This chapter 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.

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

(v) 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.

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

(vii) 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, insisting 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.

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

• The ‘Memorandum of Understanding’ (MOU) signed by the three parties in July 2008.
• The ‘Global Political Agreement’ (GPA) formally signed by the three parties on 15 September 2008.
• The Constitution of Zimbabwe, with particular focus on the clauses introduced by Constitutional Amendment No. 19 signed into law by the President on 11 February 2009.

This chapter was 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.\(^4\)

**Flawed documents**

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

In regard to the latter, 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.\(^5\) 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.\(^6\)

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. Political will and the good faith of those involved in the process are necessary for the fulfilment of the terms of the

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\(^4\) 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 Bennett (see below) would be sworn in at the same time. This obviously has not happened.

\(^5\) *Waterfalls TMB v. Minister of Housing* 1957(1) SA 336 (SR).

\(^6\) For this reason, only article XX of the GPA and no others became part of Zimbabwe’s law by virtue of Constitutional Amendment No. 19.
agreements. Any breach of the terms of the MOU and GPA has political rather than legal implications, and the political mechanisms or 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 No. 19.

The MOU
Owing 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’.7 According to clause 6 of the MOU, ‘the Dialogue commenced on 10 July 2008 and will continue until the Parties have finalized 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 finalizing ‘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

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 clause 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 (4.4) on the agenda), until the GPA became part of Zimbabwe’s constitution, or until all the items on the agenda had been ‘finalized’ – i.e. economic growth and activity had been restored, sanctions removed, etc. 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 clause 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 a New Government’ (article XX of the GPA) 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

\[8\] In an interview broadcast on SW Radio Africa on 23 October 2009, Gorden 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; transcript at <http://www.swradioafrica.com/pages/hotseat261009.htm>.

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parliament until that point fell within the provisions of clause 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: first, 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’; second, most such appointments would also have constituted the process of the ‘formation of a new government’; third, the appointments were made by the President of Zimbabwe and his recognition as legitimate President (and thus his 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 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 No. 19.

Article 25 specifically states that the GPA is to enter into force upon its signature by the parties, which signatures were officially appended to the document on 15 September 2008. Hence article XX came into force on that date. However, article XX refers to the ‘Framework for a New 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 its 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 that ‘[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 the 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. 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 deal simply with the structure or establishment of the new government but also with the formalities for appointments to the new government and not simply by the new government. 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 that the Prime Minister would be appointed by the President of Zimbabwe prior to the enactment of Constitutional Amendment No.19 (see below), 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 No.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, maintaining that a re-constituted Zimbabwe Electoral Commission must first be appointed.

9 This claim has been made repeatedly and most recently in an interview broadcast on SW Radio Africa on 23 October 2009 with Didymus Mutasa, Minister of State for Presidential Affairs; transcript at <http://www.swradioafrica.com/pages/hotseat261009.htm>.
10 And, in addition, for the appointment of some members of parliament – see article 20.1.10 of the GPA.
11 Section 39 of the Electoral Act [Chapter 2:13].
12 The manner in which appointments were made to this body was altered in 2007 (discussed in the Epilogue).
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 his 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 No.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 be required to vacate his office only 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 it can be challenged in the 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). Therefore, people who were ministers under the outgoing government continued as such by virtue of the fact that no new President assumed office. However, section 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 26 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

13 Quinnell v. Minister of Lands Agriculture and Rural Resettlement SC 47/04.
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; any application to the High Court in this regard could have interesting results. It was widely reported before the formation of the inclusive government that the Reserve Bank, through Gideon Gono, supplied judges with flat-screen televisions, satellite decoders and generators at no charge. 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 raise 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 (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.

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, and ought to have been made ‘in consultation’ with the Prime Minister. This was not done, so the appointment was 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

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14 Section 16(a) of the Reserve Bank Act.
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 above 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, but section 110 of the constitution indicates that the Attorney-General may be removed from office only 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), 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. 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 No. 19

Having been passed by parliament, the Constitution of Zimbabwe Amendment (No. 19) Act was signed into law by President Mugabe on the afternoon of 11 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 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:

17 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.
19 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.
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; [Emphasis added.]

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 tense (such as ‘appoints’), ‘shall appoint’ (implying both the future tense and an imperative), and ‘will’ (meaning only the future tense). 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.\(^{20}\)

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)’ (section 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

\(^{20}\) Attorney-General, Transvaal v. Additional Magistrate Johannesburg 1924 AD 421 at 436.
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Appointment under sub-clause (p) (see below). The appointment thereafter is deemed to be a ‘formality’. If so, this has important implications for 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 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 of 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) (section 20.1.6(2)) and be made with the agreement and consent of the Prime Minister), whereas under the constitution (section 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’ implies 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 from 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 No. 19. It was probably anticipated that this would take place almost immediately after the signing of the GPA.21

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 used consistently 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 under 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 ‘independent Constitutional Commissions in terms of the Constitution’. Independent constitutional commissions are established by the constitution, not by the President appointing them; the President appoints the persons who are to be commissioners.22 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) be appointed only 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 the 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 Minister was sworn in only a few hours before the President signed the Constitution of Zimbabwe Amendment (No. 19) Act into law.

22 The point is not pedantic, as it may be necessary to determine whether a commission exists in the absence of its commissioners.
Ministers, ministers and deputy ministers are to be made ‘in accordance with this agreement’. At the time the GPA was signed, neither the post of Prime Minister nor the posts of Deputy Prime Minister existed in terms of the constitution. While the GPA provided that the Prime Minister was to be appointed pending the enactment of Constitutional Amendment No.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-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 them. 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 fifteen ZANU(PF) nominees and sixteen nominees from the MDC formations. In accordance with the agreement, they may be removed from office only in terms of section 20.1.6(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 that 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 Inter-party Political Agreement,[23] being Article XX thereof, shall, during the subsistence of the Interparty Political Agreement, prevail notwithstanding anything to the contrary in this Constitution.

[23] Interparty Political Agreement is the legally correct title of the GPA.
But 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, this 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. [Emphasis added.]

The sub-clause thus concerns:

• ‘key’ appointments
• made ‘under and in terms of the Constitution’
• ‘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, this sub-clause became of central importance owing to section 115 of the constitution, introduced as part of Constitutional Amendment No. 19, 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. [Emphasis added.]

Together, these two provisions now require that, rather than merely consult the Prime Minister (as in the GPA), the President must secure the agreement or consent of the Prime Minister. However, it is not obvious which appointments sub-clause (p) should apply to. One difficulty is caused by the subjective term ‘key’: what constitutes a ‘key appointment’ is not defined. One might 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 (20.1.7) provides:
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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. [Emphasis added.]

Article 20.1.3(p) of Schedule 8 provides that ‘key’ appointments made 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 between the President, the Vice-Presidents, the Prime Minister and the Deputy Prime Ministers, and not just consultation with the Prime Minister.

Article 20.1.3(p) thus at first sight appears to conflict with article 20.1.7. For example, following the death of Vice-President Msika, a replacement must be appointed in terms of article 20.1.6(2) of the GPA and Schedule 8 of the constitution. As an appointment under the constitution, article 20.1.3(p) of the GPA should apply; but the appointment is also surely 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. 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 requires consultation and agreement between the President, the Vice-Presidents, the Prime Minister and the 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 among nineteen 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

24 Handel v. R 1933 SWA 37 at page 40.
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 that the phrase ‘this agreement’ appears is because of the incorporation of article XX of the GPA, unamended, as a schedule to the constitution. The word ‘this’ cannot refer to the GPA. This sub-clause is situated in a schedule to the constitution not in 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’. In that case, ‘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 this agreement’.

In this regard, sub-clause (o) is of relevance. This provides that the President ‘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 if 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 provide specifically 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 the sub-clauses in Schedule 8.

This leads to the rather convoluted result that, after the passage of Constitutional Amendment No. 19, 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 sub-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. A second approach is possible which does not offend against that rule.

Firstly, we have seen above that verbiage arises in other sub-clauses, such as sub-clause (n), which provides that the President ‘appoints independent

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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’. 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 (article 24.1) provided 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 up sub-clause (p), the drafters anticipated that the appointments made ‘in accordance with this agreement’ – or implicitly so made, such as sub-clause (i) – 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; but that stipulation is not provided. 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 that the individuals are then ‘formally’ appointed when they take 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.

Having waded through this necessarily lengthy and somewhat turgid attempt to explain the provisions relating to appointments in article 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. That feeling would be heightened when one considers that the Prime Minister’s executive authority is derived solely from sub-clause (p). Yet one is required to hack through a hermeneutic thicket in order to determine its meaning and thus the extent of his 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 now 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 the President in this case, 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 13 February 2009, President Mugabe purported to swear into office thirty-five ministers, and, on 19 February 2009, a further six, bringing the total to forty-one, 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 fifteen 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 thirteen MDC-T and three 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 were ZANU(PF) nominees. The ministers in question are as follows:26

MDC-T

2. Giles Mutsekwa [MP Manicaland], Home Affairs.
3. Sekai Holland [Elected Senator, Chizhanje], Minister of State in the Prime Minster’s office

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.

26 These have been determined by viewing video footage of the ceremony.
ZANU(PF)
1. John Nkomo [Appointed Senator], Minister of State in the President’s office.
2. Flora Bhuka [MP Midlands], Minister of State in Vice-President Msika’s office.
3. Sylvester Nguni [MP Mashonaland West], Minister of State in Vice-President Mujuru’s office.
4. Savior Kasukuwere [MP Mashonaland Central], Youth Development, Indigenization and Empowerment.
5. Joseph Made [Appointed Senator], Agriculture, Mechanization and Irrigation Development.

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 No. 19 leaves this power unaffected. Mugabe, in fact, appointed all ministers to Cabinet except three ‘Ministers of State’.

**The appointment of deputy ministers**
On 19 February 2009, nineteen deputy ministers were purportedly sworn in, four more than the constitutional establishment of fifteen. They comprised ten 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.

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"These are Flora Bhuka, Sylvester Nguni and Sekai Holland."
Chapter Eight

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 provided only in the main body of the constitution (sections 31D and 31E) and are not in Schedule 8, which 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. 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 section 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 (section 31E(2) of the constitution).

Section 31D(1) appears largely unaffected by the GPA and Constitutional Amendment No. 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.

As noted in elsewhere, ‘after consultation’ has been defined to mean 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 Communications Technology is a violation of the GPA. This does not appear to be the case. Mugabe also similarly 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(7) of Schedule 8.

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

28 See Chapter Seven, fn. 61.
President retains the power to dismiss under section 31E(1)(a) of the constitution. Since this is done ‘after consultation’ rather than ‘in consultation’ with 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 (article 20.1.10 of Schedule 8).

The appointment of Roy Bennett
Roy Bennett is an MDC-T nominee for a post of deputy minister which the MDC wishes to be within the Ministry of Agriculture, Mechanization 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 of weapons of war contrary to Zimbabwe’s laws. The President retains the power previously held under section 31D(1) of the constitution, by virtue of article 20.1.3(k) of Schedule 8 of the constitution, to ‘formally’ appoint ministers and deputy ministers. 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, the President 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, these points have no currency at present: the MDC-T quota of deputy ministers has already been exceeded; the appointment of Bennett would therefore be unconstitutional.

The appointment of Senators
The President has the power under the amended constitution (article 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.

(b) 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). They must therefore meet the constitutional requirement that a minister hold 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 such a 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 being first secured, his appointment as minister can be legally challenged.

The appointment of a second Vice-President

Section 31C(1) of the constitution simply provides 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) in early August 2009. 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

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29 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, arguably requiring the application of article 20.1.3(p) to his appointment.
nominated by ZANU(PF) for this post is required. No time limit is given for when the vacancy must be filled.

**Appointments to 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 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.\(^{30}\)

**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.

\(^{30}\)It is important that those who have already proved themselves unable to perform the duties that are required as a commissioner adequately 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. 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: D. Matyszak, *Hear no Evil, See no Evil, Speak no Evil: A Critique of the Zimbabwe Electoral Commission Report on the 2008 General Elections* ([Harare]: Research and Advocacy Unit, 2009), available at <http://idasa.org/gbOutputFiles.asp?WriteContent=Y&RID=2575>; and D. Matyszak, *2013 Vision – Seeing Double and the Dead: A Preliminary Audit of Zimbabwe’s Voters’ Roll* ([Harare]: Research and Advocacy Unit, 2009), available at <http://www.kubatana.net/docs/demgg/rau_audit_voters_roll_091012.pdf>.
A constitutional amendment is required to regularize 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 regularize these appointments.

6. Since the quota of six 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.

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

Postscript: Legal Notes on Death and the President

[September 2010]

ZANU(PF) supporters have on several occasions expressed the wish that President Robert Mugabe die in office.31 With speculation about Mugabe’s ill health rife,32 and more plausible than usual, it is interesting to consider the legal position and what ought to happen in terms of the current constitution if Mugabe were to die today.33

Section 29(3)(b) of the constitution provides that if the President becomes incapable of performing the functions of his office by reason of mental or physical incapacity he will cease to hold office if a joint committee of the Senate and House of Assembly formed at the request of a two-thirds majority of parliament so recommends. If, however, Mugabe dies suddenly, so that the


33 The word ‘ought’ has been selected as it is not beyond the bounds of possibility that those interested in assuming power might declare the constitution suspended and place Zimbabwe under formal military rule.
question of the degree of his debilitation is not an issue, section 31 of the constitution provides that the duties and functions of the President shall be assumed temporarily by a Vice-President. Where there are two Vice-Presidents, responsibility is assumed either by the Vice-President designated by the President for such eventuality or, in the absence of such designation, the last Vice-President who acted as President in the President’s absence.

These provisions were supplemented in 2007 by section 2 of Constitutional Amendment No. 18, drafted specifically with the possibility of Mugabe’s sudden death or retirement in mind. Section 28(3)(b) of the current constitution now provides that, if the office of the President becomes vacant by reason of death, resignation or removal from office, the two houses of parliament will come together as an electoral college to elect a new President. The new President will remain in office until the next election. If these provisions are implemented, given the intense jockeying that is likely to take place to fill this immensely powerful post, the procedure to be followed is of some interest.

The election of the President through the parliamentary electoral college must take place within ninety days of his death or resignation. The procedure to be followed is set out in the Fifth Schedule to the Electoral Act. The Clerk of Parliament plays an extremely important role in this regard. He sets the date of the election on not less than fourteen days’ notice and simultaneously invites nominations for the post from members of parliament. Candidates must have at least twenty-five nominators and must signify their acceptance of the nomination in writing. The Clerk of Parliament, whose decision is subject to review by the Supreme Court, may reject any nomination which does not comply with the Act. Where there is more than one candidate, a vote then takes place, with the House of Assembly as the preferred venue, and presided over by the Chief Justice. Half the members of the electoral college constitute a quorum, but, if there is no such quorum, the matter is simply adjourned for an hour and those present thereafter constitute a quorum.

Voting is not secret. The Chief Justice directs persons to gather in blocs in parts of the house allocated to each candidate and for whom they wish to

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34 Certain presidential functions cannot be exercised by a Vice-President (section 31(2)), such as the power to declare war or dissolve parliament.
35 There are currently two Vice-Presidents, Joice Mujuru and John Nkomo, appointed by the President in terms of section 31C(1) of the constitution. As constitutional appointments, the consent of Tsvangirai should have been obtained before the appointment of John Nkomo as Vice-President, made after the passage of Constitutional Amendment No. 19 and the introduction of article 20.1.3(p) which makes this a requirement. Tsvangirai made no attempt to exercise this power.
36 Constitution of Zimbabwe Amendment (No. 18) Act (No. 11 of 2007).
37 Section 29(1) of the constitution.
38 Currently a male, Mr Austin Zvoma.
vote. One member of the bloc is appointed to compile a register of number of persons and their names in his or her candidate’s bloc. The tally of supporters in each bloc is then given to the Chief Justice, who announces the figures. If no candidate receives an absolute majority of votes, the candidate with the least number of votes is eliminated and the process repeated until such a majority is achieved. If there are only two candidates who receive an equality of votes, the process is repeated over and over, with such adjournments not exceeding 48 hours as the Chief Justice may determine, until one candidate has attained a majority; the Chief Justice announces that candidate as duly elected as President. Lists of those comprising the voting blocs, indicating who voted for whom is entered into the journals of both houses.

However, since the enactment of Constitutional Amendment No. 19 (which incorporated, almost verbatim, article XX of the appallingly drafted Interparty Political Agreement), little is clear and free from ambiguity in relation to the composition of Zimbabwe’s government.

One of the most glaring anomalies is that Zimbabwe’s constitution is unique in that it does not merely provide that Zimbabwe is to have a President: it is a constitutional requirement that the President is a specific individual, Robert Gabriel Mugabe. On the death of Mugabe there can be no compliance with this provision. It is unusual that constitutional provisions are drafted in such a way that their implementation may be avoided on account of vis major (an act of God). However, from this provision it may be inferred that the legislature did not contemplate that the post of presidency would be occupied by any other person during the subsistence of the GPA, and thus that no provision was made for the contingency of Mugabe’s death. It is then arguable that article 20.1.10 of Schedule 8 to the constitution was not intended to apply to the presidency. Article 20.1.10 provides:

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 office of President is a post referred to in clause 20.1.6. If it is held that this clause does apply to the presidency, any vacancy arising through the death of Mugabe must be filled by a nominee of ZANU(PF). The provisions of Schedule 8 to the constitution ‘shall, during the subsistence of the Interparty

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39 Constitution of Zimbabwe Amendment (No.19) Act (No.1 of 2009). Interparty Political Agreement is the legally correct term for what is more commonly referred to as the Global Political Agreement (GPA) and will be used generally here.

40 Article 20.1.6(1) of Schedule 8 to the constitution. The provisions of the Kenyan constitution establishing a unity government contain no equivalent provision. It is also a constitutional requirement that the Prime Minister is Morgan Tsvangirai, and no one else.
Political Agreement, prevail notwithstanding anything to the contrary in [the] Constitution.’

However, a further question arises as to whether 20.1.10 is intended to replace the provisions relating to the parliamentary electoral college or to exist alongside them. If they are to replace those provisions, then ZANU(PF) may nominate a replacement for Mugabe, and the nominee is presumably sworn in as President without further ado as if elected. This interpretation should not be accepted lightly. An enormous amount of power is concentrated in the presidency. Section 28 of the constitution requires that the President is democratically elected either through a national election or through an electoral college comprising primarily democratically elected representatives of the people. The effect of this interpretation is that these democratic provisions are excluded in favour of a provision which allows the President to be selected by a party cabal, and the person so selected may lawfully continue in office until 2013 or the next election.41 This clearly subverts normal democratic practice.

However, there is no need to interpret article 20.1.10 in this manner. There is nothing in the constitution that is ‘to the contrary’ of article 20.1.10, and the article does not contradict the provisions relating to an electoral college. Reading the provisions together would merely create a requirement that only ZANU(PF) nominees may be submitted to the Clerk of Parliament as candidates for election by the electoral college to ensure that the vacancy is filled by a nominee of ZANU(PF). While article 20.1.10 states that the candidate must be ‘a nominee of’ ZANU(PF), there is no requirement that the candidate be from ZANU(PF). Although this is most likely, it is legally permissible for a compromise candidate to be nominated by ZANU(PF) who is not a member of the party.

No timeframe is established by article 20.1.10 and, since it is unclear what procedure is to be followed, the timeframe which will be applied is equally uncertain. As indicated above, between the death of Mugabe and the appointment of a new President, a Vice-President is effectively acting President. If the provisions relating to the electoral college apply, this interregnum period (with the presidency occupied by a Vice-President) cannot be longer than ninety days. If the provisions do not apply, the interregnum may be extended indefinitely by a delay in advancing a ZANU(PF) nominee in terms of article 20.1.10 as no deadline for this is specified. The manner in which the nominee is to be selected is also obscure and likely to be contested, suggesting that the process will be protracted.

The ZANU(PF) constitution contains no provisions as to what is to

41 There is considerable speculation as to when the next elections will be held, though there is no legal requirement to hold elections before 2013.
happen on the demise of its president. The president is elected by the National People’s Congress. This congress convenes every five years and the 230-member Central Committee is mandated to act on behalf of the congress when it is not in session. Fissures with ZANU(PF) might develop into open rifts within the Central Committee, which may be unable to reach consensus on the ZANU(PF) nominee. In any event, there is no constitutional requirement that the nominee submitted by ZANU(PF) for appointment as President is the person who succeeds Mugabe as leader of ZANU(PF) in terms of ZANU(PF)’s party constitution. There is no provision in Zimbabwe’s constitution indicating who has the authority to submit the name of the ZANU(PF) candidate as nominee to fill the vacancy, the assumption being that this would be determined by ZANU(PF) as a party and, more particularly, that Mugabe would represent ZANU(PF) for the purpose of submitting nominations for executive vacancies. Rival groupings may each claim the right to put forward a candidate for immediate appointment as President in terms of article 20.1.10.

Instead of a delay in submitting a nominee under article 20.1.10 as outlined above, it is equally possible that a faction of ZANU(PF) may announce their nominee on the very hour of Mugabe’s death, claim the sole right to select the nominee and that article 20.1.10 implies immediate appointment overriding the provisions for an interregnum period.

Article 20.1.10 gives no indication as to who formally appoints the nominee as President, once the nominee has been selected. If the nominee is treated as a President elect, then he or she should be sworn into office by the Chief Justice and this should take place on the day of the nomination or no later than forty-eight hours thereafter. However, it is plausible that an interregnum Vice-President may claim the discretion to determine who within ZANU(PF) may advance a nominee and when the nominee is to be appointed as President. The Vice-President performing the functions of the President may wish to extend the interregnum period for as long as possible while consolidating his or her position.

To summarize, as the constitution now stands, it is unclear whether article

42 The constitution of ZANU(PF) is a skeletal document, bereft of detail, though the constitutional procedures of the party have presumably been elaborated in party resolutions and may indicate who has the appropriate authority to submit the name of a nominee as President. A copy appears on the ZANU(PF) Website at <http://www.zanupf.org.zw/index.php?option=com_content&view=article&id=79&Itemid=107>.
43 The composition of which is undefined in ZANU(PF)’s constitution.
44 Article 20.1.10 is unlikely to be read as overriding the requirement that the President take the oath of office required in terms of the constitution, and thus the appointment could take place only after the swearing-in by the Chief Justice or other judge of the Supreme Court in terms of Section 28(5) of the constitution.
45 Section 28(5) of the constitution.
20.1.10 applies to the presidency. If it does not, any member of parliament able to muster the endorsement of twenty-five other members may submit nominations for election to the presidency through the parliamentary electoral college. During this period, a Vice-President will assume the duties of the presidential office. If article 20.1.10 does apply, it is unclear whether the law requires simply that a ZANU(PF) nominee is appointed as President without further ado, or whether the law requires that an election is conducted through parliament acting as an electoral college but with only ZANU(PF) nominees as candidates. In the absence of an electoral college, the manner in which the ZANU(PF) nominee will be selected is difficult to determine.

This ambiguity in the law to be followed upon Mugabe’s sudden death, when considered alongside the uncertainties of ZANU(PF)’s succession politics,46 has the potential to turn the merely messy into the thoroughly chaotic, as each contender endeavours to apply an interpretation of the law which is most advantageous to him or her. Past displays of ruthlessness by competing factions within ZANU(PF) over the succession issue suggest that this is not a prospect to be welcomed.

In this situation, a faction or factions of ZANU(PF) may seek to exploit the ambiguity of the law outlined above, and, if they feel that their favoured candidate will not be put forward under article 20.1.10 as the sole and most probable electee, may demand that the competing nominees face an election through the parliamentary electoral college, arguing, as they would have every right to, that this is the correct and lawful procedure to be followed.

At this juncture it is also worth noting that the provisions of article 20.1.10 have application only during the subsistence of the GPA. If the GPA has terminated owing to the withdrawal of any party (and there is no legal impediment to a party withdrawing), then the constitutional requirements of convening an electoral college must be implemented, and nominees will not be restricted to persons from ZANU(PF). If the MDC-T shows more chutzpah than it has hitherto, it may insist that article 20.1.10 has no application to a vacancy in the presidency, or decide to withdraw from the GPA precisely so that article 20.1.10 has no application and so that its own nominees might be advanced as candidates to the electoral college. Once again, matters could get extremely messy juridically. If the MDC-T withdraws from the GPA after the death of Mugabe but before the appointment of a replacement, it is unclear whether article 20.1.10 should still have effect, or whether it will fall away and the constitutional provisions relating to the electoral college will have sole, unadulterated application. In other words, does one apply the constitutional


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provision prevailing at the time of Mugabe’s death or at the time of determining the replacement?

Given the current composition of the houses of parliament, in the event of an electoral college being convened, the MDCs’ position will present possibilities for manoeuvre. The 100-seat Senate comprises sixty elected seats, ten Provincial Governors, twelve appointed seats and eighteen chiefs. Of the twelve appointed seats, four must be nominees of MDC-T and two nominees of MDC-M. The House of Assembly has 214 seats, 210 of which are elected, while one Vice-President, the Prime Minister and two Deputy Prime Ministers hold seats ex officio.47

As a result of vacancies arising from the death and suspension of some members, the current party voting strengths in the House of Assembly are MDC-T 96, ZANU(PF) 96, and MDC-M 7 – a total of 199 members. In the Senate, the MDC-T has 27, the MDC-M 8, and ZANU(PF) 29 elected and appointed members. The remainder of sitting members comprise ten Provincial Governors and seventeen traditional chiefs, making a total of 91 sitting members.48 Mugabe has extensive powers over the appointment and dismissal of chiefs,49 and all Provincial Governors in the Senate are Mugabe appointees.50 On the basis of their past records, the chiefs and governors can be expected to vote with ZANU(PF). On this basis the combined voting strengths in the two houses sitting as an electoral college is the MDC formations 138 (15 MDC-M) and ZANU(PF) 152.

ZANU(PF) thus has a narrow margin of a 14-seat majority by virtue of the presence of governors and chiefs in the Senate (and therefore the electoral college). The significance of the manner in which these appointments are made thus comes to the fore. Article 20.1.3(p) of Schedule 8 to the constitution and

47If the persons appointed to these posts already held seats in parliament, the appropriate party may nominate a non-constituency member to the house where they held a seat (one of the twelve appointed seats in the Senate is such a seat). Only those in these posts who were not members of parliament become ex officio members of the House of Assembly (article 20.1.8 of Schedule 8 to the constitution).


49The President appoints chiefs in terms of section 3 of the Traditional Leaders Act [Chapter 29:17], though ‘wherever practicable’ he must appoint a person nominated by the appropriate persons in the community concerned and in accordance with customary laws of succession. The eighteen chiefs in parliament comprise the President and Deputy President of the Council of Chiefs and two chiefs from each of the eight non-metropolitan provinces (sections 34(1)(c) and (d) of the constitution) chosen by an electoral college comprising the provincial assemblies of chiefs (section 40(b) of the Electoral Act).

50The Provincial Governors were appointed by Mugabe in August 2008 under section 4 of the Provincial Councils and Administration Act [Chapter 29:11]. Their term of office being two years (under section 6), these posts are technically vacant, and so, too, then, are these Senate seats.
section 115 of the constitution together require that any appointments made by Mugabe in terms of any act of parliament be made with Tsvangirai’s consent. The appointments both of governors and chiefs are made by Mugabe in terms of acts of parliament and both thus require Tsvangirai’s consent. Mugabe has refused to follow this constitutional requirement in regard to the appointment of governors and Tsvangirai has not attempted to seek compliance in regard to the appointment of chiefs. Leaving the dispute over the appointment of the governors to SADC, rather than testing this in the courts, may thus not be the wisest course of action for MDC-T.

Nonetheless, it is obvious that in a poll by the parliamentary electoral college to choose between several ZANU(PF) candidates competing for the presidency, it would be numerically possible for the MDC-T, MDC-M or either party alone to determine the outcome. One would expect the MDC to provide support to one candidate or the other only in exchange for some political concessions relating to the powers of the future President and the governance of the country.

However, these legal niceties are unlikely to find traction in the less subtle realm of Zimbabwe’s present political milieu. A powerful political cabal within ZANU(PF) will most probably impose its anointed successor, claiming the authority of article 20.1.10 to do so. This cabal may have the political power and brute force to swiftly crush any rivals seeking to advance an alternative person or process to determine the succession. And if it has the power to rapidly impose its will in this manner, so too will it have the power to ensure that the advent of democracy in Zimbabwe is indefinitely delayed.