remedies and fora it prescribes. The exception is where the challenge is that the Act is not constitutional. Put differently, subsidiarity forces a litigant to first resort to the legislative remedy before the constitutional remedy which entails an interpretation of the Constitution. This approach is viewed by others as judicial deference to politics where it allows the Legislature to give the bounds of a right and its remedies as opposed to the judiciary adding to the content of the legislative effort.

The Constitutional Court in the *Moyo* judgment dealt with one of the reasons underlying the principle of subsidiarity. The court held that:

⁴² See section 3 (2)(e) of the Constitution

⁴³ See *Majome v Zimbabwe Broadcasting Corporation and Ors* CCZ-14-2016 and *Boniface Magurure and 63 Ors v Cargo Carriers International Hauliers (Pvt) Ltd* CCZ-15-2016

⁴⁴ CCZ-19-17

⁴⁵ [Chapter 10:28]

The principle of subsidiarity seeks to prevent the Constitutional Court from having to decide on an *ad hoc* basis whether or not to exercise its jurisdiction. That method would make the law uncertain and open the Constitutional Court to the criticism of handpicking certain cases over others, as opposed to applying a general principle to all cases. The purpose of subsidiarity was stated in the article by Karl Klare *supra* as being the prevention of a claimant from precipitating a full-dress adjudication of a constitutional issue when the Legislature has given effect to a constitutional right. Subsidiarity is therefore seen as performing a “gate-keeping function”. It precludes litigants whose rights are protected under a statute enacted to give effect to constitutional rights from relying on such constitutional rights before the Constitutional Court for redress, as opposed to first seeking redress under the statute. The matter may end up at the Constitutional Court. It must do so through the correct process provided for in the wholesome and hierarchical legal system.

The principle of subsidiarity therefore seeks to bring certainty to the law. It proceeds from the premise that a matter must go through the cycle of the legal system and may even end up in the Constitutional Court.

The rationale of the subsidiarity principle was stated in *Boniface Magurure & 63 Others v Cargo Carriers International Hauliers (Pvt) Ltd*⁴⁶ :

The principle of subsidiarity is based on the concept of one-system-of-law. Whilst the Constitution is the supreme law of the land it is not separate from the rest of the laws. The principles of constitutional consistency and validity underscore the fact that the Constitution sets the standard with which every other law authorised by it must conform. The Constitution lays out basic rights and it is up to legislation to give effect to them. This is the nature of the symbiotic relationship between the Constitution and legislation. The legal system is one, wholesome and indivisible. As was put in *Gcaba v Minister for Safety and Security and Others* 2010 (1) SA 238 (CC):

‘The constitutional and legal order is one coherent system for the protection of rights and the resolution of disputes.’

⁴⁶ CCZ-15-2016

Subsidiarity, like constitutional avoidance and ripeness, respects the wholesomeness and coherence of the legal system. Klare⁴⁷ cited in the *Moyo* judgment adds to the rationale of the subsidiarity principles:

The *raison d'être* of subsidiarity principles is to strike an authoritative balance between the conflicting values of judicial deference and constitutional supremacy, so that courts are not at large weighing the conflict on an ad hoc, case-by-case basis.

While subsidiarity proceeds on the wholeness of a legal system as constitutional avoidance, it also seeks to balance, according to Klare, constitutional supremacy and judicial deference. The conflict between the two principles essentially arises in that while the Constitution provides the content and standard that the law should attain (constitutional supremacy), the laws enacted by the Legislature are meant to give effect to the constitutional ideals. Judicial deference arises because the Legislature as the elected are argued to be better placed to deal with the detail of the content of the rights in enactments. There is a perceived conflict where the court seeks to give detail to the law where the Legislature has already done so. This is why subsidiarity seeks to only step in where there is legislative relief when it is argued that the legislative intervention is short of the constitutional standard.

2.4 Conclusion

The principles of constitutional avoidance, ripeness and subsidiarity seek to give effect to the principle that the legal system is indivisible. When one looks closely, one will see that subsidiarity and constitutional avoidance are essentially the same. Constitutional avoidance, however, comes into play where the Constitution provides a remedy in terms of section 85 (1) of the Constitution. The inquiry becomes whether or not the application of these principles is in conflict with the relief provided to litigants by section 85 (1) of the Constitution.

⁴⁷ K Klare, 'Legal Subsidiarity & Constitutional Rights: A Reply to AJ Van der Walt' (2008) *Constitutional Court Review* 135

CHAPTER THREE

THE APPLICATION OF CONSTITUTIONAL AVOIDANCE, RIPENESS, MOOTNESS AND SUBSIDIARITY IN ZIMBABWE

3.0 Introduction

The previous Chapter explained the rationale behind the doctrines that avoid constitutional remedies before other remedies have been resolved. This chapter attempts to determine whether the application of the doctrines in adjudication of constitutional matters has led to better enjoyment of the rights in Zimbabwe. The next question is to determine whether the application of the doctrines has achieved the desired results.

3.1 The duty to respect fundamental human rights and freedoms

The application of the doctrines of constitutional avoidance and related doctrines which promote the use of non-constitutional remedies where they exist without reaching a constitutional matter appears at face value to be at odds with the constitutional mandate on all institutions at all levels to protect constitutional rights under Chapter 4 of the Constitution.¹ Section 44 of the Constitution provides:

44 Duty to respect fundamental human rights and freedoms

The State and every person, including juristic persons, and every institution and agency of the government at every level must respect, protect, promote and fulfil the rights and freedoms set out in this Chapter.

An interpretation of section 44 of the Constitution draws out the fact that every level of every institution and agency of the government has the obligation to respect, protect, promote and fulfil the rights set out under Chapter 4 of the Constitution. This implies that the judiciary as an institution of government has such obligation at every level to promote the said rights. The Constitutional Court and other courts with constitutional jurisdiction are not exempt from this duty. This means that every provision that grants access to the courts in vindication of constitutional rights ought to give the courts an opportunity to protect, promote and fulfil the Chapter 4 rights. The judiciary, under the separation of powers, has the adjudicative function

¹ Section 44 of the Constitution

over the law² being tasked with its interpretation.³ The duty of the judiciary to protect, promote and fulfil the fundamental rights and freedoms is best understood in its adjudicative role. Flowing from that therefore when the courts endowed with constitutional jurisdiction are approached through the correct constitutional procedure for the vindication of constitutional rights, they ought to adjudicate over such a dispute to promote and protect the rights. An interpretation of the section 44 obligation on the judiciary anticipates upholding, promoting and protecting of constitutional rights as opposed to upholding non-constitutional remedies where the constitutional remedies are available. Arguments can be made against such an approach but the fact still remains that such an approach is in line with section 44 of the Constitution. It becomes highly doubtful that the doctrines of constitutional avoidance, ripeness, subsidiarity and mootness can co-exist with the provisions of section 44 of the Constitution. It becomes important to understand the constitutional access provisions for which the doctrines of constitutional avoidance, ripeness, mootness and subsidiarity come into play.

3.2 Constitutional provisions which grant access to constitutional remedies

3.2.1 Section 85 (1) of the Constitution

The current section 85 (1) like its predecessor section 24 (1) of the Lancaster House Constitution⁴ provides for the vindication of fundamental human rights and freedoms. Section 85 (1) is wider than its predecessor in terms of the *locus standi* for parties seeking to bring actions under it. Section 85 (1) provides:

85 Enforcement of fundamental human rights and freedoms

(1) Any of the following persons, namely—

- (a) any person acting in their own interests;
- (b) any person acting on behalf of another person who cannot act for themselves;
- (c) any person acting as a member, or in the interests, of a group or class of persons;
- (d) any person acting in the public interest;
- (e) any association acting in the interests of its members;

² J Waldron 'Separation of powers in thought and practice' (2013) Vol 54:433 *Boston College Law Review* 434

³ M J C Ville *Constitutionalism and the separation of powers* (1998) 178

⁴ Constitution of Zimbabwe Order, 1979 (SI 1600 of 1979 of the United Kingdom)

is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this Chapter has been, is being or is likely to be infringed, and the court may grant appropriate relief, including a declaration of rights and an award of compensation.

Section 85 (1) extends *locus standi* to any person who falls within the categories stated from (a) to (e) to approach ‘a court’ for relief alleging either that a fundamental right or freedom has been or that that it is being or that it is likely to be infringed. That is all that is required under section 85 (1). The implication is that where the conduct or omission that causes the actual, likely or apprehended breach of a right results in a breach of the right in the context of the scope of the right then a court ought to grant appropriate relief to the person who approaches with the requisite *locus standi*. A matter brought under section 85 (1) is properly before the court where it conforms with the requirements under that section.⁵

The only possible limit that the Constitution makes to the access granted by section 85 (1) is through section 85 (3) which provides for Rules of different courts to facilitate the right to approach the courts in terms of section 85 (1) of the Constitution. But even those Rules are meant to fully facilitate the right to approach the court as opposed to provide procedural impediments to such rights.⁶ Of section 24 which was the predecessor of section 85, the court stated in *Mandirhwe v Minister of State*⁷ that the purpose of section 24 was to provide speedy access to the courts in a proper case without protracted litigation.⁸

⁵ *Meda v Sibanda* CCZ 10-16

⁶ Section 85 (3) of the Constitution.

⁷ 1986 (1) ZLR 1 (SC)

⁸ *Mandirhwe v Minister of State* (n 5 above) 7

The purpose of s 24 is to provide, in a proper case, speedy access to the final court in the land. The issue will always be whether there has been an infringement of an individual's fundamental rights or freedoms, and frequently will involve the liberty of the individual; constitutional issues of this kind usually find their way to this court, but a favourable judgment obtained at the conclusion of the normal, and sometimes very lengthy, judicial process could well be of little value. And even where speed is not of the essence there are obvious advantages to the litigants and to the public to have an important constitutional issue decided directly by the Appellate Division without protracted litigation.

Explaining the kind of access brought by section 85 (1) of the Constitution, Malaba DCJ (as he then was) held in *Mudzuru & Anor v Minister of Justice, Legal and Parliamentary Affairs & Ors*⁹ that:

Section 85 (1) of the Constitution is the cornerstone of the procedural and substantive remedies for effective judicial protection of fundamental rights and freedoms and the enforcement of the constitutional obligation imposed on the State and every institution and agency of the government at every level to protect the fundamental rights in the event of proven infringement. The right to a remedy provided for under s 85 (1) of the Constitution is one of the most fundamental and essential rights for the effective protection of all other fundamental rights and freedoms enshrined in Chapter 4. The right to a remedy enshrined in s 85 (1) constitutes a constitutional obligation inherent in Chapter 4 as a whole.

The concession out of the dicta of the Chief Justice in the *Mudzuru* case is that section 85 (1) is foundational and important to the effective judicial protection of fundamental rights and freedoms. The right to the remedy and the ability of a litigant to access such remedy is key to the enjoyment of all the other rights. In other words, without the right to enforce the constitutional freedoms and rights in Chapter 4, the rights remain an unreachable ideal.

In addition, the court in *Mudzuru* accepted that because of the obligation on the State to respect, promote and protect human rights, the rights under Chapter 4 are entitled to a full measure of protection:

The object of s 85 (1) of the Constitution is to ensure that cases of infringement of fundamental rights which adversely affect different interests covered by each rule of standing are brought to the attention of a court for redress. The object is to overcome the formal defects in the legal system so as to guarantee real and substantial justice to the masses, particularly the poor, marginalised and deprived sections of society. The fundamental principle is that every fundamental human right or freedom enshrined in Chapter 4 is entitled to a full measure of effective protection under the constitutional obligation imposed on the State. The right of access to justice, which is itself a fundamental right, must be made available to a person who is able, under each of the

⁹ CCZ 12-15

rules of standing, to vindicate the interest adversely affected by an infringement of a fundamental right, at the same time enforcing the constitutional obligation to protect and promote the right or freedom concerned.

Critically, the dicta in *Mudzuru* ties in section 85 (1) as being tied in with the right of access to justice.¹⁰ The ability of a party to access the remedies through section 85 (1) allows for the furthering of the right of a litigant to another fundamental constitutional right to access to justice.

3.2.2 Section 175 (4) of the Constitution

Section 175 (4) of the Constitution provides access specifically to the Constitutional Court where a constitutional matter arises amid proceedings before any subordinate court. The section provides:

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

This means the court may, of its own motion or if requested by any party, refer a constitutional matter that arises in any proceedings before a court. A constitutional matter is defined as:

“Constitutional matter” means a matter in which there is an issue involving the interpretation, protection or enforcement of this Constitution¹¹

Section 175 (4) of the Constitution contemplates that a constitutional matter that arises amid proceedings ought to be referred to the Constitutional Court. A constitutional matter which ought to be referred to the Constitutional Court is one that is necessary to the determination

¹⁰ The right to access to justice under our law is in terms of section 69 (3) of the Constitution which provides:

69 Right to a fair hearing

(1) ...

(2) ...

(3) Every person has the right of access to the courts, or to some other tribunal or forum established by law for the resolution of any dispute.

¹¹ Section 332 of the Constitution

of the dispute before the subordinate court in which it arises.¹² If the constitutional matter is not necessary for the determination of the dispute in the subordinate court, the Constitutional Court will not decide the constitutional matter. This constitutes some level of judicial minimalism in that the court does not want to resolve a constitutional matter beyond its ability to dispose of the dispute before it. The implication is that where the resolution of the constitutional matter is not relevant to the dispute, such is not resolved by the Constitutional Court. This approach is supported by the principle of mootness in that the constitutional matter would be moot and academic where the resolution of the constitutional matter no longer related to a controversy between the parties.¹³ If it was never an issue that was relevant to the dispute at hand, then the doctrine of constitutional avoidance just discards dealing with such constitutional matter favouring the non-constitutional proceedings in the subordinate court which would be capable of rendering a remedy to the litigant.

3.3 The application of the constitutional avoidance, ripeness, mootness and subsidiarity doctrines in Zimbabwe

The doctrines of constitutional avoidance, ripeness, mootness and subsidiarity come into play in the presence of a constitution which allows access to the courts for determination of constitutional matters in terms of section 175 (4) and section 85 (1). All that one has to show in terms of these provisions is that they fall squarely into them and nothing more. In terms of section 175 (4), there needs to arise a constitutional matter in proceedings in a subordinate court which question is necessary to resolve the issues before the subordinate court. In other words, the Constitution being the supreme law, a constitutional issue may possibly arise in every case but it would not be necessary for the determination of the dispute before a court. In terms of section 85 (1), one has to show that he or she or it can fit into the categories of (a)-(e) and allege actual or on-going or likely infringement of a constitutional right. Constitutional avoidance, ripeness, mootness and subsidiarity create additional hurdles to cross in order to access constitutional remedies that are, in the coupling of section 85 (1), easily accessible.

In *Zinyemba v The Minister Of Lands and Rural Resettlement & Anor*,¹⁴ the Constitutional Court dealt with an applicant who approached the court in terms of s 85 (1)(a) on the basis of

¹² *Dhlamini & Ors v The State* CCZ 1/14 p 9 *Mandirhwe v Minister of State* 1986 (1) ZLR 1 (S) 5E-H

¹³ Currie I & J de Waal, *The Bill of Rights Handbook* (2013) 87

¹⁴ 2016 (1) ZLR 23 (CC)

the infringement of rights enshrined in s 68 (1), s 71 (3) and 291 of the Constitution. She alleged the infringement of such rights arising from the conduct of the Minister in withdrawing her offer letter to land without giving her notice and the opportunity to make representations regarding that decision. She had been granted the offer letter with one of the conditions being that the 1st respondent could withdraw or change the offer letter in the event of a breach by the applicant or if he deemed it necessary. One of the four challenges mounted against that application by the respondent was that the Administrative Justice Act [Chapter 10:28] had been promulgated to give effect to the fundamental rights enshrined in s 68 (1) and (2) of the Constitution.¹⁵ The Court in that matter firstly accepted in *orbiter* that a party approaching the court in terms of section 85 (1)(a) of the Constitution has to fit the criterion discussed above. It found that in view of section 68 (3) which provides that an Act of Parliament has to give effect to the right, once that Act of Parliament was in place, ‘section 68 of the Constitution takes a back seat’.¹⁶ The only constitutional challenge it held to be permissible with the Administrative Justice Act in existence is where the allegation is that the Act does not give effect to the rights in section 68.

The approach taken by the Constitutional Court is what Young characterises as ‘deferential mode of review...(which) describes the deference to the epistemic and democratic advantages of legislation or policy over judicial decision-making’.¹⁷ The same approach was taken in *Majome v Zimbabwe Broadcasting Corporation & Ors*¹⁸. When one analyses the *Zinyemba* judgment, it is clear that where the protection of a right is made in an Act of Parliament, the courts are lax in creating somewhat of a parallel interpretation of that right. In other words, the courts leave the substance of the right to be dealt with by the Legislature until or unless someone comes to court alleging that the legislative effort falls short in giving effect to the right. Ray views this approach as tending to ‘push the Court away from playing an independent role in interpreting and enforcing the social rights.’¹⁹ It is viewed as leaving

¹⁵ At 25C

¹⁶ At 26C-D

¹⁷ K G Young ‘The Avoidance of Substance in Constitutional Rights’ (2014) 5 Constitutional Court Review 233 at p 238

¹⁸ CCZ 14-16. In this case, the Constitutional Court found that the applicant therein was bound by the doctrine of subsidiarity in the choice of forum and cause of action. The court held that where legislation has been enacted to give effect to a right then that underlying constitutional right should not be relied upon unless there is a challenge to the efficacy of the legislation giving effect to the right.

¹⁹ B Ray, ‘Evictions, Aspirations and Avoidance’ (2013) 5 Constitutional Court Review

the giving of substance to constitutional rights to the political branches of the State.²⁰ The danger is argued to be that the courts will end up losing their institutional power as an independent partner in the interpretation of constitutional rights.²¹

In *Berry (Nee Ncube) & Anor v The Chief Immigration Officer & Anor*²², the court dealt with an applicant who approached the Constitutional Court in terms of section 85 (1)(a) and (b) of the Constitution alleging the infringement of the right to the freedom of movement and residence. The infringement was alleged to have arisen out of the fact that an alien spouse of a Zimbabwean citizen was being denied entry into Zimbabwe as he was a prohibited person in terms of the Immigration Act.²³ The court, in dealing with the constitutional issue found that in the absence of a challenge of the constitutionality of section 17 of the Immigration Act, the applicant sought to impugn lawful conduct.²⁴ It also found, in addition, that the fact that the applicant had alternative remedies called to mind the doctrines of ripeness and constitutional avoidance.²⁵ It dismissed the application before it on other basis, including the doctrines of constitutional avoidance and ripeness. It did not determine the constitutional issue raised of whether or not the right to freedom of movement had been infringed.

In *Katsande & Anor v Infrastructure Development Bank Zimbabwe*,²⁶ the Constitutional Court dealt with an application under s 85 (1) seeking an order affirming the first applicant's constitutional right to belong to a trade union of his choice in terms of s 65 (2) of the Constitution as well as an order declaring the conduct of the respondent in refusing to grant the 1st applicant the permission to belong to Zimbabwe Banks and Allied Workers Union (ZIBAWU) unconstitutional. The court found that because there was an issue pending in the Labour Court whose determination would make the constitutional application unnecessary, it could not deal with it. It found that it was undesirable for a superior court to resolve undetermined matters still pending in a subordinate court. On those bases it found that the principles of ripeness and avoidance were applicable in the circumstances on the basis that 'it is a well-founded principle in our law that this court will not ordinarily consider a

²⁰ K G Young (n 15 above)

²¹ K G Young (n 15 above)

²² 2016 (1) ZLR 38 (CC)

²³ [Chapter 4:02]

²⁴ At 46C-D

²⁵ At 47D-F

²⁶ CCZ 9-17

constitutional question unless the existence of a remedy is dependent solely upon it'.²⁷ Further, it found that the applicants had a remedy which could resolve its dispute without reaching a constitutional issue. In this case again, the court did not deal with the constitutional matter and it did not go on to determine whether the decision by an employer to prohibit an employee to participate in a trade union was constitutional.

In *Chawira & Ors v Minister of Justice Legal and Parliamentary Affairs & Ors*,²⁸ the court dealt with an application in terms of s 85 (1)(a) and (d) of the Constitution where the applicants alleged that the length of their stay on death row constituted 'an affront to their human dignity and freedom from torture or cruel, inhuman or degrading treatment or punishment in violation of ss 51 and 53 of the Constitution.'²⁹ The court confronted with this case found firstly that the applicants had approached the Constitutional Court without exhausting statutory legal remedies. The court enumerated these as: review of the complained conduct in terms of the Administrative Justice Act³⁰; appeal to the Supreme Court in terms of section 70 (5)(b) of the Constitution; and seeking Presidential pardon or commutation under section 48 (2)(e) of the Constitution. It reasoned that the Constitution being the mother of all the law, every matter may very well be constitutional and that that would make the Constitutional Court dysfunctional if the court entertained every matter. It further noted that this would make the existence of other courts nugatory.³¹ It was on this premise that the court invoked the principle of constitutional avoidance. BHUNU JCC noted in that case that:

As we have already seen, in the normal run of things courts are generally loathe to determine a constitutional issue in the face of alternative remedies. In that event they would rather skirt and avoid the constitutional issue and resort to the available alternative remedies.³²

It is interesting to note the terminology of BHUNU JCC in rendering the judgment of the Court that the courts would rather skirt and avoid the constitutional issue in favour of alternative remedies. The Constitutional Court justified this approach by stating that the

²⁷ At page 8

²⁸ CCZ 3-17

²⁹ At page 2

³⁰ [Chapter 10:28]

³¹ At page 6

³² At page 9-10

Constitution does not function in a legal vacuum but operates along with ‘applicable subsidiary legislation together with other available legal remedies’.³³ It stated that the preferred scenario in that case was that it ‘ would rather wait until the wheels of justice have turned full circle, for doing otherwise in the circumstances of this case, would be inconsistent with this Court’s status as the highest court of last resort in constitutional matters’.³⁴ It found that when the matter was ripe, it would resolve the constitutional matter and therefore dismissed the application before it.

In *Ruvunga v Portcullis (Pvt) Ltd*³⁵ the court dealt with an application in terms of section 85 (1) of the Constitution alleging that an award of costs made against the applicant in litigation in the High Court of Zimbabwe violated his rights in terms of section 69 (4) of the Constitution. The court captured the substantive issue that it had to determine arising from the application as ‘whether the rationale of costs in our courts contradicts s 69 (4) and whether the section therefore precludes a successful litigant from claiming costs from the losing party.’³⁶ Before it could relate to the issue, it sought to establish whether the application was properly before it. The court found that the applicant had the remedy of appealing to the Supreme Court in terms of section 43 of the High Court Act [Chapter 7:06] and therefore that the application fell foul of the principle of constitutional avoidance.³⁷ It found the matter not to have been ripe for determination on the constitutional matter arising.

In *Meda v Sibanda & Ors*³⁸ the court dealt with an application in terms of s 85 (1)(a) of the Constitution of the Republic of Zimbabwe Amendment (No. 20) 2013 alleging the violation of s 71 (3) of the Constitution arising from an order of the High Court declaring a certain property especially executable. The applicant had not appealed against the judgment of the High Court which she alleged to violate her rights in the Supreme Court. Instead, she just filed a constitutional application. The court called in to aid, two decisions of the Constitutional Court of South Africa to explain the doctrine of avoidance: *State v Mhlungu*³⁹

³³ At page 10

³⁴ At page 10

³⁵ CCZ 21-17

³⁶ At page 2

³⁷ At page 6

³⁸ CC 10-16

³⁹ 1995 (3) SA 867 (CC)

and *MEC for Development Planning & Local Government, Gauteng v Democratic Party*⁴⁰. It then found on that basis that the application had to be dismissed in light of the doctrine of constitutional avoidance.

When one takes into consideration the above case, the basis upon which they were rejected falls into three main categories. These are:

- a. Failure to use other non-constitutional remedies such as an appeal to the Supreme Court.
- b. Failure to use remedies arising out of legislation enacted to give effect to the constitutional rights.
- c. Seeking a constitutional remedy where there were pending non-constitutional proceedings in a subordinate court which could resolve the dispute

The rationale being that the Constitution is not an island, so to say. It is supreme law which exists with other laws over which it enjoys its supremacy. As a result, the Zimbabwean courts have resolved, as of now at least, to only hear constitutional matters where they really have to, in that the litigant has recourse to no other remedy at law which can give them what they seek in the resolution of the constitutional matter. The doctrines seek to promote the one-system-of-law concept.⁴¹ Malaba CJ, in *Moyo v Chacha & Ors*,⁴² explained subsidiarity to explain that all laws consistent with the Constitution give effect to the Constitution. He stated:

⁴⁰ 1998 (4) SA 1157 (CC)

⁴¹ *Boniface Magurure and 63 Ors v Cargo Carriers International Hauliers (Pvt) Ltd* CCZ 15-2016 at p 9 where the court held:

The principle of subsidiarity is based on the concept of one-system-of-law. Whilst the Constitution is the supreme law of the land it is not separate from the rest of the laws. The principles of constitutional consistency and validity underscore the fact that the Constitution sets the standard with which every other law authorized by it must conform. The Constitution lays out basic rights and it is up to legislation to give effect to them. This is the nature of the symbiotic relationship between the Constitution and legislation. The legal system is one, wholesome and indivisible. As was put in *Gcaba v Minister for Safety and Security and Others* 2010(1) SA 238(CC).

“The constitutional and legal order is one coherent system for the protection of rights and the resolution of disputes.”

⁴² CCZ 9-17

Under a single legal system, laws are enacted to give effect to the Constitution. A remedy that is consistent with the Constitution serves the purposes of the Constitution when it is used in accordance with the provisions of the law by which it is established.⁴³

3.4 Conclusion and Analysis

Although grounded in rationale, the doctrine of avoidance has been criticised for limiting the contribution of the courts to the development of the law in important areas.⁴⁴ The approach taken by the Constitutional Court is akin to what is generally branded a minimalist court which ‘settles the case before it, but leaves many things undecided.’⁴⁵ This is so in the sense that there is a general disinterest in going beyond the dispute. This is even more confounded because the system is minimalist in not hearing constitutional matters where there is a non-constitutional remedy which can dispose of the dispute. In assessing the doctrine of constitutional avoidance, Woolman⁴⁶ made the following apt observations:

On its face, this salutary rule seems unobjectionable. What is objectionable is the turning of this salutary rule into a full-blown doctrine in which a court must never ‘formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied’

This approach effectively means the constitutional rights themselves per se are not given effect to but effect is given to any other remedy which may have the same effect of giving the litigant what they seek. In other words, one may accept that the body of law in existence exists to give effect to the Constitution and that by obtaining relief under any law, the constitutional rights are indirectly protected. This is regardless of the fact that in pursuing that right, the litigant may not even refer to the Constitution but the effect is that by the resolution of the dispute in a legal manner, the Constitution is not infringed. This may well be. However, three issues arise. The first is the risk that arises as found in the rationale for the section 85 (1) procedure being for a speedy remedy.⁴⁷ The question that arises is if the litigant

⁴³ n 40 p26

⁴⁴ J Dugard ‘Court of first instance? Towards a pro-poor jurisdiction for the South African Constitutional Court’ (2006) 22 SAJHR p 270

⁴⁵ Stu Woolman, The Amazing, Vanishing Bill of Rights, South African law journal, January 2007

⁴⁶ n 37 p 784-785

⁴⁷ *Mandirhwe v Minister of State* (n 5 above)

eventually gets what he seeks in an alternative remedy, is it worth sending that litigant away when they are genuinely aggrieved considering the cost of litigation? Where the Constitutional Court or a court of constitutional jurisdiction can determine the matter, the issue is what difference it makes if a constitutional court determines the matter before it. It is submitted that the determination of the issue by the Constitutional Court or a court with constitutional jurisdiction on a constitutional matter develops jurisprudence in constitutional law. Further it is a pro-rights and pro-poor approach which favours the upholding of constitutional ideals and the rights of access to the courts of the less privileged who cannot afford to go from court to court until they reach the apex court where they make a good case on a constitutional matter. Secondly, the Constitution does make provision for those rights and freedoms for a reason. In other words, there is a positive duty on the judiciary to respect, promote and fulfil the freedoms in Chapter 4. When the courts favour non-constitutional remedies over adjudication of an alleged violation of Chapter 4 rights, they fall short in their obligation in terms of section 44 of the Constitution. In other words, the duty of the courts to uphold those rights is not qualified in section 44 to mean an indirect protection of the rights especially since the section makes the requirement that the obligation honoured is at every level of government institutions. There should be the protection and promotion of those rights at the level of courts with constitutional jurisdiction too. One could argue that given its function as the third arm of the State which interprets the law, the best way for the Judiciary to promote, fulfil and protect Chapter 4 rights at all levels is through performing its role of interpreting such rights whenever the rules of standing have been satisfied without adding the hurdle of the doctrines of constitutional avoidance, ripeness, mootness and subsidiarity.

Thirdly, the doctrines of the constitutional avoidance, ripeness, mootness and subsidiarity ought to be viewed in light of the role of the courts generally and the Constitutional Court in particular in a constitutional democracy such as ours. In *Glenister v President of the Republic of South Africa & Ors*,⁴⁸ the court held that in a constitutional democracy, the courts are the ultimate guardians of the Constitution not only with the right but the duty to intervene where the Constitution has been violated.⁴⁹ In *Doctors for Life International v Speaker of the National Assembly and Others*,⁵⁰ the court went further to state that the Constitutional Court ‘has been given the responsibility of being the ultimate guardian of the Constitution and its

⁴⁸ [2008] ZACC 19; 2009 (1) SA 287 (CC); 2009 (2) BCLR 136 (CC)

⁴⁹ Paragraph 33

⁵⁰ [2006] ZACC 11; 2006 (6) SA 416 (CC)

values’ and that it would take clear language in the Constitution to oust the court’s jurisdiction to deal with constitutional violations. In light of this, it can be argued that the approach of the courts in refusing to deal with constitutional matters where other remedies exist amounts to the courts not playing their role as the ultimate guardians of the Constitution. An additional issue which would arise is that if the Constitutional Court and other courts are the ultimate guardians of the Constitution then what would be the purpose of deferring to legislative remedies where a person has properly approached a court of constitutional jurisdiction with a matter which can be determined on a constitutional basis. There would be very little justification as the very checks and balances of the separation of powers anticipate that political power be exercised in accordance with the Constitution with an independent judiciary keeping political forces accountable.

The concern raised in the *Chawira* case is that hearing all the applications brought before the Constitutional Court makes the Court dysfunctional as it would be flooded by constitutional matters where alternative remedies arise. This remark is reasonable to the extent that Bhunu JCC in making it was making reference only to the Constitutional Court. However, it is not just the Constitutional Court which has constitutional jurisdiction to deal with constitutional applications or constitutional matters. The Constitutional Court does have matters which are solely under its jurisdiction.⁵¹ However, applications under section 85 (1) can be made to ‘a court’ and a court presupposes a court endowed with constitutional jurisdiction by the Constitution itself. The High Court is one such court which ‘may decide constitutional matters except those that only the Constitutional Court may decide’.⁵² It follows that such applications may be made in the High Court to avoid the dysfunction of the Constitutional Court.

⁵¹ Section 167 (2) provides:

- (2) Subject to this Constitution, only the Constitutional Court may—
 - (a) advise on the constitutionality of any proposed legislation, but may do so only where the legislation concerned has been referred to it in terms of this Constitution;
 - (b) hear and determine disputes relating to election to the office of President;
 - (c) hear and determine disputes relating to whether or not a person is qualified to hold the office of Vice- President; or
 - (d) determine whether Parliament or the President has failed to fulfil a constitutional obligation.

⁵² Section 171 (1)(c) of the Constitution

It is clear that our application of the doctrines as an absolute bar to hearing constitutional matters where there are other non-constitutional ways of resolving the disputes is an affront to a pro-human rights approach. The next Chapter will analyse the approach of South Africa and the United States of America in the application of the doctrine of constitutional avoidance, ripeness, mootness and subsidiarity. The purpose of such a comparative analysis is to determine whether these countries have a better system of application of the doctrines from which we can learn or if the application is the same.

CHAPTER FOUR

THE APPLICATION OF THE DOCTRINES OF CONSTITUTIONAL AVOIDANCE, RIPENESS AND MOOTNESS IN SOUTH AFRICA AND THE UNITED STATES OF AMERICA

4.1 Introduction

The approach taken by Zimbabwe in the application of constitutional avoidance, ripeness and subsidiarity was discussed in the previous chapter. This Chapter concerns itself with a comparative analysis of the approach of other countries when dealing with constitutional avoidance and other doctrines which favour non-constitutional remedies. The countries that will be considered are South Africa and the United States of America. South Africa has been chosen for its similarity in the Constitution and common law with Zimbabwe. The United States of America has been studied as a leading jurisdiction in constitutional law.

4.2 South Africa

4.2.1 Constitutional jurisdiction of South Africa

The authors, M du Plessis, G Penfold and J Brickhill distinguish the jurisdiction of the South African Constitutional Court to be approached directly in relation to matters falling within its exclusive jurisdiction with matters which may come to the court where it shares concurrent jurisdiction of other courts.¹ There are six specified matters which fall under the court's exclusive jurisdiction in terms of the South African Constitution.² The Rules of the Constitutional Court of South Africa formulate procedure for how the court is to be approached in respect of those matters.³ It is the second category of matters which are relevant to this discussion.

One must note firstly that there is a difference between the court sharing concurrent jurisdiction in respect of a constitutional matter with another inferior constitutional court and the court being able to give a constitutional remedy where another non-constitutional remedy exists at law. In fact, in *Bruce & Anor v Fleecytex Johannesburg CC & Ors*,⁴ Chaskalson P

¹ M du Plessis, G Penfold and J Brickhill *Constitutional Litigation* (2013) 78

² Section 167 (4) of the Constitution of South Africa

³ The position is the same with the Constitutional Court Rules of Zimbabwe SI 61 of 2016

⁴ 1998 (2) SA 1143 (CC) para 7 and 8

(as he then was) in stating why all matters could not just be heard by the Constitutional Court demonstrated the distinction:

‘This court is the highest court on all constitutional matters. If, as a matter of course, constitutional matters could be brought directly to it, we could be called upon to deal with disputed facts on which evidence might be necessary, to decide constitutional issues which are not decisive of the litigation and which might prove to be purely academic, and to hear cases without the benefit of the views of other courts having constitutional jurisdiction.’

Under the South African Constitution, the Constitutional Court uses the sieve of what are termed direct access applications to determine which matters should be heard by the court in the first instance.⁵ In terms of the South African Constitution, the High Court is a constitutional court.⁶ The Supreme Court of Appeal which hears appeals from the High Court⁷ among other courts therefore also has appellate constitutional jurisdiction. The principles of the constitutional avoidance, ripeness, subsidiarity and mootness doctrines are therefore related to courts with constitutional jurisdiction. Considerations on whether a person approaches the Constitutional Court as opposed to another constitutional court is not the concern of this study. This study is concerned with the avoidance of constitutional issues by a court of constitutional jurisdiction. It is important to look at the doctrine of constitutional avoidance, ripeness and mootness pre 1994 and post 1994 under the Final Constitution.

4.2.2 Constitutional avoidance, ripeness and mootness pre-1994

4.2.2.1 Ripeness

Ripeness is understood under South African law to encompass three principles:

- a. What Loots⁸ calls ‘ripeness qua premature action’⁹ which is where an applicant complains of the validity of a law which has not personally affected them.

⁵ This is in terms of the Constitutional Court Rules as read with s 167 (6)(a) of the South African Constitution. This is similar to the Zimbabwean Constitution as read with the Constitutional Court Rules which make provision for direct access applications.

⁶ Section 169 of the South African Constitution

⁷ Section 168 (3) of the South African Constitution

⁸ C Loots ‘*Standing, Ripeness and Mootness*’ in S Woolman & M Bishop (Ed) *Constitutional Law of South Africa* (2013)

- b. The failure by an applicant to exhaust other remedies
- c. Bringing a matter to be dealt with on a constitutional issue where it can be resolved without reaching a constitutional issue¹⁰

In the last respect, it intersects with the doctrine of constitutional avoidance. To the extent that the principle in (c) was applied before the South African Final Constitution came into being, the doctrine of constitutional avoidance was being applied. One of the earliest references to it was in *S v Mhlungu* which will be dealt with in the study of the doctrine in post-constitutional South African constitutional jurisprudence.

Loots traces the doctrine of ripeness to have been used by the South African courts as long back as 1906 in the case of *African Political Organisation and the British Indian Association v Johannesburg Municipality*.¹¹ In that case, the plaintiffs were seeking an order declaring *ultra vires* a regulation which prohibited people of colour from travelling on a municipal tramway service. The court in that case dismissed the matter on the basis that none of the plaintiffs had actually been refused access to the tramcars.

In a subsequent case in 1921, the court found that for a party to challenge the validity of legislation, they did not have to contravene the law so that the court could relate to the matter.¹²

However, subsequently in *Cabinet of the Transitional Government for the Territory of South West Africa v Eins*¹³ the Appellate Division refused to entertain the merits of an appeal brought before it on the basis of *locus standi* and ripeness. In that case, the respondent had approached the High Court for an order declaring unconstitutional legislation which authorised the Transitional Cabinet to prohibit certain persons from being in the territory of South West Africa and to order the removal of any person believed to endanger or likely to endanger the security of the territory or to engender hostility between members of different population groups. The classes of person who could be removed or prohibited were persons who were not born in the territory, persons not serving in the defence force or employed by the government. The respondent was not born in the territory but was a permanent resident

⁹ C Loots 'Standing, Ripeness and Mootness' in S Woolman & M Bishop (n 8 above) 7-17

¹⁰ C Loots 'Standing, Ripeness and Mootness' in S Woolman & M Bishop (n 8 above) 7-18

¹¹ 1906 TS 692

¹² Transvaal Coal Owners Association v Board of Control 1921 TPD 447

¹³ 1988 (3) SA 369 (A)

thereof. The court of first instance declared the Act to be unconstitutional for violating the Bill of Fundamental Rights under the South West Africa Constitution Act. The appellate division, on appeal, held that in the absence of any action having been taken against the respondent, the court could not claim relief. It effectively found the dispute not to be ripe. Loots¹⁴ noted that this case demonstrated the ‘blurring of the doctrines of standing and ripeness.’

4.2.2.3 Mootness

Loots¹⁵ states that the principle of mootness only appeared after the promulgation of the Interim Constitution. For that reason, we will consider mootness after the Constitution came into being and follow its evolution in South African jurisprudence.

4.2.3 Post the Final Constitution

4.2.3.1 Constitutional avoidance

In *Van der Walt v Metcash Trading Limited*,¹⁶ the court held that:

Whether one can speak of a non-constitutional issue in a constitutional democracy where the Constitution is the supreme law and all law and conduct has to conform to the Constitution is not free from doubt. However, as judges who swore to uphold the Constitution, we must accept that such distinction exists and try to make sense of that distinction.

In South African constitutional jurisprudence, the principle of constitutional avoidance was enunciated in the 1995 case of *S v Mhlungu*.¹⁷ In that case, the court laid down the general principle of constitutional avoidance that ‘where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.’¹⁸ That same year in *Zantsi v Council of State, Ciskei*¹⁹ the court dealt with the same doctrine, adding a rider in this judgment. The court held that the court can deviate from the

¹⁴ C Loots ‘*Standing, Ripeness and Mootness*’ in S Woolman & M Bishop (n 8 above) 7-16

¹⁵ C Loots ‘*Standing, Ripeness and Mootness*’ in S Woolman & M Bishop (n 8 above) 7-20

¹⁶ 2002 (4) SA 317 (CC) para 32

¹⁷ 1995 (3) SA 867 (CC) para 59

¹⁸ n (17 above) para 59

¹⁹ 1995 (4) SA 615 (CC) para 4

doctrine of constitutional avoidance and ripeness²⁰ where there are compelling reasons to do so.²¹ The necessity of adherence to the doctrine was expressed in the *Zantsi* case where the court noted the ‘far reaching implications’ of constitutional determinations advocating for adherence to it where possible.²² Even in the formative stage of South African jurisprudence, the doctrine was to be used except where compelling reasons overpowered its application. In determining applications for direct access and applications for leave to appeal, the court considers this doctrine.²³

The authors, Currie and de Waal²⁴ note that the doctrine of avoidance is very important where the Bill of Rights is being applied in a dispute. The reason is that the Bill of Rights necessarily always applies in every legal dispute meaning it is capable of both direct and indirect application.²⁵ The authors further opine that given its prevalent application, the Bill of Rights should not be applied directly in a legal dispute unless it is necessary to do so. The doctrine is not applied absolutely. Currie and de Waal²⁶ enumerated the exceptions to the application of the principle of avoidance under South African law laid out in *S v Mokoena*²⁷ as:

1. Whether the determination of a constitutional issue is necessary for the determination of the non-constitutional issue;
2. The attitude of the parties to the approach proposed by a court. In the present matter, all the parties agreed that the constitutional issues could be determined in advance;
3. Whether the correctness of the convictions could be properly determined without an inquiry into the constitutional issues at stake; and
4. Whether there was any public interest in the matter.

4.2.3.3 Ripeness

²⁰ Ripeness to the extent that it is related to constitutional avoidance.

²¹ n (19 above)

²² N (19 above) para 5

²³ *Gauteng v Democratic Party* 1998 (4) SA 1157 (CC) para 32

²⁴ I Currie & J De Waal *The Bill of Rights Handbook* (2013) 69

²⁵ Currie & Waal (n 21 above)

²⁶ Currie & Waal (n 21 above) 70

²⁷ 2008 (5) SA 578 (T)

In 1996, the Constitutional Court dealt with the principle of ripeness in *Ferreira v Levin NO & Ors*²⁸ where the court stated:

[199] The essential flaw in the applicants' cases is one of timing or, as the Americans and, occasionally, the Canadians call it, "ripeness". That term has a particular connotation in the constitutional jurisprudence of those countries which need not be analysed now. Suffice it to say that the doctrine of ripeness serves the useful purpose of highlighting that the business of a court is generally retrospective; it deals with situations or problems that have already ripened or crystallized, and not with prospective or hypothetical ones. Although, as Professor Sharpe points out¹¹ and our Constitution acknowledges, the criteria for hearing a constitutional case are more generous than for ordinary suits, even cases for relief on constitutional grounds are not decided in the air. And the present cases seem to me, as I have tried to show in the parody above, to be pre-eminent examples of speculative cases. The time of this Court is too valuable to be frittered away on hypothetical fears of corporate skeletons being discovered.

The argument of ripeness was raised in *National Coalition for Gay and Lesbian Equality & Ors v Minister of Home Affairs & Ors*.²⁹ In that case, the applicants sought to impugn the validity of immigration law as being discriminatory to them without having been affected directly by the law. The respondent raised the doctrine of ripeness to the effect that had the applicants made the requisite applications under the law, they may have been granted the permits making the proceedings before the court unnecessary to be determined on the constitutional issue. The court in that case examined the viability of the non-constitutional remedy that the applicants ought to have taken as argued by the respondent. It found that the remedy was not viable to provide the relief sought by the applicants.³⁰

In *S v A*,³¹ the court declined to determine the constitutionality of the common law crime of sodomy in light of the unclear circumstances of the case. The court was not clear as to whether or not the intercourse had taken place in private with or without the consent of the victim. It declined to determine what it viewed as a theoretical and academic exercise.

²⁸ 1996 (1) SA 984 (CC)

²⁹ 2000 (2) SA 1 (CC) ; 2000 (1) BCLR 39

³⁰ n 25 above para 26

³¹ 1995 BCLR 153

The Constitutional Court in *Doctors for Life International v Speaker of National Assembly*³² stated that where a person approaches it for it to intervene in an on-going legislative process, it would rather err on the side of letting the process play out before intervening. The court stated, however, that where ‘immediate intervention is called for in order to prevent the violation of the Constitution and the rule of law, courts will intervene and grant immediate relief.’ In other words, the court was stating that the doctrine of ripeness does have some exceptions.

In 2010, in *Abahlali base Mjondolo of South Africa v Premier of KwaZulu Natal*³³ the Constitutional Court held that where a law threatens constitutional rights, one does not have to necessarily wait for the implementation of the law before he or she can approach a court. The court has relaxed the doctrine meaning that the fact that the law affects constitutionally protected rights is enough in the absence of an actual encounter between the litigant and such law.

4.2.3.4 Mootness

In 1997, the Constitutional Court declined to entertain a matter brought before it from the Supreme as moot in *JT Publishing (Pty) Ltd & Anor v Minister of Safety and Security & Ors.*³⁴ In that case a declaration of unconstitutionality was sought in respect of the Publications Act (Act 42 of 1974) and the Indecent or Obscene Photographic Matter Act (Act 37 of 1967). When the Constitutional Court was then seized with the matter, Parliament had passed an Act of Parliament which repealed the impugned legislation. The court found the issues to be purely academic and it declined to grant a declaratory order as sought. Loots opines that this case illustrates ‘the dangers of concluding prematurely that a matter has become moot’ as although the court gave the decision on the 21st of November 1996, as at January 1998 the new legislation had not already come into operation.³⁵

³² 2006 (6) SA 416 (CC) paras 68-69

³³ 2010 BCLR 99 (CC)

³⁴ 1997 (3) SA 514 (CC)

³⁵ C Loots ‘*Standing, Ripeness and Mootness*’ in S Woolman & M Bishop (n 8 above) 7-22

In South Africa, currently where a matter is moot, the court still has discretion of whether or not to determine it.³⁶ The discretion factors in the interests of justice among other considerations.³⁷ Those are:

...the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity, and the fullness or otherwise of the argument advanced.

In *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council*³⁸ the court determined a matter which was moot between the parties in the interests of justice. The consideration was that there were two conflicting judgments on the issue to be determined.

The discretion of whether or not to hear a matter which was moot was also exercised in *Western Cape Education Department & Anor v George*³⁹ and the principle to be gleaned without being specific to the facts of this particular case is that where the practical effect of the determination is not restricted to the parties litigating but is of public interest then mootness does not take precedence. This is the so called difference between mootness as to the parties as distinguished from mootness 'relative to society at large'.⁴⁰ In *Weise v Government Employees Pension Fund*⁴¹ the court related to a dispute regarding costs where the main dispute had been rendered moot by a legislative amendment.

4.2.3.5 Comments

South Africa's application of the doctrines allows certain exceptions contrary to our own. A difference must be noted in the jurisdiction of the South African law making the Constitutional Court the highest court in the Republic. This is important in that it is unlike

³⁶ President, Ordinary Court Martial & Ors v Freedom of Expression Institute & Ors 1999 (4) SA 682 (CC) para 15-16

³⁷ Independent Electoral Commission v Langeberg Municipality 2001 (3) SA 925 (CC) para 11

³⁸ 2007 (1) SA 343 (CC)

³⁹ 1998 (3) SA 77 (SCA)

⁴⁰ C Loots 'Standing, Ripeness and Mootness' in S Woolman & M Bishop (n 8 above) 7-22. The Interim Constitution of South Africa specifically provided for a referral of constitutional issues important to the public even where the Supreme Court had resolved the matter but the final Constitution does not have the same provision

⁴¹ 2012 (6) BCLR 599 (CC)

our own Constitutional Court which shares the esteem of being the highest court with the Supreme Court except in constitutional issues. This may well be the reason why South African jurisprudence has developed further in the application of these doctrines.

4.3 Constitutional Avoidance, Ripeness and Mootness in United States of America

4.3.1 Avoidance and ripeness

The principles of ripeness and constitutional avoidance are related and they will be dealt with as such in this study of the American system. In 1936, in *Ashwander v. Tennessee Valley Authority*,⁴² the Supreme Court of the United States of America had to determine whether a federal government had the constitutional authority to engage in manufacturing and distributing electricity. Chief Justice Hughes wrote the opinion for the majority of the court resolving the constitutional issue. Justice Brandeis wrote a concurring judgment stating the position that the court ought not to have resolved the constitutional questions because of their importance and should have avoided answering the constitutional questions. He formulated stated seven rules of avoidance which the United States has applied as:⁴³

The Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision. They are:

1. The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding, declining because to decide such questions "is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act."

....

2. The Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it."

....

⁴² 297 U.S. 288 (1936)

⁴³ This quotation of the principles omit the cases cited in support of the rules. These can be accessed in the full text judgment of the court

"It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Burton v. United States*, [196 U. S. 283](#), [196 U. S. 295](#).

3. The Court will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."

....

4. The Court will not pass upon a constitutional question, although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found widespread application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter. *Siler v. Louisville & Nashville R. Co.*, [213 U. S. 175](#), [213 U. S. 191](#); *Light v. United States*, [220 U. S. 523](#), [220 U. S. 538](#). Appeals from the highest court of a state challenging its decision of a question under the Federal Constitution are frequently dismissed because the judgment can be sustained on an independent state ground. *Berea College v. Kentucky*, [211 U. S. 45](#), [211 U. S. 53](#).

5. The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation.

....

Among the many applications of this rule, none is more striking than the denial of the right of challenge to one who lacks a personal or property right. Thus, the challenge by a public official interested only in the performance of his official duty will not be entertained. *Columbus & Greenville Ry. v. Miller*, [283 U. S. 96](#), [283 U. S. 99-100](#). In *Fairchild v. Hughes*, [258 U. S. 126](#), the Court affirmed the dismissal of a suit brought by a citizen who sought to have the Nineteenth Amendment declared unconstitutional. In *Massachusetts v. Mellon*, [262 U. S. 447](#), the challenge of the federal Maternity Act was not entertained, although made by the Commonwealth on behalf of all its citizens.

6. The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits.

.....

7. "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court

will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."

These have become known as the infamous *Ashwander* rules. The second rule of avoidance is akin to what is termed 'ripeness' in that there can be no anticipation of a constitutional law in advance. The seventh rule introduces what is termed in American constitutional law as the use of constitutional avoidance as a canon of interpretation and as a remedy.⁴⁴ This latter rule of avoidance as stated in the first Chapter will not be explored.

Hansen⁴⁵ outlines three reasons for constitutional avoidance in the United States. The first he says is to enable fruitful dialogue with Congress for possible redrafting of the legislation⁴⁶ where it is the constitutionality of legislation that is in question. The second is for the court to avoid giving a full-fledged constitutional disposition which would harm its legitimacy.⁴⁷ The third is 'political calculus' which is a way for the court to 'soften public and Congressional resistance to the Court's movement of the law in a direction that the court prefers as a matter of policy.'⁴⁸

4.3.1.1 Constitutional avoidance

Constitutional avoidance has been applied in many other cases apart from *Ashwander*. In *Escambia County v. McMillan*,⁴⁹ the court decided that the determination of a matter on statutory grounds where there were applicable had the effect of mootng the constitutional issue. It held:

Affirmance on the statutory ground would moot the constitutional issues presented by the case. It is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.

In 2009, the United States Supreme Court was confronted with having to determine the constitutionality of §5 of the Voting Rights Act of in *Northwest Austin Municipal Util. Dist.*

⁴⁴ Constitutional Avoidance as Interpretation and as Remedy 2016 Michigan Law Review, Volume 114, Issue 7

⁴⁵ RL Hansen 'Constitutional Avoidance and Anti-Avoidance by the Roberts Court' (2009) Supreme Court Review

⁴⁶ RL Hansen (n 42 above) 183

⁴⁷ RL Hansen (n 42 above) 183

⁴⁸ RL Hansen (n 42 above) 183

⁴⁹ 466 U.S. 48 (1984)

No. One v. Holder.⁵⁰ The District Court for the District of Columbia which was seized with the matter first found the Act to be constitutional. The suit had been filed with the constitutional question as well as a statutory claim. The United States Supreme Court noted probable jurisdiction but found the principle of constitutional avoidance to be most applicable to the constitutional question favouring to dispose of the matter on the statutory claim. The majority of the court whose opinion was written Roberts CJ found that:

We will not shrink from our duty “as the bulwar[k] of a limited constitution against legislative encroachments,” The Federalist No. 78, p. 526 (J. Cooke ed. 1961) (A. Hamilton), but “[i]t is a well-established principle governing the prudent exercise of this Court’s jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case,” *Escambia County v. McMillan*, [466 U. S. 48](#), 51 (1984) (*per curiam*). Here, the district also raises a statutory claim that it is eligible to bail out under §§4 and 5.

Justice Thomas wrote a partly concurring and partly dissenting judgment in which he accepted that the doctrine “avoids decision of constitutional questions where possible, and it permits one lawsuit, rather than two, to resolve the entire controversy.”⁵¹ He disputed the sufficiency of the statutory relief to fully dispose of the whole case before the court. While the court was divided on the sufficiency of the non-constitutional remedy, one must note the statement made in the opinion of the court that it is the practice of the United States Supreme Court to avoid determining unnecessary constitutional questions.

The court however, does not blindly apply the avoidance doctrine. In fact the following year after the *Northwest* case, in *Citizens United v. Federal Election Comm'n*,⁵² the court refused to apply the constitutional avoidance doctrine after it rejected the statutory claim. In other words, the necessity to reach the constitutional question arose. In both the opinion of the majority and the concurring opinion, the court refused to be bound by the doctrine of constitutional avoidance where it meant that they would accept an unsound and narrow argument as some sort of judicial restraint.

4.3.1.2. Ripeness

⁵⁰ 557 US 193 (2009)

⁵¹ Dissenting and concurring judgment of Justice Thomas citing C. Wright, *The Law of Federal Courts* §19, p. 104 (4th ed. 1983)

⁵² 558 U.S. 310 (2010)

In *Abbott Laboratories v Gardner*,⁵³ the United States Supreme Court was confronted with a suit for a pre-enforcement judicial review of certain regulations. The trial court had found that such a suit provided no controversy and therefore lay beyond the jurisdiction of the District Court. The United States Supreme Court found that the pre-enforcement judicial review raised a purely legal question and that the ‘impact of the regulations upon petitioners is sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage.’⁵⁴ The court discarded ripeness in that case after accepting its place in American jurisprudence:

Without undertaking to survey the intricacies of the ripeness doctrine, it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a two-fold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

The doctrine is very much alive in the American constitutional jurisprudence. It is not absolute as demonstrated in the *Abbot Laboratories* case.

4.3.2 Mootness

Mootness in American constitutional law is entrenched in Article III of the Constitution which requires that there be a controversy in a case to be decided by the courts.⁵⁵ In matters that are moot, the American courts vacate the decision of the lower court so that the slate is clean so to say for any fresh litigation.⁵⁶

In *De Funis v Odegaard*,⁵⁷ the United States Supreme Court dealt with mootness. In that case, the petitioner, a white male, sought an injunction on a claim that his denial of admission into a university was as a result of racial discrimination in breach of the Equal Protection Clause of the Fourteenth Amendment. The trial court granted the injunction and ordered the

⁵³ 387 U.S. 136 (1967)

⁵⁴ 387 U. S. 152-154

⁵⁵ Powell v. McCormack, 395 U. S. 486

⁵⁶ Alvarez v. Smith, 558 U.S. 87 (2009)

⁵⁷ 416 US 12 (1974)

university to admit the petitioner into the law school in 1971. The Washington Supreme Court reversed the decision of the trial court finding the admission not to be unconstitutional. The Washington Supreme Court, however stayed the operation of its own judgment until the determination of the United States Supreme Court since the petitioner had filed his writ of *certiorari*. By the time that the United States Supreme Court had to determine the matter, the petitioner had registered for his final quarter. Regardless of the decision of the court, the petitioner was to finish his studies at the end of the term. The majority of the Court found that in accordance with limitations placed under it by Article III of the Constitution, the court could not consider the merits of the case. It also held that there was no controversy and that the constitutional question was not capable of repetition as against the petitioner as he would no longer have to apply for admission into law school again. In the dissenting judgment, reliance was placed on the authority of *Gray v Sanders*⁵⁸ for the proposition that a case is not mooted by ‘the mere cessation of allegedly illegal conduct’. In the dissenting judgment, it was held that because the cessation had been caused by judicial intervention therefore:

The case is thus ripe for decision on a fully developed factual record with sharply defined and fully canvassed legal issues. *Cf. Sibron v. New York*, [392 U. S. 40](#), [392 U. S. 57](#) (1968).

Moreover, in endeavoring to dispose of this case as moot, the Court clearly disserves the public interest. The constitutional issues which are avoided today concern vast numbers of people, organizations, and colleges and universities, as evidenced by the filing of twenty-six *amicus curiae* briefs. Few constitutional questions in recent history have stirred as much debate, and they will not disappear. They must inevitably return to the federal courts, and ultimately again to this Court.

The dissenting judgment bemoaned the failure by the majority to consider the public interest in the litigation.

The American courts have exceptions to the mootness of a constitutional matter. One of those exceptions has been stated above which is that the cessation of illegal conduct does not make a matter moot.⁵⁹

The first exception recognised is the ability of the matter to be repeated yet evading review. In *Roe v Wade*⁶⁰ the court was faced with a constitutional challenge to State criminal abortion

⁵⁸ 372 U. S. 368 (1963)

⁵⁹ United States v. W. T. Grant Co., 345 U.S. 629 (1953)

⁶⁰ 410 U.S 113 (1973)

legislation. It was unclear whether the petitioner had been pregnant when the matter had initially been heard by the trial court in 1970 and as a result, there was an allegation that since the petitioner was no longer subject to a '1970' pregnancy, the matter was moot. The court found that:

The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated. *United States v. Munsingwear, Inc.*, [340 U. S. 36](#) (1950); *Golden v. Zwickler, supra*; *SEC v. Medical Committee for Human Rights*, [404 U. S. 403](#) (1972).

But when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be "capable of repetition, yet evading review." (Emphasis added)

The second exception to mootness is where there is a continuing controversy and where there are secondary legal consequences to what looks like a moot matter. In *Sibron v New York*⁶¹ the court accepted these as two possible exceptions to the mootness doctrine stated in *St. Pierre v. United States*⁶² that:

The Court stated that "[i]t does not appear that petitioner could not have brought his case to this Court for review before the expiration of his sentence," noting also that, because the petitioner's conviction was for contempt, and because his controversy with the Government was a continuing one, there was a good chance that there would be "ample opportunity to review" the important question presented on the merits in a future proceeding.

....

The second exception recognized in *St. Pierre* permits adjudication of the merits of a criminal case where "under either state or federal law further penalties or disabilities can be imposed . . . as a result of the judgment which has . . . been satisfied."

⁶¹ 392 US 40 (1968)

⁶² 319 U. S. 41 (1943)

Therefore the mootness of a matter is only limited to where the controversy is fully non-existent and where the resolution of the matter brings no further legal consequences for the person seeking constitutional relief. The third exception is where the litigation has been brought as a class action. In *Sosna v Iowa*⁶³ the court dealt with a matter which had been brought by the petitioner as a class action but which had subsequently become moot as regards the petitioner. The court held that:

The fact that appellant had long since satisfied the durational residency requirement by the time the case reached this Court does not moot the case, since the controversy remains very much alive for the class of unnamed persons whom she represents and who, upon certification of the class action, acquired a legal status separate from her asserted interest.

This meant that the mootness was alive for the other unnamed persons in her ‘class action.’

4.3.3 Comments

American jurisprudence has expanded even beyond the South African constitutional jurisprudence. The rationale for these doctrines are clearly expounded but so are their limitations.

4.4 Conclusion

From the above, there is a noted difference between the approach of South Africa and United States with our application of the doctrine of constitutional avoidance and related doctrines in human rights litigation. The differences may be explained by the jurisdictional differences of the countries with Zimbabwe. Regardless of whether that is the real reason, the principles explained above would not be *ultra vires* the Zimbabwean Constitution and common law to apply. The next Chapter will deal with recommendations which can be made to the application of the doctrines of constitutional avoidance, subsidiarity, ripeness and mootness as we apply them in Zimbabwe.

⁶³ 419 U.S. 393 (1975)

CHAPTER FIVE

FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

5.0 Introduction

This Chapter will conclude and summarise the main findings made in the previous chapters. It will give recommendations on the best application of the constitutional avoidance doctrine regard being given to the comparative analysis with the international and the regional approach.

5.1 Findings

The study has been focused on the application of the doctrine of constitutional avoidance, ripeness and subsidiarity in Zimbabwe and whether this application is consistent with the obligation placed upon the judiciary and the courts to uphold Chapter 4 rights.

This study found, in Chapter 2, that the general principle which governs the appropriateness of a court to relate to any dispute is justiciability. As a principle, justiciability was found to fall into two categories- normative justiciability and institutional justiciability. Normative justiciability is more substantive in that it looks at the sufficiency of the content of the law to deal with a specific dispute while institutional justiciability inquires into whether the courts as opposed to other branches of government are more appropriate to deal with a dispute. The study then found that justiciability as far as it relates to this study is understood to encompass ripeness, standing and mootness. Ripeness and mootness are two of the doctrines that are related to constitutional avoidance in being a bar to the hearing of constitutional matters. Further, it was also found that the principle of subsidiarity is essentially the same as constitutional avoidance as a whole. The major finding which put the study in perspective is that the doctrines of constitutional avoidance, subsidiarity, ripeness and mootness exist in the context of section 85 (1) of the Constitution of Zimbabwe.

Section 85 (1) of the Constitution as discussed above makes the requirement that a person seeking to enforce constitutional rights fits into the categories of standing given in its paragraphs (a) to (e). It was mentioned in passing that section 85 (1) is a liberalisation of the traditional rule of standing. In addition, section 85 (1) accepts a person falling in the categories of paragraphs (a)-(e) can approach a court alleging that a Chapter 4 right or freedom has 'been or is being or is likely to be infringed'. It is upon these requirements that

the court grants remedy to a person who approaches it in terms of section 85 (1). It is in light of this that the finding was made that the doctrine of avoidance and other such doctrines seem to add an additional hurdle not countenanced by the Constitution.

A finding was made, in Chapter 3, that the application of the constitutional avoidance doctrine and other doctrines that avoid the hearing of substance in constitutional adjudication over non-constitutional remedies is absolute. The study of the doctrines and their application in Zimbabwe under Chapter 3 has shown that the Zimbabwean courts adhere to the doctrine of avoidance, ripeness and subsidiarity to avoid hearing constitutional issues which would have arisen and which would have been brought to courts of constitutional jurisdiction. This is so including in matters where the constitutional issues relate to constitutional rights and freedoms alleged violation.

The reasons for such an approach were found to vary from the one system of law theory to the general considerations of the undesirability of clogging the Constitutional Court with matters where litigants can obtain the relief they seek from non-constitutional remedies. In other words, it was found that Zimbabwe adheres to the principle that the Constitution is somewhat of an overall guideline whose detail is expressed in other legislation and the common law. Therefore, where a remedy exists under legislation or the common law which gives the litigant the relief he seeks, then that remedy automatically protects constitutional rights if it is consistent with the Constitution. Put differently, the supremacy clause itself is a guarantee that any other law which is inconsistent with the Constitution ought not to stand and conversely, that all laws which are consistent with the Constitution automatically give effect to the Constitution.

Chapter 4 carried out a comparative analysis of the approach of two countries. In looking at the approaches of two other jurisdictions, South Africa and the United States of America, the study examined the application of the doctrines of constitutional avoidance, ripeness and mootness. The study found that in South Africa, all these doctrines are not applied absolutely. Specifically as regards constitutional avoidance, it was shown that the South African courts will consider the necessity of determining a constitutional issue in resolving a non-constitutional dispute; the public interest and the attitude of the parties to the resolution of the constitutional issue. Further, it was found that the South African courts also consider the interests of justice in determining whether a constitutional issue has become moot. The South African courts went as far as to determine the substantive adequacy of the non-constitutional

remedy in one of the cases considered where the doctrine of ripeness had been raised against the hearing of the constitutional issue.¹ In other words what became apparent from the study of the approach of the courts in South Africa is that the doctrines are applied in the context of a jurisprudence which accepts that there are exceptions to their application.

After the study of the approach of the United States, a finding was made that there is a vast jurisprudence around these doctrines making their application not absolute but subject to certain exceptions. It was found that the rationale of applying constitutional avoidance and ripeness in the United States of America is threefold to firstly allow political dialogue on the issue, secondly as political calculus and thirdly to protect the legitimacy of the courts. A further finding was made that, in the application of the doctrine of avoidance, the American courts do not apply it blindly where it means that they accept an unsound and narrow argument as some sort of judicial restraint. In the application of the doctrine of mootness, the American courts find exceptions. The first is that even if there is voluntary cessation of illegal conduct the matter is not mooted. Further, mootness will not be applied where there is an ability of the matter to be repeated yet evading review. Thirdly, the courts will not consider a matter moot where there is still a continuing controversy and secondary consequences to the matter which appears moot. Fourth, where the matter has been brought as a class matter and the person bringing the class action opts to withdraw the matter, the interest of the class combats any mootness that may be apparent therefrom. Further, it was found that in application of the doctrine of ripeness, the American courts do not apply it absolutely. In Chapter 4, one found also that the American courts can relate to a purely legal question where the petitioners had a direct interest in the outcome of the resolution of the question even where the persons have not been affected by the challenged law.

5.2 Recommendations

Five main recommendations are made in light of the study carried out in the previous chapters.

5.2.1 Development of jurisprudence on the doctrines

The first recommendation is that the judiciary of Zimbabwe ought to develop jurisprudence further to limit or define the scope of application of the doctrine of constitutional avoidance,

¹ *National Coalition for Gay and Lesbian Equality & Ors v Minister of Home Affairs & Ors* 2000 (2) SA 1 (CC)

subsidiarity, mootness and ripeness. As long as the doctrines are being applied, the Constitutional Court as the apex court of constitutional jurisdiction ought to create a vast jurisprudence which clearly outlines that the doctrines are possibly a general rule which has certain exceptions. The exceptions stated in *R v Mokoena*² are recommended as a good starting point and the courts can go further to develop the law in a manner which is consistent with the social, legal and economic realities of this country. The reason that the recommendation targets the Constitutional Court as the one which defines these boundaries is because of the doctrine of *stare decisis* which binds subordinate courts in respect of the decision of the Constitutional Court. The numerous cases explored in Chapter 3 of this study originate from the Constitutional Court of Zimbabwe. As a result, all other courts are bound by those decisions and if they continue to stand without developing exceptions, they will be applied as they are by the lower constitutional courts. Therefore once the green light is given by the apex court, the lower courts will have discretion to exercise upon well-explained principles in finding whether or not the doctrine of constitutional avoidance and other doctrines are applicable on a case to case basis. It has been argued that the difficulty that arises with constitutional avoidance is where it is applied as an absolute rule of constitutional adjudication.³ It may be that there has not arisen in the eyes of the constitutional courts a proper case where the courts have realised the need to deviate from the doctrines. However, as it is and according to the application of the doctrines in Zimbabwe, where the doctrines are applicable, the courts will refuse to hear the merits of the constitutional issues arising in the matter. The consideration of the United States of America showed that the American constitutional jurisprudence already countenances exceptions to the doctrines. This is recommended for Zimbabwe for many reasons. The first reason is that it is more consistent with section 44 of the Constitution. The second reason is that of the consideration of the cost of litigation for the average Zimbabwean, which may be saved by not just discarding of all constitutional matters which may be resolved by non-constitutional remedies. This is in the context of a person whose non-constitutional remedy lies perhaps in the Magistrates Court or the High Court who may end up at the Constitutional Court through appeals. The third is the time factor where the litigant, even if he or she is not financially constrained, may end up in the Constitutional Court anyway for the remedy. Further, there are issues which are so fundamental that they need a pronouncement on the constitutional matter upon which they

² 2008 (5) SA 578 (T)

³ S Woolman 'The Amazing, Vanishing Bill of Rights' 2007 *South African Law Journal* 784-5

are premised. All this supports an approach which is not absolute but which takes into consideration these factors and more.

5.2.2 Remittal of matters to the High Court

It is recommended that the Constitutional Court itself is of the opinion that hearing many matters makes it dysfunctional, it may make orders for remittal to the High Court where it has jurisdiction to hear the constitutional issues. The court, in *Chawira*,⁴ had this apprehension that hearing all constitutional matters may make it dysfunctional. It is accepted that in respect of certain matters, the Constitutional Court has exclusive jurisdiction.⁵ However, section 85 (1) of the Constitution which is the ultimate access provision for the protection of fundamental rights makes reference to ‘a court’ and not the Constitutional Court. This means that if the main argument for constitutional avoidance and other such doctrines is that they flood the apex constitutional court then that can be easily remedied by the hearing of some of these matters in the High Court. Suffice it to say, to date the High Court of Zimbabwe sits in four places- Harare, Bulawayo, Masvingo and Mutare. It may be able to shoulder this responsibility in conformity with section 44 of the Constitution and also in the exercise of a jurisdiction extended to it by the supreme law of the land, the Constitution.

5.2.3 Application of the doctrines as an exception

It is recommended that the courts make the application of the doctrine of constitutional avoidance, ripeness, mootness and subsidiarity an exception as opposed to the general rule. This recommendation draws from the very fact of section 44 of the Constitution. It has to be accepted that the doctrines are useful to the extent that they, in some case, promote other remedies at law under the one system of law theory.⁶ However, there is need for development of constitutional jurisprudence⁷ and it has been stated that a court which takes a minimal approach to constitutional issues may end up losing its authority. There is need and an obligation that the courts with constitutional jurisdiction promote, protect, fulfil and uphold

⁴ *Chawira & Ors v Minister of Justice, Legal and Parliamentary Affairs NO & Ors* CCZ 3-17

⁵ See section 167 (2) of the Constitution

⁶ *Boniface Magure and 63 Ors v Cargo Carriers International Hauliers (Pvt) Ltd* CCZ 15-2016

⁷ See *S Woolman n 2 (above) 765* where it is stated that:

The court's ongoing failure to develop coherent doctrines in many areas of fundamental rights jurisprudence does not only undermine the Bill of Rights and the rule of law. It places the court's very authority at risk.

the Constitution at that level of jurisdiction. This means that where a person has properly and procedurally approached a court in terms of the Constitution, the first instinct of the court should be aligned with section 44 of the Constitution in favour of hearing the constitutional matter in the protection and promotion of Chapter 4 rights. The doctrine of avoidance and such other doctrines ought to be used sparingly where the court realises a real need for the litigant to utilise non-constitutional remedies. The approach taken by the courts in awarding punitive costs is an appropriate example of how the courts should apply the doctrine of avoidance and other such doctrines. It ought to be a route the courts hardly take unless good cause has been shown by a party raising the doctrines as a bar to hearing the constitutional matter or by a court *mero motu* having considered all the relevant circumstances. This is an approach that is pro-human rights and which takes into account the economic realities of a country like Zimbabwe as well as section 44 of the Constitution.

5.2.4 Resolution of purely legal questions

It is recommended that the Zimbabwe courts resolve purely legal questions relating to the breach of Chapter 4 rights even in the absence of a controversy. This recommendation is made from the approach of the United States of America where it refused to accept that ripeness defeats the resolution of a purely legal question regarding the violation of rights. This is an approach Zimbabwe should take in light of section 44 of the Constitution. Even where a person has an apprehension of the violation of their rights which is predicated on just the existence of a law which the applicant has not come in conflict with, the courts ought to resolve whether such law possibly infringes on constitutional rights. This approach is consistent with the general principle of law stated in *McFoy v United Africa Company Limited (West Africa)*⁸ that anything done contrary to the law would be a nullity anyway and incurably so to the extent that even a court order setting aside does not give any prior elevation. Therefore, the Zimbabwean courts ought to do away with ripeness where there is a clear case to be made for the consideration of whether an act or a law violates Chapter 4 rights.

5.2.5 Ousting of the doctrine of constitutional avoidance

It is recommended that this jurisdiction oust the doctrine of constitutional avoidance and other such doctrines in human rights litigation. While it may sound outrageous to some to

⁸ [1961] 3 All ER 1169

suggest such a course like doing away with the doctrines in a growing constitutional jurisdiction like ours, one needs to consider the implications of section 44 of the Constitution. It must be noted that in terms of the paragraph 18 (2) of the Sixth Schedule to the Constitution, the Constitutional Court sits, for seven years from 2013, constituted by the Chief Justice, Deputy Chief Justice and seven judges of the Supreme Court. The practical realities of this arrangement appear to be consistent with the remarks of Bhunu JCC in *Chawira*. However, post the seven year transitional period, the Constitutional Court will be manned as provided in section 166 of the Constitution.⁹ It may be argued that where the court is so constituted sitting only for constitutional matters, it may dispense of the doctrines of constitutional avoidance, ripeness and subsidiarity especially in Chapter 4 litigation. Of course, arguments may still be made for these doctrines under the one system of law theory. However, the essential question that will remain will be whether or not those arguments for constitutional avoidance and related doctrines are greater than the constitutional mandate to promote, uphold, fulfil and protect the rights and freedoms in Chapter 4 at every level of every institution and of the judiciary. The real question will become whether or not the courts exercising constitutional jurisdiction honour their section 44 obligations when they do not hear constitutional issues arising from the vindication of Chapter 4 rights and freedoms because there exists non-constitutional remedies which have the effect of protecting those rights. An answer for that crucial question is one that informs the approach Zimbabwe ought to take with regards the doctrines of constitutional avoidance, ripeness and subsidiarity. It is this answer which will also inform the choice of Zimbabwean courts in answering only the part of a constitutional matter which resolves a dispute thereby falling under the compartmentalisation of a minimalist court. It is proposed that while international jurisprudence is laden with these doctrines, Zimbabwe may opt to defunct them by taking a pro-rights approach which does not qualify the section 85 (1) access provision to a remedy as well as any other access to constitutional remedies. This approach is consistent with section

⁹ Section 166 (1) and (2) of the Constitution provides:

166 Constitutional Court

- (1) The Constitutional Court is a superior court of record and consists of—
 - (a) the Chief Justice and the Deputy Chief Justice; and
 - (b) five other judges of the Constitutional Court;
- (2) If the services of an acting judge are required on the Constitutional Court for a limited period, the Chief Justice may appoint a judge or a former judge to act as a judge of the Constitutional Court for that period.

44 of the Constitution. It is consistent with the economic realities of this country and it is therefore proposed as a recommendation.

5.3 Conclusions

As stated above, the doctrine of constitutional avoidance and subsidiarity are best explained in the one system of law theory which states that the body of law is consistent and hierarchical in nature meaning all remedies which are not inconsistent with the Constitution essentially protect the Constitution. This can be said to arise from the supremacy of the Constitution itself which is asserted in section 2 (1) of the Constitution. This position although seemingly logical may be argued to undermine the Constitution and the remedies under it which are effectively its authority. The force of the Constitution lies in the remedies it provides for its breaches and violation. Therefore the force of the Chapter 4 rights lies in the enforcement power found in the power to remedy the breach in section 85 (1) of the Constitution. This was aptly explained by Malaba DCJ (as he then was) in the judgment of *Mudzuru & Anor v Minister of Justice, Legal and Parliamentary Affairs NO & Ors.*¹⁰

It is an argument that can be levelled against the doctrine of constitutional avoidance and related doctrines that it undermines the supremacy of the Constitution while appearing to uphold it. The doctrines do this by entrusting the power to protect the Constitution to other subsidiary recourses as if the Constitution itself needs a saviour. The Constitution has made safeguards for its own protection and for protection of the rights set out under Chapter 4 by mandating all levels of the State and every institution to protect, promote and fulfil it.¹¹ For the institution of the judiciary as a whole it means to interpret the law and adjudicate over legal disputes in conformity with the Constitution. In terms of section 44, this means the

¹⁰ CCZ 12-15 which provides at page 13:

Section 85 (1) of the Constitution is the cornerstone of the procedural and substantive remedies for effective judicial protection of fundamental rights and freedoms and the enforcement of the constitutional obligation imposed on the State and every institution and agency of the government at every level to protect the fundamental rights in the event of proven infringement. The right to a remedy provided for under s 85(1) of the Constitution is one of the most fundamental and essential rights for the effective protection of all other fundamental rights and freedoms enshrined in Chapter 4. The right to a remedy enshrined in s 85(1) constitutes a constitutional obligation inherent in Chapter 4 as a whole.

¹¹ Sections 44 and 45 (1) of the Constitution

courts ought to promote, respect, protect and fulfil the rights set out under Chapter 4. The duty does not stop here in light of the requirement that the fulfilment, protection and promotion of the Constitution is required at every level of every institution. This means different things for different institutions. For the judiciary however, it means at every level of the judiciary and therefore at every level of jurisdiction.

It is a given that any judicial pronouncement which violates the Constitution and by extension the Chapter 4 rights and freedoms is in light of section 2 (1) a nullity for its inconsistency with the same. That settles the obligation of courts exercising non-constitutional jurisdiction in upholding, safeguarding, protecting and fulfilling the Constitution and Chapter 4 rights and freedoms. However, the responsibility of the courts of constitutional jurisdiction in Zimbabwe can be argued to be abdicated where the doctrine of avoidance, ripeness, mootness and subsidiarity are applied absolutely. There has to be protection of the Chapter 4 rights and freedoms at that level of jurisdiction too.

The application of the doctrines of constitutional avoidance, ripeness and mootness as studied in the United States of America and South Africa is commendable in that the doctrines exist in a rich jurisprudence which provides room for the exercise of some sort of discretion on a case to case basis. Discretion is meant, in this context, that there exists exceptions and considerations for a court to exercise its mind before applying the doctrines. The doctrines are not applied as an absolute and therefore in different cases, arguments made for the application of the doctrines has been found not to have merit in light of considerations such as the interests of justice, public interest and the fact that the issues may be evading resolution by the very nature of how they arise.

The approaches of these courts take into account various realities that these courts do not. One example is the American courts limiting the confines of the doctrine of ripeness not to cover legal questions where the petitioner has not had any brushes with the law he seeks to impugn. This is commendable because as a principle if that law is unconstitutional or violates the rights of the petitioner, it matters not that such petitioner has actually been affected by the right. In other words, this approach promotes constitutional rights as opposed to trump upon them. It is this type of approach that Zimbabwe may take especially in light of section 44 of the Constitution.

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