JOHANNES TOMANA
versus
JUDICIAL SERVICE COMMISSION
and
THE MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 2, 8 March, 5, 14 and 26 April 2016 and 11 May 2016

Urgent Chamber Application

T Mpofu, for the applicant
A B C Chinake, for the 1st respondent
H Magadure, for the 2nd respondent

MAKONI J:

BACKGROUND FACTS

On 25 February 2016 a citizen by, the name Rooney Kanyama (Kanyama), filed a Constitutional Court application wherein he sought the following order.

"IT IS DECALRED THAT:

1. The order of the Constitutional Court granted under case number CCZ8/15 on the 28th October 2015 was granted contrary to provisions of the Constitution and the law and violates by that circumstance applicant's right to protection of the law as set out under section 56 (1) of the Constitution of Zimbabwe.

ACCORDINGLY, IT IS ORDERED THAT:

2. The order of the Constitutional Court granted under case number CCZ8/15 on the 28th October 2015 be and is hereby set aside in its entirety.

3. There shall be no order as to costs"

On the same day the applicant filed the present application under a Certificate of Urgency I arrived at the conclusion that the citizen's application was filed first and then the applicant's

application filed later as the applicant's application places reliance on the application by Kanyama.

In the urgent chamber application, the applicant seeks, in the interim, the stay of the process for his possible removal from office which has been instituted by the first respondent. In the final, he seeks a declaratur to the effect that the process for his removal from office commenced by the first respondent pursuant to its meeting on 11 February 2016 and communicated to him in terms of a letter dated 12 February 2016 is a nullity. He also seeks costs as against the first respondent.

His basis for seeking such relief is that the letter is based on two judgments one by Constitutional Court in the Prosecutor General of Zimbabwe On The Question Of The Constitutional Independence and Protection From The Direction And Control Of Anyone CC 28/15and the other by Mathonsi J in *Professor Charles Muchemwa Nherera* v J*ayesh Shah* HH 845/15 both of which he considers to be invalid.

He averred that the Constitutional Court judgment is invalid for the following reasons.

(i) The Constitutional Court had no jurisdiction to deal with the issue of contemplated court orders. The orders emanated from the Supreme Court and High Court and could only be enforced by the High Court. Contempt proceedings were actually pending in the High Court at the time of the order of the Constitutional Court.

(ii) Declaration of the question of the independence of his office. He was not heard as his legal practitioners did not have interest on the matter.

(iii) The Constitutional Court which made the order was not properly constituted as the Deputy Chief Justice did not sit in the matter.

(iv) A citizen Rooney Kanyama has filed a constitutional application challenging the validity of the order.

The applicant challenges the judgment by Mathonsi J for the following reasons;

(i) He was not a party in the matter which was the subject of the judgment.

(ii) The findings made by the court related to the plaintiff's case only. The court did not consider the defendant's case as the court granted absolution from the instance.

(iii) He was not bound by that judgment on matters that related to his person.

(iv) The judgment is not in *rem* but *in personam*.

(v) He was not involved in the Nherera case when he was the Attorney General.

He further averred that the position contemplated by the first respondent is void. His basis for challenging the process is as follows:

1. (a) That the first respondent misread the provisions of s 259 (a) and 187 of the Constitution. The first respondent's view that it has a supervisory role over his conduct and can activate disciplinary proceedings against him is contrary to s 260 of the Constitution.

   (b) He is head of the Prosecution Authority in the same manner that the Chief Justice is the head of the Judiciary. Process for his removal can only be activated by the President and not by Judges.

2. (a) The serious conflict of interest of the first respondent and certain of its officials. The head of the first respondent sat in the matter which resulted in the Constitutional Court judgment in issue. He is also the one who has written to him enforcing his order.

   (b) The Chairman of the first respondent is the one who raised the issue of his possible contempt and its implications on the Constitution *ex mero motu*.

   He, the applicant wrote to the first respondent requesting the reasons for the order made by the Constitutional Court. He received the response on 24 February 2010 and the response reflected the following:

(a) The active involvement of the Chair of the first respondent. He was aware that the first respondent did not sit to adopt the position communicated in that letter.

(b) That the applicant must respond before being furnished with the reasons.

(c) The letter records that the first respondent would want to be satisfied whether he actually disobeyed the court orders. It records that a court has found that as a fact. He is therefore being asked to address on a matter of fact which the first respondent considers irrelevant.

(d) The letter takes a very clear position that he is guilty. The process is accordingly a charade.

3. The Constitutional Court order is under challenge. Due process requires that the issue of the validity of the order be executed first before reliance can be placed on it.
4. Reliance on the Mathonsi J to which he says had nothing to do with him. He was not heard in the matter. He suggested that if the first respondent wishes to put certain functional conspectus to him they should do so and he will respond. He cannot respond where findings have already been made.

The applicant then goes on to address the requirements for the grant of an interim interdict. He averred that he had a right to due process and to constitutional validity. This right is being harmed by the process which has been commenced by the first respondent. The balance of convenience favours him as the first respondent waited for a period in excess of four months after the Constitutional Court judgment before taking any action. There is no other remedy available to him except to seek the interdict.

On 25 February 2016, the Registrar wrote to Messrs Garikayi and Company, the applicant's legal practitioners. The letter reads:

> "**RE: ROONEY KANYAMA VS MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS AND PROSEUCTOR GENERAL OF ZIMBABWE HONOURABLE JOHANNES TOMANA**
>
> Reference is made to the above matter.
>
> Your application was placed before Chief Justice who commented as follows;
>
> "Your papers are not in order."

On the same date, the first respondent filed its Notice of Opposition.

On 2 March 2016, the applicant then addressed a letter to the Registrar advising that he would seek the recusal of all presently sitting judges of the High Court of Zimbabwe which includes myself from the matter and that the matter should be heard by a retired Judge, or a Judge from outside the jurisdiction. It is important at this stage to set out the terms of that letter in *extensor*. It reads as follows:

"**RE: JOHANNES TOMANA v JUDICIAL SERVICES COMMISSION AND ANOTHER Case Number HC 1913/16**

Kindly place this minute before her Ladyship Mrs Justice MAKONI.

1. "We advise that first respondent served its opposing papers on the 1st of March 2016 contrary to the directive you had issued. That presented problems for us given that counsel had been on standby to settle the Answering affidavit in the evening of the 29the February 2016. When the papers were served upon us in the morning of the 1st of March 2016, we managed to do so after hours on the 1st of March 2016.

2. The opposing papers have now been considered. Regrettably a clear breach of applicant's right to a fair hearing as set out under section 69 of the Constitution of Zimbabwe had been noted. The breach arises in this manner.

3. To the opposing affidavit is attached a letter of the 25th February 2016 authored by the Registrar of the Constitutional Court. It is addressed to those who represent Mr Rooney Kanyama. The letter reads in material particular
"Your papers are not in order."

4. We have become aware that on the day Mr Kanyama filed his application before the constitutional Court, Constitutional Court Registry officials frantically tried to have him bring back the application before effecting service. It was advised that the Registry officials had been in error in accepting the application. As far as we understand the law, every citizen has the right to approach the Constitutional Court and decisions on applications are made by the full court.

5. This gives our client great cause for concern. You will notice that the pendency of the application filed by Mr Kanyama is an integral component of the application before you. We however, now have the following situation:

    a. A directive bearing on that Constitutional Court application has been issued which is calculated to and does undermine our client's application.

    b. We wonder how first respondent came by this directive and would demand an explanation on that aspect of the matter.

    c. It has become clear that contrary to all acceptable standards, the application by Mr Kanyama was placed before a judge of the Constitutional Court when it was less than a day old. An ambiguous remark has been given without jurisdiction.

    d. You will notice that the actions of the very same officials involved in the generation of this objectionable letter are also at the core of the application before you.

    e. It does not help matters that for all intents and purposes the very same officials are the superiors of all Judges of the High Court which regrettably Judge, also includes yourself.

f. The developments put you on a direct collision course with your superiors. Alternatively, it ties your hands at the instance of your superiors who are party to the matter before you.

g. Whilst your integrity is not doubted and must be publicly vouched for, it would be foolhardy for anyone to ignore these developments. Matters would have been different if the officials involved had allowed this matter to be heard without taking this kind of step.

6. It has consequently become imperative that this matter be dealt with by a Judge who is not presently sitting in the High Court of Zimbabwe. The Constitution of Zimbabwe allows for the appointment of an Acting Judge. Precedent also shows that in related matters, Judges have been appointed from outside the jurisdiction. Because of the nature of the issues transversed herein, we have taken the trouble to copy the honourable JUDGE PRESIDENT.

7. Regrettably it has become imperative that we argue for the adoption of this course. We see no point in ignoring these developments. We take the very strong view that arguing before you in light of this background would be an abdication of our duty both to the court and to our client. As you will appreciate, this has been a very difficult decision particularly for counsel who is required to advance these contentions. Our request puts both you and counsel into an unenviable situation but regrettably we have been left with no option.

8. We consequently ask whether it may please you Judge to hear the parties on this aspect of the matter earlier than the set down time. We will procure the attendance of the respondents for that purpose.

9. On a related note, we also wish to advise that our client's counsel of choice is involved in the Diamonds saga which unfortunately was set prior to the present matter. An indulgence would have been sought anyway on that basis.

We thank you for taking time to consider this minute."

On the same day the first respondent filed a supplementary affidavit deposed to by the Acting Chief Registrar in which he was responding to the concerns raised by the applicant in the above letter. In it, he explained the practice in the Constitutional Court where an application appears to be patently defective. Such an application is placed before the Chief Justice for directions. He explained that the practice is based on Practice Direction No. 2 of 2013 and that it has been employed in various other cases. He cited two examples of such cases. He further explained that this is so because there are currently no rules of court in the Constitutional Court and the Registrar is enjoined to consult the Chief Justice for directions. In *Kanyama*'s case, he had not stated, in the application, in terms of which section of the Constitution he was

approaching the Constitutional Court. He put in issue the fact that the Registrar sought to have the application returned after it had been issued.

The matter was set down for hearing on 2 March 2016. At the hearing the applicant expressed his intention to make an oral application for my recusal. Mr *Chinake* argued that such an application should be in writing whereby the applicant deposes to an affidavit giving a basis for the recusal. The applicant indicated that he would file the application or some other court process.

On 7 March 2016, the applicant filed a Chamber Application for referral to the Constitutional Court in terms of s 175 (4) of the Constitution of Zimbabwe. In it he seeks to enforce his rights to fundamental justice as set out under s 69 (1) of the Constitution of Zimbabwe. He seeks an Order in the following terms:

1) The application for referral to the Constitutional Court be and is hereby granted.
2) The following question is referred to the Constitutional Court for its determination.
   Whether applicant can, consistent with the standard set out under s 69 1 of the Constitution of Zimbabwe, receive a fair hearing if the application filed under case number HC 1913/16 is dealt with by a presently sitting Judge of the High Court of Zimbabwe
3) Cost be in the cause.

At the resumption of the hearing of the matter on 8 March 2016, the first respondent indicated that it needed 10 days to respond to the application. The request was not opposed. It was therefore granted. I then gave directions regarding the time frames within which any further papers were to be filed.

The first respondent was to file its Notice of Opposition by 10 March 2016. On 16 March 2016 the first respondent, instead, filed a notice headed "1st Respondent's Notice Of Intention To Make An Application In Terms Of Section 175 (4) Of The Constitution Of Zimbabwe 2013 (The Notice) The preamble to the Notice reads as follows:

> "Take Notice that the 1st respondent on the resumption of the hearing under case number HC 1913/16 intends to make the following application in terms of Section 175 (4) of the Constitution of Zimbabwe 2013."

The Notice then goes on to relate to the thirteen constitutional points that the first respondent contends arose from the proceedings. The thirteen points are listed hereunder.

1. Constitutional Issue No. 1:

   Whether the exercise by the first respondent of the legal right granted to it in terms of s 187 (3) as read with s 259 (7) of the Zimbabwean Constitution, 2013 in the circumstances of this case, violates applicant's right under s 160 (1) of the Constitution of Zimbabwe, 2013?

2. Constitutional Issue No. 2:

   Whether constitutionally, the office of the Prosecutor General is at par with the Chief Justice?

3. Constitutional Issue No. 3:

   Whether the provisions of s 259 (7) of the Constitution of Zimbabwe, 2013 relating to the removal of a judge from office to apply to the removal of a Prosecutor General from office?

4. Constitutional Issue No. 4:

   4.1 Whether under the Constitution of Zimbabwe, 2013, an inferior Court can set aside a determination made by the Constitutional Court.

   4.2 In the alternative whether the decision of the Constitutional Court is binding on all Courts in Zimbabwe?

5. Constitutional Issue No. 5:

   Whether the Constitutional Court of Zimbabwe has Constitutional authority to review its own decisions either *mero motu* or at the instance of any applicant before the Court.

6. Constitutional Issue No. 6:

   Whether any proceedings or process instituted by the first respondent pursuant to s 259 (7) of the Constitution of Zimbabwe, 2013 can be stayed pending the

determination of any separate Criminal or other administrative proceedings against the General?

7. Constitutional Issue No. 7
   Whether s 259 of the Constitution of Zimbabwe, 2013 violates s 260 of the Constitution of Zimbabwe.

8. Constitutional Issue No. 8:
   Whether the Constitutional Court of Zimbabwe is properly constituted in circumstances where the Chief Justice and the Deputy Chief Justice do not sit concurrently in hearing any matter?

9. Constitutional Issue No. 9:
   Whether any Order issued by the Constitutional Court in circumstances where the Chief Justice and the Deputy Chief Justice did not concurrently hear the matter together is a nullity.

10. Constitutional Issue No. 10:
    Whether the provisions of s 259 (7) as read with s 187 of the Constitution of Zimbabwe, 2013 are subservient to any other provisions of the Constitution?

11. Constitutional Issue No. 11:
    Whether the Constitution of Zimbabwe 2013 allows the *ad hoc* appointment of a "foreign Judge" to determine any process instituted in terms of s 259 (7) as read with s 187 of the Constitution of Zimbabwe?

12. Constitutional Issue No. 12:
    Whether the fact that all Judges of the Constitutional Court and all other inferior Courts in Zimbabwe are subordinate, constitutionally, to the Chief Justice of the Republic of Zimbabwe, raises a presumption of bias and prejudice on the facts or at

law sufficient to require the wholesale recusal of all Zimbabwean Judicial Officers appointed under the Constitution of Zimbabwe from determining the urgent application filed by the applicant *in casu* and further whether the hearing of such matter by any Judicial Officer subordinate to the Chief Justice of Zimbabwe violates the applicant's constitutional rights.

13. Constitutional Issue No. 13:

Whether the Constitutional Court established in terms of the Constitution of Zimbabwe, 2013 has the inherent jurisdiction to enforce compliance of Court Orders within Zimbabwe and whether such rights includes the right to commit any offender to a term of imprisonment or order the payment of a fine?

In the Notice, at p 5, are first respondent's submissions in detail. In them, the first respondent contends that the constitutional issues arose *ex facie* the record and that there are neither frivolous nor vexatious. It then sought the referral of the thirteen constitutional matters for determination by the Constitutional Court. In the penultimate paragraph of that Notice the applicant prays for an Order referring the matters referred to in Section (b) of the Notice to the Constitutional Court for determination.

PROPRIETY OF THE NOTICE FILED BY THE FIRST RESPONDENT

At the hearing on 5 April 2016 Mr *Mpofu* moved that an Order be granted in terms of the Order attached to the applicant's application on the basis that the application had not been opposed. He further submitted that, the first respondent, instead of fling a Notice of Opposition had filed the Notice above. That Notice was not a pleading and that the first respondent should file a chamber application. He said that the applicant will not insist on 10 days that the first respondent had once insisted on previously.

The first respondent's position regarding the filing of the Notice was twofold.

1. It did not oppose the referral of the matter to the Constitutional Court in terms of the request made by the applicant but denies that the correct procedure was followed. Mr *Chinake* submitted that it was not necessary in terms of Section 175 (4) to make either a

court or a chamber application. In other words it was not necessary to file a formal court application. The section says that a party can request that a constitutional matter be referred to the Constitutional Court. It does not say that a party shall file a court application. The simple requirements in terms of Section 175 (4) are that

(i) The constitutional issue must arise in that matter.

(ii) The person must make a request for a referral.

(iii) If the court finds that the request is not frivolous and vexatious it is bound to refer the matter to the Constitutional Court .

He further submitted that the request can be made orally or in writing. It is within the discretion of the litigant to choose. Out of an abundance of caution, the first respondent had given notice of its intention to make such a request to all the parties well before the date of the hearing.

Mr *Chinake* then concluded by submitting that the applicant's application to have the one issue referred to the Constitutional Court is not opposed. He further submitted that the first respondent was making its own application for the thirteen points that arose in the matter to be referred to the Constitutional Court. He then moved that the thirteen points be referred to the Constitutional court in terms of Section 175 (4).

Mr *Mpofu* objected to the Notice on the basis of two substantive points. On the first one, Mr *Mpofu* submitted that these are application proceedings. The rules under which the notice is filed is not set out. If an application is filed, as *in casu*, the procedure for the respondent to follow is set out under rule 229 (A) of the High Court Rules 1971. This is what the first respondent should have done.

Section 175 (4) provides for a request and the request should be made in terms of the law. The Constitutional Court has pronounced itself on the law on how a request should be made and the form it must take. He referred to the case of *Mwonzora and 31 others* v *The State* CCZ 9/15 in particular para 15 where it was stated that it was insufficient to make a statement from the bar as the applicant's legal practitioner in that matter had done. It was further stated that the applicant in that matter should have been called to testify under oath. He referred, further, to para 16 where it was stated that the absence of oral evidence can be fatal to an application of this nature and that the rationale is that the court hearing the application makes findings of fact and

then refers the matter to the Constitutional Court. Mr *Mpofu* then went on to give examples of the disputes of fact that might arise in this matter. He related to the first Constitutional point number 1 of the first respondent which reads as follows:

> "Whether the exercise by the 1st respondent of the legal right granted to it in terms of Section 187 (3) as read with Section 259 (7) of the Zimbabwean Constitution 2016 in the circumstances of this case violates applicant's right under Section 169 (1) of the Constitution of Zimbabwe 2013."

Mr *Mpofu* submitted that it makes reference to "the circumstances of this case." The applicant's position is that the first respondent had actually not exercised any right in the circumstances of this case. It is not the first respondent's process. The facts on which he makes the argument cannot be dealt with by the Constitutional Court. The Constitutional Court may be presented with a dispute of fact which it cannot deal with. That is if the first respondent does not put its factual position regarding that point.

He also related to constitutional point number 11 which talks about a foreign Judge. He submitted that it is not clear where the first respondent gets the idea of a foreign Judge from. The applicant's evidence was that either a retired Judge or a Zimbabwean Judge who is serving elsewhere has to come and deal with the matter. Evidence on the point has to be lead either on affidavit or in whatever manner.

He also referred to constitutional point number 12 and that it raises disputes of facts in that the applicant's point is that the objectivity or independence of the Judges of this court is not in issue but what is in issue is the circumstances, considered from the particular facts of this matter, as to what findings if at all, a Judge of this court is expected to or can make in the circumstances of this matter. This is a factual enquiry.

He further submitted that the issue of evidence can only be dispensed with in circumstances where the facts are common cause. Related to the above point, Mr *Mpofu* asked how the applicant was expected to respond to the Notice filed by the applicant and whether an respondent can be barred in terms of that Notice.

The second substantive point raised by Mr *Mpofu* was that the questions asked by the first respondent are not constitutional matters. He submitted that a constitutional matter is a matter as to what the Constitution says with regards to an alleged contravention of the Declaration of Rights. In other words s 175 only permits a party who alleges a violation of a

right set out in the Declaration of Rights to make a request of its referral to the Constitutional Court. He relied, in support of his contention, on the case of the *Prosecutor General of Zimbabwe* v *Telecel Zimbabwe (Pvt) Limited*, CCZ 10 /15 (Telecel matter). He submitted that the request by the first respondent is not properly before the court and moved that it be dismissed.

The matter was postponed to allow the second respondent's counsel, who had not been served with the Notice to take instructions on the matter from the second respondent. At the resumption of the hearing Mrs *Chimbaru*, for the second respondent, indicated that the second respondent was not opposed to the requests by both the applicant and the first respondent for the constitutional matters they raised to be referred to the Constitutional Court.

Mr *Chinake*, in rebuttal to the submissions made in the objections to the filing of the Notice, related to two issues. The first point was that s 175 (4) is clear and unambiguous. It expressly says that a party may make a request. It does not say a party may apply. He asked whether if he had made an oral application at the hearing requesting the constitutional matters to be referred to the Constitutional Court, that request would not be a request as contemplated in terms of s 175 (4). He submitted that the *Mwonzora* and the *Telecel* cases referred to by the applicant related to the question of notice to other parties if a party intends to take a constitutional point. In *casu* notice was given seven (7) days prior to the set down of the matter. He submitted that he could still make a *via voce* application from the bar.

The second point was that the current Constitution, in terms of s of 332, defined what a constitutional matter is. The submission by the applicant that only matters where there is an alleged breach of a fundamental right can be referred to the Constitutional Court cannot be sustained. He submitted that the applicant has put in issue various points relating to the interpretation of the Constitution and that the first respondent can refer those matters to the Constitutional Court. He gave the Mbuya Chinake scenario where she would have been arrested and detained for eight (8) days by the police and then brought before a Magistrate. Just before she gets into court she gets to know that she was supposed to have been detained by the Police for only 48 hours. He asked whether the Magistrate would ask Mbuya Chinake to stand down and file an application. His view was that he cannot find support for that proposition anywhere in the Constitution.

He also made the point that the cases referred to by Mr *Mpofu* were distinguishable from the present matter in that:

(1) They are criminal matters

(2) They deal with the abrogation of the Constitutional rights.

(3) All were in the Magistrates court,

(4) The Constitutional Court focused on two issues.

(i) What a Judicial Officer faced with an application should do.

(ii) What evidence is to be placed before the court when such applications are made.

In Mbuya Chinake' scenario he asked whether her giving evidence would not have been sufficient to meet the requirements for a request. And that if it was a represented accused Counsel could lead evidence from the accused person.

He further submitted that the applicant seems to ignore the record which already exists.

He then took the court through the founding affidavits of the applicant in both the main matter and the chamber application for referral. He pointed out instances where the applicant makes constitutional points in those affidavits for example on p 5 para 5 where the applicant seeks a declarator on the invalidity of the process which has been commenced by the first respondent. He submitted that this is what is related to by the first respondent in its constitutional point number 1 and number 10.

He concluded by saying that he is making a request, on notice, for the constitutional points to be referred to the Constitutional Court, which points arise from the papers already before the court.

On the interpretation of s 332 of the Constitution Mr *Mpofu* submitted that whilst a litigant can raise whatever question on the interpretation, protection or any enforcement of the Constitution, the proper raising of the question, in a matter which gives Constitutional Court jurisdiction, is where the problem arises from the protection, the interpretation and the enforcement is infused with a question of a violation of right set out under Chapter (4) of the Constitution.

In determining this matter I will start with the second point raised by Mr *Mpofu* which raises the issue: What is a constitutional matter.

Section 332 of the Constitution, which is under the definition section, provides;

> "Constitutional matter means a matter in which there is an issue involving the interpretation, protection or enforcement of this Constitution."

In my view the section is clear and unambiguous and should be given its literal and grammatical meaning. There is no need to employ any tools of interpretation as giving any other meaning would lead to an absurdity, or some repugnancy inconsistent with the rest of the instrument. See *Chahava & Anor* v *Mapfumo NO & Anor* CCZ 6/15 p 6. Section 332 can be broken down into three categories, i.e .The constitutional matter in which there is an:

(i) Issue involving interpretation.

(ii) Issue involving protection.

(iii) Issue involving enforcement.

The interpretation adopted by Mr *Mpofu*, in my view, relates to only one aspect of that section, which is enforcement, and ignores the other two categories which are interpretation and protection. Mr *Mpofu* might have misunderstood the import of the Telecel judgment (*supra*). In that case and at p 7 para 3 of the cyclo styled judgment Gwaunza JA started by quoting the provisions of s 85 (i) of the Constitution which is titled "Enforcement of Fundamental Human Rights and Freedoms." She then went on to say:

> "What is clearly evident from this provisions is that the relief sought and to be granted by this court <u>in terms of this section</u> must relate to fundamental rights and freedoms enshrined in the relevant chapter and nothing else, such a relief may include a declaration of the rights, said to have been or about to be violated. The applicant did not allege that the right he alleges was violated by the Supreme Court once was an enshrined fundamental right." (my own underlining)

That case is distinguishable from the present matter in that, on that particular part of the judgment on p 7 para 3, Gwaunza JA was dealing with an issue of how the applicant, in that matter, could have brought an application directly to the Constitutional Court, which would have been in terms of s 85 (1). She was not dealing with an application in terms of s 175 (4) of the Constitution.

If one were to have regard to the first respondent's constitutional points number 2 and number 3, could it be said that they cannot be raised as constitutional matters as they do not allege an abrogation of an enshrined fundamental right.

Constitutional point number 2 reads as follows:

"Whether constitutionally the office of the Prosecutor General is at par with the office of the Chief Justice.

Constitutional point number 3 reads as follows:

'Whether the provisions of s 259 (7) of the Constitution of Zimbabwe 2013 relating to the removal of a Judge from office apply to the removal of a Prosecutor General from the office."

My view is that these points could be raised as constitutional matters as they require an interpretation of the Constitution and that is provided for in terms of s 175 (4). I would agree with the definition of a constitutional matter as advanced by the first respondent.

The next issue for determination is: How is the request in terms of s 175 (4) made. What form should it take?

Section 175 (4) provides:

"(4) If a constitutional matter arises in any proceedings before a court, the person presiding over that court may and, if requested by any party to the proceedings, must refer the matter to the Constitutional Court unless he or she considers the request is merely frivolous or vexatious."

This issue was related to by the Constitutional Court in the *Mwonzora* case (*supra*) That Judgment is paragraphed and my view is that that was deliberate so that each point could clearly stand out. It was meant to provide a guideline to a court faced with an application such as the present one. What comes out of that judgment is that:

(i) It is insufficient to make a statement from the bar as the applicant's legal practitioner in that matter did, see paragraph 15 of that judgment.

(ii) The absence of oral evidence can be fatal to an application of this nature as it completely disables findings of fact to be made on the complaints raised, see para 16 of that judgment.

The point is, in my view, the request, whatever form it takes, either a written or an oral application, must not be made from the bar by an applicant's legal practitioner. Secondly it must place evidence before the court laying a basis for the referral of the constitutional matter to the Constitutional Court. In other words, findings of fact which the court takes into account in deciding whether or not to refer the issue raised to the Constitutional Court can only be made from the evidence placed before the court.

The rationale for that judgment is laid down in para 16 of that case where it is stated that it is the basis of those findings that the Constitutional Court is called upon to deal with the allegations raised and where necessary afford the appropriate relief.

The first respondent, in making its request for referral, did not provide a factual basis for the constitutional matters that it raised. It is only in rebuttal to the objections made by Mr *Mpofu* that the first respondent's factual basis was put before the court and from the bar. No evidence was led either in the form of an affidavit, or *viva voce*. This presents challenges to the court in view of the disputes of facts pointed out by Mr *Mpofu* in his submissions which I have already made reference to. The first respondent's constitutional point number 1 which talks about "the circumstances of this case." What circumstances are being referred to? Are the parties agreed on the circumstances? If not how is the Constitutional Court supposed to deal with that factual position? Mr *Mpofu* also referred to constitutional point number 11 where reference to the appointment of a foreign Judge is mentioned. The applicant's position is he does not know where that issue of a foreign Judge comes from. He did not seek the appointment of a foreign judge. The applicant's evidence makes reference to either a retired Judge or a Zimbabwean Judge serving elsewhere. This dispute needs to be resolved. In constitutional point number 12 the issue is what findings, if at all, a Judge of this court is expected to or can make in the circumstances of this matter. This again is a factual enquiry where findings of fact need to be made.

How can the court make findings of fact on the above aspects in the absence of evidence from the first respondent? Would the parties not get to the Constitutional Court and start setting out different factual conspectus from the one that the other part has or from the ones that I would have contemplated in dealing with the matter?

A related issue is how does the other part respond to such a notice.

My view is that for a litigant who would have had an opportunity to make a written application he or she should do so. In this case the first respondent filed a Notice of intention to make an application seven (7) days before the hearing of the matter. It should have proceeded to file a formal application as had been indicated in its Notice. Or if the first respondent's choice was to make an oral application such, an application should have been made and evidence lead in court relating to the factual issues. In the example of Mbuya Chinake who would have been made aware of her rights just before going into court, an oral application would be available to

her and is proper. She would have to then lead oral evidence of her ordeal and that would entail moving over from the dock to the witness stand. That evidence would be tested by the State through cross examination and there after the Magistrate would then make findings of fact.

While s 175 (4) provides for a request for referral to be made, one must bear in mind that this provision is in a Constitution. The Constitution provides a broad framework which creates fundamental rights for one to seek enforcement, protection and interpretation of those rights. One would have to go through certain processes provided for by the law in either an Act of Parliament and in the rules of the court. In terms of the rules of the High Court, as they stand now, a party with a request such as the present one can either make an application or in very rare circumstances, approach the court by way of action. The application can be oral or written. The first respondent did not do either.

In the result, it is my view that the first respondent's request is not properly before me and is hereby dismissed.

I will proceed to consider the applicant's chamber application for referral.

BACKGROUND FACTS

I will start by setting out the factual basis for making that application, which has not been opposed, except on one point relating to whether the applicant seeks the appointment of a foreign judge or not. I say it has not been opposed on the basis that neither of the respondents presented contrary factual positions to those presented by the applicant.

At the initial hearing of the matter, the applicant, through his counsel, intimated that an application for the recusal of the presiding judge would be made. The applicant did not pursue the application. He explained that his counsel, for personal reasons, did not wish to make submissions that might have had to be made in that application. The applicant respected his counsel's, position since he wanted his representation. He was then advised by his counsel that the application, as presently formulated, catered for the "delicate interests of everyone involved" and accords him the relief that he seeks.

The factual conspectus upon which the applicants seeks relief is set out in his letter dated 2 March 2016 which I quoted in *extenso* at the beginning of the judgment, which letter he adopted as if specifically pleaded in this application.

The applicant then made the following clarifications and additional points in para 10 of the founding affidavit

> "a. Upon further reflection, it has occurred to counsel that even if her Ladyship were to recuse herself from hearing the matter that would leave the problem unresolved. Ordinarily the matter must then go to another Judge who would then be asked to recuse him/herself as well. This course ensures however, that the nub of the problem is addressed.
> b. Once the Constitutional Court makes the determination I crave it, the administrative authorities would then decide how they want to proceed. They may appoint a retired judge. They may appoint Zimbabwean born Judges sitting in other jurisdictions. The bottom line is that it is an order of the Constitutional Court which would ensure that practical effect is given to the relief that I seek.
>
> c. I must also point out, that this application has nothing to do with my lack of confidence in the Judiciary in Zimbabwe. It is however, a recognition of the fact that it is a misnomer for a Judge of the High Court to make findings criticizing or upholding what had been done by the head of the Judiciary.
>
> d. I trust to reiterate that Judges as a matter of practice decline to sit when they are required to make findings in favour of or against their peers. It is unheard of that a Judge could make findings in favour of or against their superior. That puts in issue the integrity of the whole process."

He then approached this court seeking a referral. He averred that it was a serious request and by law the court is enjoined to uphold it.

I might as well at this stage settle the issue of whether the applicant seeks the appointment of a foreign judge or not. The applicant relates to this issue in para 6 of the recusal letter and in para 10 (b) of the Founding Affidavit to the Chamber Application.

Paragraph 6 talks about the appointment of an Acting Judge. An acting Judge is appointed in terms of s 181 of the Constitution. Such an appointment is limited to a former judge and for a limited period, as provided for in s 181 (3). My view is that if para 6 of the recusal letter was not clear as to what the applicant meant by "….. Judges having been appointed from the outside jurisdiction," the position is clarified in para 10 b of the founding affidavit of the Chamber Application. He suggests the appointment of a retired judge or Zimbabwean born judges sitting in other jurisdictions".

Whether The Constitutional Questions Arise From The Urgent Chamber Application

In their consent to have the question posed by the applicant to be referred to the Constitutional Court, it appears the parties, overlooked the issue of whether the question arose from the urgent chamber application.

I have set out, in detail, what relief the applicant seeks in the urgent chamber application and the basis thereof above.

The issue is whether the question that the applicant seeks referral to the Constitutional Court arises from the urgent chamber application.

THE LAW

The issue was dealt with in *Tsvangirai* v *Mugabe & Anor* 2006 (1) ZLR 148 (S) where Malaba JA (as he then was) at p 159 H and 10 A-B in dealing with, whether the question for referral can only arise when the court is sitting, he made the following remarks:

> "It is clear from the provisions of s 24 (2) that, whilst the request for the reference of the question to the Supreme Court for determination must be made to the judge whilst he or she is actually sitting in court, the question itself does not have to arise when the court is sitting. It may arise on the pleadings. See *Granger* v *Minister of State* 1984 (1) ZLR 194at 199 H, or from the circumstances of the case, as happened in *Mandirhwe*'s case *supra*, and *Zinyemba* v *Minister of Public Service & Anor* 1989 (3) ZLR 351 (S), provided that the existence of the remedy sought in the proceedings depends on the determination of the question as to the contravention of the Declaration of Rights by the Supreme Court. Raising a question, the determination of which has no bearing on the relief sought in the proceedings, amounts to an abuse of the process of the Supreme Court" (my own underlining)

In the *Zinyemba* case *(supra)* Gubbay JA (as he then was) quoted with approval Baron JA in *Mandirwhe* v *Minister of State* (1981 (1) SA 759 (ZA) at 764 H where he made the following remarks:

> "Since therefore the proceedings must finally be concluded in the court in which they were commenced, it follows that a reference under ss (2) may be made *mero motu* by the person presiding only if the determination of the question is in his opinion necessary to enable him to reach a decision on the redress sought; unless the answer to the question is sought for this purpose the court a quo is simply seeking an academic opinion, which is not a proper exercise of the discretion given by the sub-section." (my own underlining)

In other words the party would be saying in the matter pending before the court, a constitutional issue worthy the consideration of the Constitutional Court, and which affects the rights of a litigant, has arisen and its determination will have an impact on the issues which the court must decide.

My view is that the question being raised by the applicant is not necessary to enable me to reach a decision on the relief that he seeks in the urgent chamber application. The issue that I am required to determine in the urgent chamber application is whether the applicant would have established the requirements of a stay of proceedings. It is thus clear, from the above analysis that the question the applicant seeks to refer, is not necessary for the determination of the matter before me. For the court to refer such a question to the Constitutional Court would be tantamount to the scenario described by Baron JA in *Mandirwe* (*supra*) where the court will simply be seeking an academic opinion from the Constitutional Court. This would not be a proper exercise and use of the discretion conferred upon this court in such matters. I am fortified in my views by the fact that the applicant is quite happy for me to determine whether the question that he raises can be referred to the Constitutional Court.

If he thought otherwise he would have sought my recusal in the referral matter.

Assuming I am wrong on the point I will then go on to consider whether the question is frivolous or vexations.

Whether The Application Is Frivolous Or Vexatious

The question that the applicant seeks to be referred to the Constitutional Court is as follows;

> "Whether the applicant can, consistent with standard set out under s 69 (1) of the Constitution of Zimbabwe receive a fair hearing if the application filed under case number HC 1913/16 is dealt with by a presently sitting Judge of the High Court of Zimbabwe."

What the applicant seeks in the urgent matter is the stay of the process that was initiated by the first respondent and a declaratur that the process is a nullity.

Mr *Mpofu*, in motivating the applicant's request, started by making the point that the request itself is not opposed by both the respondents. The attitude of the respondents is fundamental. There is an issue that they assert must be determined by the Constitutional Court. For the court to find that the request is frivolous it would have to override the views of the parties to the dispute. He concluded by saying that it should be an exceptional step which the court ought not to take.

The second point he made was that the process in issue, is a process whose cause of action arose from the first respondent who took the issue from a judgment issued by the Constitutional Court, of which they do not have reasons. The judgment is unprecedented in that a litigant had approached the Constitutional Court seeking a definition of his rights. The court then says "there is some order that it granted which you did not obey it, notwithstanding that there were contempt proceedings pending in the High Court and that you have not come to deal with the issue." The court commits that person for contempt.

He submitted that the first respondent has personnel who sit in both the Constitutional Court and the High Court. If the applicant is not happy with what he termed "Judge induced process, or a judge instigated process" who does he turn to. This is fundamental to s 69 (1) regarding the right to a fair hearing before an independent tribunal. He contended that there is a way for the Constitutional Court to find that, though not deliberately, a situation has been created which makes reasonable people question whether justice can be served.

He submitted that when the applicant filed the urgent application he was prepared "to brave the cold weather". Circumstances then occurred which the applicant could not ignore. The application by *Kanyama*, on which the urgent application, *inter alia*, placed reliance on, was negated through correspondence. The correspondence was authored by the Head of the first respondent. It was upon sight of this correspondence that the applicant filed the request. Such correspondence was quickly made available to the first respondent who then file a notice of opposition arguing that there was no application in the Constitutional Court upon which the applicant places reliance. He stressed that he did not impute deliberateness, malice or ill will but was making a point on what pertains on the ground.

His next point was that though independent, Judges of the High Court are subordinates to the Head of the Judiciary. When interviews for elevation come up, judges of the High Court appear before the Head of the Judiciary. If a judge of this court were to say that the Head of Judiciary erred it would appear as if, as Mr *Mpofu* put it "the gloves are off. If he or she were to hold that he was correct, then it will look like there is deference. When these circumstances are considered then the issue of recusal arises. The complication that the applicant faces is that if I were to recuse myself, the matter will be referred back to the Judge President who will appoint

another judge. That the judge will be met with the same objections. He submitted tha, that's why he adopted the current position.

On the test for recusal Mr *Mpofu* relied on *Mcmillan & Ors* v *Provincial Magistrate Harare & Ors* 2004 (1) ZLR 17 H, *Goy and Masimba* v *R & Jackison WO* 1963 R & N 318 (FS).

THE LAW

The wording of s 175 (4) of the Constitution is such that it leaves a judicial officer with no option but to act in accordance with the provision unless he or she forms an opinion that the question was merely frivolous or vexatious.

When is a question considered to be frivolous and vexatious? This was clearly set out in *Williams & Anor* v *Msipha* 2010 (2) ZLR 552 (s) at 568 C – G. Where Malaba DCJ stated:

> "In *S* v *Cooper & Ors* 1977 (3) SA 475 (T) at 476 D, BOSHOFF J said that the word "frivolous" in its ordinary an natural meaning connotes an action or legal proceeding characterised by lack of seriousness as in the case of one which is manifestly insufficient. The raising of the question for referral to the Supreme Court under s 24 (2) of the Constitution would have to be found on the facts to have been obviously lacking in seriousness, unsustainable, manifestly groundless or utterly hopeless and without foundation in the facts on which it was purportedly based.

In *Martin* v *A-G* 1993 (1) ZLR 153 (S) it was held that the ordinary and natural meaning of the words "frivolous or vexatious" in the context of s 24 (2) of the Constitution had to be bone in mind and applied to the facts by the person presiding in the lower court to form the requisite opinion. GUBBAY CJ at 157 said:

> 'In the context of s 24 (2) the word 'frivolous' connotes, in its ordinary and natural meaning, the raising of a question marked by lack of seriousness; one inconsistent with logic and good sense, and clearly so groundless and devoid of merit that a prudent person could not possibly expect to obtain relief from it. The word 'vexatious', in contra-distinction, is used in the sense of the question being put forward for the purpose of causing annoyance to the opposing party in the full appreciation that it cannot succeed; it is not raised *bona fide* and a referral would permit the opponent to be vexed under a form of legal process that was baseless. See *Young* v *Haloway & Anor* [1895] p 87 at 90-91; *Dyson* v *A-G* [1911] 1 KB 410 (CA) at 418; *Norman* v *Matthews* (1916) 85 LJ KB 875 at 859; S v *Cooper & Ors* 1977 (3) 475 (T) at 476 D-G; *Fisheries Development Corporation of SA Ltd* v *Jogensen & Anor* 1979 (3) SA 1331 (w) AT 1339 E-F."

Further down in the judgment at 569 A – B he provided guidance regarding the standard, by which the facts on which the raising of the question is based, must be measured. He states

> "The standard by which the facts on which the raising of a question is based must be measured is put so high to enable the person presiding in the lower court to stop legal proceedings that should not have been launched at all. In other words, refusal of a referral of a question as to the contravention of a fundamental human right or freedom to the Supreme jurisdiction to determine the matter, is an extraordinary remedy intended to be used in clear and exceptional cases".

From the above I can summarise, regarding frivolity, into the following points:

(i) lack of seriousness

(ii) manifestly groundless

(iii) utterly hopeless and without foundation in the facts on which it is purportedly based.

(iv) inconsistent with logic and good sense

(v) groundless and devoid of merit that a prudent person could not possibly expect to obtain relief from it.

In regard to vexatiousness:

(i) the question being put forward for the purpose of causing annoyance for the opposing party in the full appreciation that it cannot succeed.

(ii) It is not raised *bona fide*

(iii) A referral would be to permit the opponent to be vexed under a form of legal process that was baseless.

The first point made by Mr *Mpofu* in motivating the request was that the referral was not being opposed by both respondents but on its own this is not decisive. The section places a duty on the court to form an opinion that the raising of the question is not frivolous or vexatious. This aspect is dealt with by Malaba DCJ in the *Williams* case (supra) at 567 F when he said:

> "The formation of the opinion is made the pre–condition for the refusal of the referral. The framers of the Constitution confided the power to form the opinion in the person presiding over the proceedings in which the question is raised. It must be his or her judgment and not that of the Supreme Court."

To that I would add that it should not be the judgment of the parties. The fact that parties agree does not necessarily mean that the request is not frivolous or vexatious. It is for the court to

decide and not for the parties. Their agreement might sway the court to find that the question is not frivolous or vexatious but that is as far as it can go.

Conflicted position of the Chief Justice

It has been contended that the Chief Justice sat in the Constitutional Court which made the order for contempt of court that is in issue. He is the head of the first respondent, which made the decision to initiate the process of his removal from office based on that judgment. He wrote the letter of 12 February 2016 initiating the process. He dealt with the *Kanyama* matter whereby he dismissed the application on which the applicant relied on in his urgent chamber application.

Recusal of High Court Judges

The other point advanced by the applicant in support of his request is the issue of recusal of all sitting judges of the High Court including myself. The basis for the contention is that the judges are subordinates to the Head of the Judiciary who happens to be the Chairman of the first respondent, which the first respondent has initiated the process for his removal from office. It was contended that a judge presiding over his application would have to make findings criticizing or upholding the conduct of the Head of the judiciary. When interviews for elevation come up the judge will appear before the same Head of the judiciary.

I must start by saying that this is an unprecedented omnibus application for the recusal of all currently sitting judges of the High Court because questions of impartiality of the judges have been raised. Initially the applicant's intention was to seek my recusal. On the advice of his counsel, who "for personal reasons," was not prepared to make the submissions which would have to be made in the application, he chose to make the current application for referral. I would want to make the same observation that was made in *President of the Republic of South Africa & Ors* v *South Africa Rugby Football Union and Ors* 1999 (4) SA 147 (CC) at para 10 wherein the court remarked thus, citing with approval *Moch* v *Nedtravel (Pty) Ltd t/a American Express Travel Services* 1996 (3) SA 1 A at 13 H:

> "Where the grounds are reasonable it is counsel's duty to advance the grounds without fear. On the part of the judge whose recusal is sought there should be a full appreciation of the admonition that she or he should "not be unduly sensitive and ought not to regard an application for his [or her] recusal as a personal affront."

I associate myself fully with the above remarks. A legal practitioner should not be constrained to advance sound grounds for recusal. As Judges, we are obliged to discharge our duties impartially and would not hold it against a legal practitioner who would be representing a litigant who would have sound grounds for one's recusal.

The Law on Recusal

I will start by examining the South African position as it pertains there. In particular *President of the Republic of South Africa & Ors* v *South African Republic Rugby Football Union & Ors* 1999 (4) SA 147 (CC). It is on all fours with the present matter.

In that case, which was an appeal from a decision of the High Court, the fourth respondent lodged an application for recusal in which he stated that he had "a reasonable apprehension" that every member of the Constitutional Court would be biased against him and that as a result he might not get a fair trial. The fourth respondent later limited his application to five members of the Constitutional Court. The basis for his application was that the five Constitutional Court judges had political affiliations, as well as personal relationships and social contacts with President Mandela who had appointed them to their positions on the bench.

The test for bias was laid down in para 38 which would be whether there is a reasonable apprehension of bias. The court went on to find that two considerations were to be built into the test itself and these are:

(1) The character of the judicial officer i.e the test for the reasonable apprehension of bias by a litigant would take into account the presumption in favour of a judge's impartiality.

(2) The character of bias – i.e that no person, judges included, is free of personal convictions and philosophies which help shape their outlook on life. These convictions would have to be curtailed by the need for impartiality on the part of the judge.

After reviewing a number of authorities and para 48, the court determined the test for judicial bias as follows:

> "It follows from the foregoing that the correct approach to this application for the recusal of members of this court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the

> adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will into be impartial."

The position in our law is settled that the test for bias is an objective one. See *MacMillan & Ors* v *Provincial Magistrate Harare and Others* 2004 (1) ZRL where the court quoted with approval the following passage is *S* v *Roberts* 1994 (4) SA 915 (SCA).

> 2.9. Apart from that, it is subject to the common law bias test. Quite recently this court in *Mcmillan & Ors* v *Provincial Magistrate Harare & Ors* quoted with approval the following passage from *S* v *Roberts*
>
> > Bias in the sense of judicial bias has been said to mean "a departure from the standard of even handed justice which the law requires from those who occupy judicial office"…… what the law requires is not only that a judicial officer must conduct the trial open- mindedly, impartially and fairly but that such conduct must be "manifest to all those who are concerned in the trial and its outcome, especially the accused……..
> >
> > It is settled law that not only actual bias but also the appearance of bias disqualifies a judicial officer from presiding (or continuing to preside) over judicial proceedings. The disqualification is so complete that continuing to preside after recusal should have occurred renders the further "proceedings" a nullity….."

The same point was made in *Associated Newspapers of Zimbabwe (Pvt) Ltd & Anor* v *Diamond Insurance Co (Pvt) Ltd* 2001 (1) ZLR 226 (H) at 238 E where it has stated.

> "In our jurisdiction, the test for bias was stated in *Leopard Rock Hotel Co (Pvt) Ltd & Anor* v *Wallem Construction* (Pvt) Ltd (*supra*) at 278A as an objective one, i.e. whether "there exist circumstances which may engender a belief in the mind of a reasonable litigant that in the arbitral proceedings he would be at a disadvantage"
>
> It was further stated at 239E:
> "Thus, the test contains a two –fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable."

The last point was restated and explained further by Uchena J (as then was) in *Matapo & Ors* v *Blila & Anor 2010* (1) ZLR 321 H with particular reference to the headnote on p 322 F – H wherein it is written:

> "…….. that an application for recusal must be based on a reasonable litigant's apprehension of bias and the apprehension must itself be reasonable. Mere apprehensiveness on the part of a litigant that a judge will be biased – even a strongly and honestly field anxiety – is not enough. The court must scrutinize the apprehension to determine whether it is to be regarded as reasonable. In adjusting this court superimposes a normative assessment on the litigant's anxieties. It attributes to the litigant's apprehension a legal value and thereby decides whether ti is such that it should be countenanced in law."

See also *JSC* v *Ndlocu & Ors* HB 172/13 and *Mangenje* v *TB TC Investments (Pvt) Ltd & Anor* HH 510/14.

The applicant *in casu* is not relying on the presence of actual bias but rather on the appearance of bias given the circumstances, as he outlined, including the fact that the judges will have to make findings regarding the conduct of the Head of the Judiciary.

The Issue

The question to ask is whether the applicant has established reasonable apprehension of bias and whether the apprehension itself is reasonable.

The applicant's apprehension is that all siting judges of the high Court, who are subordinates to the Head of the Judiciary, will not be able to criticize or uphold the conduct of their head.

The independence of a judge is particularly protected in terms of the Constitution. Section 164 (1) of the Constitution provides:

> "The courts are independent and are subject only to this Constitutions and the law which they must apply impartially, expeditiously act without fear, favour of prejudice"

The Constitution also provides principles guiding the judiciary in the exercise of their judicial authority. Of note is s 165 (2) and (3) which read:

> "(2) Members of the Judiciary, individually and collectively, must respect and honour their judicial office as a public trust and must strive to enhance their independence in order to maintain public confidence in the judicial system.
>
> (3) When making a judicial decision, a member of the judiciary must make it freely and without interference or undue influence."

Over and above that, the reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. See President of South Africa & Others (*supra*).

Further to the above, Judges "are assumed to be people of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of the circumstance." See *United States* v *Morgan* 1941 USSC 123 quoted in. *R* v *S (RD)* 1997 118 CCC quoted with approval in *President of RSA* para 40 *(supra)*.

It must also be pointed out those judges who are nominated for elevations do not appear before the Head of the Judiciary for interviews. They appear before the Judicial Service Commission which consists of a number of panelists. The Head of the Judiciary is just but one of the panelists. He will be carrying out his duties as mandated by the Constitution and one assumes that he will do so impartially. To suggest that a Judge can lose his or her integrity and independence because of the prospect of an interview would be taking it too far.

The absurdity of the applicants' argument clearly comes out when one considers the process of appointment of judges as provided for in terms of s 180 of the Constitution. Section 180 (1) provides that all judges including the Chief Justice, Deputy Chief Justice and the Judge President are appointed by the President in accordance with that section. Cases have been brought before the High Court for and against the President, in his official capacity. Decisions have been made for and against the President. There is no indication that the central role of the president in the appointment of judges has led to any bias in favour of or against him. In the same vein, a judge of the High Court can deal with a matter involving the JSC and indirectly the Chief Justice.

It does not assist the applicant that he is a legal practitioner of some standing. He was, at one point, the adviser to the government before the National Prosecuting Authority was made into an independent entity, which he now heads. He is expected to understand;

(i) that cases are decided in accordance with the law and evidence and not on the basis of some other considerations or external factors

(ii) that judges, in carrying out their functions are independent and not subject to the direction and or control of anyone in the same manner that the applicant's offices independence is constitutionally enshrined and protected.

When asked why he sought referral to the Constitutional Court which is also manned by subordinates of the Chief Justice, Mr *Mpofu* responded that it was a better of the two evils and did not expand on that. He further submitted the Constitutional Court will not be looking at its recusal but of that of the High Court. It appeared he had not cogent reason to proffer.

With regard to the conflicted position of the Chief Justice the applicant is falling into error of conflating the two distinct functions of the Chief Justice as provided for in the Constitution. In one he will be exercising his judicial powers as a Judge and in the other, administrative powers as Head of the Judicial Services Commission. The decision he makes using his administrative authority can be reviewed by any judge in the ordinary way. In any event the issues that the applicant raises in the urgent matter are legal issues.

The applicant has failed to establish reasonable apprehension of bias.

In the result the applicant has failed to establish a factual basis for his request for referral to Constitutional Court. The reasons he advanced are groundless, utterly hopeless and without foundation in the facts on which they are purportedly based. I will therefore make a finding that the request is frivolous.

Since the respondents were not opposed to the order being sought by the applicant, I will not make an order for costs.

In the result I will make the following order.

1) The application is dismissed
2) There will be no order as to costs.

Mambosasa Legal Practitioners, applicant's legal practitioners
Kantor & Immerman, 1st respondent's legal practitioners
National Prosecuting Authority, 2nd respondent's legal practitioners