

REPORTABLE (1)

FRANCIS BERE

v

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

**SUPREME COURT OF ZIMBABWE
GUVAVA JA, UCHENA JA & KUDYA AJA
HARARE, 27 MAY 2021 & 14 JANUARY 2022**

L. Madhuku, for the appellant

A. B. C. Chinake, for the first respondent

M. Chimombe, for the second-seventh respondents

GUVAVA JA:

1. This is an appeal against the whole judgment of the High Court (court *a quo*). The suspension from office of the appellant led to a flurry of court applications in the court *a quo*. This is just one of them in which the court *a quo* dismissed the appellant's application. The application was made in terms of s 4 of the Administrative Justice Act [*Chapter 10:28*] ('the Act') on the basis that the respondents had failed to comply with the provisions of s 3(1)(a) of the Act.

BACKGROUND FACTS

2. The appellant is a former judge of the Supreme Court of Zimbabwe having been dismissed from office by the sixth respondent. The first respondent is a body corporate

established in terms of s 189 of the Constitution of Zimbabwe Amendment (No. 20) Act 2013 ('the Constitution'). The second respondent (being the Chairperson), third and fourth respondents (being members), constituted a Tribunal appointed by the President of the Republic of Zimbabwe in terms of s 187(3) of the Constitution. The Tribunal was set up to inquire into the removal of the appellant from the office of a judge. The fifth respondent was the Secretary of the Tribunal and is the Permanent Secretary of the Ministry of Justice, Legal and Parliamentary Affairs. She is also the coordinator of the Special Anti-Corruption Unit in the Office of the President. The sixth respondent is the President of Zimbabwe (The President) and the seventh respondent is the Minister of Justice, Legal and Parliamentary Affairs. The Tribunal has since completed its mandate and is no longer in existence.

3. On 17 March 2020 the President, acting in terms of s 187(4) of the Constitution of Zimbabwe 2013 issued, in a Zimbabwean Government Gazette Extraordinary Proclamation 1 of 2020 Statutory Instrument 70 of 2020 in which, amongst other things, he established a Tribunal to investigate the question of removing the appellant from the office of a judge. The Tribunal's terms of reference were set out as follows:

- “(i) to investigate into the matter of the removal from office of Honourable Justice Francis Bere JA;
- (ii) to investigate into the matter of Honourable Justice Bere's conduct, whether it can be deemed to have been tantamount to gross misconduct;
- (iii) to investigate whether the Honourable Judge conducted himself or presided over matters where there was conflict of interest;
- (iv) to investigate any other matter which the Tribunal may deem appropriate and relevant to the enquiry;
- (v) to consider all information submitted by the Judicial Service Commission and any other relevant information in order to arrive at an appropriate recommendation to the President;
- (vi) to recommend to the President whether or not the Honourable Judge should be removed from office in terms of s 187 of the Constitution and;
- (vii) to report to the President, in writing, the result of the inquiry within a period of five (5) months from the date of swearing in of the members.”

4. On 13 May 2020, following the publication of the Proclamation referred to above, the appellant made an application in terms of s 4 of the Administrative Justice Act (the Act) before the court *a quo*. The application was made on the allegation that the first respondent failed to comply with s 3(1)(a) of the Act in that it failed to “act lawfully, reasonably and in a fair manner” in advising the President to set up a Tribunal to investigate the appellant. In making the application it was the appellant’s complaint that, by letter dated 3 March 2020, he was suspended from the office of a judge pending the determination of the question of his removal from office by a three member Tribunal appointed by the President.
5. The appellant further averred that the suspension was preceded by a letter addressed to him by the Acting Secretary of the first respondent dated 28 February 2020. In the letter the appellant was informed that at a meeting held on 13 December 2019, the first respondent had resolved to advise the President to consider the appointment of a tribunal to conduct and further investigate him for alleged misconduct.
6. The appellant raised five grounds, asserting that the first respondent failed to comply with s 3(1)(a) of the Act. Firstly, it was his averment that the first respondent had no jurisdictional grounds for referring the matter to the President. Secondly, the appellant averred that there was gross irregularity in the referral by the first respondent as it failed to accord him the right to be heard. Thirdly, he asserted that at the time the first respondent made its decision to refer the matter to the President it had become *functus officio* as it had previously made a determination on the matter exonerating him of any wrong doing. Fourthly, that the first respondent, in making its decision was not properly constituted as it lacked a proper *quorum*. Finally that the fifth respondent was biased as

she was the person who referred the complaint which was made by Mr Moxon (Moxon) to the first respondent. It was thus argued that, as a secretary to the Tribunal, she was a judge in her own cause.

7. The second, third, fourth and seventh respondents submitted that they had no interest in the outcome of the application and would abide by the court's decision. The President maintained that he was simply fulfilling his constitutional obligation when he appointed the Tribunal upon the recommendation of the first respondent.
8. The fifth respondent submitted that she was acting in her official capacity as a Permanent Secretary, Coordinator of the Special Anti-Corruption Unit in the office of the President and as Secretary of the Tribunal set up by the President. She stated that she received correspondence from Moxon wherein he complained about the manner in which the appellant had handled his case which was before him. She thereafter referred the complaint against the appellant to the first respondent. She further stated that, before receiving the complaint from Moxon, she had been made aware of allegations of improper conduct against the appellant by Mr Ndudzo, a legal practitioner from Mutamangira and Associates, and she duly included the two incidents in her referral letter to the first respondent and the Chief Justice of Zimbabwe. In denying that she was conflicted, the fifth respondent maintained that, she had no personal interest in the matter and was only carrying out her duties.
9. At the commencement of the proceedings the first respondent raised two preliminary points. It was submitted on behalf of the first respondent that the court *a quo* had no jurisdiction to review the constitutional powers vested in the President if he decides to

appoint a Tribunal in terms of s 187 of the Constitution. Secondly, that the matter was *lis alibi pendens* as a similar application under HC 2162/20 had already been made by the appellant.

10. On the merits of the matter, the first respondent averred that it acted lawfully, reasonably and in a fair manner in respect of the advice it gave to the sixth respondent in terms of s 187(3) of the Constitution. The first respondent maintained that the appellant was availed an opportunity to respond to the allegations made against him and he duly did so in writing. Further, that the decision to refer the appellant's matter to the President was made by a properly constituted board of its Commissioners. The first respondent also averred that the *onus* to prove the purported allegation of an improperly constituted quorum lay with the appellant.
11. The appellant in turn raised a preliminary point to the effect that the deponent of the first respondent's opposing affidavit Mr Chikwana (the first respondent's Acting Secretary) lacked authority to act on behalf of the first respondent. The appellant averred that on the authority of the case of *Francis Bere v Judicial Service Commission and Ors* HH 269/20 the court had already found that since it is the first respondent which has the constitutional duty to advise the President on the question of removal of a judge from office it could not delegate the function of defending that decision in a court of law to its Acting Secretary.

DETERMINATION BY THE COURT A QUO

12. The court *a quo*, in a well-reasoned judgment dismissed the appellant's preliminary point. The court found that, in light of the first respondent's board resolution authorizing Mr Chikwana to do so, he could properly act on its behalf. The court also dismissed the

preliminary point taken by the first respondent that the matter before it was *lis alibi pendens*. The court reasoned that *lis alibi pendens* was not an absolute bar to a determination of the matter. The court thus dismissed the point as it did not dispose of the matter. The court also declined to deal with the part that the court had no powers to review the Constitutional powers vested in the President as it reasoned that the issue was on the merits and was not a preliminary part.

13. On the merits of the matter, the court *a quo* held that on the point that there was no *quorum* at the first respondent's meeting of 13 December, 2019, the appellant had made bare allegations without supporting affidavits of those present at the meeting and without attaching minutes of the meeting to show that there was no *quorum*. The court *a quo* further held that the first respondent had no obligation to assist the appellant in proving his allegation.
14. With regards to the issue of whether the first respondent was *functus officio* and could not reverse its decision of 21 November 2019, wherein it had purportedly found the appellant not guilty of misconduct, the court *a quo* found that the appellant failed to substantiate his allegations. It found that he did not support his averment that he had received a phone call from the first respondent's Deputy Acting Secretary informing him that a decision had been taken to exonerate him. The court noted that the appellant ought to have either produced minutes of the alleged meeting of 21 November 2019 or filed a supporting affidavit from the Deputy Acting Secretary.
15. The court *a quo* also found, on the issue of the alleged violation of the appellant's *audi alteram partem* Rule that the appellant was given an opportunity to respond to the

allegations made against him. The court noted that the exchange of correspondences between the first respondent and appellant was sufficient. Thus the court found that the appellant's right to be heard had not been violated.

16. Concerning the absence of jurisdictional facts to ground the first respondent's decision to advise the President, the court noted that it was not sitting as an appeal court to determine the correctness of the first respondent's decision to refer the appellant's matter to the President. Rather it was being called upon to decide whether any of the jurisdictional grounds for removal of a judge were disclosed in the first respondent's papers. The court noted that s 187(1)(c) of the Constitution provides for gross misconduct as one of the jurisdictional grounds for the removal of a judge from office and that is what was averred in the papers to the President. The court, however, concluded that whether or not there was gross misconduct on the part of the appellant was not an issue to be determined by it as the terms of the Tribunal set up by the President covered that aspect. It was therefore left for that Tribunal to determine the guilt or otherwise of the appellant. In accordance with the above findings the court *a quo* dismissed the application with an order that the appellant pays the first respondent's costs.
17. Aggrieved by the decision of the court *a quo* the appellant noted an appeal on the following grounds:
 1. "The court *a quo* erred in law in not upholding the appellant's point *in limine*, namely that that (sic) the 1st Respondent was not properly before the court as the deponent to its opposing affidavit was prohibited by the Constitution of Zimbabwe from representing the 1st Respondent in an application brought by a judge pursuant to section 187 (3) of the aforesaid Constitution.
 2. The court *a quo* erred in law in not finding that the 1st Respondent had no *quorum* at its meeting of 13th December 2019 and consequently erred in not finding that the 1st Respondent's advice to the 6th Respondent pursuant to section 187 (3) of the Constitution was a nullity.

3. The court *a quo* erred in law in not finding that at the meeting of 13th December 2019, the 1st Respondent was already *functus officio* in respect of the complaints raised against the appellant and consequently erred in not finding that the 1st Respondent's advice to the 6th Respondent pursuant to section 187 (3) of the Constitution was a nullity.
4. The court *a quo* erred in law in not finding that there had been a breach of the *audi alteram partem* rule in respect of the 1st Respondent's handling of complaints against the appellant at its meeting on 13th December 2019 and consequently erred in not finding that the 1st Respondent's advice to the 6th Respondent pursuant to section 187 (3) of the Constitution was a nullity.
5. The court *a quo* erred in law in finding that the court had no jurisdiction to determine the existence or otherwise of the jurisdictional facts under section 187 (1) of the Constitution and grounding the 1st Respondent's advice to the 6th Respondent in respect of complaints against the appellant pursuant to section 187 (3) of the Constitution.

SUBMISSIONS BEFORE THIS COURT

18. At the hearing, the first respondent raised a point *in limine* to the effect that the matter before the court had become moot. The point was taken on the basis that the appellant had already been removed from the office of a judge following the findings of gross misconduct by the Tribunal appointed by the President. Counsel for the first respondent, Mr *Chinake*, submitted that the appeal had become moot arising from the fact that the appellant's appeal was predicated on his suspension from office. He argued that this position had since been overtaken by events. He further submitted that the relief sought by the appellant intending to set aside the decision by the first respondent to refer the complaint against the appellant to the President under s 187(3) of the Constitution would result in a *brutum fulmen*. Counsel further argued that in light of the Proclamation removing the appellant from the office of a judge, the work of the Tribunal had been completed, the dismissal of the appellant was final and as such the appeal was devoid of merit.

19. In opposition, counsel for the appellant Mr *Madhuku* argued that the matter was not moot as there was a live controversy which required the Court's determination. Counsel submitted that the live issue related to whether or not the decision of the first respondent to advise the President in terms of s 187(3) of the Constitution was valid. It was counsel's submission that this was a live issue which had to be determined by the court as it affected whether or not the appellant was lawfully removed from office. Counsel further argued that, in any event even if the matter is moot, this Court has a discretion to hear the matter. Counsel thus prayed for the dismissal of the preliminary point.
20. On the merits of the matter, counsel for the appellant submitted that the Acting Secretary for the first respondent had no authority to depose to the opposing affidavit. Counsel argued that the court in HH 269/20 had already determined that the Acting Secretary could not so act. The court *a quo* could not make a contrary finding that Mr Chikwana had authority to act on behalf of the first respondent. Counsel also submitted that the *quorum* recommending that the complaint against the appellant be referred to the President was not properly constituted.
21. Counsel further submitted that the appellant was not afforded the right to be heard in terms of the *audi alteram partem* rule as he was not given an opportunity to respond to the letter written by Mr Ndudzo. Counsel argued that the first respondent lacked the jurisdiction to refer the matter to the President without first conducting an internal hearing of its own. Lastly, it was counsel's argument that each party should bear its own costs owing to the reason that the issues raised in the appeal were fundamentally important.

22. *Per contra*, counsel for the first respondent argued that the court *a quo* did not err in finding that the first respondent's Acting Secretary could depose to the opposing affidavit as he acted merely as an agent of the first respondent and he could swear positively to the facts as he sat in its meetings. Counsel further argued that the appellant had been afforded his right to be heard as he had been given an opportunity to reply in writing to the complaints levelled against him as well as an opportunity to be heard by the tribunal which right he opted not to exercise by walking out of the hearing. Counsel submitted that in terms of s 187(3) of the Constitution the first respondent was within its rights and had an obligation to refer the matter to the President. He further argued that the *onus* rested squarely on the appellant to prove his assertion that the first respondent's quorum was not properly constituted. Counsel was not opposed to the prayer that each party bears its own costs.
23. Counsel for the second to seventh respondents, Mr *Chimombe* submitted that none of the appellant's grounds of appeal impugned the actions of the second to seventh respondents. Counsel submitted that the President was within his constitutional mandate in appointing a Tribunal to investigate the appellant's alleged acts of misconduct. Counsel thus submitted that the Tribunal correctly investigated the matter and made recommendations to the President. It was his argument that the President correctly acted upon those recommendations in terms of his constitutional powers.

DETERMINATION OF THE PRELIMINARY POINT

24. The appellant approached the court *a quo* with an application for review of the first respondent's decision to refer his matter to the President and other ancillary relief. Before the application was filed and heard by the court, the President in terms of his

constitutional powers under s 187(3) of the Constitution appointed a Tribunal to investigate the alleged misconduct of the appellant. While the Tribunal was in the process of investigating the appellant and making recommendations to the President, the appellant launched this application and other applications before the court *a quo*. The application was dismissed. It is common cause and accepted by the parties that the appellant was subsequently found guilty of misconduct and removed from the office of a judge. It is on this basis that the first respondent raised the preliminary point to the effect that the appeal before us is now moot.

25. The doctrine of mootness has been discussed in a number of case authorities in this jurisdiction. In *Thokozani Khuphe & Anor v Parliament of Zimbabwe & Ors* CCZ 20/19 at p 7, the Court remarked as follows:

“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 parties. It is incumbent upon the Court to determine whether an application before it still presents a live dispute as between the parties. The question of mootness of a dispute has featured repeatedly 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 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... The mere fact that 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 does not without more render it unjustifiable. The court retains a discretion to hear a moot case where it is in the interests of justice to do so. *J T Publishing (Pty) Ltd v Minister of Safety and Security* 1997 (3) SA 514 (CC) at 525A-B.”(underlining is my own)

In *Chombo v Clerk of Court, Harare Magistrates Court (Rotten Row) & Ors* CCZ 12/20 at pages 7 to 8, the Court held that:

“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 establish 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 to the doctrine of mootness.”

26. From the above authorities it can be deduced that in order for a matter to be moot, the court will have found that events have occurred which overtake 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 bar to a court to hear it. A court retains discretionary powers to hear a moot case where it is in the interest of justice for it to do so. As a general rule, courts must be wary of making a determination on a matter, which has been overtaken by events or is moot as such a determination leads to an ineffectual judgment.
27. The present appeal, as indicated above, was made on grounds of appeal which seek to impugn the decision of the court *a quo* which dismissed the appellant’s application for review and effectively found that the decision by the first respondent to refer the appellant’s matter to the President was lawfully made.
28. It is common cause that following the filing of this application for review, the President established a Tribunal in terms of s 187(3) of the Constitution. The Tribunal upon concluding its mandate found the appellant guilty of misconduct and made recommendations to the President. The President, acting in terms of s 187(8) of the Constitution, made a decision in accordance with the Tribunal’s recommendations. The President therefore made the decision to remove the appellant from the office of judge as an exercise of his Constitutional power and mandate. The decision was final and binding

upon the appellant. At that stage the issue of appellant's suspension, referral of the matter to the President and the legality thereof had clearly been overtaken by events. The appellant was no longer on suspension but had been removed from office. On the basis of the above facts it is apparent that the matter before this Court is now moot.

29. A reading of the record shows that the relief sought by the appellant on appeal was effectively for an order declaring that the decision of the first respondent referring his allegations of misconduct to the President, be declared unlawful, null and void. The relief sought further extends to a prayer that his suspension from the office of a judge and the decision by the President to appoint a Tribunal to investigate his matter be set aside and consequently Proclamation No. 1 of 2020 issued under Statutory Instrument 70 of 2020 be declared unlawful, null and void and of no force. Such relief can no longer be enforced as the proverbial horse has long left the stable and bolted. The appellant was removed from office.
30. It is without doubt that the powers exercised by the President in establishing the Tribunal are mandated by the Constitution. The power exercised by the President under s 187(3) is peremptory. 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. In this regard, this is a matter which would ordinarily call for this Court to decline to exercise its jurisdiction as the dispute has clearly been overtaken by events.
31. Although we are of the firm view that the matter is moot we 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 to 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 interest 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 appellant's fundamental right to be heard had been trampled upon are important issues. The issue of whether or not there was propriety in the referral of the matter to the President by the 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 a 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.

DETERMINATION OF THE MERITS OF THE MATTER

32. The appellant's grounds of appeal raise four broad issues for determination which are as follows:
- (i) Whether or not the court *a quo* erred in finding that the first respondent's Acting Secretary could depose to its opposing affidavit and act on its behalf.
 - (ii) Whether or not the appellant failed to prove that there was no quorum at the first respondent's meeting of 13 December 2019.
 - (iii) Whether the first respondent was *functus officio* as it is alleged to have reversed its decision of 21 November 2019.
 - (iv) Whether or not the appellant's right to be heard was violated.

I will deal with each of these issues in turn.

WHETHER OR NOT THE COURT A *QUO* ERRED IN FINDING THAT THE ACTING SECRETARY COULD DEPOSE TO THE FIRST RESPONDENT'S OPPOSING AFFIDAVIT AND ACT ON ITS BEHALF IN LITIGATION BEFORE THE COURT A *QUO*.

33. It was counsel for the appellant's argument that the first respondent was improperly before the court *a quo* as the deponent of its opposing affidavit, Mr Chikwana, had no authority to act on behalf of the first respondent. In supporting this argument great emphasis was placed on the decision made in *Francis Bere v Judicial Service Commission and Ors* HH 269/20 wherein the court ruled that the Acting Secretary had no authority to depose to an affidavit on behalf of the first respondent as it is the constitutional duty of the first respondent to advise the President on the question of the removal of a judge from office and that such constitutional duty cannot be delegated.
34. *In casu*, the court *a quo* found that as Mr Chikwana was armed with a resolution to act on behalf of the first respondent and sits in its meetings, takes minutes as its secretary and has full knowledge of the matter at hand he thus had the capacity to depose to an affidavit on its behalf.
35. It is settled law that deponents to affidavits must be able to positively swear to the facts and averments therein. This position is set out in the High Court Rules, 1971 (the Old Rules). Order 32 r 227(4)(a) provides as follows:

"B. GENERAL PROVISIONS FOR ALL APPLICATIONS

227. Written applications, notices and affidavits

- (4) An affidavit filed with a written application—
- (a) shall be made by the applicant or respondent, as the case may be, or by a person who can swear to the facts or averments set out in therein..."
(my underlining)

36. It is not in dispute that Mr Chikwana, at the time when the application was heard *a quo* was the Acting Secretary of the first respondent. It is also common cause that as the secretary of the first respondent he sits in its meetings, keeps its minutes and is knowledgeable of all of the Commission's daily business. It is also common cause that first respondent issued a resolution in which the Acting Secretary was clothed with authority "to sign documents on behalf of the JSC in litigation matters." A resolution by its nature shows the true intentions of an entity. The first respondent like a company with a board of directors acts through its Commissioners. It is the Commissioners who regulate its daily business and make binding decisions on behalf of the Commission. In *First Mutual Investment (Pvt) Ltd v Roussaland Enterprises (Pvt) Ltd and Ors* HH 301/17 the court noted the following:

"A company, as a legal person, has no mouth through which it articulates its intentions. It has no ears with which to hear. It has no sense of sight or smell. It has no mind of its own. It speaks to no one except through its directors, not individually but collectively, through resolutions which they pass when they are assembled in one room for the purpose of transacting the business of the company. Directors and no one else are, together, the eyes, ears, nose and mind of the company. Hahlo brings out the above stated principle in a clear and lucid manner in his South African Company Law through cases, 6th ed. The learned author makes reference to the board of directors and their powers. He states at p 343 as follows:

'The powers of the company vest in the directors as a board, and not as individuals. Directors exercise their powers by passing resolutions at board meetings; of which proper notice must be given to all directors, and at which a quorum must be present'

...

The deponent to the founding affidavit had every opportunity to attach to his answering affidavit a resolution of the applicant's directors as the law required him to have done. The resolution would have constituted clear evidence of his authority to depose to the founding affidavit. His decision not to attach the resolution left the applicant's case standing on nothing. He failed to convince the court that he was clothed with the requisite authority to speak for, and on behalf of, his employer. The application cannot, on the mentioned basis, be allowed to stand."(my underlining)

37. *In casu*, the first respondent passed a resolution authorizing its Acting Secretary to act on its behalf in all litigation matters. This was clearly enough evidence to show that

Mr Chikwana was not on a frolic of his own and had the requisite authority to depose to the opposing affidavit on behalf of the first respondent.

We do not accept that the Commission in any way abdicated its duties and delegated its function to Mr Chikwana. It is clear from the papers before the court that the Commission made its decision in terms of the Constitution. Once it had made its decision and that decision was challenged in a court of law, it could authorize any of its employees who had knowledge of the facts to litigate on its behalf. The litigation involved the constitutional function of the first respondent advising the President to investigate on the question of the removal of the appellant from the office of a judge. What was being defended in the court *a quo* was the decision of the first respondent. This decision was made by the Commission. Mr Chikwana, as Acting Secretary had personal knowledge of the decision of the Commission. He was duly authorized to defend this decision on behalf of the Commission. In our view, this certainly does not amount to a delegation of functions by the first respondent.

38. In any event, the first respondent being a legal *persona*, can only act through a person who has been bestowed with authority to act on its behalf through a resolution. That the Acting Secretary was the appropriate person to act on behalf of the first respondent is established in the Judicial Service Act [*Chapter 7:18*] (The Judicial Service Act). Section 10(1) and (2) of the Judicial Service Act provides as follows:

“10 Appointment and functions of Secretary of Commission

- (1) The Commission shall appoint, on such terms and conditions as the Commission shall fix, a person to be the Secretary of the Commission.
- (2) The Secretary of the Commission shall, subject to the Commission’s directions, supervise and manage the Commission’s staff, activities, funds and property and perform such other functions on behalf of the Commission as the Commission may assign to him or her.”

39. The Judicial Service Act which governs the establishment of the first respondent allows the Commission's Secretary to act on its behalf in any function which may be assigned to him or her. It is therefore apparent that the authority exercised by the Acting Secretary was not only lawful authority but sanctioned authority by the first respondent. The submission by counsel for the appellant that the *dicta* in HH 269/20 are binding in this matter has no merit. It is trite that a judgment of the High Court is not binding on another judge as they exercise parallel jurisdiction. The judge in the court *a quo* acknowledged the existence of the judgment in HH 269/20 and respectfully disagreed with it. He also gives reasons why he disagrees with the judgment. In our view the way this point was handled by the court *a quo* cannot be impugned. We are of the firm view that the first respondent's Acting Secretary clearly had authority to depose to the opposing affidavit and the court *a quo*'s finding in this regard cannot be faulted.

WHETHER OR NOT THERE WAS NO *QUORUM* AT THE FIRST RESPONDENT'S MEETING OF 13 DECEMBER 2019 AND WHETHER THE FIRST RESPONDENT WAS *FUNCTUS OFFICIO* AS AT THAT DATE

40. The facts of these two issues are interlinked so it is expedient to deal with them together. The appellant's application for review was dismissed on the basis that he failed to prove that first respondent did not have a proper *quorum* at the first respondent's meeting of 13 December 2019 and that at that meeting the first respondent had become *functus officio* as it had already made a decision on 21 November 2019 exonerating the appellant.

41. It was the appellant's argument *a quo* and before this Court that at the meeting of 13 December 2019, where the decision to refer the appellant's matter to the President was reached, there was no *quorum* and thus an invalid resolution was passed. The

appellant made the allegation in his founding affidavit before the court *a quo* but did not produce any evidence to substantiate the allegation. The court *a quo* found that the appellant could not make bare allegations without producing either the minutes of the meeting or a supporting affidavit from a Commissioner of the first respondent who was present or absent on that day. A reading of the appellant's founding affidavit shows that he made the allegations based on what he termed "reliably informed" information without producing an *iota* of evidence to substantiate the claim.

42. The appellant further alleged that at a meeting on 21 November 2019 he was exonerated from all allegations against him and that he was informed, through a telephone call, of the news by the first respondent's Acting Deputy Secretary Mr Msipa. It was on this basis that the appellant argued that the first respondent was *functus officio* at the time it made the decision to refer his matter to the President on 13 December 2019.

It is common cause that Mr Msipa has not left the employ of the first respondent. The appellant could and should have approached him for a supporting affidavit in this regard. In the event that he felt constrained to do so, he could have subpoenaed the records of the phone call that he allegedly held with Mr Msipa. The court *a quo* found that the arguments by the appellant were bare unsubstantiated allegations as there was no supporting evidence. In any event, it seems highly unusual that the Judicial Service Commission would have relayed this information to a judge through a phone call. The allegations against the appellant were serious. No letter was produced by the appellant to show that the first respondent had written to him indicating that it was no longer pursuing the case against him. In our view it would be only after such formal notification that the

appellant would be in a position to allege that the first respondent had made a prior decision and was now *functus*.

43. This Court finds no fault with the court *a quo*'s conclusions in this respect. It is apparent that the appellant made unsubstantiated allegations. It is an accepted principle of our law that it is the duty of a person who makes an allegation to prove the allegation. (See *Mavrick Trading Private Limited v Double Services* HH54/17, *Macro Plumbers (Pvt) Ltd v Sheriff of Zimbabwe N. O and Another* HH 57/15, *ZUPCO Ltd v Pakhorse Services (Pvt) Ltd* SC 13/17).
44. In view of the well-grounded principles set out above, we find that the appellant's second and third grounds of appeal are devoid of merit.

WHETHER OR NOT THE APPELLANT'S RIGHT TO BE HEARD WAS VIOLATED

45. In his founding affidavit *a quo*, the appellant averred that his right to be heard was violated by the first respondent in that he was denied the opportunity to respond to the letter by Mr Ndudzo which he wrote prior to the meeting of 13 December 2019. It was the appellant's argument that he was not given an opportunity to have sight of and respond to Mr Ndudzo's letter because it was submitted after he had made his own response to the allegations against him on 20 August 2019. The appellant believes that by not being given the opportunity to respond to the letter the decision of 13 December 2019 was unlawfully and unfairly made.
46. The record shows that from the moment the allegations against the appellant were made to the day when he was suspended there was correspondence between him and the first

respondent. The appellant was given various platforms and opportunities to respond to the two allegations made against him. Where decisions were made by the first respondent in respect of his matter the appellant was informed in writing. While it is accepted that the appellant was not given Mr Ndudzo's letter which was written after the appellant had made his response, it is our view that the issues had already been canvassed in previous correspondence. It should be borne in mind that the *audi alteram partem* is not a rule of fixed content but varies with the circumstances of each case. What is important is that the principles of fairness have been invoked, before a decision is reached. As was stated by GUBBAY JA as he then was in *Metsala v Chairman, Public Service Commission & Anor* 1989(3) ZLR 147(SC) at 154.

“The *audi* maxim is not a rule of fixed content, but varies with the circumstances. In its fullest extent, it may include the right to be apprised of the information and reasons underlying the impending decision; to disclosure of material documents; to a public hearing and, at that hearing, to appear with legal representation and to examine and cross-examine witnesses. See, generally, Baxter *Administrative Law* at pp 545-547. The criterion, as I have noted, is one of fundamental fairness and for that reason the principles of natural justice are always flexible. Thus the “right to be heard” in appropriate circumstances may be confined to the submission of written representations. It is not the equivalent of a “hearing” as that term is ordinarily understood.”

Thus when the first respondent decided to refer the matter to the President, the appellant was advised of this decision and the basis thereof. It was not necessary for the appellant to again respond to the letter. The decision to refer the matter to the President cannot in these circumstances be said to be a nullity.

In any event, after the tribunal established by the President, was mandated to investigate all the allegations against the appellant and in carrying out the investigations the appellant was again afforded the opportunity for a fair hearing. It is an open secret that the appellant elected to walk out from the hearing of an independent tribunal.

47. In *Forestry Commission v Moyo* 1997 (1) ZLR 254 (S) at p 262 the court discussed the effect of walking out of a disciplinary hearing and remarked as follows:

“The second and alternative ground, as I understand it, was that the respondent ought to have been afforded the opportunity to be heard even though he had walked out of the inquiry. I am unable to agree ... His exit indicated that he had no intention of participating in the inquiry. He took a calculated risk that it would proceed without him. There was, in my opinion, no obligation upon the investigation panel to postpone the hearing and call upon the respondent to appear at another date. The *audi alteram partem* rule was not violated.”(my underlining) (See also *Dombodzvuku & Anor v CMED (Pvt) Ltd* SC14/11)

The appellant ought to have been cognisant of the fact that the tribunal was set up to investigate his matter on all issues which related to his alleged acts of misconduct. If the appellant had an issue with the letter from Mr Ndudzo and such complaint arose after the decision made on 13 December 2019 to refer his matter to the President had already been made, the appellant should have challenged that letter before the tribunal. It was not disputed that the appellant was given an opportunity to represent himself and prove his defence before the tribunal but rather it was conceded that he walked out of the tribunal hearing.

48. From the above cited authorities the appellant’s actions of walking out of the hearing amounted to a waiver of his right to the *audi alteram partem* rule. The first respondent gave the appellant adequate opportunities to make his case and likewise the tribunal gave the appellant every opportunity to make his case but the appellant decided to waive the right for reasons best known to himself. The appellant’s right to be heard cannot be said to have been violated in the circumstances of this case. The appellant’s fourth ground of appeal thus lacks merit.

DISPOSITION

49. The preliminary objection raised by the first respondent has merit as the matter is now moot. However, in the exercise of our discretion, we decided to determine the merits of the matter. We are of the firm view that the appeal is devoid of any merit. The decision of the court *a quo* cannot be impugned. The appeal must therefore be dismissed. The parties were agreed that each party will bear its own costs in the matter. As such no order will be made in respect of costs.

50. In the result, it is accordingly ordered as follows:

The appeal be and is hereby dismissed with no order as to costs.

UCHENA JA I agree

KUDYA AJA I agree

Dube, Manika & Hwacha, appellant's legal practitioners

Kantor & Immerman, 1st respondent's legal practitioners

Civil Division of the Attorney General's Office, 2nd-7th respondents' legal practitioners