

**REPORTABLE** (47)

**ERICA NDEWERE**  
**V**  
**(1) PRESIDENT OF ZIMBABWE N.O.**  
**(2) CHIEF JUSTICE N.O.**  
**(3) JUDGE PRESIDENT OF THE HIGH COURT N.O.**  
**(4) JUDICIAL SERVICE COMMISSION**  
**(5) MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY**  
**AFFAIRS N.O.**

**SUPREME COURT OF ZIMBABWE**  
**MAKONI JA, MATHONSI JA & KUDYA JA**  
**HARARE: 24 JANUARY 2022 & 30 MAY 2022**

Ms *B. Mtetwa*, for the appellant

*M. Chimombe*, for the first and fifth respondents

*A. B. C. Chinake*, for the second, third and fourth respondents

**MAKONI JA:**

[1] This is an appeal against the whole judgment of the High Court (the court *a quo*) in which it dismissed the appellant's urgent chamber application wherein she sought an interdict to prevent the first respondent (the President) from establishing a Tribunal in terms of s 187 (3) of the Constitution of Zimbabwe, 2013 ('the Constitution').

**FACTUAL BACKGROUND**

[2] The appellant is a former judge of the High Court of Zimbabwe having been removed from office by the President on the recommendations of a Tribunal he set up.

- [3] What led to the intended establishment of the Tribunal were complaints relating to the appellant's performance as a judge. In particular, the complaints related to her work output which was deemed unsatisfactory and below the expected standard. One of the complaints was that the appellant issued a review judgment in respect of criminal proceedings without having properly perused the record of proceedings. As a consequence, she ordered the release, from prison, of a person who had previous convictions which militated against his release. The position of the fourth respondent (JSC) was that the appellant's conduct *inter alia* amounted to gross misconduct and or gross incompetence warranting the referral of the matter to the President in terms of s 187 (3) of the Constitution.
- [4] It is common cause that by letter dated 15 September 2020, the appellant was advised by the JSC that she was under investigation for impeachable acts of misconduct. In response, the appellant's erstwhile legal practitioners, in a letter dated 30 September 2020, wrote back to the JSC indicating that the appellant was not obliged to respond to that matter. Their view was that the JSC had no legal authority to deal with the complaints raised against the appellant and that the second respondent had no authority to direct the JSC to attend to any complaints against a sitting judge of the High Court. Further, the letter highlighted that in any event, it was premature for the JSC to invoke s 187 (3) of the Constitution before compliance with the provisions of the Judicial Service (Code of Ethics) Regulations SI 107/2012 (Code of Ethics).
- [5] Consequently, the JSC resolved that the question of the appellant's removal from

office ought to be investigated by a Tribunal appointed to inquire into the matter in terms of s 187 (3) of the Constitution. It advised the appellant of this resolution by letter dated 12 October 2020.

[6] A day after receipt of the letter, the appellant, through her erstwhile legal practitioners, filed an urgent chamber application under case number HC 6128/20 which she subsequently withdrew.

[7] On 26 October 2020, the appellant, through her current legal practitioners, filed yet another application through the chamber book, seeking the Provisional Order which is the subject matter of this appeal. The Provisional Order sought reads as follows:

**“INTERIM RELIEF GRANTED**

**IT IS ORDERED THAT:**

1. Pending the final determination of the legality of the fourth respondent’s decision to advise the first respondent to establish a Tribunal in the absence of due process, the first respondent be is hereby interdicted from setting up a Tribunal to investigate the question of removing the applicant from office in terms of s 187 (3) of the Constitution.
2. In the event that a Tribunal referred to here above is already set up by the first respondent to investigate the applicant’s conduct, then the Tribunal’s proceedings be stayed until the determination of the legality of the fourth respondent’s decision to advise the first respondent to establish a Tribunal.

**TERMS OF THE FINAL ORDER SOUGHT**

That the first, second, third, fourth and fifth respondents show cause to this Honourable Court why a final order should not be granted in the following terms:

1. The fourth respondent’s decision advise to the first respondent to set up a Tribunal to inquire into the question of whether the applicant should be removed as a judge be and is hereby declared unlawful and set aside (*sic*).
2. It is hereby declared that any disciplinary action against the

applicant must be done in compliance with Statutory Instrument 107 of the 2012 being the Judicial Services (Code of Ethics) Regulations, 2012 as read with the Constitution of Zimbabwe.”

### **PROCEEDINGS IN THE COURT A QUO**

- [8] At the commencement of the proceedings, the fourth respondent raised five points *in limine* which the second and third respondents associated themselves with. The appellant also raised a point *in limine*.
- [9] On the merits, the appellant contended that she managed to satisfy all the pre-requisites for the granting of an interim interdict. She argued that a proper construction of s 187 (3) and s 190(4) of the Constitution, as well as Part III of the Code of Ethics reveals that a judge accused of any act of misconduct is entitled to be subjected to the provisions of the latter enactment before any contemplated referral to the President can be done.
- [10] The appellant submitted that the interpretation given by the JSC to s 187 (3) of the Constitution to the effect that it is empowered to refer such a matter directly to the President without resorting first to the Code of Ethics will have the effect, *inter alia*, of not only eroding the independence of the judiciary but also negates the very notion of security of tenure of the judges, deprives the appellant of her right to administrative justice as enshrined in s 68 of the Constitution, results in the negation of her right to protection against unfair discrimination and equal protection of the law in that other judges accused of misconduct were subjected to the Code of Ethics and finally that the procedure adopted by the JSC attenuates the principle of certainty in that whereas some judges are first subjected to the Regulations others like herself do not get to enjoy that “two- rung” process.

[11] The appellant further contended that the Code of Ethics was a direct consequence of s 190 (4) of the Constitution. She also contended that the gravity or nature of the alleged infraction was immaterial and irrelevant in so far as the procedure to be followed is concerned. In her view the provisions of the Code of Ethics are prescriptive and no departure therefrom is permissible. No distinction is drawn, in terms of the legislation and as far as procedure is concerned, between the disciplinary action against judges in terms of the Code of Ethics *vis a vis* their removal from office as the latter is a species of the former.

[12] The JSC, *per contra*, contended that it did no more than what s 187 (3) of the Constitution entitled it to do. It disputed the interpretation given to the said provision by the appellant and argued that impeachable conduct referred to the President, does not have to be preceded by proceedings under the Code of Ethics. Furthermore, the respondents submitted that it was clear *ex facie* the record that the appellant was potentially guilty of gross misconduct or, in the alternative, gross incompetence and as such, the existence of a *prima facie* case against her meant that the provisions of s 187 (1)(a) and (b), as read with s 187 (3) of the Constitution had been properly triggered by the JSC. It was their submission that the aforementioned sections relate to impeachable conduct and thus it had a basis to refer the matter to the President.

#### **DETERMINATION BY THE COURT A QUO**

[13] The court *a quo*, in a well-reasoned judgment, dismissed all the preliminary points raised by the JSC and the appellant. None of the parties appealed against the court *a quo*'s dismissal of the points in *limine*. It will therefore, not be necessary, for the

determination of this matter, to relate to the findings of the court *a quo* on the preliminary points.

[14] On the merits, the court *a quo* held that in so far as the procedure for dealing with judges accused of acts of misconduct is concerned, s 187 (3) of the Constitution and Part III of the Code of Ethics provide distinct dichotomous routes. The court held that s 187 is principally aimed at investigating the suitability or otherwise of the imperiled judge in continuing to hold office in light of the alleged acts of misconduct and the Code of Ethics is mainly aimed at some other disciplinary measures short of removal from office. It was the court's position that the applicability of the abovementioned provisions is a question that is dependent on the gravity of the offence. It held that the use of the words "gross incompetence" and "gross misconduct" in s 187 (3) of the Constitution, which words are absent in s 21 of the Code of Ethics, conveys the notion that it is reserved for indiscretions that are deemed serious. The court concluded, on this point, by finding that:

"the appellant's argument that no distinction can and should be drawn between 'disciplining' of judges and 'removal' of judges cannot be sustained because a reading of those sections clearly conveys such a distinction."

[15] The court also opined that the fact that the outcomes of the two procedures are different lends further credence to the existence of the dichotomy. Whereas the outcome under s 187 of the Constitution is the possible removal of a judge from office, under the Code of Ethics, there are various possible outcomes.

[16] The court *a quo* further held that, if the procedure under the Code of Ethics was meant to be antecedent to the referral in terms of s 187 (3) of the Constitution, then either the Constitution or the Code of Ethics or both would have said so.

Sections 21, 24, 25, and 26 of the Code of Ethics make it clear that they are subject to the Constitution. Further the Sixth Preamble to the Code of Ethics clearly conveys the meaning that the Code of Ethics was intended to plug the *lacuna* obtaining before its promulgation, namely that there was no formal complaints mechanism for conduct falling short of impeachable conduct. The court also noted that subs (3) of s 24 of the Code of Ethics makes it clear that nothing contained in it shall be construed as taking away or derogating from the powers bestowed upon a person to make a direct referral for impeachable conduct. It further found that in any event, the Code of Ethics was promulgated in 2012 and, therefore, predates the current Constitution which came into effect a year later.

[17] Concerning the allegations of bias, *mala fides* and non-observance of the *audi alteram partem* rule levelled against the second, third and fourth respondents in handling her matter, the court *a quo* made a finding that the appellant rejected the invitation to respond to the complaints against her and, thus, cannot claim that her right to be heard was violated.

[18] To that end, the court *a quo* held that the appellant did not manage to establish a *prima facie* right let alone a clear one entitling her to be subjected to the Code of Ethics first before a referral as contemplated under s 187 (3) of the Constitution. In light of that, the court *a quo* held that it was not necessary to interrogate the remaining requirements for an interim interdict as the application before it did not establish a *prima facie* right.

[19] In accordance with the above findings, the court *a quo* dismissed the application with costs.

[20] Aggrieved by the decision of the court *a quo*, the appellant noted an appeal on the following grounds:

- “1. The court *a quo* erred and misdirected itself in placing reliance on s 187 (3) of the Constitution when the principle of subsidiarity required that reliance be on the Judicial Service (Code of Ethics) Regulations, 2012 in taking any disciplinary measures against the appellant.
2. The court *a quo* erred and misdirected itself when it held that the Judicial Service (Code of Ethics) Regulations, 2012 is aimed at some disciplinary measure other than the removal of a judge from office but also holding that the outcome of a disciplinary process instituted under the Judicial Service (Code of Ethics) Regulations, 2012, may result in a referral in terms of s 187 (3) of the Constitution.
3. The court *a quo* erred and misdirected itself when it held that s 187 (3) of the Constitution, 2013 and Part III of the Judicial Service (Code of Ethics) Regulations, 2012 provide for different procedures for dealing with the question of misconduct of a sitting judge of the High Court when such distinct procedures are not contained in the Constitution and the Judicial Service (Code of Ethics) Regulations, 2012.
4. The court *a quo* erred and misdirected itself when it held that s 187 (3) of the Constitution is reserved for transgressions that are deemed serious and that the Judicial Service (Code of Ethics) Regulations 2012, is reserved for minor transgression when such a distinction is not contained in either the Constitution, the Judicial Services Act or the Judicial Service (Code of Ethics) Regulations, 2012.”

[21] She sought the following relief;

- “1. That the instant appeal succeeds with costs.
2. That the judgment of the court *a quo* be set aside and the following be substituted in its place and stead;
  - “1. Pending the final determination of the legality of 4<sup>th</sup> respondent’s decision to advise the 1<sup>st</sup> respondent to establish a tribunal in the absence of due process, the 1<sup>st</sup> respondent be and is hereby interdicted from setting up a Tribunal to investigate the question of removing the applicant from office in terms of section 187(3) of the Constitution.
  2. In the event that a Tribunal referred to hereabove is already set up by the 1<sup>st</sup> respondent to investigate the applicant’s conduct, then the Tribunal’s proceedings be stayed until the determination of the legality of the 4<sup>th</sup> respondent’s decision to advise the 1<sup>st</sup> respondent to establish a tribunal.”
  3. That this matter be and is hereby remitted to the High Court for continuation of proceedings on the return date.””

[22] In the concluding paragraph in her heads of argument the appellant’s position was

as follows:

“In light of the above, the appellant prays that the appeal succeeds with costs. However, in light of the fact that the interim relief sought **has been overtaken by events**, it is prayed that the judgment of the court *a quo* be set aside and the matter be remitted back to the court *a quo* for determination of the final relief sought.”(my emphasis)

## SUBMISSIONS ON APPEAL

[23] At the hearing of the appeal, the court asked counsel for the appellant, Mrs *Mtetwa*, to first address the court on the question whether the matter before the court had become moot first before addressing the merits of the matter. The request was made on the basis that, on the recommendation of the JSC, the President constituted a Tribunal to consider the removal of the appellant from office. The Tribunal has already conducted investigations and held an inquiry which consequently led to the removal of the appellant from the office of a judge.

[24] Mrs *Mtetwa* submitted that the issue of mootness did not arise in the present appeal. It was her submission that when the President acted upon receipt of the referral, he did so in the belief that all due and proper processes had been followed as provided for in the Code of Ethics. If those processes were not followed and the necessary transparent investigations carried out, the referral would have been invalid and everything that followed would be invalid. As such, the matter cannot be moot.

[25] Notwithstanding her submissions that the matter was not moot, and despite the concession in the Heads of Argument, Mrs *Mtetwa* submitted that mootness is not a bar to hear a matter. The court retains a discretion to hear the merits of the appeal if it is in the interests of justice to do so. In *casu* it was particularly important for the court to give guidelines for referral of a judge to the President. For authority

she relied on the case of *Francis Bere v Judicial Service Commission & Ors* SC 1/22 where this Court proceeded to hear the appeal on the merits after having made a finding that the appeal was moot. She further submitted that in that case the provisions of the Code of Ethics had been followed. There had been participatory investigations by a panel of three judges which was set up in terms of the Code of Ethics.

[26] On the merits, Mrs *Mtewa* submitted that the Code of Ethics was not adhered to, therefore, all the proceedings thereafter were void. It was her submission that in terms of the principle of subsidiarity, the appellant ought to have been subjected to the subsidiary legislation, therefore the second respondent ought to have followed the procedure in the Code of Ethics before looking for recourse to the Constitution. She further submitted that the second respondent did not conduct an investigation and failed to ensure that all processes before the referral were followed. She also submitted that the court *a quo* erred in relying on the constitutional provisions on the investigative part of the proceedings. She maintained that if the legislature intended that there be two processes, one for serious infractions and the other for non-serious in-fractions it would have said so.

[27] Finally, counsel made an application to amend the relief sought. She moved the court to grant an order declaring that the removal of the appellant from office was a nullity.

[28] Per *contra*, Mr *Chimombe* for the first and fifth respondents submitted that the relief the appellant was seeking in the instant appeal had been overtaken by events. It was his submission that the Tribunal appointed by the President had duly carried

out its Constitutional mandate resulting in the removal of the appellant from office. He further submitted that the appellant has taken those proceedings on review in the High Court. She has also filed an appeal in the Labour Court against the decision of the President to remove her from office.

[29] Counsel for the second, third and fourth respondents, Mr *Chinake*, submitted that the test in respect of mootness is factual. That the appellant was no longer a judge of the High Court is a fact. The question is not whether the matter is moot or not because on the facts the matter is moot. The question should be whether this Court has a basis of exercising its discretion, in the interests of justice, to still hear the matter. He submitted that the following points militate against the exercise of that discretion.

[30] Firstly, the appellant voluntarily attended the Tribunal and fully participated in its enquiry. The Tribunal completed its work and the legal process of her removal from office has occurred. The appellant continues to seek legal remedies in other courts namely in the High Court and the Labour Court.

[31] Secondly, when the appeal was filed it was open to the appellant to seek an expedited hearing. He submitted that no effort was made to seek such an expedited hearing of the matter as provided in the rules, and secure the relief she seeks in her notice of appeal. As a result, this Court is unable to grant the relief sought by the appellant.

[32] Thirdly, the JSC advised the appellant of the complaints against her, provided her with the details of the complaints and invited her to comment. The appellant,

through her erstwhile legal practitioners, took a position that she had no obligation to address the complaint. As a result, the JSC resolved to refer the matter to the President in terms of s 187 (3) of the Constitution. The actions of the JSC are unimpeachable. This Court cannot issue a *declaratur* nullifying the actions of the JSC. He concluded by submitting that there was nothing exceptional about this case warranting this Court exercising its discretion to hear this moot case.

[33] On the merits counsel submitted that the Code of Ethics makes it clear that it does not purport to supersede s 187 (3) of the Constitution. The Code of Ethics recognises the supremacy of the Constitution in particular ss 21, 24, 25 and 26 of the Code. He further submitted that the Code is limited to administrative complaints and impeachment processes are dealt with in terms of s 187 (3) of the Constitution.

#### **DETERMINATION OF THE QUESTION OF MOOTNESS**

[34] The appellant approached the court *a quo* in an urgent chamber application seeking the Provisional Order outlined above.

[35] As is clear from the Provisional Order, the appellant sought, in the interim, an interdict preventing the President from setting up a Tribunal to investigate the removal of the appellant from office and in the event that it had already been set up, an order staying the proceedings of such Tribunal. It is common cause that the Tribunal was set up, executed its mandate and the appellant was removed from being a Judge of the High Court in terms of s 187 (3) of the Constitution. It is on

this basis that the respondents take the position that the appeal before the court has been overtaken by events.

[36] At this point in time, it is appropriate to deal with the doctrine of mootness as I believe it could be dispositive of this instant appeal.

## THE LAW ON MOOTNESS

[37] A matter is moot if the dispute becomes academic by reason of changed circumstances, thus making the jurisdiction of the court unsustainable.

[38] The issue was comprehensively dealt with by the Constitutional Court in *Thokozani Khupe & Anor v Parliament of Zimbabwe & Ors* CCZ 20/19 at p 7, where it held 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’”.

[39] The above principle was followed in *MDC & Ors v Mashavira & Ors* SC 56/20 at p 33 where it was stated:

“...a court may decline to exercise its jurisdiction over a matter because of the occurrence of events outside the record which terminate the controversy between the parties. ... [I]f the dispute becomes academic by reason of changed circumstances, the case becomes moot and the jurisdiction of the court is no longer sustainable”

[40] In *ZIMSEC v Mukomeka and Anor* SC 10/20 at pp 6– 7, Patel JA (as he then was) set out a two–stage approach in determining whether or not an appeal is moot. The learned Judge, cited the Supreme Court of Canada, in *Borowski v Canada (Attorney General)* [1989] 1 SCR 342, where it was held that:

“It is first necessary to determine whether the requisite tangible and concrete dispute has disappeared rendering the issues academic. If so, it is then necessary to decide if the court should exercise its discretion to hear the case.”

[41] In respect of the second stage of an inquiry on mootness, Patel JA held at p 7 that:

“The next step in the analysis is to decide whether or not the court should exercise its discretion to hear the case. In that respect, courts are guided by the rationale and policy considerations underlying the doctrine of mootness – *Borowski’s* case, *supra*.

The overriding consideration is whether or not it is in the interests of justice to hear a moot case. The factors to be taken into account in that regard were lucidly enunciated by the Constitutional Court of South Africa in *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) at para 11:

‘... discretion must be exercised according to what the interests of justice require. A prerequisite for the exercise of the discretion is that any order which this Court may make will have some practical effect either on the parties or on others. Other factors that may be relevant will include the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity, and the fullness or otherwise of the argument advanced.’ [Emphasis added.]

[42] The doctrine is well developed in American law. A case is moot if it:

“...seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has actually been asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical effect upon a then existing controversy.” (see *Ex Parte Steel* 162 Fed. 694, 701 (N. D. Ala. 1908).

Furthermore, a case is moot:

“If the parties are not adverse, if the controversy is hypothetical, or if the judgment of the court for some other reason cannot operate to grant any actual relief...and the court is without power to grant a decision.” See *Diamond, Sidney A.* “Federal Jurisdiction to Decide Moot Cases.” *University of Pennsylvania Law Review* Vol. 94 at p 125.

[43] Barron and Dienes Barron J (eds) Barron J and Dienes T (eds) *Constitutional Law* (West St Paul, Min 1995) put it succinctly when they observed that "a case or controversy requires present flesh and blood dispute that the courts can resolve".

[44] In South African Jurisprudence, mootness is when a matter “no longer presents an existing or live controversy” (see *National Coalition for Gay and Lesbian Equality & Ors v Minister of Home Affairs* 2000 (2) SA 1 (CC), at para 21).

[45] Section 16 (2)(a)(i) of the South African Supreme Court Act provides as follows:

‘(i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.’

[46] It can be gathered from the above authorities that mootness essentially restricts the court’s jurisdiction to hear or determine a matter, particularly if giving the judgment in that matter will produce no tangible result but merely an opinion. It is based on the notion that judicial resources ought to be utilised efficiently and not dedicated to advisory opinions. However, the fact that a matter is moot is not an absolute bar for the court to decide an appeal where the interests of justice so require. An analysis of decisions in which Zimbabwean Courts proceeded to determine matters despite the fact that they had become moot exposes the application of the foregoing principles. In the case of *Stevenson v Minister of*

*Local Government & Ors 2002 (1) ZLR 498 (S)* at p 501F – G, the court heard a matter that was moot for the purpose of determining the party liable to pay costs.

Sandura JA held as follows:

“In the circumstances, the learned judge in the court *a quo* should have dealt with the issues raised in the appellant’s application.

However, it is pertinent to note that after the appeal in this matter had been noted, mayoral and council elections for Harare were held in March 2002. It follows, therefore, that the reason for the appellant’s application has now fallen away.

Nevertheless, a determination of the issues raised in the application is essential for the purpose of determining which party should pay the costs of the application in the court *a quo*...” [*my emphasis.*]

[47] See also *Bere’s* case *supra*.

[48] The South African courts have attempted to outline factors to be considered when a court wishes to break through the veil of mootness to decide an appeal that is moot for justice’s sake. In *VINPRO NPC v The President of the Republic of South Africa & Ors* (741/2021) [2021] ZAWHCHC 149 the court opined as follows:

“[50] Moreover, this Court has proffered further factors that ought to be considered when determining whether it is in the interests of justice to hear a moot matter. These include -

- (a) whether any order which it may make will have some practical effect either on the parties or on others;
- (b) the nature and extent of the practical effect that any possible order might have;
- (c) the importance of the issue;
- (d) the complexity of the issue;
- (e) the fullness or otherwise of the arguments advanced; and
- (f) resolving the disputes between different courts.”

[49] In *casu*, under the first consideration in the test for mootness, it is apparent from the record that the appellant sought an order in the court *a quo* interdicting the President from establishing a Tribunal to investigate the question of removing her

from office in terms of s 187 (3) of the Constitution and a stay of the Tribunal proceedings in the event that it had already been set up pending the determination of the legality of the JSC's decision to advise the President to establish a Tribunal. It is common cause that the Tribunal was set up and its proceedings were conducted and concluded with the full participation of the appellant. At this point, the issue of the JSC's referral of the matter to the President, the setting up of the Tribunal by the President and the legality thereof has undoubtedly been overtaken by events. The judgment, if rendered in favour of the appellant, 'cannot operate to grant any actual relief' to her. There is no longer any 'present flesh and blood dispute that the court can resolve'. In light of the above, it is my position that the appeal before this court is now moot.

[50] Additionally, the fact that the appellant belatedly sought to amend the relief sought confirms that the matter is indeed moot and the relief sought no more than a *brutum fulmen*. It must have been clear to her that it would not be competent for this Court to grant the relief she sought in her Notice of Appeal as conceded in the last paragraph of her Heads of Argument. The tangible and concrete dispute between the parties had disappeared by the time the appeal was heard rendering the issues academic.

[51] This leads to the next stage of enquiry as highlighted in the *ZIMSEC* case *supra* to the effect that where a matter is found to be moot, the overriding consideration is whether or not it is in the interests of justice to hear a moot case.

**WHETHER OR NOT IT IS IN THE INTEREST OF JUSTICE TO DETERMINE THE  
INSTANT APPEAL THAT IS MOOT**

[52] As alluded to above, the appellant, at the eleventh hour applied to amend the relief sought in her prayer amidst queries raised by this Court as to whether it was competent for the court to grant the relief sought by the appellant in her Notice of Appeal. The Court enjoined the appellant to file supplementary heads in motivating why the application should be granted. The court also enjoined the respondents to file supplementary heads of argument in respect of the application to amend the prayer by the appellant. It is to be commended that the supplementary heads of argument were promptly filed.

[53] It is the appellant`s submission that in terms of s 22 (1)(a) of the Supreme Court Act, this Court is empowered to grant an amended relief sought provided that the relief sought is underpinned by the case made by the appellant. Further, she submitted that this Court enjoys wide powers which include granting a declaratory order. She prayed that the appeal succeeds in terms of the amended draft order motivated during arguments which read as follows:

“The appellant prays that this Honourable Court declares that her referral to the President in terms of s 187 (3) of the Constitution without first subjecting her to the provisions of the SI 107 of 2012 was unlawful hence null and void.”  
(my underlining)

[54] Mr *Chinake* submitted that the *declaratur* which the appellant seeks is not clear as it is couched inelegantly and offends the mandatory provisions of the rules that require proper drafting of pleadings. He further submitted that the appellant is trying to surreptitiously seek a declaratory order whereas in the court *a quo* she

sought an interdict. He submitted that the court *a quo* did not deal with the question of a *declaratur* and in the circumstances it cannot be the subject matter of the instant appeal. In that regard, he prayed that the application to amend be dismissed with costs.

[55] I have deliberately underlined the word “declares” in the amendment sought. This is so for the following reasons. Firstly, the appellant is raising an issue that was not before the court *a quo*. The proceedings *a quo* related to an application for an interdict preventing the President from appointing a Tribunal and an order staying the work of such a Tribunal if it had already been appointed. It is settled that this Court is not a court of first instance especially in matters relating to granting a *declaratur*. In *Guwa & Anor v Willoughbys Investments (Pvt) Ltd* 2009 (1) ZLR 368 (S) at p 382 to 383, this Court held that:

“It is clear from these provisions that the Supreme Court is a creature of Statute and that it derives its jurisdiction specifically from the Supreme Court Act and other legislative provisions. In other words, although it is the highest court in the land, its powers are regulated strictly by Statute. It is not a Court of first instance. It has no original jurisdiction but only appellate, since it was created by statute purely as a Court of appeal. Nowhere in the Supreme Court Act nor in the Rules of the Court is the Supreme Court given jurisdiction to entertain, in the first instance, an application for a *declaratur*. Whilst in terms of s 25 of the Supreme Court Act every Judge of the Supreme Court shall have the same review power and authority as are vested in the High Court to review proceedings, no person has the right to institute any review in the first instance before the Supreme Court.”

[56] Similarly, in *Mutasa & Anor v The Registrar of the Supreme Court & Ors* 2018 (1) ZLR 461 (S) it was held that at 466 B:

“Clearly the Supreme Court cannot grant a *declaratur* in the first instance, even where the parties may be in agreement and approach the court by consent seeking an order beyond the courts’ jurisdiction, such consent does

not and cannot compel a judge to issue an order beyond his or her jurisdictional authority.”

[57] Mrs *Mtetwa*'s argument that the appellant sought a *declaratur* in the final relief and therefore the issue was ventilated before the court *a quo* is untenable. The judgment of the court *a quo* is clear that it did not relate to the requirements of a *declaratur* but to those of an interim interdict.

[58] It is thus my view that the appellant seeks to make this Court a second court of first instance. The case before the court *a quo* was one for an interim interdict, it examined the requirements of such interdict. It did not deal with the question of a *declaratur* at all and in the circumstances, it cannot be the subject matter of this appeal. I agree with Mr *Chinake* that, in making the application to amend the relief sought, the appellant is trying to surreptitiously seek a declaratory order from this Court. The above authorities are categorical that this Court cannot grant a *declaratur* in the first instance.

[59] In my view what the appellant seeks cannot be termed an amendment but rather an abandonment of the original relief and the replacement or substitution with a totally different and new relief. The application to amend the relief sought cannot therefore succeed.

[60] Mrs *Mtetwa* referred the court to the *Bere* case as authority for the proposition that the fact that a matter is moot is no bar for the court to hear the matter. The *Bere* case is clearly distinguishable from the case in *casu*. In the *Bere* case Bere approached the High Court in terms of s 4 of the Administrative Justice Act

[Chapter 10:28] on the basis that the respondents had failed to comply with the provisions of s 3 (1)(a) of the Act. He raised five grounds in support of his contention. This is what the High Court was seized with. It dismissed the application. Disgruntled by the decision he appealed to this Court. This Court, having found that the matter was moot decided that the matter was sufficiently important to warrant a departure from the general rule and it exercised its discretion to hear the merits of the matter. In dealing with the appeal the court related to the points in *limine* and the grounds for review raised and ventilated before the court *a quo*. It examined the correctness or otherwise of the decision of the court *a quo* on the issues ventilated before it. It concluded that the appeal had no merit and dismissed it. In *casu* the appellant is asking this Court to examine the correctness of the decision of the court *a quo* in relation to an issue that was not ventilated before it. This, the court cannot do.

It is for the above reasons that this Court declines to exercise its discretion to hear the appeal which is now moot.

## DISPOSITION

[61] In *Khupe & Anor v Parliament of Zimbabwe & Ors supra* the court found that the case did not fall into the category of cases where the court may exercise its discretion to hear a moot case in order to settle an important legal question. It therefore proceeded to dismiss the application.

[62] This Court in the *MDC* and *Zimsec* matters *supra* associated itself with the above stated position that a court may decline to exercise its jurisdiction over a matter that is moot.

[63] In South Africa, the Supreme Court is guided by s 16 (2)(a)(i) of the South African Supreme Court Act cited in para 45 above.

[64] The same position prevails in the United States of America. In the case of *Mills v Green* 159 US 651 (1895) at 653, the Federal Supreme Court held as follows:

“It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this Court, if it should decide the case in favour of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal.”

[65] From the above authorities, it is settled that where the court makes a finding that an appeal is moot and declines to exercise its discretion to hear the appeal in the interests of justice, the court declines jurisdiction and dismisses the matter. That is the fate that befalls the present appeal.

Everything considered, the appeal is clearly moot. The relief that the appellant seeks has been overtaken by events. There is no longer any live dispute between the parties for the court to resolve. Furthermore the case does not fall into the category of cases where the court can exercise its discretion to hear a moot matter in the interests of justice.

[66] On the issue of costs, there is no reason to depart from the general principle that costs follow the cause.

[67] In the result, it is accordingly ordered as follows:

The appeal be and is hereby dismissed with costs.

**MATHONSI JA:** I agree

**KUDYA JA:** I agree

*Mtewa and Nyambirai*, appellant's legal practitioners.

*Kantor & Immerman*, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondent's legal practitioners.

*Civil Division of the Attorney General's Office*, 1<sup>st</sup> and 5<sup>th</sup> respondent's legal practitioners.