APPOINTMENTS UNDER ZIMBABWE'S INCLUSIVE GOVERNMENT

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Introduction

This paper considers the general appointment of persons by the President of Zimbabwe to positions in the new inclusive government and specifically in terms of any Act of Parliament or the Constitution. The issue of these appointments has proved contentious, with the MDC-T claiming that the appointments which have been made (and one which has not) violate the agreements relating to power sharing between the parties.[1]

On the 27th January, 2009 the Extraordinary Summit of the SADC issued a communiqué which stated that:

- *the allocation of ministerial portfolios endorsed by the SADC Extraordinary Summit held on 9 November 2008 shall be reviewed six (6) months after the inauguration of the inclusive government.*

- *the appointments of the Reserve Bank Governor and the Attorney-General will be dealt with by the inclusive government after its formation.*

- *the negotiators of the parties shall meet immediately to consider the National Security Bill submitted by the MDC-T as well as the formula for the distribution of the Provincial Governors;*

Despite the MDC's complaints, SADC has done nothing to follow up on this communiqué. ZANU PF has refused to "deal" with these issues, insists that it has not breached any of the agreements with the MDC, and that there is nothing unlawful or improper in the actions of President Mugabe in relation to these appointments.[2]

In addition to relevant statutes, there are three documents of importance in this regard:

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[1] MDC Media Release 23/10/09.

[2] *Zimbabwe Government Leaders Expected To Meet Monday* http://www.radiovop.com/ 25/10/09.

1. The "Memorandum of Understanding" (MOU) signed by the three parties in July, 2008.

2. The "Global Political Agreement" (GPA) formally signed by the three parties on 15th September, 2008.

3. The Constitution of Zimbabwe with particular focus on the clauses introduced by Constitutional Amendment 19 signed into law by the President on 11th February, 2009.

The paper is written without knowledge (and thus consideration) of any verbal agreements which may have been reached in relation to appointments by those involved in the Inclusive Government.[3]

Flawed Documents.

All three documents mentioned above are remarkable for astoundingly bad drafting which renders both their interpretation and harmonisation extremely complex and problematic.

In the latter regard, both the MOU and the GPA are specifically stated to be agreements between ZANU PF and the two MDC formations. Yet both purport to bind the President of Zimbabwe, who is not a party to either agreement. It is elementary law that only a party to an agreement may be bound by its terms. However, even if the President of Zimbabwe had been included as a party to the agreement, it is also a doctrine of law that executive discretion cannot be fettered by contract.[4] All clauses in both the MOU and the GPA which purport to restrict the President's executive discretion are not, therefore, legally enforceable through the courts. Furthermore, many other clauses in the MOU and GPA are in the nature of political pronouncements, requiring political rather than legal interpretation and implementation.[5]

Accordingly, both the MOU and the GPA must be viewed as being a political arrangement between the political players involved. In this sense, although the President of Zimbabwe is not a signatory to the agreement in that capacity, as signatory *qua* President and First Secretary of ZANU PF, both he and his powers as President, must be regarded as being an integral part of the agreed political arrangement. Being a political arrangement incapable of enforcement by court order, the implementation of the provisions of the MOU and the GPA is dependent upon politics and not the law, for its implementation. Political will and the good faith of those involved in the process is necessary for the fulfilment of the terms of the agreements. Any breach of the terms of the MOU and GPA has political rather than legal implications and the political mechanisms or

[3] There have been reports that the parties agreed that five MDC provincial governors would be sworn in at the end of August 2009 and that Roy Bennet (see below) would be sworn in at the same time. This obviously has not happened.

[4] *Waterfalls TMB v Minister of Housing* 1957(1) SA 336 (SR).

[5] For this reason, only Article XX of the GPA and no others became part of Zimbabwe's law by virtue of Constitutional Amendment 19.

bodies mandated to deal with such a breach will need to be called upon. The GPA established a mechanism to deal with breaches – the Joint Monitoring and Implementation Committee, which has political rather than legal powers (Article 22.1). The AU, SADC and the facilitator were also the agreed "guarantors" and "underwriters" of the GPA (Article 22.6) though the substance of these terms is informed by the political only. They have no legal meaning or traction.

However, once Article XX became part of Zimbabwe's Constitution, it ceased to be merely part of an agreed political arrangement and became fully legally enforceable. For this reason a distinction must be made between appointments made during the currency of the MOU and GPA, and those made after the passage of Constitutional Amendment 19.

The MOU

Due to poor legal drafting, the period over which the MOU was to have effect is unclear. Under the MOU, the parties agreed enter into a dialogue with "a view to creating a genuine, viable, permanent and sustainable solution to the Zimbabwean situation and, in particular, to implement this Memorandum of Understanding." According to clause 6 of the MOU, the Dialogue commenced on 10 July 2008 and will continue until the Parties "have finalised all necessary matters…. It is envisaged that the Dialogue will be completed within a period of two weeks from the date of signing of this MOU." What is meant by finalising "all necessary matters" is unknown. The agenda of the dialogue was stated in the MOU as follows:

The Parties have agreed to the following Agenda:

4.1. Objectives and Priorities of a new Government
(a) ECONOMIC
(i) Restoration of economic stability and growth
(ii) Sanctions
(iii) Land question
(b) POLITICAL
(i) New Constitution
(ii) Promotion of equality, national healing and cohesion, and unity
(iii)External interference
(iv)Free political activity
(v) Rule of law
(vi) State organs and institutions
(vii) Legislative agenda priorities
(c) SECURITY
(i) Security of persons and prevention of violence
(d) COMMUNICATION
(i) Media (ii) External radio stations
4.2 Framework for a new Government
4.3 Implementation mechanisms
4.4 Global political agreement.
5. Facilitation

These provisions are singularly obscure and the period over which the MOU was to have effect cannot thus be determined with any certainty. Yet it was essential that the period of the MOU be defined in view of the fact that it was agreed in terms of section 9 thereof that:

> *The Parties shall not, during the subsistence of the Dialogue, take any decisions or measures that have a bearing on the agenda of the Dialogue, save by consensus. Such decisions or measures include, but are not limited to the convening of Parliament or the formation of a new government.*

This restriction on decisions or measures that had "a bearing on the agenda", lasted as long as the subsistence of the dialogue. The subsistence of the dialogue could be held to last until the signing of the GPA (only one of the items on the agenda 4.4), until the GPA became part of Zimbabwe's Constitution, or until all the items on the agenda had been "finalised"; i.e. economic growth and activity had been restored, sanctions removed etc.[6] While the first of these three options appears the most logical (being the only one which could have taken place in the two week period) it does not sit comfortably with section 9 of the MOU itself, as there would be little point preventing the unilateral formation of a new government during the subsistence of the dialogue, but not in the hiatus between the conclusion of the dialogue and the time that the GPA became part of Zimbabwe's Constitution – the more particularly in light of the fact that the tenor of the "Framework for the New Government", Article XX, was that many decisions, including appointments to the new government were to be made by consensus, as discussed below.

However, if the dialogue subsisted until the GPA was signed, appointments made by the President of Zimbabwe in terms of the Constitution or any Act of Parliament until that point, fell with the provisions of section 9 of the MOU as affecting "the agenda of the dialogue" or the formation of a new government and thus had to be made by consensus between the political parties. This is so for three reasons: firstly, the fact that the manner of making appointments was included in the GPA [Article 20.1.3] indicates that this was "part of the agenda of the dialogue"; secondly, most such appointments would also have constituted the process of the "formation of a new government"; thirdly, the appointments were made by the President of Zimbabwe and his recognition as legitimate president (and thus the ability to make these appointments) was itself part of the agenda of the dialogue, as the inclusion of this issue in the GPA indicated [20.1.6(1)].

The Appointment of the Provincial Governors

The appointment of the ten Provincial Governors related to the formation of the new government. They were made by the President of Zimbabwe in terms of section 4 of the Provincial Councils and Administration Act [*Chapter 29:11*]. Accordingly, these were appointments to be made with the consensus of all the parties. The failure to do so constituted a clear breach of political arrangement agreed by the parties under the MOU and was an act of bad faith by Robert Mugabe. However, since the appointments were made in terms of the laws of Zimbabwe, political rather than legal action is required to reverse the appointments. This is

[6] In an interview broadcast on SW Radio on 23/10/09 Gordon Moyo, Minister of State in the Prime Minister Office, suggested that appointments made by Mugabe after the signing of the GPA in November and December, 2008 violated the MOU as well as the GPA.

legally possible as the President of Zimbabwe has the power to remove a Provincial Governor in terms of section 8(2)(b) of the Act.

The GPA

In terms of Article XX of the GPA, the parties agreed a Framework for a New Inclusive Government. Like the MOU, the period over which this Article was to have currency is obscure and this appears to be the source of the current dispute between the MDC-T and ZANU PF in relation to appointments made before Constitutional Amendment 19.

Article 25 specifically states that the GPA is to enter into force upon the signatures of the parties, which were officially appended to the document on the 15th September, 2008. Hence Article XX came into force on that date. However, Article XX refers to the "Framework for a New Inclusive Government" yet to be formed. Accordingly, the argument of ZANU PF appears to be that the provisions of Article XX thus only related to an obligation to establish an inclusive government sometime in the future and one which, after establishment, would apply the provisions of Article XX. In terms of this argument, Article XX prescribed the formalities to be followed by the Inclusive Government for appointments to senior government positions, or appointments under any Act of Parliament or the Constitution. These formalities, it is then argued, did not apply to appointments made before the establishment of the Inclusive Government, but only to appointments once the Inclusive Government had been formed. One such formality is indicated by Article 20.1.3(p) which provides:

> *The President **in consultation** with the Prime Minister makes key appointments the President is required to make under and in **terms of the Constitution** or any **Act of Parliament**.*

The Governor of the Reserve Bank and Attorney-General were appointed in November and December 2008 respectively, that is, after the signing of the GPA but before the formation of the Inclusive Government.

It is thus argued that since these appointments were made by the President who was not part of the yet to be formed Inclusive Government, the formalities to be followed and requirements to be met by the Inclusive Government did not need to be, and could not be, applied.[7] In support of this argument it is pointed out that the formality of consulting the Prime Minister under 20.1.3(p) could not be met as, at the time of the appointments, the Prime Minister himself was yet to be appointed.

This argument is sophistry and cannot be sustained for several reasons. Firstly, although Article XX is titled Framework for a New Government, it does not simply deal with the structure or establishment of the new government, but also the formalities for appointments *to* the new

[7] The claim has been made repeatedly and most recently in an interview broadcast on SW Radio on 23/10/09 with Didymus Mutasa, Minister of State for Presidential Affairs.

government and not simply *by* the new government.[8] The formalities thus had to be followed in appointing the personnel who were to be part of the establishment of the new government. Secondly, the GPA specifically provided[9] that the Prime Minister would be appointed by the President of Zimbabwe prior to the enactment of Constitutional Amendment No 19, thus anticipating that the Article would have operation before the formation of the Inclusive Government. Thirdly, it was thus implicit that, if the President intended to make an appointment under the Constitution or any Act of Parliament, he was required to appoint the Prime Minister first so that he was available to be consulted. The ability to do so prior to the enactment of Constitutional Amendment 19 was probably included for precisely this reason. It is perhaps worth noting that government has adopted a similar argument to justify its failure to hold by-elections in terms of the Electoral Act as required,[10] maintaining a reconstituted Zimbabwe Electoral Commission must first be appointed.[11]

The Appointment of Gideon Gono

The appointment of the Governor of the Reserve Bank is provided for by an Act of Parliament - the Reserve Bank of Zimbabwe Act [Chapter 22:15] section 14. Accordingly, the President of Zimbabwe was obliged under 20.1.3(p) to consult with the Prime Minister before making this appointment. His failure to do so and appointment of Gideon Gono as Governor in November 2008 was a breach of the political arrangement agreed by the parties under the GPA and an act of bad faith. Since the appointment was made before the enactment of Constitutional Amendment 19, no *legal* remedy arises from the GPA. Any remedy under the GPA must lie in the political realm. Here, it should be noted that, even if the President had the political will to remove Gideon Gono from his post, the ability to do so legally is complicated by the fact that once appointed, the Governor may only be required to vacate his office on the grounds specified in section 17(2) of the Reserve Bank Act, that is on the basis of misconduct, incompetence etc..

However, it does not appear that the appointment of Gideon Gono was in fact made in terms of the Reserve Bank Act and can be challenged in Zimbabwe High Court on this basis. This is so for two reasons.

Firstly, before appointing the Governor of the Reserve Bank the President was obliged, in terms of Section 14 of the Act, to consult with the Minister of Finance. At the time of the appointment of the Governor, the new Ministers had yet to be appointed.

The Constitution provides that the term of office of Ministers ends upon the assumption of office of a new President [31E(1)(c)]. The Supreme Court has ruled that where the same person is re-elected as President, that person is not a new President for the purposes of section 31E(1)(c).[12]

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[8] And, in addition, for the appointment of some Members of Parliament – 20.1.10 of the GPA.

[9] See below.

[10] Section 39 of the Electoral Act [Chapter 2:13]

[11] Constitutional Amendment 19 altered the manner in which this body is to be constituted.

[12] *Quinnell v Minister of Lands Agriculture and Rural Resettlement* SC 47/04.

Therefore, people who were Ministers under the outgoing government continued as such by virtue of the fact that no new president assumed office. However, 31E(2) of the Constitution also provides that no person shall hold office as Minister for longer than three months without being a member of Parliament. This three month period is suspended if Parliament is dissolved. The former Minister of Finance, Samuel Mumbengegwi lost his seat in the 2008 elections. Although he was entitled to remain as Minister for longer than three months while Parliament was dissolved, the moment Parliament sat on the 26th August, 2008 he automatically ceased to be Minister of Finance. Accordingly, the President was obliged to wait until a new Minister of Finance was appointed in order to comply with the requirement of consultation with the Minister under the Act. His failure to do so meant that the appointment was not in compliance with the Act. The intention of the Act may be to ensure that the person who occupies the post of Governor is someone who will enjoy a good working relationship with the Minister, as their respective duties are closely tied. By not following the provisions of the Act, incompatible persons occupy these positions to the detriment of good governance.

Secondly, it may be that Gideon Gono was not qualified to hold the post of Governor, as persons holding shares in any banking institution are excluded from holding the post [section 16(a) of the Reserve Bank Act]. It is believed that Gono still holds shares in a commercial bank, CBZ.

Any application to the High Court in this regard could have interesting results. It was widely reported before the formation of the unity government, that the Reserve Bank, through Gideon Gono, supplied judges with flat screen televisions, satellite decoders and generators at no charge.[13] Judges ought to receive their remuneration in accordance with section 88 of the Constitution, that is, through the Consolidated Revenue Fund. Payments or perks given to judges from any other source raises the taint of undue influence. It is thus likely that any application to the High Court to declare the appointment of Gono as Governor of the Reserve Bank unlawful will be preceded by an application for the recusal of the Judge if he or she has been a beneficiary of what appears to be the Governor's largesse.

In addition to the usual and regular audit of the Reserve Bank's accounts, the Minister of Finance has the power under section 36(3) of the Reserve Bank Act to require auditors "to provide such other reports, statements or explanations in connection with the Bank's activities, funds or property as the Minister considers expedient." Given the apparent distribution of largesse to Judges, and admitted improprieties by the Governor, such as the use of funds belonging to donor agencies without their authority[14] (which, if done by an ordinary citizen, or more analogously a lawyer holding monies in trust, would have resulted in charges of theft by conversion) it is apposite that the Minister exercise these powers.

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[13] *RBZ Compromising Judges* The Zimbabwe Independent 14/08/09.

[14] *Zim: Central Bank Raids Foreign Accounts* http://www.africanews.com 09/04/09

The Appointment of Johannes Tomana

The Attorney-General is appointed by the President in terms of section 76(2) of the Constitution in consultation with the Judicial Service Commission. As such, it is an appointment in terms of the Constitution and thus falls squarely within the ambit of article 20.1.3(p) of the GPA. The appointment thus ought to have been made "in consultation" with the Prime Minister. The GPA thus required that the President of Zimbabwe appoint, and thereafter consult with, the Prime Minister, before appointing the Attorney-General. He did not do so. The appointment was thus a clear breach of the GPA.

Since the appointment was made in December 2008, before Article XX of the GPA became part of the Constitution, the appointment, while in breach of the GPA, does not violate the Constitution or any other law of Zimbabwe. It is assumed that Tomana holds the necessary qualifications for appointment as Attorney-General. Accordingly, this breach has political repercussions and requires a political rather than legal response for the same reasons as outlined in relation to the appointments of Provincial Governors and, *vis-à-vis* the GPA, the Governor of the Reserve Bank.

Furthermore, like the Governor of the Reserve Bank (and unlike Provincial Governors) once appointed, the Attorney-General does not hold office simply at the pleasure of the President. The provision is badly drafted,[15] but section 110 of the Constitution indicates that the Attorney-General may only be removed from office on specified grounds such as misconduct and the inability to discharge the functions of his office - and even then possibly only after a tribunal established for this purpose has recommended such removal from office. Accordingly, even if Mugabe had the political will to remove Tomana as Attorney-General, there would have to be compliance with the requirements of section 110 of the Constitution. Tomana has openly proclaimed his allegiance to ZANU PF[16] and his appointment was clearly based on political considerations. The difficulty is that removal of Tomana on political grounds would violate those sections of the Constitution which ostensibly shield the office of the Attorney-General from political interference.[17] Such an act would not be in accordance with the stated objective of the GPA of restoring the rule of law.

Appointments after the Enactment of Constitutional Amendment 19

Having been passed by Parliament, President Mugabe signed Constitutional Amendment 19 into law on the afternoon of 11th February, 2009. The amendment incorporated the whole of Article XX of the GPA into the Constitution as Schedule 8. The provisions of Article XX thus became part of the supreme law of Zimbabwe, and not merely part of a political arrangement between the MDC formations and ZANU PF. As a result, any failure to comply with the provisions of

[15] The provisions do not make it clear whether the removal of the Attorney-General may only be through a specially convened tribunal, though this is implicit.

[16] *New AG Openly Declares Support for Zanu-PF* The Zimbabwe Times 13/01/09.

[17] For example section 76(7) providing that in the exercise of his powers he is not subject to the directions of any person or authority

Schedule 8 has legal, rather than merely political, implications and a remedy may be sought through Zimbabwe's High Court or Supreme Court.

However, bad drafting renders the position in relation to appointments under the inclusive government less than clear. The following sub-clauses of Article 20.1.3 indicate why this is so:

The President

i) formally appoints the Vice Presidents;
j) shall, pursuant to this Agreement, appoint the Prime Minister pending the enactment of the Constitution of Zimbabwe Amendment No. 19 as agreed by the Parties;
k) formally appoints Deputy Prime Ministers, Ministers and Deputy Ministers in accordance with this agreement;[…]
n) appoints independent Constitutional Commissions in terms of the Constitution;
(o) appoints service/executive Commissions in terms of the Constitution and ***in consultation*** *with the Prime Minister;*
(p) ***in consultation*** *with the Prime Minister, makes key appointments the President is required to make under and in terms of the Constitution or any Act of Parliament*

It is extremely difficult to unravel the meaning of these clauses, not least because there is a wide variety of ways in which they indicate that appointments are to be made by the President. Some are "formal" appointments; some are made "in accordance with this agreement"; some are made "pursuant to this agreement"; some are made "in terms of the Constitution"; one is made "*under and* in terms of the Constitution; some are made "in consultation with the Prime Minister"; and some are a combination of these.

Furthermore, adding to the confusion, Article XX throughout variously uses the present simple such as "appoints"; "shall appoint", implying both the future and an imperative; and "will". It is difficult to determine the logic behind these variations.

Under the basic canons of interpretation, each word in a clause is assumed to have a meaning and to have been inserted for a specific purpose. No word may be assumed to be superfluous. A corollary is that where a word appears in one clause, but is omitted from another similar clause (or a different word is substituted), it is assumed that a different meaning is intended.[18]

Consider sub-clause (i). Firstly, this clause differs from (j) (n), (o) and (p) by the use of the word "formally". This leads to the question as to why this word has been included and how the provisions of the sub-clauses which include this word differ from those that do not. It could be that because the Vice-Presidents are nominated by the "President and/or ZANU PF" [20.1.6(2)] and that, although the President has the power to appoint, it is intended that he has no discretion to refuse to make such an appointment, once the nomination has been made [and once the Prime Minister has agreed or consented to the appointment under sub-clause (p) (see below)]. The appointment thereafter is deemed to be a "formality". If so, this has important implications for

[18] *Attorney-General, Transvaal v Additional Magistrate Johannesburg* 1924 AD 421 at 436.

clause (k) which also uses the word "formally" and would mean that the President cannot refuse to appoint, on the basis of an exercise of discretion, any Minister or Deputy Minister nominated by, for example, MDC-T under sub-clauses 20.1.6.(5) and 20.1.6(6) respectively and agreed to by the Prime Minister. Yet Mugabe has purported to do precisely that in refusing to appoint a MDC-T nominee as a Deputy Minister (see below).

Secondly, sub-clause (i) also differs from the others in that sub-clauses (k) and (j) provide that the formal appointments must be "in accordance with [or pursuant to] this agreement" and the other remaining sub-clauses above provide that the appointments must be made "in terms of the Constitution". Sub-clause (i) does not provide either of these two requirements. So at the time of the currency of the GPA were the appointments of Vice-Presidents to be made in terms of the agreement or the constitution? The two are not the same. Two Vice-Presidents are mandatory under the agreement and must have certain qualities (i.e. be nominated by the President or ZANU PF [20.1.6(2)] and be made with the agreement and consent of the Prime Minister) whereas under the Constitution (31C) it is at the President's discretion whether there be one or two Vice-Presidents with no qualifications for office provided.

In the absence of the phrase "in accordance with this agreement" in sub-clause (i), it must also be asked why it was deemed necessary to include sub-clause (i) at all. The President's power to appoint Vice-Presidents was already provided for by the Constitution. Why was it necessary to include this power in the GPA? There are numerous other powers which the President has under the Constitution (including the power to make appointments in numerous other instances) which are not repeated in the GPA. Why then was this power included and not others, and what, if anything, is the significance of this?

The answer may be that it was thought necessary to spell out which of the President's powers were to remain unchanged. This partially explains the fluctuations between the use of the present simple, such as "appoints" and the use of "shall". Generally, the present simple is used when there is reference to a power existing at the time of the GPA, and "shall" is used in relation to appointments to posts which come into being after the formation of the inclusive government. This use of "shall" is almost entirely consistent in 20.1.3 read with 20.1.6 (the clause relating to quotas), and, where it is not, "shall" infers obligation rather than the future. However, the present simple is used in relation to the appointments of the Deputy Prime Ministers [sub-clause (k)] when, to be consistent, "shall" should have been used, as the posts of Deputy Prime Ministers were only to be created at a point in the future.

The use of the present tense ("appoints") in relation to the appointment of the Prime Minister is different to that of the Deputy Prime Ministers. Although, like the Deputy Prime Ministers, the post of Prime Minister did not exist at the time of the signing of the GPA, the President was required to appoint the Prime Minister pending the passage of Constitutional Amendment 19. It was probably anticipated that this would take place almost immediately after the signing of the GPA[19].

[19] In fact the Prime Minister was sworn in only a few hours before the President signed Constitutional Amendment 19 into law.

However, while the use of "shall" and the present tense can be explained on this basis for the purposes of 20.1.3, it is not consistently used throughout Article XX. For example 20.1.4 commences with: the Prime Minister

(a) chairs the Council of Ministers and is the Deputy Chairperson of Cabinet;

notwithstanding the fact that the council of Ministers did not exist at the time of the signing of the GPA. It would have been more logical to provide that the Prime Minister "shall chair" etc.

The President's power to appoint Ministers sub-clause (k) already existed under the Constitution. However, the appointment of Ministers is required to be "in accordance with this agreement" and not "in terms of the Constitution".

The intention seems to be to make a distinction between the appointments in terms of Constitution, as it existed at the time of the GPA, and appointments in terms of the agreement. However, it was not always necessary to do so.

Sub-clause (n) provides that the President appoints the "independent Constitutional Commissions *in terms of the Constitution*". The independent Constitutional Commissions are established by the Constitution, not by the President appointing them. The President appoints the persons who are to be Commissioners.[20] There are no provisions in the GPA relating to the appointment of Commissioners and thus no need to insert the phrase "in terms of the Constitution" to distinguish appointments in terms of the Constitution from those made in terms of the agreement. Commissioners could and can only be appointed in terms of the Constitution. The inclusion of this phrase in sub-clause (n) is thus superfluous. The Constitution also provides that all Commissions established by Constitution are to be independent [section 109]. Accordingly, the inclusion of the word "independent" does not distinguish independent Constitutional Commissions from non-independent ones. The word serves no function and should have been omitted.

Sub-clause (k) provides that the appointments of the Deputy Prime Ministers, Ministers and Deputy Ministers are to be made "in accordance with this agreement". At the time the GPA was signed neither the posts of Prime Minister nor Deputy Prime Ministers existed in terms of the Constitution. While the GPA provided that the Prime Minister was to be appointed pending the enactment of Constitutional Amendment 19, no equivalent provision was made for the Deputy Prime Ministers. Hence, the intention was that the Deputy Prime Ministers would be appointed following a constitutional amendment. Since there was no constitutional provision at the time of the GPA providing for the post of Deputy Prime Minister, the GPA could not have provided that the appointment be "in terms of the Constitution". Nor could the President appoint the Deputy Prime Ministers prior to the Constitutional Amendment. There was no need for the GPA to state that these appointments be "in accordance with this agreement". The sub-clause should simply have read, as a separate sub-clause, the President ("formally") appoints the Deputy Prime Ministers. The fact that one Deputy Prime Minister had to be from MDC-T and one from MDC-

[20] The point is not pedantic, as it may be necessary to determine whether a Commission exists in the absence of its Commissioners.

M was already assured by clause 20.1.6(4) to be applied at the time of the future appointments. The phrase “in accordance with this agreement” thus appears to be superfluous in relation to the Deputy Prime Ministers.

The position is different in relation to Ministers, as at the time of the signing of the GPA the President had the power to appoint Ministers. The drafters of the GPA thus thought to distinguish between appointments “in terms of the Constitution” and the new provisions in terms of which Ministers were to be appointed under sub-clause (k), and “in accordance with the agreement” [20.1.6(5)]. Ministers must be appointed so that there is a quota of 15 ZANU PF nominees and 16 nominees from the MDC formations. In accordance with the Agreement, they may only be removed from office in terms of 20.1.7(7), after consultation among the leaders of the signatory parties.

However, once Article XX became part of the Constitution as Schedule 8, all appointments referred to in the Article, *ipso facto*, became appointments in terms of the Constitution (see below).

Article XX was transposed into Schedule 8 without the changes which ought to have been made to reflect the fact that the clauses were now part of a Schedule to a legally enforceable Constitution rather than part of a political agreement. Schedule 8 commences with:

> *For the avoidance of doubt, the following provisions of the Interparty Political Agreement, being Article XX thereof, shall, during the subsistence of the Interparty Political Agreement, prevail notwithstanding anything to the contrary in this Constitution*

However, the whole preamble to Article XX was also included which contains “clauses” such as:

> *Accepting that the formation of such a government will have to be approached with great sensitivity, flexibility and willingness to compromise.*

To stipulate that this “provision” is “to prevail notwithstanding anything to the contrary in this Constitution” is legal gibberish.

Because of this wholesale inclusion of the sub-clauses discussed above, references to the fact that appointments are made “in accordance with this agreement” rather than “in accordance with this Schedule - or better still “in accordance with” the appropriately cross-referenced section of the Schedule of Constitution - remain. The transposition also included an obvious error in the GPA where the GPA is referred to in clause 20.1.1. as “this Constitution” rather than “this agreement”.

Turning to sub-clause (p):

To recap, the sub-clause provides:

> *The President **in consultation** with the Prime Minister makes **key***

> *appointments the President is required to* ***make under and in terms of the Constitution*** *or any Act of Parliament.*

The sub-clause thus concerns:

a) "key" appointments

b) made "under and in terms of the Constitution; and

c) "under and in terms of any Act of Parliament".

These appointments are made by the President "in consultation with the Prime Minister". Once the GPA was incorporated into the Constitution, the sub-clause became of central importance due to section 115 of the Constitution, introduced as part of Constitutional Amendment 19 and which provides:

> *"in consultation" means that the person required to consult before arriving at a decision arrives at the decision* ***after securing the agreement or consent*** *of the person so consulted.*

Together these two provisions now require, unlike the GPA, that rather than merely consulting with the Prime Minister, the President is now required to secure the agreement or consent of the Prime Minister due to the special meaning given to the phrase "in consultation with".

However, it is not obvious as to which appointments sub-clause (p) should apply.

One difficulty is caused by the subjective term "key". What constitutes a "key appointment" is not defined. One would assume that if an appointment is important enough to require the President and Prime Minister's attention, it is a "key" appointment. The word "key" thus initially appears to be superfluous.

In addition to Article 20.1.3(p), a second clause of Schedule 8 also provides:

> *Senior Government appointments: The Parties agree that with respect to occupants of* ***senior Government positions****, such as* ***Permanent Secretaries*** *and Ambassadors, the leadership in Government, comprising the President, the Vice-Presidents, the Prime Minister and Deputy Prime Ministers,* ***will consult and agree on such prior*** *to their appointment.* [20.1.7].

20.1.3(p) of provides that appointments by the President of Zimbabwe under the Constitution or any Act of Parliament must be made in consultation with the Prime Minister. Yet many of these appointments may also be appointments to senior government positions, and Article 20.1.7 then requires that there be consultation and agreement amongst the President, Vice-Presidents, the Prime Minister and Deputy Prime Ministers, and not just consultation with the Prime Minister.

20.1.3(p) thus at first sight appears to conflict with 20.1.7. For example, following the death of

Vice-President Msika, a replacement must be appointed in terms of section 20.1.6(2) of the GPA and Schedule 8 of Constitution. As an appointment under the Constitution, Article 20.1.3(p) of the GPA should apply. But surely the appointment is also a senior government position, suggesting that 20.1.7 has application.

However, one can apply the canons of interpretation that superfluity should be avoided, as should an interpretation that gives rise to conflicting provisions.[21] This may be done by assuming that the word "key" was inserted to distinguish appointments which are "key appointments" in terms of the Constitution from those which are merely "senior government" appointments, whether in terms of the Constitution or otherwise.

Schedule 8 may thus be said to provide for two types of appointment only, those which are key and those which are to senior government positions. The former requires that the President secure the Prime Minister's agreement, the latter consultation and agreement amongst the President, Vice-Presidents, the Prime Minister and Deputy Prime Ministers

If sub-clause (p) appeared in isolation in the Constitution, its effect would be reasonably clear. However, it appears in Schedule 8 to the Constitution, and amongst 19 other sub-clauses, five of which, extracted above, relate to appointments. The otherwise clear meaning of sub-clause (p) may be adulterated by the context of the other clauses pertaining to appointments. This context may affect what is meant by "appointments the President is required to make under and in terms of the Constitution" in sub-clause (p).

Doubt may arise, for example, as to whether appointments made under sub-clause (k) are appointments "in terms of the Constitution", since appointments under that sub-clause are not "in terms of the Constitution", but "in accordance with this agreement". On this basis, sub-clause (p) would not apply to an appointment under sub-clause (k). However, this would be to lose sight of the fact that the only reason the phrase "this agreement" appears is because of the incorporation of Article XX, unamended, as a Schedule. The word "this" cannot refer to the GPA. The sub-clause is situated in a Schedule to the Constitution not the GPA (from which it was extracted) and "this" must thus refer to that Schedule. The Schedule is part of the Constitution and an appointment made under a sub-clause in that Schedule should plainly be one which is made "in terms of the Constitution".

Per contra, it may be argued that by importing Article XX wholesale into Schedule 8 of the Constitution, the intention was to retain and carry across the original meaning of the GPA into the Constitution. In terms of this argument, the phrases "in accordance with this agreement" would mean "in accordance with the provisions of Article XX relating to the structure of government as set out in the GPA before they became part of the Constitution". "Under and in terms of the Constitution" would mean "in terms of the main body of the Constitution". Sub-clause (p) would then have no application to sub-clauses in Schedule 8 which refer to "in accordance with the agreement".

In this regard sub-clause (o) is of relevance this provides the President:

[21] *Handel v R* 1933 SWA 37 at p40.

appoints service/executive Commissions in terms of the Constitution and ***in consultation*** *with the Prime Minister*

If sub-clause (p) which provides that all appointments "under and in terms of the Constitution" are to be in consultation with the Prime Minister, and this requirement of consultation applies to all the sub-clauses relating to appointments given above, including sub-clause (o), then, it is argued, there would have been no need to specifically provide that appointments to service commissions "be in consultation with the Prime Minister" as this requirement would already be provided for by sub-clause (p). Accordingly, the inference must be that sub-clause (p) was not intended to apply to these sub-clauses.

This leads to the rather convoluted result, after the passage of Constitutional Amendment 19, that although an appointment made under sub-clause (k), for example, would be a constitutionally valid appointment, it is not one which, for the purposes of clause (p), is an appointment made "under or in terms of the Constitution." The argument offends the interpretive rule that the plain meaning of language should be adopted where possible.[22] A second approach is possible which does not offend against the rule.

Firstly, we have seen that verbiage arises in other sub-clauses, such as sub-clause (n) which provides that the President "appoints independent Constitutional Commissions in terms of the Constitution" where there is no need to use the word "independent" or the phrase "in terms of the Constitution" (see above). The phrase "in consultation with the Prime Minister in sub-clause (o) may simply be another instance of such verbiage.

Secondly, there is no necessity to assume that the drafters of the GPA intended the distinction between appointments "in accordance with this agreement" and those "in terms of the Constitution" be carried into the amended Constitution. The GPA provided [24.1] that "that the constitutional amendments which are necessary for the implementation of this agreement shall be passed by parliament." With equal logic then, one may assume that in drawing sub-clause (p) the drafters anticipated that the appointments made "in accordance with this agreement" or implicitly so made,[23] would become part of the Constitution, and that sub-clause (p) would then apply to them.

Sub-clause (p) is also the last in a series relating to appointments and may for this reason be regarded as a catch-all clause intended to apply to all preceding clauses. If that were not the case, clarity could have been provided by stipulating that the President "makes *all other* key appointments" in consultation with the Prime Minister. It does not do so. It may also be the case that the intention was that the appointments are to be determined by the President with the agreement of the Prime Minister, and the individuals are then "formally" appointed by taking the oaths of office and loyalty. This, together with the requirement of nominations in accordance with set quotas, gives meaning to use term "formally" in clauses (i) and (k) (as suggested above).

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[22] *Venter v R* 1907 TS 910 at 914-5.

[23] Such as sub-clause (i).

Having waded through this necessarily lengthy and somewhat turgid attempt to explain the provisions relating to appointments in 20.1.3, the reader may have the sensibility that the drafters of the GPA ought to be located and immediately taken outside and shot. The feeling will be heightened when one considers that the Prime Minister's executive authority is derived solely from this sub-clause. Ye,t one is required to hack through a hermeneutic thicket in order to determine its meaning and thus the extent of this authority. At the time, perfectly lucid versions of the proposed constitutional amendment had been prepared by professional legislative drafters and were available for adoption. Unfortunately they were ignored.

What follows is based upon the plain meaning of the wording of sub-clause (p) - that the President is required to act in terms of clause (p) in relation to all appointments under the Constitution, other than in relation to senior government appointments as set out in clause 20.1.7, that is, the President is required to secure the agreement or consent of the Prime Minister when making appointments in terms of the Constitution.

The Appointment of Ministers

The appointment of Ministers by Mugabe thus, as a matter of constitutional imperative, requires the Prime Minister's agreement. It is assumed that this was secured.

The establishment of the Ministries appears in Article 20.1.6 of Schedule 8:

> *(5) There shall be thirty-one (31) Ministers, with fifteen (15) nominated by ZANU PF, thirteen (13) by MDC-T and three (3) by MDC-M.*
>
> *(6) There shall be fifteen (15) Deputy Ministers, with (eight) 8 nominated by ZANU PF, six (6) by MDC-T and one (1) by MDC-M.*

On the 13th February, 2009 President Mugabe purported to swear into office 35 Ministers and, on the 19th February, 2009, a further six Ministers bringing the total to 41, ten more than are permitted by the Constitution. As such, the appointment of these ten additional Ministers is unconstitutional, unlawful and void. Which Ministers are unconstitutionally in office depends upon the order in of the swearing-in. Once the quota of 15 ZANU PF nominees was reached, the purported assumption of office by any ZANU PF nominee thereafter was unconstitutional. The same considerations applied once the quota of 13 MDC-T and 3 MDC-M Ministers had been reached. Ministers are required to both take and subscribe to oaths of loyalty and of office. While they all took the verbal oaths simultaneously on the date of their swearing in, the process was not completed until they had subscribed in writing to these oaths. The ten that did so after the quotas had been reached are not constitutionally appointed as Ministers. Of the ten, three were MDC-T nominees, one an MDC-M nominee and six ZANU PF nominees. The Ministers in question are as follows:

MDC-T

1. Henry Madzorera [Elected Senator] Health and Child Welfare.
2. Giles Mutsekwa [MP Manicaland] Home Affairs

3. Sekai Holland [no parliamentary seat] National Healing.

MDC-M

1. Gibson Sibanda (who has since lost his Ministerial post as he has no parliamentary seat) Minister of State in Deputy Prime Minister Mutambara's office.

ZANU PF

1. John Nkomo [Appointed Senator] Minister of State in President's Office .
2. Flora Bhuka [MP Midlands] Minister of State in Vice-President Msika's office.
3. Sylvester Nguni [MP Mashonalnd West] Minister of State in Vice-President Mujuru's office.
4. Savior Kasukuwere [MP Mashonaland Central] Youth Development, Indigenisation and Empowerment.
5. Joseph Made [Appointed Senator] Agriculture, Mechanisation and Irrigation Development.
6. Walter Mzembi [MP Masvingo Province] Tourism and Hospitality Industry.[24]

It is not open to ZANU PF and the MDC formations to argue that they had an agreement amongst themselves to amend the GPA to provide for the increased number of Ministers. The number of Ministers is set, as part of the law of Zimbabwe, by Schedule 8 to the Constitution and not by the GPA. Any alteration to the Schedule requires a constitutional amendment. It would be unprecedented that a country's constitution could be amended simply at the whim of (some of) the country's political parties.

The Appointment of Cabinet

After the GPA was signed it was simply assumed that those appointed as Ministers would automatically become members of the Cabinet. This is not the case. The Constitution provides, in section 31G(1), that the Cabinet consists of such Ministers as the President may from time to time appoint. The GPA and constitutional amendment 19 leaves this power unaffected. Mugabe in fact appointed all Ministers to cabinet except those who are "Ministers of State".

The Appointment of Deputy Ministers

On the 19th February, 2009 19 Deputy Ministers were purportedly sworn in, four more than the constitutional establishment of 15. They comprised 10 ZANU PF nominees (two above the permitted eight) and eight MDC-T nominees (two above the permitted six). The same considerations outlined above in relation to the purported appointments of additional Ministers apply to the four Deputy Ministers purportedly sworn in above the constitutionally prescribed quotas. The order of the subscription to the oaths of loyalty and office by the Deputy Ministers has not been determined.

[24] This has been determined by viewing video footage of the ceremony.

The Terms of Appointment of Ministers and Deputy Ministers

The question then arises whether the terms relating to the appointments of Ministers under the Constitution such as taking an oath of office and loyalty, the prohibition on holding any other public office or paid office in the employment of any person and the requirement of holding a parliamentary seat, no longer apply since these requirements are only provided in the main body of the Constitution - sections 31D and 31E - and are not in Schedule 8. Schedule 8 prevails over the main body of the Constitution during the subsistence of the GPA.

It is arguable that the terms for appointment and tenure of office for Ministers and Deputy Ministers are governed in accordance with the GPA as incorporated in Schedule 8 to the Constitution, and not in accordance with sections 31D(2) and 31E.[25] However, this is not how the provisions were interpreted and Ministers and Deputy Ministers were required to take oaths of office and loyalty as provided by 31D(2) of the Constitution. There seems to be an acceptance that a Minister loses his post as such if he does not hold a parliamentary seat for more than three months [31E(2) of the Constitution][26].

Section 31D(1) appears largely unaffected by the GPA and Constitutional Amendment 19. This provides that the President:

> *(a) shall appoint Ministers and may assign functions to such Ministers, including the administration of any Act of Parliament or of any Ministry or department*

Clause 20.1.3(l) provides that the President:

> *after consultation with the Vice Presidents, the Prime Minister and the Deputy Prime Ministers, allocates Ministerial portfolios in accordance with this Agreement*

"After consultation" is specifically given a different definition to "in consultation with" which requires that the agreement or consent of the person consulted be secured. "After consultation" means that the President is not bound by the opinion of the people consulted. Accordingly the President is merely required to consult as normally understood in relation to the allocation of portfolios. His discretion to assign duties and the administration of Acts remains unfettered. The MDC has alleged that the reduction of the duties of the MDC Minister of Information Communication Technology is a violation of the GPA. This does not appear to be the case.

Mugabe also thus retains the power to "re-shuffle" his cabinet should he so wish.

The removal of a Minister is provided for in article 20.1.6(70 of Schedule 8.

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[25] The GPA or Inter Party Political agreement, as is the legally more correct title, is specifically held to "prevail notwithstanding anything to the contrary" in the Constitution.

[26] See below under Ministerial Appointments.

Ministers and Deputy Ministers may be relieved of their duties only after consultation among the leaders of all the political parties participating in the Inclusive Government.

The use of the passive voice obscures agency, but it must be assumed that the President retains the power to dismiss under section 31E(1)(a) of the Constitution. Since this is done "after consultation" rather than "in consultation" the political parties, he is not bound by the results of the consultation. However, any replacement must be a nominee of the party to which the dismissed Minister belonged [20.1.10].

The Appointment of Roy Bennett

Roy Bennett is an MDC-T's nominee for a post of Deputy Minister which the MDC wishes to be within the Ministry of Agriculture, Mechanisation and Irrigation Development. President Mugabe has refused to swear Bennett into office, ostensibly on account of charges he faces relating to the possession or supply or weapons of war contrary to Zimbabwe's laws. The President retains the power previously held under section 31D(1) of the constitution to "formally" appoint Ministers and Deputy Ministers, by virtue of article 20.1.3(k) of Schedule 8 of the Constitution. This power is, however, constrained as noted above, by the fact that a specified quota of such appointments must be from particular political parties, and must be made after securing the consent or agreement of the Prime Minister.

It is unclear how these provisions ought to be interpreted. They could imply that once a candidate has been nominated from a particular party and the Prime Minister's agreement or consent obtained, Mugabe must appoint the nominee to the post. On this interpretation, the President's agreement to the appointment is not required, and the appointment is a formality only. This interpretation would give the Prime Minister a veto power over the appointment of ZANU PF and MDC-M nominees, without any reciprocal veto power by the President over MDC-T nominees. Alternatively, it could be argued that by giving the President the power to make such appointments, his agreement to the appointment must also be secured. In other words the phrase in section 115 "after securing the agreement or consent of" must be read to mean "after the two have reached an agreement on the appointment". Mugabe clearly has not agreed to the appointment of Bennett. There is no mechanism under the amended constitution as to what is to happen if no such agreement can be reached. The resolution of such a deadlock would thus need to be political rather than legal.

However, the above points have no currency at present. The MDC-T quota of Deputy Ministers has already been exceeded. The appointment of Bennett would thus be unconstitutional.

The Appointment of Senators

The President has the power under the amended constitution [20.1.9 of Schedule 8] to appoint senators to Parliament.

(a) The President shall, in his discretion, appoint five (5) persons to the existing positions of Presidential senatorial appointments.

(a) There shall be created an additional six (6) appointed senatorial posts, which shall be filled by persons appointed by the President, 4 of whom will be nominated by MDC-T and 2 by MDC-M.

As these are appointments under the constitution, article 20.1.3(p) has application and the Prime Minister's agreement is required. In the absence of such agreement, the appointments are unconstitutional. Furthermore, some of the President's appointments to the Senate are also Ministers (such as Patrick Chinamasa[27]). They thus meet the constitutional requirement that a Minister holds a seat in Parliament only by virtue of such appointment. If the appointment to Parliament is not validly made, then the Minister is not a Member of Parliament and does not meet the requirement necessary to hold office as a Minister. Gibson Sibanda of MDC-M, for example, ceased to be a Minister after holding that post for more than three months without securing a parliamentary seat. If Chinamasa was appointed as Senator without the necessary agreement of the Prime Minister first secured, his appointment as Minister can be legally challenged.

The Appointment of a Second Vice-President.

Section 31C(1) of the Constitution simply provided that there be "no more than" two Vice-Presidents, giving the President the discretion as to whether to appoint more than one Vice-President. However, Article 20.1.6 of Schedule 8 to the Constitution (which Schedule specifically overrides any other constitutional provision to the contrary – paragraph 1) requires that there be two Vice-Presidents appointed by the President. President Mugabe is thus required to appoint a second vice-president following the death of Vice-President Msika of ZANU PF. The filling of vacancies is provided for by article 20.1.10 of Schedule 8.

> *In the event of any vacancy arising in respect of posts referred to in clauses 20.1.6 and 20.1.9 above, such vacancy shall be filled by a nominee of the Party which held that position prior to the vacancy arising.*

The appointment of the Vice-President is an appointment in terms of the Constitution and thus article 20.1.3(p) as read with section 115 has application. The Prime Minister's agreement or consent to the appointment of whoever is nominated by ZANU PF for this post is required. No time limit is given for when the vacancy must be filled.

Appointments to the Constitutional Commissions

The amended constitution establishes various commissions in addition to the Service Commissions – the Zimbabwe Electoral Commission; the Zimbabwe Anti-Corruption Commission; the Zimbabwe Media Commission; and the Zimbabwe Human Rights Commission. With the exception of the Anti-Corruption Commission, the persons constituting these Commissions are appointed by the President from lists provided by the Parliamentary

[27] Although Chinamasa was appointed in August, 2008 before the signing of the GPA once Article XX became part of the constitution, all appointments had to be in terms of the new constitution requiring the application of 20.1.3(p) to Chinamasa's appointment.

Committee on Standing Rules and Orders and are headed by a specifically qualified chairperson, again appointed by the President.

Since these are appointments made by the President under the constitution, Article 20.1.13(p) has application and the Prime Minister's agreement must be obtained.

It is important that those who have already proved themselves unable to adequately perform the duties that are required as a Commissioner, are not appointed to the Commissions. For example, persons appear on the list of appointments to the Zimbabwe Electoral Commission who were responsible for producing a seriously flawed (and late) report on the elections of 2008[28].

Conclusion

Despite the poorly drafted instruments determining the powers of both Mugabe and Tsvangirai in relation to appointments, the following can be determined:

1. The appointments of the provincial governors violated the MOU and can and ought to be reversed.

2. The appointment of Gideon Gono as Governor of the Reserve Bank was a breach of the GPA. It was also a breach of the Reserve Bank Act and on that basis can and ought to be reversed.

3. The appointment of Johannes Tomana as Attorney-General was a breach of the GPA. Reversal of the appointment would require his voluntary resignation or removal by a tribunal which recommends the same on the basis of misconduct.

4. Ten Ministers are currently in office unconstitutionally. Their appointments can, and probably will be, challenged in Court. A constitutional amendment is required to regularise these appointments.

5. Four Deputy Ministers are currently in office unconstitutionally. Their appointments can, and probably will be, challenged in Court. A constitutional amendment is required to regularise these appointments.

6. Since the quota of 6 MDC-T Deputy Ministers has already been exceeded, the appointment of Roy Bennett would also be unconstitutional without an appropriate constitutional amendment.

7. Patrick Chinamasa's position as Minister may be subject to a Court challenge.

[28] Here see two recent reports from RAU detailing both the inadequacies of ZEC and the Commissioners, as well as their failure to ensure that there was an adequate voters' roll. See RAU (2009), *HEAR NO EVIL, SEE NO EVIL, SPEAK NO EVIL: A CRITIQUE OF THE ZIMBABWE ELECTORAL COMMISSION REPORT ON THE 2008 GENERAL ELECTIONS. Derek Matyszak.* August 2009. HARARE: RESEARCH & ADVOCACY UNIT; RAU (2009), *2013 Vision – Seeing Double and the Dead. A preliminary Audit of Zimbabwe's Voters' Roll.* Derek Matyszak. September 2009. HARARE: RESEARCH & ADVOCACY UNIT.

8. The appointment of the second Vice-President to replace Msika ought only to be done with Tsvangirai's consent. Any attempt to do otherwise may be the subject of a Court interdict.

9. All appointments to the Constitutional Commissions should only be done with Tsvangirai's consent. Any attempt to do otherwise may be subject of a Court interdict.