REPORTABLE (2)

ERICA FUNGAI NDEWERE

v

THE PRESIDENT OF ZIMBABWE

CONSTITUTIONAL COURT OF ZIMBABWE
GARWE JCC, MAKARAU JCC, GOWORA JCC, HLATSHWAYO JCC, PATEL JCC
UCHENA AJCC & MATHONSI AJCC
HARARE, 15 MAY 2024 & 26 MARCH 2025

B. Mtetwa with *R. Chitotombe*, for the applicant

V. Munyoro with *M. Chimombe*, for the respondent

GARWE JCC:

[1] This is an application brought in terms of s 167 (2) of the Constitution of Zimbabwe, 2013 ("the Constitution"). The applicant seeks a declarator that the President failed to fulfil a constitutional obligation within the contemplation of the Constitution when he removed the applicant from the office of Judge of the High Court on 17 June 2021. The removal was pursuant to what the applicant considers was an invalid and unlawful recommendation by a tribunal appointed by the President to look into the question of her removal from office. The applicant further seeks, as consequential relief, an order setting aside that decision and a further order re-instating her to her position as a judge of the High Court without loss of salary and other benefits from the date of appointment of the tribunal.

[2] Having carefully considered the facts of this matter in their totality as well as the submissions by the parties, there can be no gainsaying that the President fulfilled his

constitutional obligations in terms of s 187 of the constitution. In the circumstances, the applicant has no cause of action against the President. Further, despite having cast serious aspersions on the Chief Justice of Zimbabwe, the Judicial Service Commission and the tribunal, the applicant did not cite them as respondents. The application must therefore fail. A no-costs order seems to me to be appropriate given the facts of the matter.

FACTUAL BACKGROUND

[3] The applicant is a former Judge of the High Court of Zimbabwe. The respondent is the President of the Republic of Zimbabwe cited in his official capacity as the functionary responsible for appointing and removing judges from office in terms of the Constitution.

[4] In September 2020, the applicant was advised by the Judicial Service Commission that a complaint had been lodged against her by the Chief Justice of Zimbabwe and that such complaint had been placed before the Judicial Service Commission for its consideration in terms of s 187 (3) of the Constitution. Three instances of alleged misconduct were cited. Firstly, that she had issued a review minute without reading the record of the proceedings. Secondly, that she had failed to action the review record in that matter for several months. Thirdly, that she had failed to deliver judgments in a number of cases within ninety days in breach of the Judicial Service (Code of Ethics) Regulations, 2012 ("the Code of Ethics Regulations").

[5] In October 2020, she received another letter from the Judicial Service Commission advising her that it (the Commission) had resolved to advise the President that the question of her

removal from office ought to be investigated by a tribunal in terms of s 187 (3) of the Constitution. She thereafter filed an urgent application challenging the decision of the Commission to refer the question of her removal to the President but this application was subsequently withdrawn. The President, by Proclamation No. 7/20, proceeded to appoint a tribunal, chaired by Retired JUSTICE SIMBI MUBAKO, to investigate the question of her removal. Consequent to the appointment of the tribunal, she was then suspended from office, initially without pay, but this decision was subsequently rescinded.

[6] At the hearing before the tribunal, it was alleged, firstly, that she had failed to deliver reserved judgments within ninety days in breach of the Code of Conduct Regulations; secondly, that she had failed to read and consider a criminal record; thirdly, that she had failed to give reasons in another criminal matter. Having filed her response to the allegations, the matter was then set down for hearing. After hearing evidence, the parties proceeded to file closing submissions. Amongst other things, she submitted to the tribunal that she reserved the right to be heard on the appropriate penalty in the event that the tribunal concluded that there had been wrongdoing on her part. In June 2021 she was then served with a letter from the office of the Chief Secretary to the President and Cabinet advising that she had been removed by the President of Zimbabwe from office. It is that dismissal that has triggered the present application.

THE APPLICANT'S CASE

[7] The applicant has filed the present application in terms of s 167 (2) (d) of the Constitution alleging that the President has failed to fulfil a constitutional obligation. Her case is that

the Chief Justice was required, in terms of s 21 of the Code of Ethics Regulations, to set up a disciplinary committee composed of three sitting Judges to investigate the allegations against her before referring the matter to the Judicial Service Commission. She contends that the statistics relied upon by the Chief Justice in referring the matter to the Judicial Service Commission were not accurate. She further contends that, had the three-member committee been constituted to conduct investigations into the allegations levelled against her, it would have established the correct statistical data regarding the cases that had been allocated to her and, ultimately, that she did not have outstanding matters.

[8] She argues that she was treated differently from other judges in violation of ss 56 and 80 of the Constitution which forbids discrimination in any form against women. She says she was suspended from work without pay and benefits yet other judges who had previously been suspended had been allowed to access their salary and benefits. She also alleges that there are a number of other Judges who have had case backlogs but have not been subjected to a similar process. She says that she is the only one who was targeted.

[9] She further argues that the tribunal grossly misdirected itself in making a finding to the effect that she was guilty of gross incompetence when such a charge was not part of the initial allegations referred to the Judicial Service Commission. She also alleges that the tribunal was not properly constituted because the secretary of the tribunal was a member of the executive and, consequently, the doctrine of separation of powers was not observed at the time the tribunal was appointed. In addition, she claims that the witnesses who testified before the tribunal were not her supervisors and therefore could not properly attest

to her competency to remain in office. She also alleges that she was not given an opportunity to address the tribunal on the appropriate penalty to be imposed once she had been found guilty and that, before the hearing, she had not been provided with all the relevant documents necessary for her to prepare her defence.

[10] The applicant also contends that the tribunal made recommendations at a time when it no longer had jurisdiction to do so. She avers that the tribunal completed its enquiry two months after the date on which it ought to have completed its inquiry. Her case is that the Proclamation that gave birth to the tribunal had given the tribunal five months to conduct its inquiry. Although the tenure of the tribunal was further extended by a month through a further Proclamation, the tribunal completed its inquiry after a period of seven months.

[11] It is her further contention that the first respondent failed to fulfil a constitutional obligation because he acted on recommendations which were unlawful and invalid. She argues that s 187 (8) of the Constitution, which mandates the first respondent to act on the recommendations of the tribunal, contemplates recommendations which are lawful and valid. She avers that the first respondent is constitutionally obliged, in terms of s 90 (1) of the Constitution, to uphold, defend, obey and respect the Constitution as the supreme law of the land.

THE RESPONDENT'S NOTICE OF OPPOSITION

[12] The opposing affidavit was deposed to by Ziyambi Ziyambi, the Minister of Justice, Legal and Parliamentary Affairs ("the Minister"). He states that he has been authorised by the

President to depose to the affidavit on his behalf. He took the preliminary point that, serious allegations of impropriety having been made against the Chief Justice, the Judicial Service Commission and the JUSTICE SIMBI MUBAKO Tribunal, the applicant should have joined them as respondents and that the non-joinder is material.

[13] On the merits, the Minister disputes the claim by the applicant that the tribunal concluded its inquiry well after the period provided for in the Proclamation had lapsed. He states that the tribunal was given an option to extend its lifespan by a further six months in the event that the inquiry was not concluded within the period of five months initially prescribed in the original Proclamation. He further denies the claims by the applicant that she was denied access to certain documents. He also disputes the applicant's contention that she had the right to address the tribunal in mitigation before it made its final recommendations to the President. He further disputed that, in terms of the law, it is mandatory, where allegations are made against a judge, for the Chief Justice to appoint a panel of three judges to inquire into such allegations. He averred that the Code of Conduct Regulations are only resorted to where the allegations against a judge relate to minor infractions whilst s 187 of the Constitution deals with allegations of a serious nature that amount to gross incompetence or misconduct.

THE APPLICANT'S ANSWERING AFFIDAVIT

[14] In her answering affidavit, the applicant has taken the preliminary point that there is no valid opposing affidavit before the Court. She has submitted that, the allegation being that the President has failed to fulfil a constitutional obligation in removing her from office,

only the President is required to depose to the opposing affidavit as it is only him who knows what landed on his desk and what he took into account in deciding to remove her from office. The President therefore cannot delegate such responsibility to the Minister. She further contends that, in any event, the affidavit constitutes inadmissible hearsay and, for that additional reason, the opposing affidavit is invalid. She further took issue with the fact that the deponent's affidavit was commissioned by one Tariro Musangwa, a law officer in the Attorney General's Office, who are the legal practitioners of the respondent.

[15] On the preliminary point taken by the respondent that there was a material non-joinder of the Chief Justice, the Judicial Service Commission and the tribunal, it was her submission that such has no merit. She contends that the jurisprudence coming out of this Court is clear that, in applications of this nature, the only permissible respondents are the President of Zimbabwe and the Parliament of Zimbabwe and no-one else.

SUBMISSIONS BEFORE THE COURT

[16] At the hearing of this matter, the court directed both parties to address it, *inter alia*, on whether or not the applicant had pleaded a valid cause of action against the President. In this regard, Mrs *Mtetwa,* for the applicant, contended that the applicant's cause of action is that the President failed to fulfil a constitutional obligation in terms of s 187 (8) of the Constitution. It was her submission that the matter should not have been referred directly to the Judicial Service Commission without an inquiry first having been undertaken in terms of s 21 of the Code of Ethics Regulations.

[17] Counsel further submitted that neither the tribunal nor the Judicial Service Commission had the benefit of the findings of the investigating committee. That failure to subject the applicant to the lawful constitutional processes before referral to the respondent invalidated the recommendations made by the tribunal to the respondent. She further submitted that this Court is entitled to determine whether the inquiry by the tribunal and the Judicial Service Commission was undertaken in terms of the Constitution.

[18] *Per contra*, Mrs *Munyoro*, for the respondent, submitted that s 187 (8) of the Constitution of Zimbabwe gives the respondent the power to act upon the tribunal's recommendations. Counsel argued that s 187 (8) of the Constitution does not give the respondent the discretion to assess the constitutionality of the referrals sent to him. She further submitted that the application does not demonstrate a cause of action against the respondent because the respondent fulfilled his constitutional obligation by acting in terms of the recommendations forwarded to him by the tribunal and that he could not have lawfully gone beyond those recommendations.

ISSUES ARISING FOR DETERMINATION

[19] Based on the above synopsis of the facts and submissions of counsel, it seems to me that three broad issues arise for determination. These are, firstly, whether the opposing affidavit deposed to by the Minister is valid. Secondly, if it is, whether there has been material non-joinder of the Chief Justice, the Judicial Service Commission and the tribunal which ultimately made recommendations to the President for the removal of the applicant from

office. The third is whether, in any event, the applicant has established a cause of action against the Respondent. I proceed to look at these issues in the order in which they arise.

WHETHER THE OPPOSING AFFIDAVIT IS VALID

[20] As already noted, the opposing affidavit is deposed to by the Minister of Justice, Legal and Parliamentary Affairs. Under oath, he states that he has been authorised to depose to the affidavit on behalf of the President. He then proceeds to deal with the various allegations made by the applicant in her founding affidavit. He deals with issues of law arising from the applicant's contentions in her founding affidavit. He takes the preliminary point that there has been material non-joinder of the Chief Justice, the Judicial Service Commission and the tribunal. He states that there is no law that requires the Chief Justice to first set up a panel of three judges in all cases before a matter is referred to the Judicial Service Commission. He also contends that the President cannot be said to have failed to fulfil a constitutional obligation because s 187 (8) is peremptory that he must act in accordance with the findings of the tribunal once these are reported to him.

[21] It is correct, as the applicant has pointed out, that some of the averments in the opposing affidavit constitute inadmissible hearsay. For example the Minister avers that:

> "from the report that was submitted to the President by the tribunal all the evidence and defences of the applicant were taken into account."

There can be no argument that the above statement does constitute inadmissible hearsay. That notwithstanding, it is clear that the Minister of Justice, Legal and Parliamentary

Affairs can quite competently depose to what he believes is the correct position on the law on behalf of the President.

[22] On the commissioning of the affidavit, it is apparent that, whilst s 2 of the Justices of the Peace and Commissioners of Oaths (General) Regulations, S.I. 183/98 proscribes the commissioning of oaths by persons who may have an interest in a matter, para 2 of the Schedule to the Regulations allows members of the Public Service to attest affidavits where their only interest arises from their employment in the public service and the primary interest in the affidavit is that of the State.

[23] I am satisfied that, whilst some portion of the opposing affidavit is predicated on hearsay, the material portions of the affidavit deal with issues of law, more particularly the question whether there has been material non-joinder of interested parties and whether the applicant had a cause of action against the respondent from the outset, issues that will shortly be related to. The Minister can therefore properly depose to these issues on behalf of the President. I am also satisfied that a law officer in the Attorney General's office can properly attest to an affidavit by the Minister of Justice, Legal and Parliamentary Affairs in the ordinary course of his duties as a public servant.

[24] I would accordingly dismiss the preliminary point that the affidavit is invalid. In light of this finding, the issue that then arises is whether the preliminary point taken by the Minister on non-joinder has merit.

THE QUESTION OF NON-JOINDER

[25] From the papers filed of record and the submissions made by counsel before this Court, it is apparent that the applicant's dissatisfaction is with the conduct of the Chief Justice, the Judicial Service Commission and the tribunal which made recommendations to the respondent for her removal from the office of a Judge. The applicant has made serious and pointed allegations against all three parties who are not cited in the proceedings. Because they are not party to the present proceedings, those parties are unlikely to be aware of the serious allegations being levelled against them. Their side of the story is unknown. The applicant has therefore created a situation where they can neither rebut nor confirm her version of events.

[26] In her founding affidavit in particular, the applicant makes a number of serious allegations, especially against the Chief Justice and the tribunal. She alleges that the Chief Justice had previously threatened her with investigations if she granted bail in a matter involving a former Cabinet Minister, one Prisca Mupfumira. She alleges that the Chief Justice and Judicial Service Commission relied on "false and inaccurate data" and that such reliance on data that did not have her input "violated her right to administrative conduct that was fair." She further says she was referred to the Judicial Service Commission by the Chief Justice "on the basis of information which was later confirmed to have been inaccurate." She further accuses the Chief Justice of "using an investigative procedure not provided for in the Code of Ethics" and of "unlawfully usurping powers given to the three-member panel." She also accuses the Chief Justice and the Judicial Service Commission of deliberately ignoring the provisions of the Code of Ethics Regulations because, as she says,

they wanted "to remove her at all costs." She further accuses the Chief Justice of "targeting her for removal at any cost and for picking and choosing whatever he thought would deliver her removal from office." She accuses the Chief Justice of involving himself in a matter before the High Court which was not before him and that "his clandestine involvement amounted to an unconstitutional interference by his office." The tribunal, in turn, is alleged to have added a charge that had not been considered by the Judicial Service Commission nor referred by that body to the President. There can be little doubt that these are serious allegations against the Chief Justice, the Judicial Service Commission and the tribunal.

[27] The President, in the opposing affidavit deposed to on his behalf by the Minister, raised the preliminary objection that, in light of these serious allegations of impropriety, there was material non-joinder of the Chief Justice, Judicial Service Commission and the tribunal. In her answering affidavit, the applicant submitted that the preliminary point had no merit as the jurisprudence of this Court has made it clear that, in a s 167 (2) application, no other person other than the President or Parliament can be cited as a party to the proceedings. More particularly, the applicant referred to the judgment of this Court in *Mliswa* v *Parliament of Zimbabwe* CCZ 2/21 as authority for the proposition that, in an application in terms of s 167 (2) (d), the only permissible respondents are the President and Parliament of Zimbabwe.

[28] It is correct that in *Mliswa, supra,* this court stated that the exclusive jurisdiction of the Court under s 167 (2) (d) cannot be invoked to inquire into the conduct of other state agencies that are not the President or Parliament of Zimbabwe. The remarks were made in

the context of the particular facts of that matter. The applicant in that case had sought to impugn the conduct of Parliament through its Speaker. In doing so, the applicant had sought to challenge the conduct of the Speaker as exceeding the powers granted to him by the Standing Orders and simultaneously imputing such allegedly unlawful conduct to Parliament. This Court found that the power given to the Speaker to impose a penalty on a member under the Standing Orders was power given to the Speaker in his official capacity as Speaker and that such power was exercised independently of that given to Parliament itself. In other words it was the finding of this Court that the conduct complained of was that of the Speaker acting independently of Parliament and that the conduct complained of was not that of Parliament. It was in the above context that this court remarked that, limiting itself to the particular facts of the matter, the only possible respondents in a s 167 (2) application were the President and Parliament of Zimbabwe.

[29] In *Joshua John Chirambwe* v *The President of the Republic Of Zimbabwe and Four Others* CCZ 4/21, this Court also reiterated that the only permissible respondents in a s 167 (2) (d) application were the President and Parliament and that other State functionaries could not be made respondents in such an application.

[30] Since then, however, this Court has moved somewhat from that position. In *Edwin Mushoriwa* and *Three Others* v *Parliament of Zimbabwe and The President of the Republic of Zimbabwe* CCZ 4/23 this Court, sitting as a full court, qualified the earlier remarks made in the above cases. In order to allow for flexibility to meet the ever-changing needs of society and the administration of justice, the law has provided that this Court is not bound

by any of its previous judgments. In *Mushoriwa*, *supra*, this court stated as follows at *paras* 56-57:

> "56. It seems to me, however, that the above proposition may require qualification. In an application in which it is alleged that Parliament or the President failed to fulfil a constitutional obligation, the relief sought must be directed at either Parliament or the President. As the s 167 (2) (d) cause of action is directed at either Parliament or the President, the application cannot seek relief against other functionaries who are not the President or Parliament. So far as this may relate to the relief sought, the position, in my view, is correct. It seems to me, however, that there must be a rider.
>
> 57. There will be situations in which the conduct of either the President or Parliament will implicate the conduct of other functionaries or even outsiders. As an example, if it is alleged that a Minister facilitated the conduct of Parliament or the President that resulted in a failure to fulfil a constitutional obligation, then such a Minister, though no relief is sought against him directly, must be cited. Such citation would enable the Minister to respond and place facts before the court so that the court is enabled to make a correct finding on whether or not such involvement facilitated the failure to fulfil a constitutional obligation and indeed whether there was such failure. In such a situation, it seems to me that it would be desirable, if not mandatory, for the functionary against whom an allegation is made to be cited. Such citation is necessary so that any dispute on the facts can be resolved, because it is on the basis of the proved facts that a declaration is made that either Parliament or the President failed to fulfil a constitutional obligation. Without citing such person, adverse findings of facts could be made without such person being aware-an outcome that would be averse to natural justice considerations. He would in these circumstances, have a direct and substantial interest in the issues raised before the court as his rights may be affected by the judgment of the court – *Maceys Supermarket* & *Bottle Store (Greencroft) Ltd* v *Edwards* 1964 RLR 13 (SR); *Federation of Non-Government Organisation Trust* & *Anor* v *Sybeth Msengezi* & *Ors* HH 645/22."

[31] Regard being had to the above remarks, the position may now be regarded as settled that, where the conduct of other actors is implicated in an application alleging the failure to fulfil a constitutional obligation by either the President or Parliament, then such persons must be cited as respondents, though no relief under s 167 (2) (d) is sought against them. As explained in *Mushoriwa*, *supra*, an allegation that the President or Parliament has failed to

fulfil a constitutional obligation is always predicated on particular facts. Where the application implicates the conduct of other actors as having been involved in or having facilitated such failure, then these other persons must be cited as respondents so that they can, if necessary, place facts before the Court to enable the Court to come up with appropriate findings on the matter.

[32] The failure to cite the Chief Justice, the Judicial Service Commission and the tribunal constituted material non-joinder. Ordinarily this Court would, for that reason, strike the matter off the roll. However, despite the non-joinder, there is need to determine the issue, raised by the President, whether the applicant has demonstrated a cause of action against him at all as the matter goes to the root of this application.

APPLICANT'S CAUSE OF ACTION

[33] In this application, the applicant seeks an order that:

> "(1) There having been no valid and lawful recommendations, it is hereby declared that the President failed to fulfil a constitutional obligation within the contemplation of s 187 (8) of the Constitution when he removed the applicant from the office of a Judge on the 17th of June 2021
>
> (2) Consequently, the decision to remove the applicant from the office of a Judge pursuant to the unlawful and invalid recommendations of the Tribunal be and is hereby set aside.
>
> (3) The applicant be and is hereby reinstated to her position as a Judge of the High Court of Zimbabwe without loss of salary and benefits from the date of publication of Proclamation 7 of 2020."

[34] In her founding affidavit, she states that:

> "Only lawful and valid recommendations are contemplated in s 187 (8) of the Constitution of Zimbabwe."

and that:

> "If the Respondent acts upon unlawful and invalid recommendations of the Tribunal, as it is in this case, he would have failed to fulfil a constitutional obligation within the contemplation of s 187 (8) of the Constitution."

and further that:

> "It could not have been the intention of the framers of the Constitution to have a judge removed from office pursuant to unlawful and invalid recommendations of a tribunal which would have ignored the judge's right to a fair, administrative, substantive procedural justice, the right to fair labour rights, the right to a fair hearing by following all the provisions of the Code of Ethics …… I dispute that the Respondent is a robot who should act in accordance with the recommendations of a tribunal which would have arrived at its recommendations in breach of the law and fundamental constitutional provisions …."

[35] During oral submissions, Mrs *Mtetwa* conceded that, not having been involved in the other processes that took place before the report of the tribunal was forwarded to him, the President would have assumed that all the processes had been properly followed. She accepted that he had no way of ascertaining whether those processes had been correctly followed. She further contended that in these circumstances:

> "the President was presented with a poisoned chalice where he had a referral sent to him which was a nullity by virtue of the failure to follow the procedures clearly laid down."

And that:

> "once there was that failure, everything that followed was a nullity. A nullity begets a nullity."

[36] A number of instances were itemised in support of the contention that the recommendations made by the tribunal to the respondent were invalid and unlawful. First, it was argued that the recommendations acted upon by the President were made at a time when the tribunal

no longer had jurisdiction to inquire into the matter and make recommendations as the tribunal had failed to conclude the inquiry within the time frame stated in the Proclamation that created it. Second, that the applicant had been denied access to documents which were crucial for her to prepare and conduct her defence before the tribunal. Third, that the applicant, despite having advised the tribunal that she would want to address it in mitigation in the event that the tribunal found that she had misconducted herself, the tribunal proceeded to make recommendations for her dismissal without her further involvement. Fourth, that the JUSTICE SIMBI MUBAKO Tribunal was constituted before the peremptory internal investigative procedures enshrined in the Code of Ethics Regulations had been complied with. The regulations, she argued, require the Chief Justice to set up a committee comprising three judges to inquire into the question whether a judicial officer had conducted herself in a manner that appeared to violate any provision of the Code before resorting to the referral procedures under s 187 (3) of the Constitution, as happened in the cases of Justices BERE and CHINAMHORA. Fifth, the applicant alleges that the involvement of Virginia Mabhiza, then Secretary for Justice, Legal and Parliamentary Affairs, breached the principle of the separation of powers, rendering the tribunal unlawful. Sixth, that the tribunal had, in its determination, failed to take into account the fact that the applicant's evidence before it was uncontroverted because, during the inquiry, the evidence presenters led secondary evidence from witnesses who had no knowledge of the work undertaken by judges. Seventh, that the referral was done in a discriminatory manner. Another judge who was involved in a criminal review that formed part of the allegations against her was not similarly referred to an inquiry. A number of other judges who had failed to deliver reserved judgments timeously were not similarly subjected to an inquiry. Further, unlike

previous instances where judges had been referred to a tribunal, she had been denied her monetary benefits for more than a month.

[37] It is the applicant's contention that the cumulative effect of these violations was such as to render the recommendations ultimately made by the tribunal to the President invalid. Because the recommendations were afflicted by these various procedural defects, they were unlawful and invalid. Consequently, the decision by the President removing her from office, predicated on these recommendations, was equally invalid and constituted a failure to fulfil a constitutional obligation.

[38] Asked by the Court what the President was required to do in terms of the law once the report of the tribunal containing recommendations was placed on his desk, Mrs *Mtetwa* conceded that he was bound to act on the recommendations as required by the Constitution "in the belief that all necessary processes had been complied with." Further questioned whether there was an obligation on the President to inquire into the validity of these other processes, she also conceded that he has no obligation because "it is assumed that the tribunal acted lawfully."

WHAT AN APPLICANT MUST PROVE

[39] Rule 27 of the Rules of this Court states as follows:-

> "An application to the Court in terms of s 167 (2) (d) of the Constitution alleging that Parliament or the President has failed to fulfil a constitutional obligation shall be brought by way of court application, supported by an affidavit setting out the constitutional obligation in question and what Parliament or the President has failed to do in respect of such obligation."

[40] The rules of this Court are therefore clear that an application in a matter such as the present must set out the constitutional obligation in question and what Parliament or the President has failed to do as directed by the Constitution. In *Joyce Teurai Ropa Mujuru* v *The President of Zimbabwe* & *Five Others* CCZ 8/18, this Court, citing with approval remarks by the Constitutional Court of South Africa on a similar provision in the South African Constitution, stated that an applicant who seeks to vindicate a constitutional right by impugning the conduct of a State functionary must identify the functionary and the impugned conduct with reasonable precision. This Court further accepted that the failure must relate to an obligation that is specifically imposed on the President or Parliament and that an obligation shared with other organs of State will always fail the s 167 (2) (d) test. We further stressed, in *Temba Mliswa* v *Parliament of the Republic of Zimbabwe* CCZ 2/21, that these two requirements are not consecutives but rather concomitants, both of which must be proved.

[41] In *Edwin Mushoriwa* & *Three Others* v *Parliament of Zimbabwe& Anor* CCZ 4/23, this Court remarked once again as follows:

> "We have said so before and we say so again. In this jurisdiction the position is settled that an alleged breach of a constitutional obligation must relate to an obligation that is specifically imposed on the President or Parliament and that an obligation shared with other organs of the state will not meet the s 167 (2) (d) test. This court has further enunciated that in an application, such as the present, an applicant must identify the functionary and the impugned conduct with reasonable precision …."

[42] This Court has therefore spoken on the matter and the position of the law on the topic is now settled. One would therefore expect that an applicant approaching the Court for a declaration that the President or Parliament has failed to fulfil a constitutional obligation

would appreciate the need to identify a specific obligation imposed by the Constitution and substantiate in what way the President or Parliament has violated that obligation. In the present matter there has been glaring failure on the part of the applicant to comply with this very clear position of the law.

THE ALLEGATIONS BY THE APPLICANT

[43] Throughout her papers, the applicant makes it clear that the basis upon which it is alleged that the President failed to fulfil a constitutional obligation is that he acted on a report containing recommendations by the JUSTICE SIMBI MUBAKO Tribunal for her removal from office as a judge of the High Court. It is suggested that the proceedings before the tribunal and, before that, the Judicial Service Commission, were afflicted by a number of procedural irregularities that vitiated the validity of the report that was produced at the end of the day. It is said by the applicant that the President failed to fulfil a constitutional obligation:

> "When he removed the applicant from office pursuant to unlawful and invalid recommendations of the Tribunal."

Further that:

> "If he acts upon an unlawful and invalid recommendation of the Tribunal, he would have failed to fulfil a constitutional obligation."

And further that:

> "It was not the intention of the legislature that a Judge could be removed from office pursuant to an unlawful and invalid recommendation of a Tribunal that would have ignored the right to fair conduct and procedural justice."

[44] In response to submissions by respondent's counsel during the hearing, Mrs Mtetwa again reiterated that the President:

"had been presented with a poisoned chalice."

having been presented:

"with a referral which was a nullity by virtue of the failure to follow procedures clearly laid down."

and further that:

"Once there was a failure to make a constitutional referral to the President, everything that followed is a nullity. A nullity begets a nullity. The President could not make a lawful determination based on such a report. The nullity started from the failure to afford her a hearing before a three-member panel of judges …."

THE PRESIDENT IN FACT COMPLIED WITH THE CONSTITUTION

[45] It was not suggested, during oral argument, that the President was aware of the alleged shortcomings at the time he considered the recommendations of the tribunal. To the contrary, and, as already noted, Mrs *Mtetwa* accepted that the President would not have known that there had been any procedural irregularities. She accepted that the President would have acted in the belief that all the required processes laid down by the law "had been followed to the letter."

[46] Section 187 of the Constitution provides, in subsections (7) and (8), as follows:-

"(7) A tribunal appointed under subsection (2) or (3) must inquire into the question of removing the judge concerned from office and, having done so, must report its findings to the President and recommend whether or not the Judge should be removed from office.

(8) The President must act in accordance with the tribunal's recommendation in terms of subsection (7)."

[47] The obligations on the President in terms of s 187 (7) and (8) are clear. He has no discretion in the matter. As was appositely stated by GUVAVA JA in *Francis Bere* v *The Judicial*

Service Commission and Six Others SC 1/22, the power exercised by the President under s 187 is peremptory. In her words:

> "he cannot refuse to appoint a tribunal once the question of investigating a judge has been referred to him. So, too, must he act in accordance with the recommendations of the Tribunal once it has made its findings ……."

[48] There can be little doubt in this case that the President complied with s 187 of the Constitution and removed the applicant from office as a judge of the High Court. In the circumstances, it cannot be suggested that the President failed to fulfil his constitutional obligations under s 187 (8) of the Constitution. Indeed, as earlier noted, Mrs *Mtetwa* accepted during submissions that the President must act on the recommendations once these are forwarded to him in terms of s 187 (8) of the Constitution.

[49] The applicant's case was predicated on an alleged failure on the part of the President to fulfil an obligation in terms of s 187 (8) of the Constitution. As has been noted, the facts of this case show that, in fact, the President complied with that obligation. Had he not done so, as applicant appears to suggest, he would have indubitably failed to comply with the obligation specifically imposed on him in terms of s 187 (8) of the Constitution. The oblique suggestion made by the applicant in her founding affidavit that the President's obligation arose from s 90 (1) of the Constitution, which states that the President must uphold, defend, obey and respect the Constitution and all other laws, included an obligation not to remove a judge from office where the recommendations of the Tribunal are made without due regard to procedural safeguards, is clearly not tenable. The President acted on the report in the belief that all processes that had taken place hitherto had been correctly

and lawfully carried out. There was also no specific obligation on the President to inquire into whether or not the prior processes had been correctly and lawfully undertaken.

[50] That the President has no constitutional obligation to ascertain the validity of a proposed law before assenting to the same has been made clear by this Court in a number of decided cases. In *Mujuru*, *supra*, this Court made it clear that the President has no legal obligation to ascertain the validity of an existing law and that, ultimately, the responsibility of determining whether a law is valid or not is that of the Judiciary unless the Constitution makes a specific provision to the contrary. The Court made similar remarks in *Edwin Mushoriwa*, *supra*, at para 95. By parity of reasoning, the President has no obligation to investigate whether the processes preceding the submission of a report containing recommendations in terms of s 187 (8) were correctly carried out.

[51] I am satisfied, in all the circumstances, that the applicant has not demonstrated any constitutional obligation on the part of the President that he has violated. To the contrary, the common cause facts show that the President complied with the constitutional dictates under s 187 of the Constitution. Had he declined to do so, then, in that circumstance, a finding that he would have failed to comply with the obligation imposed on him by s 187 (8) of the Constitution would have been warranted.

[52] No constitutional obligation having been shown to have been violated, the applicant has no cause of action against the President arising from his obligations under s 187 of the Constitution.

THE COMPLAINT IS AGAIST EARLIER PROCESSES

[53] It is apparent that the applicant is unhappy with the conduct of the Chief Justice, the Judicial Service Commission and the JUSTICE SIMBI MUBAKO Tribunal. She had the right to seek a review of that conduct before the appropriate *fora* and to get requisite relief in respect of that conduct she considered had violated her rights under the law. She says this Court must now consider whether such conduct had the effect of rendering the report of the tribunal a nullity.

[54] The alleged violations do not involve the interpretation, protection or enforcement of the Constitution. They have nothing to do with the constitutional obligations that the President must fulfil. What the applicant, in reality, seeks is a review of the various processes that took place up until the time the tribunal forwarded its report to the President. As indicated earlier, those processes could have been subjected to review before other courts with the requisite jurisdiction. As these are not constitutional matters, the invitation by the applicant that this Court should now intervene and enquire into the question whether the Chief Justice, the tribunal and the Judicial Service Commission acted lawfully must, for the above reasons, respectfully be declined. In any event, not having cited them as parties to this application, this Court would be disabled from undertaking any such inquiry in their absence.

[55] It is further said that this Court cannot avoid the responsibility on it to determine the validity of "what landed on the President's desk." As just noted, the powers of this Court are

specifically restricted to constitutional matters only. In respect of other matters that are not of a constitutional matter, remedies abound in other fora established in terms of the law.

DISPOSITION

[56] Having cast serious aspersions on their conduct, the failure by the applicant to cite the Chief Justice, the Judicial Service Commission and the JUSTICE SIMBI MUBAKO Tribunal constituted material non-joinder.

[57] That notwithstanding, no obligation in terms of s 187 has, in any event, been shown to have been violated by the President. The applicant, therefore, had no cause of action against the President right from the outset.

[58] In the circumstances, the application must fail. A no-costs order appears appropriate on the facts of this matter.

[59] The application is therefore dismissed with no order as to costs.

MAKARAU JCC **:** **I agree**

GOWORA JCC **:** **I agree**

HLATSHWAYO JCC **:** **I agree**

PATEL JCC **:** **I agree**

UCHENA AJCC **:** **I agree**

MATHONSI AJCC **:** **I agree**

Mtetwa & Nyambirai, applicant's legal practitioners

Attorney-General's Office, respondent's legal practitioners