BEATRICE TELE MTETWA
versus
JUDICIAL SERVICE COMMISSION
And
EMMERSON DAMBUDZO MNANGANGWA N.O
(PRESIDENT OF THE REPUBLIC OF ZIMBABWE)

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO, 1 February & 16 March 2022

Opposed Application

T.R Mafukidze, for the applicant
A.B.C Chinake, for the 1st respondent
M. Chimombe for the 2nd respondent

ZISENGWE J: The year was 2016. Conditions were ripe, according to the Judicial Service Commission (the 1st respondent), for the appointment of four additional judges to the Supreme Court to meet the manpower demands of that bench. Acting therefore in terms of Section 180 of the Constitution, the 1st respondent flighted advertisements in the print media announcing the existence such vacancies and inviting nominations from the President (the 2nd Respondent) and members of the public with a view thereafter to conducting public interviews to fill those vacant positions.

In due course nominations were received and nine candidates (all sitting judges of the High Court at the time) were interviewed following which a list of eight names was submitted to the 2nd respondent, the expectation being that four judges would be appointed from that list. To the dismay of the applicant, however, only two of that number were subsequently appointed to the Supreme Court bench. In applicant's view the appointment of two judges instead of the four announced in the advertisement flighted by the 1st respondent constituted a flagrant violation of the constitution

in several respects. She then embarked a mission to unravel when had led to that outcome. To that end she wrote to the 1st respondent requesting the following information; the score-sheets showing the scores attained by each individual candidate during the interview process, a list of the names submitted to the 2nd respondent from which to appoint the four Supreme Court judges and the date on which that list was submitted to the 2n respondent.

Utterly dissatisfied with the response she received from officers of the 1st respondent essentially turning down her request supposedly on the basis of the confidentiality of such information, she mounted the current application. In this application she seeks an order in the following terms;

Whereupon after reading documents filed of record hearing counsel:

It is ordered that:

1. The 1st respondent produce:
    a) The scoring sheeting's in respect of each candidate interviewed on the 29th of September 2016 for the Supreme Court vacancies.
    b) A dated copy of the list of qualified nominees matching in number the advertised vacancies plus two.
    c) Any and all correspondences exchanged between the respondents between 29th September, 2016 and the 1^{1th} of May 2018.
2. The 2nd respondent appoint from the list submitted to him but the 1st respondent, the two remaining judges to fill the four vacancies in ordered of their ranking on the 1st submitted to him.
3. The respondents pay the costs of suit, the one paying, the other to be absolved.

The application stands opposed by both respondents, who apart from raising certain preliminary points which according to them are potentially dispositive of the matter, contend in the main that there was nothing amiss in the entire process leading to the appointment of two judges instead of the anticipated four.

For its part, the 1st respondent though its then acting secretary, Mr Walter Tambudzai Chikwana, averred that it performed its mandate to the letter by undertaking the entire process up to the stage where it submitted a list of eight prospective appointees to the 2nd respondent for the

latter's consideration. Accordingly, it is the 1st respondent's position that it cannot be taken to task for processes beyond what it was constitutionally mandated to do. It is contended in other words that the question of the number of judges subsequently appointed by the 2nd respondent is something outside its control for which it is therefore not accountable.

As for applicant's quest for a full disclosure of all documentation leading up to the appointment of the two judges, the 1st respondent averred firstly that there is no such obligation reposed on it from an interpretation of relevant provisions of the Constitution (notably Sections 62,68 and 180) to make such disclosure, but *a fortiori* it resists to produce such documentation on the basis that in terms of Section 11 of the Administrative Justice Act, *[Chapter 10:28]* the appointment of Judicial officers does not constitute an exercise of an administrative function and as such is exempt to the overall purview of that Act and hence from availing the said documents. That Section reads;

> ***11 Application of Act to certain administrative authorities or actions limited or excluded***
> *(1) The following provisions*
> *(a) paragraph (c) of subsection (1) of section three; and*
> *(b) subsection (2) of section three; and*
> *(c) section six;*
> *shall not apply to any of the administrative actions specified in Part I of the Schedule.*
> *(2) The following provisions*
> *(a) paragraph (c) of subsection (1) of section three; and*
> *(b) section six;*
> *shall not apply to any of the administrative actions specified in Part II of the Schedule*
> The relevant part of the schedule reads:
> **SCHEDULE (Section 11 (1), (2) and (6))**
> **ADMINISTRATIVE ACTIONS IN RESPECT OF WHICH APPLICATION OF SECTIONS 3(1) (C), 3(2) AND 6 EXCLUDED OR QUALIFIED**
> *PART I*
> *ACTIONS TO WHICH SECTIONS 3(1) (C), 3(2) AND 6 DO NOT APPLY*
> *1. Any exercise or performance of the executive powers or functions of the President or Cabinet.*

2. Decisions to institute or continue or discontinue criminal proceedings and prosecutions.

3. Decisions relating to the appointment of judicial officers. (emphasis added)

For his part the 2nd respondent in addition to objecting to the manner of his citation which he deemed irregular and inconsistent with the provisions of section 4 of the State liabilities Act, *[Chapter 8:14]*, averred that his interpretation of Section 180 of the Constitution permitted him to appoint only 2 judges from the list submitted to him. The upshot of this latter argument was that the Constitution required that for the appointment of each judge, three names had to be submitted to him. According to him therefore, to enable him to appoint four judges he needed a minimum of twelve names yet only eight names were submitted to him.

The 2nd respondent also referred to the mootness of the issue of the appointment of Supreme Court judges. In this regard he indicated that the vacancies that existed in 2016 have since been filled and that as of the time he authored the opposing affidavit no vacancies existed in the Supreme Court.

When oral arguments were presented in court, the applicant all but abandoned that leg of her application relating to the disclosure of all documentation leading to the appointment of the two judges, i.e. paragraph 1 of the order sought. That effectively left the sole question for determination being whether or not the 2nd respondent should be compelled to appoint two judges more judges from the list that was submitted to him in 2016. Predictably the question of the mootness or otherwise of that question immediately assumed a more pronounced profile prompting me to direct parties to file supplementary heads of argument on the subject. These have been duly filed and it is to this question that I now turn, suffice it to say that only if it is found that the dispute is not moot or that despite its mootness there is a need in the interests of justice to adjudicate that matter on the merits will it be necessary to do so.

Whereas both respondents insist that the mandamus sought by the applicant compelling the 2nd respondent to appoint two additional judges from the list submitted to him in 2006 is now water the bridge and moot as it has been overtaken by several key developments which have since eventuated in the interim, the applicant argues to the contrary. She contends that this particular dispute between is not only live but is also relevant for future guidance.

To put matters into perspective it is perhaps necessary to take a few steps back and recount the milestones which birthed the current dispute. The original list of nine judges who were interviewed for the four Supreme Court positions comprised the following:

1. Hon Mr Justice Francis Bere
2. Hon Ms Justice Priscilla Makanyara Chigumba
3. Hon Mr Justice Alfas M. Chitakunye
4. Hon Mr Justice Charles Hungwe
5. Hon Mr Justice Samuel K. Kudya
6. Hon Mr Justice Joseph M. Mafusire
7. Hon Mrs Justice Lavender Makoni
8. Hon Mr Justice Nicholas Mathonsi
9. Hon Mr Justice Happias Zhou

In the wake of those interviews which were held on 29 September 2016, Justices Lavender Makoni and Francis Bere were appointed by the 2nd respondent from a list submitted to him by the 1st respondent. It is not clear who among the above did not make it to the list of eight.

As earlier stated, two key developments have since played out in the area of Judicial appointments in general and in respect of appointments to the Supreme Courts in particular. Firstly, there have been two amendments to Section 180 of the Constitution of Zimbabwe namely, Constitution of Zimbabwe amendment No. 1, Act No.10 of 2017 and Constitution of Zimbabwe No. 2, Act No.2 of 2021 (hereinafter referred solely for purposes of convenience and brevity as the "first and second amendments respectively) The effect of the first amendment was to exclude the positions of Chief Justice, Deputy Chief Justice and Judge President of the High Court from the public interview process for their respective appointments. This amendment is of minimal relevance to the present application.

The second amendment however, has a direct bearing on the present application. In a word the new provision empowers the President to promote a sitting judge of the Supreme Court, High Court, Labour Court or Administrative Court to be a judge next higher court on the recommendation of the 1st respondent. It therefore permits a circumvention of the interview process.

The other major development in the sphere of Judicial appointment that has occurred in the interim relates to the appointment of eight judges to the Supreme Court all drawn from the High Court bench. Pertinently, four of the judges who were on the original 2016 interview list have since been elevated to the Supreme Court (albeit at different times) namely;

Honourable Justice Nicholas Mathonsi (June 2019)

Honourable Justice Hungwe (June 2019)

Honourable Justice Alfas M. Chitakunye (June 2021), and

Honourable Justice Kudya (June 2021)

It is in light of these developments that the two respondents contend that the question of the appointment two judges from the original 2016 list is now moot as it has since been over taken by events.

Whether or not the dispute is moot

On the applicable test to determine whether or not a matter is moot the recent Supreme Court decision in *Francis Bere v Judicial Service Commission and 6 Others* Section 1/22 is quite instructive. In that case the court had to grapple *inter alia* with the question of whether or not the irregularities or misdirections complained of by the appellant in the process leading up to his suspension as judge of the Supreme Court had not been rendered moot by the very fact of his subsequent removal by the President from that position.

The court referred to the case of Thokozani *Khupe & Another v Parliament of Zimbabwe & Others CCZ 20/19* where the following was said:

> *"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… The question of mootness is an important issue that the court must take into account when faced with a dispute between the parties. It is incumbent upon the court to determine whether an application before is still presents a live dispute as between the parties. The questions of mootness of a dispute has featured reportedly in this and other jurisdictions. The position of the law is that a court hearing a matter will not readily accept an invitation to adjudicate issues which are of "such a nature that the decision sought will have no practical affair or result…… A matter is not moot only at the commencement of the proceedings. It may be considered moot at the time the decision on the matter is to be made…. The mere fact the matter is moot does not constitute an absolute bar to a court to hear a matter. Whilst a matter may be moot as between the*

parties, that not without more render it [unjusticiable]. The court retains a discretion to hear a moot case where it is in the interests of justice to do so. ***JT Publishing (Pty) Ltd v Minister of Safety and Security*** *1997 (3) SACC at 525A-B."*

The court also referred to the matter of *Chombo v Clerk of Court Harare Magistrate Court (Rotten Row) and Others* CCZ 12/20 before summarizing the test as follows;

"From the above authorities it can be deduced that in order for a matter to be moot, the court will have found events have occurred which overtaken the dispute and terminate the controversy as between the parties. It is now trite that a matter is moot if further legal proceedings with regard to it can have no effect or events have placed it beyond the reach of the law. However, that is not the end of the matter as the fact that a matter has become moot does not automatically constitute a to a court to hear it. A court retains discretionary powers to hear a moot case where it is in the interests of justice for it to do so. S general rule courts must be wary of making a determination on a matter, which has been over taken by events or is mot as such a determination leads to an ineffectual judgement."

The applicant's position is that the dispute between the parties is not moot and even if it is found to be, it would be in the interests of justice that it none the less be adjudicated upon. The reasons advanced for this contention can be summarised as follows;

1. That the outcome of this case has a direct bearing on the interests of the three judges who were candidates in the 2016 interviews and have not ascended the Supreme Court, namely Justice Mafusire, Justice Zhou and Justice Chigumba.
2. That there is a need for a proper judicial interpretation of Section 180(2) of the Constitution which requires the 2nd respondent to appoint one nominee from a list of three qualified persons submitted to him by the 1st respondent in the wake of the interview process.
3. That the outcome of this case affects the conduct of the 2nd respondents in relation to future Judicial appointments, notably to the High Court bench as same was unaffected by the two amendments to Section 180 of the Constitution.
4. That the two constitutional amendments cannot have retrospective effect.

All these are interrelated as will be shown below. Regarding the question of retrospective application, it cannot be gainsaid that the general position is that an enactment does not apply respectively (unless it expressly provides so). However, in the present case it is not so much the

amendments *per ser* but the results they have since produced in the wake of their promulgation that have impacted the state of affairs.

Born out of the second amendment was the elevation (without the interview process) of six judges from the High Court to the Supreme Court bench. This was in 2021. One can safely assume that this particular number was upon the recommendation of the 1st respondent based on its assessment of the work load demands of that court. Effectively therefore, the position of both respondents, and the 1st respondent in particular, that there are currently no vacancies in that court can hardly be disputed. Sight must not be lost that the responsibility of assessing the manpower demands of the Courts rests on the 1st respondent.

It would be farcical, in my respectful opinion, to insist on the appointment of two additional judges to the Supreme Court notwithstanding that such appointments would be excess to requirements as things currently stand, all in the name of satisfying a need that existed some six years ago, which need no longer exists today.

Closely related to the above is the very fact that four of the judges who were part of the number of candidates interviewed have since found their way to Supreme Court bench *albeit* via different processes (two of them via the interview process and the other two via the amended section 180). It would be difficult for applicant to argue that any of their number were not the very ones who would have been appointed by 2nd respondent should this application have been heard determined in her favour in 2016.

One of the arguments advanced by the 1st respondent in its contention that the dispute is now moot is that a new procedure for the appointment of judges has been ushered in through Section 180 (4) (a) of the Constitution and that should the president proceed to appoint any judges outside the framework of that section, that would amount to a violation of the Constitution. The contrary argument presented by the applicant is that since the Judicial Service Commission made its recommendations in 2016 in the wake of interviews, then all the President needs to do is to appoint two additional judges because he is already seized with the recommendations.

That argument, of course, cannot be sustained. This is because there cannot be a blending or amalgamation of the two processes. There should never be doubt as to which of the two processes (the interview process or the direct appointment) that led to a particular appointment. The recommendations in 2016 were based on the outcome of the performance of individual

candidates during the interview process. The recommendation under the present provision is based on some other criteria, therefore there cannot be a conflation of the two.

Similarly, to insist on the appointment of two judges from the remaining three judges who were interviewed in 2016 would in my view lead to a violation of Section 180 (even without its subsequent amendment) given that the pool from which the 2nd respondent was required to pick and appoint has significantly shrunk. It has since dwindled from the original 8 names to just 3. The judges that have since been elevated to the Supreme Court are now out of contention and therefore ineligible for consideration. The list has therefore since shrunk to the extent that it is no longer legally feasible to appoint two judges therefrom whichever interpretation or formula one gives to Section 180 prior to the amendment. Further in this regard, whether the three remaining participants in the interview process all made it to the list of eight referred to the 2nd respondent remains unknown. Without appearing speculative or presumptive, I find therefore that compelling the 2nd respondent to appoint even one judge of the remaining three to the Supreme Court might imply the 2nd respondent having to consider for appointment one who may not have made it to the list of eight.

Additionally, sight must not be lost that situations may conceivably arise where 2nd respondent may be unable to appoint the number of judges advertised say for instance where the number of nominations receive fails to reach even the number advertised or the interview process yields a number below the minimum required to comply with the ratio provided in Section 180. I only say this to caution against the blanket insistence to appoint the number advertised regardless the situation on the ground, so to speak.

In light of the foregoing, therefore, I have come to the conclusion that the dispute was rendered moot by the events outlined above which played out their intervening period between the institution of the application and now. What remains to be deliberated upon is whether it is in the interests of justice to proceed it adjudicate over the dispute despite its mootness. The court retains such a discretion. See *Francis Bere v Judicial Service Commission and 6 Others* (Supra); *Thokozani Khupe & Another v Parliament of Zimbabwe & Others CCZ 20/19, Exparte Chief Immigration officer 1993 910 ZLR 122 (S) & Chombo v Clerk of Court Harare Magistrate Court (Rotten Row) and Others CCZZ 12/20*.

The following remarks from the *Chombo* case (supra) are opposite;

> *"It is settled law that a court retains the discretion to hear a matter even where it has become moot. The overriding consideration is whether or not it is in the interests of justice that the matter be heard… A litigant seeking to have a matter that is moot determined by the courts must established exceptional circumstances which justify the hearing of the matter. The question is whether the applicant has established just cause for the matter to be considered as falling under the exception of the doctrine of mootness"*

Perhaps owing to the fact that both respondents did not have sight of the applicants' supplementary heads, they did not address this specific issue in their own supplementary heads of argument. However, the applicant did. In this regard it was submitted on her behalf that the court should proceed to determine the dispute even after making a finding of its mootness. In this respect two key arguments were presented in support of doing so, namely;

(i) To create certainly on the correct interpretation of Section 180 of the constitution in light of the possibility of future recurrence of the same dispute.

(ii) To provide guidance to all participants to the judicial appointment process particularly the Judicial Service Commission and President as well as to create certainly prospective candidate to the High Court bench.

Several authorities were cited in support of the first argument; *State v Monamela 2000(5) BCLR 491, MEC of education, Kwazulu-Natal v Pillay* 2008 2 BCLR 99 (CC), *ZIMSEC v Mukomeka & Another* SC 10/2020 *and Pheko v Ekurhuleni Metropolitan Municipality* 2012 4 BCLR 388(CC) and *Khupe & Another v Parliament of Zimbabwe & Others* (supra).

In the *Khupe* case, the following dictum by MALABA CJ was extracted in support of the contention that the possibility of future recurrence of a dispute justifies the determination of that controversy dispite its mootness.

> *"Where a matter is of such a nature that it might keep arising in the court or where there is need to resolve a serious legal question, the court may exercise its discretion to hear the moot issue by reason of its significance as it would in such circumstances be in in the interests of justice to make a determination on the issue."*

Similarly, in See *Francis Bere v Judicial Service Commission and 6 Others* (Supra). The Supreme court acceded to a motion for it to depart from the general rule against adjudicating over a matter that was found to be moot on the basis of the importance of the matter. The following was said:

"Although we are of the firm view that the matter is moot me were persuaded by Mr Madhuku's submission that the matter is sufficiently important to warrant a departure from the general rule and for this court the exercise its discretion to hear it on the merits. The issues raised on the merits, in our view, are issues which must be determined in the interests of justice. It seems that the issue of whether or not the acting Secretary could file an opposing affidavit on behalf of the first respondent and whether the appellants fundamental right to be heard had seem trampled upon are important issues. The issue of whether or not there was propriety in the referral of the matter to the President by Judicial Service Commission is also an important issue. The case relates to the removal of a judge from office. The judiciary is one of the three pillars of our Constitution. It is imperative that the removal of judge must be in accordance with the law. It is our view therefore that the circumstances of this case, provides an exception that this matter be determined on the merits even though it is moot"

Regarding the second argument, to the extent that there is need to provide clarity in the interpretation of Section 180 (4) (previously found in section 180 (2)) of the Constitution particularly as it relates to the future appointment of high Court Judges which process remained unaffected by the two constitutional amendments and on the strength of what was held in the *Francis Bere* case (supra), I hold the view that the matter is of sufficient importance to warrant a departure from the general rule.

I briefly digress here to observe that contrary to the tenor of applicant's averments that the appointment of two judges instead of the anticipated four was actuated by some other ulterior motive, it appears the 2nd respondent was *bona fide* in his belief that he needed at least twelve names on the list to be able to appoint 4 judges. This is borne out by the fact that he has since proceeded to elevate four High Court judges to the Supreme Court from the original list submitted in 2016, thereby putting to rest the supposition that his reluctance to appoint them in 2016 was for some other obscure consideration.

Prior to the two amendments referred to earlier Section 180 (2) of the Constitution provided as follows;

180 appointment of Judges

(1) ....

(2) Whenever it is necessary to appoint a judge, the Judicial Service Commission must-

a) advertise the position;

b) invite the President and the public to make nominations

c) conduct public interviews of prospective candidates;

d) prepare a list of three qualified persons as nominees for the office, and

e) submit the list to the President; whereupon, subject to subsection (3), the President must appoint one of the nominees to the office concerned

3. If the President considers that name of the persons on the list submitted to him or her in terms of subsection (2) (e) are suitable for appointment of the office, he or she must require the Judicial Service Commission to submit a further list of three qualified persons, whereupon the President must appoint only the nominees to the office concerned.

From the parties' submissions it is clear that there are two divergent interpretations of paragraph e) of subsection 2) above. The dichotomy stems the text of the provision which specifically requires the submission by the 1st respondent to the President a list of three names where a single position has arisen thus throwing into confusion on what should happen where two or more positions have arisen.

The one interpretation which is the one given by the 2nd respondent is a direct mathematical multiplication of the number of positions available by the factor of 3. Therefore, according to this interpretation if 10 positions (which is not uncommon with appointments to the High Court) arise then 30 names must be submitted to the President for consideration.

The alternative interpretation which is the one favoured by the applicant is that all that is required is that there be placed before the President at least 2 names more than the positions available (hence the mantra "number of positions plus two"). In other words, for 2 positions a minimum of 4 names must be submitted to the President, and for 3 positions at least 5 names must be submitted and so forth.

One can only surmise that the two respondents have different views on this very aspect with the 2nd respondent holding the first interpretation and the 1st respondent the second interpretation. How else does one explain 1st Respondent's submission of eight names to the 2nd respondent expecting the appointment of four judges?

In my view the better view is that all that is required is that there be at least two additional names for each position advertised. Here is why. Firstly, it was the intention of the constitution maker that there be three names for ***every*** position advertised, it would have used that language. Secondly, if the strict literal interpretation were to be applied, not only would it mean that a list

containing three times the number positions available would have to be submitted to the President, but also that the names would be bunched in batches of three to satisfy the requirement of "*a list of three qualified persons as nominees for the office"* I do not believe that that was the intention of the Constitution maker as that would yield an absurd result given that the list submitted is the product of an interview process. The names prepared by the 1st respondent will no doubt be one based on a ranking their individual performances with the highest scoring topping the list and the least performing at the bottom. The bunching of names into groups of three would therefore be impractical or would yield absurd results.

I therefore hazard to say that in my view the interpretation which accords with the intention of the Constitution maker is that there must at least be three names on the list from which pick each successive appointment. In other words, for as long as there are three or more names on the list submitted to him, the 2nd respondent can validly pick and appoint the next Judge therefrom.

However, for reasons outlined in the first part of this judgement, not least the absence of vacancies on the Supreme Court bench, it is not possible grant the order sought namely to compel the 2nd respondent to appoint two additional judges and the application therefore stands to be dismissed.

Costs

There is merit in the submissions by the applicant that in light of the nature of the case, it being Constitutional nature and of public interest there would be no justification in making an award of costs, see *Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd* [1984] All SA 509 ZS; *Anjin Investments (Pvt) Ltd v The Minister of Mines and Mining Development & 3 Ors* CCZ 6/18; *Liberal Democrats & 4 Ors v President of the Republic of Zimbabwe E.D Mnangagwa N.O* & 4 Ors CCZ 7/18. Besides, the applicant has not been entirely unsuccessful, she mounted an application on a subject of considerable public interest and scored a measure of success.

Accordingly, it is hereby ordered as follows:

Application is hereby dismissed with no order as to costs.

Mtetwa & Nyambirai counsel for the applicants' legal practitioners
Kantor & Immerman, 1st respondent legal practitioners
Civil Division of the Attorney General's Office, 2nd respondent legal practitioners