

NAMATAI KWEKWEDZA
versus
JUDICIAL SERVICE COMMISSION
and
MINISTER OF JUSTICE, LEGAL AND PALIAMENTARY AFFAIRS.

THE HIGH COURT OF ZIMBABWE
MHURI J
HARARE, 17 January, 2022 & 9 March 2022

APPLICATION FOR A MANDATORY INTERDICT

Advocate T. Mpofo, for the Applicant
Mr *ABC Chinake*, for the 1st Respondent
No appearance for 2nd Respondent

MHURI J: Applicant filed this application seeking an order in the following terms, that:

1. It is declared that:
 - (i) the information requested from first Respondent pursuant to the Applicant's letter to it dated 20 May 2021 is subject to provision of section 5 of the Freedom of Information Act [*Chapter 10:33*] as read with Section 61 and 62 of the Constitution of Zimbabwe and that the Applicant is entitled to make such request and first Respondent is obliged to make a response thereto.
 - (ii) the conduct by the first Respondent to withhold the information requested as per sub paragraph (i) above is inconsistent with and therefore violates provisions of section 61 and 62 of the Constitution of Zimbabwe
2. The Respondents be and are hereby ordered and directed to make a necessary response pursuant to relevant provisions in the Freedom of Information Act and to be guided thereby.
3. The first Respondent shall pay the Applicant's costs of suit.

At the commencement of this hearing advocate Mpofo for the Applicant withdrew the application against second Respondent the Minister of Justice, Legal and Parliamentary Affairs.

The application therefore is against the first Respondent only, that is, The Judicial Service Commission who hereinafter shall be referred to as the Respondent. He also made three preliminary observations which he said the Court should take note of, and these are that:-

1. this matter is not about the validity of the tenure of the Chief Justice Luke MALABA. It is not a back door way of challenging the Chief Justice's tenure as submitted by the Respondent. It is a direct way by which obligations on the Respondent given by the Constitution must be given effect to.
2. the letter by Applicant of 20 May 2021 to the Respondent was not written in aid of the Musa Kika matter which had already been resolved by 15 May 2021. Applicant's letter is about Applicant's enforcement of her rights.
3. a matter as important as this should not be shrouded in secrecy. Respondent must be seen to be doing the right thing and be accountable to the citizens.

The facts that give rise to this application are that;

by a letter dated 11 May 2021 titled, RE: ELECTION TO REMAIN IN OFFICE OF CHIEF JUSTICE OF ZIMBABWE: MR JUSTICE L.MALABA, addressed to THE HONOURABLE MR JUSTICE L.MALABA and authored by the Chief Secretary to the President and Cabinet Dr M.J.M Sibanda, the Chief Secretary advised the Chief Justice of his Excellency, the President of the Republic Zimbabwe's acceptance of his election to continue in the office of the Chief Justice beyond the age of seventy (70) years for an additional period of five (5) years from 16 May 2021. I hereunder reproduce the said letter.

“THE HONOURABLE MR JUSTICE L.MALABA
Chief Justice of Zimbabwe Constitutional Court of Zimbabwe
Maondera Building
HARARE.

RE: ELECTION TO REMAIN IN OFFICE OF CHIEF JUSTICE OF ZIMBABWE: MR JUSTICE L. MALABA

His Excellency, the President of the Republic of Zimbabwe has considered your election to continue in the office of Chief Justice beyond the age of seventy (70) years for an additional period of five (5) years. He has further considered and accepted the medical report which you submitted as proof of your mental and physical fitness to continue in that office.

I am pleased to advise you that after consultation with the Judicial Service Commission as required by law, His Excellency, the President has, in terms of section 186(1) of the constitution, accepted your election to continue in the office of Chief Justice beyond the age of seventy (70) for an additional period of five (5) years from 16 May 2021.

Dr M.J.M. Sibanda
CHIEF SECRETARY TO THE PRESIDENT, AND CABINET.”

Following the extension of Chief Justice’s tenure, Applicant, through her legal practitioners of record, Scanlen & Holderness, made an application to the Secretary of the Respondent on 20 May 2021 requesting for access to information pertaining to the extension of the Chief Justice’s tenure. I hereunder reproduce the application.

“THE SECRETARY
JUDICIAL SERVICE COMMISSION
2nd Floor Causeway Building
Corner 3rd/ Central Avenue
HARARE

Dear Sir;

RE: APPLICATION FOR ACCESS TO INFORMATION: EXTENSION OF THE CHIEF JUSTICE’S TENURE

We refer to the above matter in which we act for NAMATAI KWEKWEDZA.
Kindly note our interest.

In terms of section 62 of the Constitution of Zimbabwe and in terms of section 7 of the Freedom of Information Act [*Chapter 10:33*] our client applies for access to copies of records of the following information:

1. How did the Judicial Service Commission come to a decision on the appropriate recommendation to make to the President under section 186(1) of the Constitution of Zimbabwe relating to Honourable LUKE MALABA’S bid to continue as Chief Justice for another five years?
 - 1.1 In particular was a meeting held by the Commissioners for this purpose?
 - 1.2 Was a resolution passed to make the appropriate recommendation? If so, may we have a copy of the Resolution.
 - 1.3 If a resolution was passed in regard to (1.2) above, which Commissioners of the Judicial Service Commission voted in favor of recommending that Honourable LUKE MALABA’S tenure be extended for another five years and which Commissioners voted against?

- 1.4 Did any Commissioners or members of the board abstain from voting? If so who?
- 1.5 Did Honourable LUKE MALABA communicate that he was conflicted in relation to this decision?

2. Did the Judicial Service Commission meet to consider whether to become involved in the litigation launched by Musa Kika in the High Court under case number HC 2128/21 and that by the Young Lawyers Association of Zimbabwe?
 - 2.1 If it met, when and where did it meet?
 - 2.2 If it did not meet- does the Judicial Service Commission, consider that the general resolution passed in 2019 empowers its secretariat to make its own decision on matters of such consequence.
 - 2.3 Was a resolution passed specifically relating to this litigation?
 - 2.4 If a resolution was passed which Commissioners voted in favour of the resolution and which Commissioners voted against the resolution?
 - 2.5 Did any Commissioners or members of the board abstain from voting? If so who?
 - 2.6 Did the Honourable LUKE MALABA declare a conflict of interest and abstain from voting? If not, why did he not do so?
 - 2.7 Was a resolution passed to the effect that the JSC lawyer was to represent the Honourable Judges cited in the litigation?
 - 2.8 If such a resolution was passed, were the Honourable Judges concerned consulted?
 - 2.9 If the Honourable Judges concerned were consulted how were they consulted and and who took what position?

As you are aware, the High Court has found, in the separate matters filed by Musa Kika and Young Lawyers Association of Zimbabwe that these are urgent matters. We also believe that this is information that is immediately available to the JSC. In that respect, we therefore seek an immediate response in terms of section 7(3) of the Freedom of Information Act [Chapter 10:33] and at any rate no later than end of business day of Monday 24 May 2020 (*sic*)

We draw your attention to your obligations under section 191 of the Constitution which requires that you conduct your business in a just, fair and transparent manner.

We tender costs for the photocopying of the required documents.

Yours faithfully

SCANLEN & HOLDERNESS.”

On 8 June 2021, Kantor Immerman, Respondent’s legal practitioners responded to Applicant’s application as follows:

“Scanlen & Holderness
13th Floor, Cabs Centre
74 Jason Moyo Avenue
HARARE

Dear Sir,

RE: OUR CLIENT: JUDICIAL SERVICE COMMISSION

YOUR CLIENT: NAMATAI KWEKWEDZA

**APPLICATION FOR ACCESS TO INFORMATION: EXTENSION OF THE
CHIEF JUSTICE’S TENURE LETTER.**

We refer to the above matter and your letter of 20 May 2021.

Kindly note that our client:

- a) Avers that the information request you have made is not made in accordance with the applicable law.
- b) Any such request is subject to the Rights of the individuals and institutions concerned.
- c) There is no automatic Right to the information.

Kindly acknowledge receipt of this letter by stamping a copy of the same and returning it to the bearer.

Yours faithfully

**A.B.C. CHINAKE
KANTOR & IMMERMANN**

cc client”

Displeased by Respondent’s response to her application, Applicant filed the current application averring that:

1. She has a clear and definite right to the information she requested in terms of section 62 of the Constitution as read with section 5 of the Freedom of Information Act.

2. By virtue of Respondent's refusal to avail the information she suffered an injury and continues to do so. Her right has been unjustifiably infringed.
3. There is no other adequate remedy save for this Court to compel Respondent to avail the information requested.

To substantiate its averments and submissions, Applicant relied on the provisions of the Constitution of Zimbabwe, in particular sections 61(1)(a) and 62 (1) and (2), provisions of Freedom of Information Act in particular Parts II III IV V and VI

Respondent strongly opposed this application submitting that this case is about the exercise of an individual right by the Chief Justice, to extend tenure. This right does not reside with the Respondent. It's clear from the Applicant's letter for request of information that, this was a concerted effort to cross examine the Respondent through letters information pertaining to the Chief Justice's tenure. There is a direct link with the Musa Kika matter, the aim being, to fight the Chief Justice's election to extend his term. This is moot as the Chief Justice's issue is no longer live. Reliance was made on the case of;

FRANCIS BERE vs JUDICIAL SERVICE COMMISSION SC 1/22.

As regards the Draft Order, Respondent's submission was that Applicant's request was responded to. She is merely unhappy with the response and should have appealed. She has no absolute right to the request. Here we are dealing with an individual's rights, the Chief Justice and medical certificates are protected in terms of the law. To buttress this submission, Respondent relied on section 57 of the Constitution.

Section 61 (1)(a) of the Constitution provides as follows:

“Freedom of expression and freedom of the media.

- 1) Every person has the right to freedom of expression, which includes-
 - a) Freedom to seek, receive and communicate ideas and other information
 - b)
 - c)

Section 62 (1) and (2) provides as follows:

“Access to Information

- (1) Every Zimbabwean citizen or permanent resident, including juristic persons and the Zimbabwean media, has the right of access to any information held by the state or by any institution or agency of government at every level, in so far as the information is required in the interests of public accountability.

- (2) Every person, including the Zimbabwean media, has the right of access to any information held by any person, including the state, in so far as the information is required for the exercise or protection of a right.
- (3)
- (4)"

These two rights, (freedom of expression and freedom of the media and access to information) come under Chapter 4 of the Constitution which deals with the Declaration of Rights. Section 44 of this chapter enjoins the State, every person, juristic persons, every institution and agency of the government at every level to respect, protect, promote and fulfill the rights and freedoms set out in *Chapter 4*.

Section 45 deals with the application of Chapter 4 and this is that: it binds the State and all executive, legislative and judicial institutions and agencies of government at every level.

These sections, 44, 45, 61 and 62 are very clear and therefore need no further elaboration. Respondent is bound by sections 44 and 45. Applicant has a right in terms of section 61 to freedom of expression, to seek, receive and communicate ideas and other information, and in terms of section 62, to have access to any information held by the State or by any institution or agency of government at every level, however in so far as the information is required in the interests of public accountability or is required for the exercise or protection of a right.

The rights under sections 61 and 62 however have limitations. As submitted by respondent, section 57 of the said Constitution can limit the right to seek information or receive and the right to access any information.

It reads:

“Every person has the right to privacy, which includes the right not to have-

- a)
- b)
- c)
- d) The privacy of their communications infringed; or
- e) Their health condition disclosed.”

Section 86 specifically stipulates the limitations of the rights and freedoms set out in *Chapter*

4. It provides:

- (1) “The fundamental rights and freedoms set out in this *Chapter* must be exercised reasonably and with due regard for the rights and freedoms of other persons.

- (2) The fundamental rights and freedoms set out in this Chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom, taking into account all relevant factors, including-
 - a)
 - b)
 - c)
 - d)
 - e)
 - f)

As alluded to earlier, after His Excellency had accepted the Chief Justice’s election to continue in the office of the Chief Justice beyond the age of seventy (70) years, and as provided for in terms of Section 7(1) of the FREEDOM OF INFORMATION ACT [CHAPTER 10:33], Applicant made an application to the Respondent requesting information as contained in her application letter.

In terms of section 8 of the same Act, Respondent responded to the application denying to grant the information as requested. Applicant was aggrieved with Respondent’s response and as submitted by Respondent ought to have appealed in terms of Section 35 of the above Act. Applicant was clearly responded to, but what she wanted were specific answers to each and every question she posed hence her approach to this Court, seeking a *mandamus compelling* Respondent to give answers to each and every question she posed. As Advocate Mpfu submitted to give a “yes” or “no” answer.

As stated earlier, it was Applicant’s submission that this matter is not about the Chief Justice. I am however not persuaded by this submission and agree with the Respondent’s submission that the matter is all about Chief Justice MALABA and his extension of tenure.

Firstly, paragraph 5 of the Applicant’s founding affidavit states;

“This is an application for an order declaring that I have the right to seek and/or access certain information requested from the first Respondent with respect to the extension of the Chief Justice’s tenure, which the later has a duty to provide in terms of section 5 of the Freedom of Information Act [Chapter 10:34]

(emphasis added)

In paragraph 8 of the same affidavit, she refers to the Chief Secretary to the President and Cabinet’s letter addressed to Honourable Mr Justice LUKE MALABA CJ

In paragraph 18 of her affidavit she avers;

“The unaccommodating and condescending conduct of first Respondent in refusing to answer a simple request for information on the process by which public power was exercised in the extension of tenure of the Chief Justice is a far cry from the transparency responsiveness and respecting of the people of Zimbabwe. The injury to my right as well as that of any Zimbabwean to good governance with which administrative authorities must hold themselves up to is apparent and self-manifest”

Secondly, Applicant’s application of 20 May 2021 clearly refers to the Chief Justice.

Its heading states:

“..... EXTENSION OF THE CHIEF JUSTICE’S TENURE”

Paragraph 1 thereto reads,

“How did the Judicial Service Commission come to a decision on the appropriate recommendation to make to the President under section 186 (1) of the Constitution of Zimbabwe relating to Honourable LUKE MALABA’S bid to continue as Chief Justice for another five years

- 1.1
- 1.2
- 1.3 If a resolution was passed to (1.2) above, which commissioners of the Judicial Service Commission voted in favour of recommending that Honourable LUKE MALABA’S tenure be extended for another five years and which Commissioners voted against?
- 1.4
- 1.5 Did Honourable LUKE MALABA communicate that he was conflicted in relation to this decision?”
(emphasis added)

I am equally persuaded by the Respondent’s submission that there was a link between Applicant’s application and the Musa Kika and Young Lawyers Association of Zimbabwe matters (HC 2128/21).

Paragraph 2 of Applicant’s application letter supports this.

She asks:

- 2. “Did the Judicial Services Commission meet to consider whether to become involved in the litigation launched by Musa Kika in the High Court under case number HC 2128/21 and that by Young Lawyers Association of Zimbabwe?”
- 2.1
- 2.2
- 2.3
- 2.4
- 2.5
- 2.6 Did the Honourable LUKE MALABA declare a conflict of interest and abstain from voting? If not, why did he not do so?
- 2.7
- 2.8
- 2.9

As you are aware, the High Court has found, in the separate matters filed by Musa Kika and Young Lawyers Association of Zimbabwe that these are urgent matters. We also believe that this is information that is immediately available to the JSC. In that respect, we therefore seek an

immediate response in terms of section 7(3) of the Freedom of Information Act [*Chapter 10:33*] and at any rate no later than end of business day Monday 24 May 2020 (*sic*).”

The above, leaves me with no doubt that Applicant’s application was all about the Chief Justice LUKE MALABA. If it was not, the questions would have been generalized questions on the process done by the Judicial Service Commission each time it makes recommendations to the President.

Having found as I did above, is this application therefore not moot? As submitted by Respondent, correctly so, in my view, this matter is now moot. The Chief Justice’s issue is no longer live. Of what benefit to Applicant or public at large will the answers to her questions about the processes that were undertaken before the President accepted the Chief Justice’s election to extend his tenure be?

GUVAVA JA put it aptly in the case of:

FRANCIS BERE

vs

1. *JUDICIAL SERVICE COMMISSION*
2. *SIMBI VEKE MUBAKO*
3. *REKAI MAPHOSA*
4. *TAKAWIRA NZOMBE*
5. *VIRGINIA MABHIZA*
6. *THE PRESIDENT OF ZIMBABWE*
7. *MINISTER OF JUSTICE LEGAL AND PARLIAMENTARY AFFAIRS*

SC I/2022

and quoting from the case of

THOKOZANI KHUPE & ANOTHER

vs

PARLIAMENT OF ZIMBABWE & ORS

CCZ 20/19 at page 7

that;-

“A Court may decline to exercise its jurisdiction over a matter because of the occurrence of events outside the record which terminate the controversy. The position of the law is that if the dispute becomes academic by reason of changed circumstances the Court’s jurisdiction ceases and the case becomes moot. It is incumbent upon the Court to determine whether an application before it still presents a live dispute as between the parties.

The position of law is that a Court hearing a matter will not readily accept an invitation to adjudicate on issues which are of “such a nature that the decision sought will have no practical effect or result

a matter is not moot only at the commencement of proceedings. It may be considered moot at the time the decision on the matter is to be made....”

Admittedly, as stated by GUVAVA JA, in the above case, a Court has the discretion to hear a matter even where it has become moot.

In casu, His Excellency the President by a letter authored by the Chief Secretary, to the President and Cabinet, accepted the Chief Justice’s election to extend his tenure beyond seventy years with effect from 16 May 2021. As a result of this, litigation was instituted seeking a declaratur that the Chief Justice was no longer the Chief Justice by operation of law. The suit was instituted by Musa Kika and also the Young Lawyers Association of Zimbabwe under case numbers HC 2128/21 and HC 2166/21. The High Court found in favour of the Applicants and issued a declaratur as prayed for by the Applicants. See judgment No HH 264/21.

As provided in section 175(3) of the Constitution of Zimbabwe, the matter was referred to the Constitutional Court for confirmation or otherwise of the orders of invalidity granted by the High Court.

MAX MUPUNGU

vs

1. *THE MINISTER OF JUSTICE LEGAL & PARLIAMENTARY AFFAIRS*
2. *JUDICIAL SERVICE COMMISSION*
3. *MUSA KIKA*
4. *YOUNG LAWYERS ASSOCIATION OF ZIMBABWE*
5. *FREDRICK CHARLES MUTANDA*
6. *ATTORNEY GENERAL*
7. *PRESIDENT OF ZIMBABWE*

CCZ 07/21

The Constitutional Court declined to confirm the orders and set them aside. In essence, the Mupungu case (*supra*), confirmed the Chief Justice’s position to remain in office for the next five years as accepted by the President. It sealed and brought to finality any challenge to the Chief Justice’s extension of tenure and all the processes that led to it.

That issue therefore is no longer live and is moot. This notwithstanding, is there any benefit to the Applicant or the public at large at this stage to order that Respondent answers the questions as “yes or no” as submitted by Applicant when the issue is no longer live, or as submitted by Respondent, when the horse has bolted. To quote from the case;

IGNATIUS MORGEN CHIMINYA CHOMBO

vs

1. *CLERK OF COURT, HARARE MAGISTRATE COURT (ROTTEN ROW)*
2. *BARBRA MATEKO N.O*
3. *L.NCUBE N.O*
4. *NATIONAL PROSECUTING AUTHORITY*
5. *JUDICIAL SERVICE COMMISSION*

CCZ 12/20

at page 9 of the cyclostyled judgment,

“The order to be given by the Court would certainly not have any practical effect on the Applicant’s case or be of any benefit to the public.”

These remarks are apt *in casu*.

In the result, I decline to grant the application.

It is therefore ordered that the application be and is hereby dismissed with costs.

Scanlen & Holderness, applicant’s legal practitioners

Kantor & Immerman, first respondent’s legal practitioners