FRANCIS BERE

versus

JUDICIAL SERVICE COMMISSION

and

SIMBI VEKE MUBAKO

and

REKAYI MAPHOSA

and

TAKAWIRA NZOMBE

and

VIRGINIA MABHIZA

and

THE PRESIDENT OF ZIMBABWE

and

MINISTER OF JUSTICE, LEGAL &

PARLIAMENTARY AFFAIRS

and

ATTORNEY GENERAL OF ZIMBABWE

HIGH COURT OF ZIMBABWE

CHIKOWERO J

HARARE, 28 July 2020 and 4 August 2020

**Opposed Application**

*L Uriri* with L Madhuku, for the applicant

*A B C Chinake,* for the 1st respondent

*M Chimombe,* for the 2nd -8th respondents

CHIKOWERO J: This is an application for review of the Judicial Service Commission’s decision to advise the President that the question of removing the applicant from the office of a judge ought to be investigated.

The applicant is a judge of the Supreme Court and the Constitutional Courts of the Republic of Zimbabwe. The first respondent (JSC) is a corporate body established in terms of the s 189 of the Constitution of Zimbabwe Amendment (No. 20) Act 2013. The second, third and fourth respondents are the members of the tribunal appointed by the President to enquire into the question of the removal of the Judge from office. Fifth respondent is the Permanent Secretary of the Ministry of Justice Legal and Parliamentary Affairs, the Coordinator of the Special Anti-Corruption Unit in the Office of the President as well as the Secretary of the Tribunal. The sixth, seventh and eighth respondents are the President of the Republic of Zimbabwe (the President), the Minister of Justice, Legal and Parliamentary Affairs (the Minister) and the Attorney General of Zimbabwe (the AG) respectively.

As an administrative authority the JSC has a responsibility to take administrative action which may affect the rights, interests or legitimate expectations of any person. In so doing, s 3(1)(a) of the Administrative Justice Act [*Chapter 10:23*] (AJA) enjoins the JSC to act lawfully, reasonably and in a fair manner.

On 13 December 2019 the JSC held an extraordinary meeting. It resolved at that meeting to advise the President that the question of removing the applicant from the office of a judge ought to be investigated. The JSC addressed a letter to the President tendering the advice.

As his obligation in terms of s 187(3) of the Constitution, the President appointed a 3 member Tribunal to enquire into the matter. As already indicated the members are second –fourth respondents, with fifth respondent as its Secretary. In the Zimbabwean Government Gazette Extraordinary dated 17 March 2020 the President made Proclamation 1 of 2020 which was published as Statutory Instrument 70 of 2020 wherein, among other things, he established the Tribunal, appointed its members, Secretary and set out the Tribunal’s terms of reference.

The applicant is aggrieved by the JSC’s decision to advise the President that the question of removing the former from the office of a judge ought to be investigated. Acting in terms of s 4(1) of the AJA the applicant has applied to this court, on review, to set aside the JSC’s decision on the basis that it failed to act lawfully, reasonably and fairly in coming up with the decision to advise the President. In other words, the applicant takes issue with the procedure adopted by the JSC in coming up with that decision. He also seeks certain consequential relief.

I pause to set out the Tribunal’s terms of reference. They are:

“(i) to investigate into the matter of the removal from office of Honourable Justice Francis

Bere JA;

(ii) to investigate into the matter of Honourable Justice Bere’s conduct, whether it can be deemed to have been tantamount to gross misconduct;

(iii) to investigate whether the Honourable Judge conducted himself or presided over matters where there was conflict of interest;

(iv) to investigate any other matter which the Tribunal may deem appropriate and relevant to the enquiry;

(v) to consider all information submitted by the Judicial Service Commission and any other relevant information in order to arrive at an appropriate recommendation to the President;

(vi) to recommend to the President whether or not the Honourable Judge should be removed from office in terms of s 187 of the Constitution and

(vii) to report to the President, in writing, the result of the inquiry within a period of five (5) months from the date of swearing in of the members.”

The grounds on which the application for review is based are:

“1. the absence of any of the three jurisdictional grounds for the removal of Judge prescribed under s 187 (1) of the Constitution and the incontrovertible facts and circumstances upon which this would be founded;

2. the absence of specificity and lack of particularity of the exact nature of the conduct, the identity of a complainant, and the prejudice or *quid pro quo* to confirm the nature and gravity of the case;

3. an objection to the appointment of the Permanent Secretary as secretary of the Tribunal on the grounds and basis that she was an actor in the process leading to the applicant’s suspension and the establishment of the Tribunal, something which gives credence to the applicant’s contention that the decision to refer his matter to the President was completely unreasonable;

4. There is no prima facie material that has been alluded to in the Proclamation that would form the basis for a referral of a matter involving a senior Judge;

5. Gross irregularity in that the JSC, having procedurally decided to take a second bite at the cherry, failed to afford applicant the right to be heard in relation to the subsequent reply from Mr Ndudzo, at or before its purported meeting of 13 December 2019 in violation of the *audi alteram partem* rule;

6. The JSC having reached a decision on the subject matter from the same basis and circumstances on 21 November 2019 and having communicated this to the applicant could not revisit he matter subsequently as it had become *functus officio*;

7. The JSC lacked a quorum to sit on 13 December 2019 and to reverse its earlier decision;

8. To the extent that the allegations are understood and based on the documents attached to the founding affidavit, the allegations made are petty and do not meet the elevated criteria of gross misconduct or gross incompetency,”

For the purposes of this application the issue of the investigation on the question of the

removal of the applicant from the office of a Judge arose from a phone call made to Mr Ndudzo, who is a legal practitioner, as well as a complaint raised against him by Mr Moxon. The latter related to applicant presiding over a matter between Meikles Limited and Widefree Investments (Pty) Ltd trading as Core Solutions. Since I am required to determine this application on procedural grounds it is not necessary for me to delve into the substance and details of the phone call and Mr Moxon’s complaint.

All the respondents opposed the application. At the commencement of the hearing, and with the consent of the legal practitioners for the applicant and the AG, I made an order for the removal of the AG from these proceedings. Further, the second, third, fourth and seventh respondents submitted that they had no interest in the outcome of the application. But they did not seek an order of costs against the applicant. Counsel for the President submitted that the latter simply fulfilled his constitutional obligation by appointing a tribunal upon receipt of the JSC’s advice. He too sought no order of costs against the applicant. Similarly, the Permanent Secretary submitted that she was appointed as Secretary to the tribunal by the President and as Coordinator of the Special Anti-Corruption Unit in the office of the President, she had simply referred Mr Moxon’s complaint to the JSC, through its Secretary, for attention. She had also made mention, in her referral letter, of the fact that, to use her words, applicant had also been implicated by Mr Ndudzo. She had played no further part in the investigations that ensued. She too did not pray that applicant be mulcted in costs.

In submissions, the JSC did not persist in its quest for punitive costs to be granted against the applicant. It was content with costs on the ordinary scale. But the applicant sought costs on the higher scale against all such respondents as opposed the application.

The JSC raised a number of preliminary points. Applicant raised one point *in limine*. I deal with the latter first.

IS THE 1ST RESPONDENT BEFORE THE COURT?

Messrs *Uriri* and *Madhuku* submitted that the Acting Secretary of the JSC, Mr Chikwanha, had no authority to represent the JSC in this matter. It is Mr Chikwanha who deposed to the JSC’s opposing affidavit. I was urged to follow this court’s decision in *Francis Bere* v *Judicial Service Commission and 7 Ors* HH269/20. In that matter the court found that since it is the Judicial Service Commission which has the constitutional duty to advise the President that the question of removal of a Judge from office had arisen it could not delegate the function of defending that decision in a court of law to its Acting Secretary, who is not a member of the JSC. That decision is under appeal on that point. I was also referred to the following decisions for the argument that where a specific constitutional duty is imposed on a constitutional body, that duty cannot be delegated: *President of the Republic of South Africa* v *South African Rugby Football Union* 2000 (1) SA 1 (CC); *Paradza* v *Chirwa* 2005 (2) ZLR 94 (S). Mr *Madhuku* argued that the making of the constitutional decision to advise the President and defending that decision in a court of law constitute one act and can therefore not be delegated. Reference was also made to *CE Dube* v *PSMAS and Another* SC 73/19 for the submission that in persisting with representation through its Acting Secretary the JSC was not properly before me. The sum total of these arguments was to persuade me to find that the opposing affidavit deposed to by Mr Chikwanha and filed together with the Notice of opposition was invalid. There was therefore no opposition by the JSC.

Mr *Chinake* argued as follows. First, there stood on record a resolution by the JSC wherein it resolved to clothe the Acting Secretary with authority to sign documents on behalf of the JSC in litigation matters. Second, s 10 (2) of the Judicial Service Act [*Chapter 7:18*] gives the Acting Secretary of the JSC the authority to carry out any function on behalf of the JSC as long as he has been so directed by it.

My view is that as long as there is evidence to satisfy the court that it is the JSC which is litigating and not some unauthorised person acting in its name, the JSC is properly before me. See *Total Zimbabwe (Pvt) Ltd* v *Power Coach Express (Pvt) Ltd* 2010 (2) ZLR (H). I have such evidence in the form of the resolution of the JSC. I am satisfied that Mr Chikwanha, who sits in the meetings of the JSC to take the minutes of the meetings and is knowledgeable of what he deposes to, is not on a frolic of his own. I take the view that the ratio *decidendi* in *Paradza* v *Chirwa N.O and Others* 9supra) actually supports the JSC’s position. In deposing to the opposing affidavit, JSC is acting through its Acting Secretary whom it duly authorised to do so. I find it absurd that the resolution would hold good for the Acting Secretary (the Chief Accounting Officer) to sign ordinary litigation papers for the JSC but not litigation papers where the JSC’s decisions made in terms of the constitution are being defended in court. The resolution does not make that distinction. It is wide enough to cover all litigation papers. Further, the Judicial Service Act, which draws its life from the Constitution gives the Acting Secretary the authority to discharge functions where the JSC directs him to do so. I am unable to agree that advising the President as was done in this matter is the same act as deposing to an affidavit defending that decision in a court of law. I dismiss this point *in limine.*

ARE THE ISSUES FOR DETERMINATION IN THIS SUIT LIS *ALIBI PENDENS* UNDER HC 2162/20?

In HC 2162/20 the applicant sought the same relief as in the present matter. That matter was an urgent chamber application. The court found that HC 2162/20 was not urgent. It removed the matter from the roll of urgent matters. The matter was neither prosecuted thereafter nor was it withdrawn. The applicant simply abandoned the matter and instituted the same matter, this time as the present court application. I have looked at *Madza* v *The Reformed Church in Zimbabwe Daisyfield Trust and Others* SC 71/04; *Tomana* v *Judicial Service Commission and Another* HH 366/16. It is clear that HC 2162/20 is not on the opposed roll. Applicant has not placed it on that roll. He has simply abandoned it by dint of not prosecuting it after it was removed from the roll of urgent matters and filing as well as prosecuting the present suit. HC 2162/20 is pending. But that is academic. *Lis alibi pendens* is not an absolute bar to hear the present matter and render a decision thereon. I will not dismiss this application on the basis of this preliminary point. It was raised by the JSC. It does not dispose of the matter before me.

THE MERITS

NO QUORUM AT THE JSC MEETING OF 13 DECEMBER 2019

It was at this meeting of the JSC that the decision was taken to advise the President that the question of the removal of the applicant from the office of a judge ought to be investigated.

The parties are agreed that the membership of the JSC is 13, but there was a single vacancy at the material time. The parties are agreed that the Constitution allows the JSC to function all the same provided it has a quorum. Its quorum is 7, being half of the membership of the JSC.

Applicant made a bare allegation that only 6 members were present at the 13 December 2019 meeting. He does not mention the names of the members who were present and of those who were not in attendance. He does not attach any supporting affidavits from either those present or those whom he alleges were absent. He does not attach a copy of the minutes of the meeting of 13 December 2019.

It is trite that an application stands or falls on the averments made in the founding affidavit. See *Muchini* v *Elizabeth Mary Adams & Others* 2013 (1) ZLR 67 (S).

It also is trite that he who alleges must prove. See *ZUPCO* v *Parkhorse Services (Pvt)* *Ltd* SC 13/17; *Circle Tracking* v *Mahachi* SC 04/17.

Mr *Uriri* conceded that all that applicant has done is to allege that there was no quorum. He argues that on the basis of the importance of the matter that bare allegation must shift the onus to the JSC to prove that there was a quorum.

It is clear that applicant relies on rumours for his allegation that there was no quorum. Matters are decided on the law, facts and the evidence and not rumours. The JSC says there was a quorum. It is not the applicant. It suffices that it challenges applicant to prove its allegation. The JSC has no obligation to assist the applicant to prove the latter’s allegation. I find that applicant has failed to substantiate its allegation that there was no quorum at the meeting of 13 December 2019.

THE JSC WAS *FUNCTUS OFFICIO* AND COULD NOT REVERSE ITS 21 NOVEMBER 2019 DECISION

Applicant claims that the JSC held an ordinary meeting on 21 November 2019 where all the Commissioners concluded that there was nothing untoward about his conduct.

He alleges that he received a phone call from the Deputy Acting Secretary of the JSC, Mr Stembinkosi Msipa breaking the good news. This is denied by the JSC which avers that no such meeting was held and therefore that the decision alleged was never made.

Applicant neither produced the minutes of the alleged meeting of 21 November 2019 nor filed a supporting affidavit by the Deputy Acting Secretary.

I find that this allegation too was not substantiated. There was therefore nothing for the JSC to reverse on 13 December 2019.

VIOLATION OF THE *AUDI ALTERAM PARTEM* RULE

Applicant accepts that he received, through the JSC, correspondence from Mr Moxon, Mr Ndudzo and the Permanent Secretary. He admits that he responded to these letters. I agree that his responses are detailed. His last response of 20 August 2019 relating to Mr Ndudzo’s letter runs into 5 pages.

Thereafter, the JSC asked Mr Ndudzo to comment on applicant’s reply. The alleged non-observance of the right to be heard relates to his not being given yet another opportunity to comment on Mr Ndudzo’s comment before the JSC met on 13 December 2019. My view is that Mr Ndudzo’s comment post 20 August 2019 was not another stage in the preliminary investigation by the JSC but a step within that stage. It seems to me that the exchange of correspondence, through JSC, could not continue *ad infinitum*. It had to end somewhere to pave way for the JSC to make a decision. Despite complaining that the contents of Mr Ndudzo’s last letter were so material that he ought to have been given an opportunity to respond thereto applicant says in the same breath that whatever was referred to the President based on the Ndudzo matter, was petty. I therefore find that there was no breach of the *audi alteram partem* rule because applicant is effectively saying Mr Ndudzo’s last letter to the JSC changed nothing.

With reference to the Moxon complaint, applicant accepted that the matter had not been concluded by the advice to the Chief Justice from the Judicial Ethics Advisory Committee and the Chief Justice’s correspondence to Mr Moxon and the applicant communicating that advice. I say so because applicant wrote to the Chief Justice stating that the former could not stand in Mr Moxon’s way should Mr Moxon want to pursue the matter further. Indeed, Mr Moxon did so and the matter ended up before the JSC at its meeting of 13 December 2019 where a decision was taken to advise the President.

ABSENCE OF JURISDICTIONAL FACTS TO GROUND THE JSC’S DECISION TO ADVISE THE PRESIDENT

An exhaustive analysis of this ground is tantamount to this court substituting its views for the *prima facie* views of the JSC, already acted upon on 13 December 2019. I do not think that it is proper for this court to do so. I observe only that on the face of it the correspondence put before me reveals that the JSC must have concluded that the applicant’s conduct needed to be investigated by a tribunal. I am not sitting as an appeal court to determine the correctness of the JSC’s decision but on review to decide whether any of the jurisdictional grounds for removal of a Judge from office is disclosed on the papers put before me and on which the decision to advise the President was made. Section 187 (1)(c) of the Constitution provides that gross misconduct is one such jurisdictional ground. Whether there was gross misconduct is not for me to determine. The Tribunal’s terms of reference cover that aspect.

By the same token, this court cannot make pronouncements on the merits or otherwise of an investigation which the tribunal is constitutionally empowered to do. The court is not the Tribunal.

I do not think it necessary for applicant to effectively be a judge in his own cause by submitting, before this court, that the basis upon which the JSC advised the President was petty. That goes to the substance of that which the tribunal is to investigate, make findings and recommend on. I have already found that it would be remiss of me to rule on the correctness of the JSC’s decision to advise the President.

Given the importance of this matter I may have hesitated to award costs against the applicant had he not instituted this application but instead prosecuted the urgent chamber application which was removed from the roll, as a court application. Applicant has caused the first respondent to incur unnecessary costs by duplicating proceedings.

In the circumstances I have no reason to depart from the general rule that success carries costs.

ORDER

In the result, the following order shall issue:

1. The application be and is dismissed.
2. The applicant shall pay the 1st respondent’s costs.

*Dube, Manikai & Hwacha*, applicant’s legal practitioners

*Kantor & Immerman*, 1st respondent’s legal practitioners

*Civil Division of the Attorney General’s Office,* 2nd – 7th respondents’ legal practitioners