ERICA F. NDEWERE
versus
THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE N.O
and
SIMBI VEKE MUBAKO N.O
and
CHARLES WARARA N.O
and
YVONNE MASVORA N.O

HIGH COURT OF ZIMBABWE
CHIRAWU-MUGOMBA, NDLOVU & KATIYO JJJ
Harare, 17, 27, 28, 29 June, 4 and 7 July 2022

B Mtetwa, for the applicant
T S Musangwa, for the 1st respondent
M Sinyoro, for the 2nd and 4th respondents
V Vengayi, for the 3rd respondent

Opposed Application

CHIRAWU-MUGOMBA J: [1] This matter was placed before the court as an application for review in terms of R60 of the High Court Rules 2021, as read with ss 26 and 27 the High Court Act [*Chapter 7:06*].

[2] The applicant was until 17 June 2021, a sitting judge of the High Court of Zimbabwe. A tribunal was set up in terms of S 187(3) of the Constitution of Zimbabwe (Amendment no. 20) 2013 to inquire into applicant's removal from office. Such tribunal consisting of the second to fourth respondents recommended to the first respondent that the applicant be removed from the office of a judge. Acting on the recommendations in terms of s 187(8), the first respondent subsequently removed the applicant from office with effect from 17 June 2021.

[3] The applicant has approached the court seeking a review and her grounds can be summarized as follows. That the second, third and fourth respondents did not have jurisdiction when they sat beyond 18 May 2021. That the tribunal committed a gross irregularity because they failed to make a determination on some preliminary issues; that the applicant was not provided with all relevant documents; that the tribunal found applicant

guilty of gross incompetence when such charge was not part of the initial reasons for the referral of her matter by the Judicial Service Commission; that the tribunal ignored applicant's uncontroverted evidence on her health status; that applicant never had an opportunity to comment on the tribunal findings; that she was not heard in mitigation in relation to the recommendation constitutes a gross irregularity.

[4] The applicant thus seeks an order setting aside the recommendations and the subsequent decision to remove her; that the decision of the first respondent to remove her from the office of a High Court Judge in terms of s 187(7)(8) of the Constitution be set aside; that the applicant be reinstated to her position as a judge of the High Court of Zimbabwe without loss of benefits and salaries from the date of publication of Proclamation 7 of 2020 and lastly costs of suit against all respondents.

[5] All the respondents filed notices of opposition and opposing affidavits. The second and fourth respondents in an affidavit filed by the fourth respondent raised a preliminary point to the effect that the applicant had approached the Labour Court in Case. No. LCH/319/21 by way of an appeal. Therefore, they urged this court to decline jurisdiction on that basis. The third respondent raised two preliminary points being that (1) there was fatal non-joinder of the Judicial Service Commission to the proceedings and (2) he is just as the second and fourth respondents immune due to the provisions of the Commissions of Inquiry Act [*Chapter 10:07*].

[6] At the hearing before going into the preliminary issues raised and the merits of the matter, the court invited submissions from the legal practitioners on the following critical legal issue- given that the first respondent acted on recommendations submitted to him by a tribunal and made a decision in terms of the Constitution to remove the applicant, does the court have jurisdiction to hear the matter? It is trite that a court can raise *mero motu,* the question of jurisdiction – see *Boswinkel* v *Boswinkel*, 1995(2) ZLR 58(H) as cited with approval in *Chikwenengere* v *Chikwenengere*, SC 75-06.

[7] Mrs. *Mtetwa* made the following submissions. The court has jurisdiction especially in view of the High Court Act which specifically refers to decisions of all tribunals being subjected to review. Section 68 of the Constitution deals with the right to have an administrative decision subjected to review. The Administrative Justice Act also supports the right of review. The High Court also has inherent jurisdiction to review decisions of a tribunal as supported by s 26-27 which are peremptory. The principle of subsidiarity entails

that the interpretation of the provisions of the Constitution should be in terms of subsidiary legislation. Section 188 of the Constitution makes it clear that an Act of Parliament must provide for the conditions of service which includes issues such as promotions, transfer, dismissal and disciplinary steps. The Judicial Service Act and the regulations made being SI 107/12 are in that regard relevant. Section 69 of the Constitution provides for rights to a fair hearing and this cannot be divorced from the right to review.

[8] Mr *Sinyoro* and Ms *Musangwa,* supported the submissions by Mrs *Mtetwa* that the court has jurisdiction. Ms *Vengayi* took a different view and submitted that the court had no jurisdiction. She submitted as follows. Given the fact that the applicant seeks to challenge the recommendations of a tribunal set up in terms of the Constitution, the court has no jurisdiction. Section 167(1b) provides that the Constitutional court decides on constitutional matters and issues connected with decisions on constitutional matters. The jurisdiction in this matter lies with the Constitutional Court. Section 176 provides that the Constitutional, Supreme and High Court have inherent powers to protect and regulate their own processes. Given that the process that is sought to be challenged relates to a constitutional issue or tribunal, the appropriate forum remains the Constitutional Court.

[9] The issue of the removal of a sitting judge and a subsequent review application to set aside recommendations of a tribunal; the removal of a judge and their reinstatement as prayed for by the applicant is novel in our jurisdiction. I am aware that a former judge, who was also removed from office after recommendations by a tribunal approached the courts in relation to his matter- see *Bere* v *Judicial Service Commission and ors,* SC 1/22. The essence of that matter is captured in para 4 of the cyclostyled judgment as follows,

> "On 13 May 2020, following the publication of the Proclamation referred to above, the appellant made an application in terms of s 4 of the Administrative Justice Act (the Act) before the court a quo. The application was made on the allegation that the first respondent failed to comply with s 3(1)(a) of the Act in that it failed to "act lawfully, reasonably and in a fair manner" in advising the President to set up a Tribunal to investigate the appellant. In making the application it was the appellant's complaint that, by letter dated 3 March 2020, he was suspended from the office of a judge pending the determination of the question of his removal from office by a three- member Tribunal appointed by the President". That matter is therefore clearly distinguishable from the present.

[10] (a) The Constitution makes provision in ss 187(7) (8) for firstly the recommending by a tribunal on whether or not the judge concerned should be removed from office and the acting by the President in accordance with the recommendations. Section 68 deals broadly with the right to administrative justice.

(b) The South African Constitution deals with the question of removal as follows in s 177:

"**Removal -** A judge may be removed from office only if-

(a) the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and

(b) the National Assembly calls for that judge to be removed, by a resolution adopted with a supporting vote of at least two-thirds of its members.

(2) The President must remove a judge from office upon adoption of a resolution for that Judge to be removed.

(c) In the Constitution of Kenya, the position is as follows as provided for in s168 (7) and (8) as follows: -

(7) A tribunal appointed under clause (5) shall—

(*a*) ……..

(*b*) inquire into the matter expeditiously and report on the facts and make binding recommendations to the President.

(8) A judge who is aggrieved by a decision of the tribunal under this Article may appeal against the decision to the Supreme Court, within ten days after the tribunal makes its recommendations."

[11] The only other instances in the Constitution that have provision for the appointment of a tribunal to look into the question of removal is in relation to the office of the Prosecutor- General – see generally s 259(7) and the Auditor-General – see s 313 generally. Since the promulgation of the Constitution in 2013, there has not been any process invoked for the removal from office of any person holding these two posts. Therefore, there is no precedent in that regard.

[12] (a) The court has however dealt with the removal of the Attorney-General under the old Constitution through the process of setting up of a tribunal – see *Gula Ndebele* v *Bhunu N.O*, 2010(1) ZLR 78(H).

The relevant section was 110(3) as follows: -

"**110 Tenure of office of certain persons**

(1) This section shall apply to—

(*a*) the Attorney-General and every Deputy Attorney-General; and...

(2) A person to whom this section applies may be removed from office only for inability to discharge the functions of his office, whether arising from infirmity of body or mind or any

other cause, or for misbehaviour and shall not be so removed except in accordance with the provisions of this section.

(3) Such person shall be removed from office by the President if the question of his removal from office has been referred to a tribunal appointed under subsection (5) and that tribunal has advised the President that he ought to be removed from office for inability to discharge the functions of his office or for misbehaviour."

In an illustrative judgment, MAKARAU (JP) (as she then was stated) as follows:

"It appears to me that before the tribunal such as the one chaired by the respondent has made its recommendation to the President, its proceedings may competently be set aside on review. I must hasten to qualify that I am not expressing this as a firm position at law as I have not received full argument on the matter nor does the issue specifically arise before me. It however appears to me that like the proceedings of any other quasi- judicial body, the proceedings of the tribunal, if tainted by procedural irregularities recognizable at law as vitiating such proceedings, may be set aside before they are concluded and before any recommendation is made. I do not read anything in the Constitution that would have the meaning of ousting the review jurisdiction of this court over the proceedings of a tribunal set up under section 110 of the Constitution.

It further appears to me, following the reasoning above, that even after completing its inquiry but before its recommendation is acted upon, the proceedings and the consequent recommendation of the tribunal can be set aside on review…."

Further, that:

"It presents itself clearly to me however that where the recommendation of the tribunal has been implemented as required by the Constitution, then the decision of the tribunal ceases to have any independent status and becomes imbedded in and forms an integral and inseparable part of the action of the President."

It is pertinent to note also that the applicant was not seeking reinstatement to his former position.

(b)The issue of the first respondent acting in certain instances and whether or not the decision made is reviewable that does not involve a tribunal has come before the courts. I can do no better than cite passages from the decision in *Moyo* v *Mkoba,* 2013(ZLR) 137 (S) as follows:

"In *Rushwaya v Minister of Local Government* 1987(1) ZLR 15 it was held at 18H that:
"Notwithstanding s 66(3) of the Constitution, the High Court can review advice given to the President by the responsible Minister in relation to the appointment of a chief in terms of the Chiefs and Headmen Act, 1982. The grounds on which such advice can be reviewed are illegality, irrationality and procedural impropriety."

Section 66(3) of the Constitution is now s 31K, which spells out the scope or limit of the executive function the exercise of which is not justiciable. It is accepted that the Minister's recommendation forms the basis of the President's decision as it should be based on information relating to matters to which he is required to give due consideration before acting on his own deliberate judgment.

In *PF ZAPU* v *Minister of Justice, Legal & Parliamentary Affairs* 1985(1) ZLR 305 it is stated in the headnote that:

> "The exercise of an executive prerogative is not necessarily an act the question of the validity of which is beyond jurisdiction of the court. The term act of State should only be applied to those acts in respect of which the courts' jurisdiction is ousted. All other executive acts, whether within the prerogative or not, are subject to review on the usual grounds."

At p 313G-H DUMBUTSHENA CJ stated the general principle in these words:

> "In my view an act of State is an act of the executive in those areas of executive prerogative which oust the jurisdiction of the courts. But such executive prerogatives are now very few and far between because whenever the exercise of executive prerogative affects the private rights, interests and legitimate expectations of the subjects or citizens the jurisdiction of the courts is not ousted. The private rights, interests and legitimate expectations of the citizens subject to judicial review acts of the executive which would otherwise oust the jurisdiction of the courts."

One of the questions was also that of justiciability of the President's executive powers as set out in the then s 3 1K of the old Constitution that read as follows:

> "**Extent to which exercise of President's functions justiciable**
>
> (1) Where the President is required or permitted by this Constitution or any other law to act on his own deliberate judgment, a court shall not, in any case, inquire into any of the following questions or matters-
>
> (a) Whether any advice or recommendation was tendered to the President or acted on by him; or
>
> (b) whether any consultation took place in connection with the performance of the act; or
>
> (c) the nature of any advice or recommendation tendered to the President; or
>
> (d) the manner in which the President has exercised his discretion.
>
> (2) Where the President is required or permitted by this Constitution or any other law to act on the advice or recommendation of or after consultation with any person or authority, a court shall not, in any case, inquire into either of the following questions or matters-
>
> (a) the nature of any advice or recommendation tendered to the President; or
>
> (b) the manner in which the President has exercised his discretion."

Such a provision is not found in the current Constitution.

The *Moyo* decision also seems to suggest that it is not the ultimate decision itself that is subject to review but the process as follows:

> "It is clear that what is reviewable is not the executive act of the President. The court cannot inquire into the fact that the President decided in the exercise of his discretion to appoint the first respondent instead of anyone else as Chief Bunina. The court cannot inquire into what information was taken into account by the President in making his decision and whether the decision was justifiable on the information."

> [13] The Administrative Justice Act [*Chapter 10:28*] states broadly in its preamble that it is an act, "To provide for the right to administrative action and decisions that are lawful, reasonable and procedurally fair; to provide for the entitlement to written reasons for administrative action or decisions; to provide for relief by a competent court against administrative action or decisions contrary to the provisions of this Act; and to provide for matters connected with or incidental to the foregoing."

> [14] The High Court act specifically provides for the right of review in s 26 as follows:

> "**26 Power to review proceedings and decisions**
> Subject to this Act and any other law, the High Court shall have power, jurisdiction and authority to review
> all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities within Zimbabwe.
> **27 Grounds for review**
> (1) Subject to this Act and any other law, the grounds on which any proceedings or decision may be brought
> on review before the High Court shall be—
> (*a*) absence of jurisdiction on the part of the court, tribunal or authority concerned;
> (*b*) interest in the cause, bias, malice or corruption on the part of the person presiding over the court or
> tribunal concerned or on the part of the authority concerned, as the case may be;
> (*c*) gross irregularity the proceedings or the decision."

[15] Internationally, it is recognised that there must be safeguards in relation to the removal of judges from office – see generally, *Judicial tenure, removal, immunity and accountability* – IDEA (2014). See also J. Van Zyl, *The appointment, tenure and removal of judges under Commonwealth principles- A compendium and analysis,* Report of Research undertaken by Bingham Centre for the Rule of law. The Compendium in 3:4:20 and 3:4:21 contains a discussion of the review or appeal by a Judge against the removal. There is also a discussion in 3:4:22 regarding how different states have approached the issue. It is noted that while at a minimum the rule of law requires that decisions of ad hoc tribunals be subject to judicial review, there has not been consistency in the Commonwealth countries.

[16] In Nigeria, the Constitution sets a Code of Conduct for Public Officers in part One of the fifth schedule. Section 15(1) establishes a Code of Conduct tribunal. Section 18(4) gives any person aggrieved by a punishment or penalty imposed, the right to lodge an appeal

with the Court of Appeal. Part 11 (5) defines public officers to include judges of the various courts.

[17] In South Africa, in an illustrative judgment of *Hlope* v *Judicial Service Commission and ors,* (with the Black Lawyers Association joining as *amicus curiae*) High Court, Gauteng Division, Case no. 43482/21, the applicant filed an application for review. This was in relation to the decision of the Judicial Service Commission reached on 25 August 2021 by a majority of 8:4 that he had committed an act of gross misconduct. The consequence of such decision was that he must be referred to Parliament to be subjected to a motion of impeachment.

[18] In India, in the case of *Sarojini Ramaswami* v *Union of India and ors,* Writ Petition (civil) 514/92, a pertinent question was put before the court as captured in the first paragraph as follows:

> "The person entitled to seek judicial review and the stage at which it is available against the findings of the Inquiry Committee constituted under Section 3(2) of the Judges (Inquiry) Act, 1968 (hereinafter referred to as 'the Act') in accordance with the law declared in Sub-Committee on Judicial Accountability v. Union of India, (1991) 4 SCC 699 is the question for decision in this writ petition. According to the petitioner, the remedy of judicial review is available to the concerned Judge against the finding, if any, by the Inquiry Committee that the learned Judge is 'guilty' of misbehaviour only prior to submission of the report of the Committee to the Speaker - in accordance with Section 4 (2) of the Act or latest till it is laid before the Parliament as required by Section 4(3) of the Act, but not thereafter. Accordingly, the petitioner claims that a copy of the report should be furnished to the concerned Judge before it is submitted to the Speaker, to preserve the right of the Judge to seek judicial review of the finding of 'guilty', if any, in the report. The merit of this submission is considered herein."

In that matter, it was held that the judge was entitled to the report before its findings were referred to Parliament.

[19] The position in South Africa, Kenya and India provide what can be termed a bus stop approach before reaching the main termini. A judge who is subject to the removal process has a window of opportunity to seek legal recourse before the removal is finalised. In Nigeria, the right to appeal is guaranteed by the Constitution as enunciated above.

[20] With regard to Zimbabwe, I find the *obiter* in the *Gula Ndebele* case that there is legal scope for review of the process of removal through the tribunal before its finalisation and before the recommendation is brought into effect very persuasive. I say this mindful of the fact that the applicant did in fact seek a copy of the report by the tribunal in HC

3673/21, but this was after her removal had already been pronounced. She thus treated the process as one when it is a two pronged one that culminates into one once the recommendation is implemented. As aptly stated by MAKARAU (JP) (as she then was) in the *Gula -Ndebele* case:

> "My reading of the section suggests that the President is bound by the Constitution to act on the recommendation of the tribunal and once he does that, the removal of the Attorney – General from office becomes the action of the President albeit on the recommendations and advice of the tribunal. The two then become inseparable in my view. While the recommendation and advice can exist on its own before implementation, once implemented, the two become one".

What is clear from the *Gula-Ndebele* matter is that the question of whether or not the High court exercises review jurisdiction, after the recommendation and removal was not dealt with or did not arise in the particular circumstances of that matter.

[21] The clear terms of reference of a tribunal centre around one issue- it is an inquiry of whether or not a judge should be removed from office. See s 187(7). The end process for any tribunal is to make recommendations. The tribunal can recommend that the judge should not be removed. It may also recommend removal from office.

[22] (a) The question then becomes whether or not the decision made by the first respondent is subject to review by this court. Whatever recommendation is made, the President must act in terms of s 187(8). In my view, once removal or no removal is recommended and acted upon, it becomes a decision made in terms of the Constitution. It could not have been the intention of the legislature that once such removal is finalised in terms of the Constitution, that this court assumes jurisdiction even under the guise of 'inherent' jurisdiction as contended by Mrs Mtetwa. Conversely, in my view, it would be absurd for the Judicial Service Commission for instance, to seek a reversal of a recommendation not to remove a judge by way of an application for review in this court.

(b) The context of the *Moyo* matter is that there was and still is in existence a specific law relating to the appointment of Chiefs. It is clear also that the President has discretion on who to appoint as a Chief but there is a supporting act of Parliament which is the Traditional Leaders Act. As held in *Marange* v *Marange,* SC 1/21;

> "It follows from the foregoing that the court *a quo* was correct in adopting the stance that it was invested with the requisite jurisdiction to review the acts and conduct of the Minister, in his capacity as an administrative authority, on the recognised grounds of illegality, irrationality or procedural impropriety. More specifically, what is reviewable is not how the President exercises his discretion but whether those who formulate their advice to him acted on sound principle. See *Rushwayo* v *Minister of Local Government & Anor* 1987 (1) ZLR 15

(S), at 18F-19B; *Chigarasango* v *Chigarasango* 2000 (1) ZLR 99 (S); *Moyo* v *Mkoba & Ors* SC 35/2013; *Munodawafa* v *Masvingo District Administrator & Ors* HH 571-15".

Using the same reasoning, in my view, what can be reviewable by this court before the first respondent acts is the process by which the tribunal makes its recommendation. This is more so given the fact that the tribunal is an administrative authority unlike the first respondent who is not covered in the definition as set out in the Administrative Justice Act. However, the first respondent has already acted on the recommendation to remove the applicant from office. The *Moyo* matter was also in the context of s 31K that ousted the jurisdiction of the court in specific instances. As stated above, the equivalent of s 31K is missing from the current Constitution.

(c) I do accept that the court has held that sometimes, the prerogative power of the President can be subject to review. See *P.F ZAPU* cited *supra*, *In re Certification of the Constitution of the Republic of South Africa* v *Hugo,* 1997(6) BCLR 708 1253 (CC); *CCSU* v *Minister of the Civil Service,* (1985) 3 ALL ER 935, HL and *R* v *Secretary of State for the Home Office, ex p Bentley* (1993) 4 ALL ER 442. There is always some suspicion around a President's executive powers especially when it comes to matters of exercising a prerogative or discretion. That is why perhaps the courts have strived to keep that in check through a judicial review. *In casu,* the effecting of the recommendation to remove or not to remove a judge, unlike the appointment of a Chief is **not** a matter of prerogative or discretion. As already discussed, once the tribunal makes a recommendation, the first respondent has no choice but to effect it. It must also be understood that the first respondent plays no part in the investigation or inquiry on whether or not a judge should be removed. He merely receives the recommendation and acts on it. To the extent that the applicant also seeks a review of the first respondent's decision, this court has no jurisdiction to delve into it.

(d) In the oft-cited case of *Johannesburg Stock Exchange and another* v *Witwatersrand Nigel Limited and another,* 1988(3) SA 132 (A) @152 A-E, the court discussed *inter alia,* the instances under which the President's exercise of executive powers can be subject to review. However, the powers discussed were those in which the President has discretion, or where he is expected to act under legislation. I emphasise again that the first respondent has no discretion once a recommendation is made whether it is for removal or non-removal.

[23] Mrs *Mtetwa* referred the court to provisions of the Administrative Justice Act as establishing the court's jurisdiction. In my view, the act would have been relevant before the

recommendation for removal was brought into effect. I say this in the context of the decision in *Gwaradzimba N.O* v *Gurta,* SC -10-15 to the effect that a litigant can bring review proceedings in terms of that act and that the High Court Rules as read with the High Court Act do not enjoy monopoly over review proceedings. As stated above, once the first respondent acted, that is the end of the road in this court for the applicant.

[24] Reference was also made to the Judicial Services Act [*Chapter 7:18*] as subsidiary legislation establishing jurisdiction. I again do not agree. Section 26 of the act provides as follows:

> "**26 Act not to affect application of certain other laws**
>
> To the extent that the appointment, conditions of service, termination or service or pension benefits of a member of the Judicial Service is or are provided for by or under the Constitution or any other enactment, this Act shall not apply to or in respect of that member. The appointment and termination of office of the applicant are in terms of the Constitution and the act is clearly not applicable."

[25] I note that in the Labour Court in LC/H/101/22 in which the applicant noted an appeal against her removal, the matter was struck off the roll as being improperly before it. Mrs *Mtetwa* submitted that the decision was under appeal to the Supreme Court. The inescapable conclusion in *casu* however is that this court has no jurisdiction to entertain this application.

[26] On costs, the applicant has raised critical legal issues pertaining to the process of removal of a sitting judge from office and legal remedies thereafter. Such issues are often taken for granted. It has also exposed some gaps, for instance, the availing of the report containing the recommendation before it is submitted to the first respondent. It seems prudent as was done in the *Ramaswami* case in India to avail the report before the recommendation is submitted to the final authority so that the judge concerned can exercise their right to seek legal remedies, they deem appropriate. Whilst costs normally follow the cause, in this matter, the most appropriate order is one that each party should bear their own costs.

DISPOSITION

The decision to remove the applicant from office having been made following the recommendation of the tribunal, and the removal having been affected thus becoming an order made in terms of the Constitution, the following order is made:

1. The court declines jurisdiction.

2. Each party shall bear their own costs

NDLOVU J: I agree …….

KATIYO J: I agree……

Mtetwa Nyambirai, applicant's legal practitioners
Civil Division of the AG's office, first respondent's legal practitioners
Sinyoro and Partners, second and fourth respondents' legal practitioners
Warara and Associates, third respondent's legal practitioners