REPORTABLE (43)

Judgment No. SC. 25/05
Const. Application No. 131/04

BENJAMIN PARADZA v

(1) DENNIS KAMONI CHIRWA N.O.
(2) JOHN MROSO N.O. (3) ISAAC MTAMBO N.O.
(4) MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS
(5) PRESIDENT OF ZIMBABWE

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, SANDURA JA, ZIYAMBI JA, MALABA JA & GWAUNZA JA
HARARE, FEBRUARY 17 & AUGUST 23, 2005

J J Gauntlett SC, with him *E Matinenga*, for the applicant

No appearance for the first, second and third respondents

F C Maxwell, with her *V Mabiza*, for the fourth and fifth respondents

MALABA JA: This is an application in terms of s 24(1) of the Constitution of Zimbabwe ("the Constitution") for two declaratory orders on the alleged likelihood of violations of certain rights guaranteed to the applicant under the Declaration of Rights contained in the Constitution.

The first order sought is a declaration that the appointment by the fifth respondent ("the President") of the tribunal ("the tribunal"), consisting of the first, second and third respondents as members, to inquire into the question of the removal of the applicant from office as a judge of the High Court of Zimbabwe ("the High Court") was unconstitutional and that compelling him to appear before such a tribunal

to answer charges of misbehaviour was likely to violate his right to protection of the law, guaranteed under s 18(1) of the Constitution.

The second order sought is a declaration that evidence of the telephone conversation the applicant had with Mr Justice Mafios Cheda ("Mr Justice Cheda") on 16 January 2003, which the latter tape-recorded, was obtained in breach of the applicant's right to privacy of telecommunication, guaranteed under s 20(1) of the Constitution, and that admission of such evidence in the proceedings before the tribunal was likely to violate his right to a fair hearing enshrined in s 18(9) of the Constitution.

The applicant is a judge of the High Court. He was appointed to that office by the President on 29 August 2001. On 4 April 2003 the Chief Justice of Zimbabwe ("the Chief Justice"), acting in terms of subs (3) of s 87 of the Constitution, advised the President that the question of removal of the applicant from office ought to be investigated.

Section 87 of the Constitution provides that:

> "(1) A judge of the Supreme Court or the High Court may be removed from office only for inability to discharge the functions of his office, whether arising from infirmity of body or mind or any other cause, or for misbehaviour, and shall not be so removed except in accordance with the provisions of this section.
>
> (2) If the President considers that the question of the removal from office of the Chief Justice ought to be investigated, the President shall appoint a tribunal to inquire into the matter.
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> (3) If, in the case of a judge of the Supreme Court or the High Court other than the Chief Justice, the Chief Justice advises the President that

the question of removal from office of the judge concerned ought to be investigated, the President shall appoint a tribunal to inquire into the matter.

(4) A tribunal appointed under subsection (2) or (3) shall consist of not less than three members selected by the President from the following –

(a) persons who have held office as a judge of the Supreme Court or the High Court;

(b) persons who hold or have held office as a judge of a court having unlimited jurisdiction in civil or criminal matters in a country in which the common law is Roman-Dutch or English, and English is an official language;

(c) legal practitioners of not less than seven years' standing who have been nominated under subsection (5);

one of whom shall be designated by the President as chairman.

(4a) … (not relevant).

(5) It shall be the duty of the association which is constituted under an Act of Parliament and which represents legal practitioners practising in Zimbabwe to nominate a panel containing the names of not less than three duly qualified legal practitioners for the purposes of subsection (4)(c) when so required by the President.

(6) A tribunal appointed under subsection (2) or (3) shall inquire into the matter and report on the facts thereof to the President and recommend to the President whether or not he should refer the question of the removal of the judge from office to the Judicial Service Commission, and the President shall act in accordance with such recommendation.

(7) The provisions of the Commissions of Inquiry Act [*Chapter 10:07*] as in force at the time or any other law substituted for the same shall, *mutatis mutandis*, apply in relation to a tribunal appointed under subsection (2) or (3) as they apply to commissioners appointed under that Act.

(8) … (not relevant).

(9) If the question of the removal of a judge has been referred to the Judicial Service Commission in accordance with subsection (6) and the Commission advises that the judge be removed from office, the President shall, by order under the public seal, remove the judge from office."

The tribunal was to inquire into and report on the allegations that the applicant attempted to defeat or obstruct the course of justice or acted corruptly in a

manner inconsistent with, or prejudicial to, the discharge of his duties as a public officer or abused his office. It appears from the President's affidavit that, after the receipt of the advice from the Chief Justice, he decided to choose the members of the tribunal from persons in category (b) only.

Following that decision by the President, the fourth respondent ("the Minister") wrote letters to the High Commissioners of Zambia, Tanzania and Malawi on 9 December 2003, asking them to approach their respective Ministers of Justice to request the Chief Justices of their respective countries to nominate judges of their courts to be members of the tribunal. The letters ("the letters of request"), which contained the same terms except for the names of the countries, read as follows:

> "Your Excellency,
>
> RE: TRIBUNAL TO INQUIRE INTO THE CONDUCT OF MR JUSTICE B. PARADZA
>
> The above-mentioned judge is facing two counts of attempting to defeat or obstruct the course of justice or, alternatively, incitement to contravening section 4(a) of the Prevention of Corruption Act. He was arrested on 17 February 2003 and was later taken to court where he was formally informed of the charges which the State is preferring against him.
>
> On 4 April 2003 the Chief Justice wrote advising His Excellency the President, in terms of section 87(3) of the Constitution of Zimbabwe, that the question of the removal from office of Mr Justice Paradza ought to be investigated by a tribunal.
>
> It is my desire to have the tribunal appointed, mainly, from Judges who come from outside Zimbabwe. Such an arrangement does, in my view, assist in the area of transparency and fairness.
>
> I should, in view of the foregoing, be grateful if Your Excellency would kindly approach, on my behalf, the Minister of Justice and request him to consult with the Chief Justice … who would nominate a Judge of his Court to be a member of the tribunal."

In accordance with the letters of request, the Chief Justices of Zambia, Tanzania and Malawi forwarded to the Minister the names of the first, second and third respondents, who are judges of the Supreme Courts of their respective countries. The nominees were possessed of the qualifications for selection required by persons in category (b) of s 87(4) of the Constitution.

On 12 February 2004 the President appointed the tribunal, consisting of the three judges, to inquire into the question of the removal of the applicant from office pursuant to s 87(3) of the Constitution. The terms of appointment required the tribunal to inquire into and report on the facts to the President on the allegations that on different dates between 14 and 23 January 2004 the applicant telephoned Mr Justice Cheda and Mr Justice George Mutandwa Chiweshe of the High Court in Bulawayo and Mr Justice Lawrence Ndlovu Kamocha of the High Court in Harare and asked them to show favour by varying or cancelling bail conditions imposed on one Russell Wayne Labuschagne ("Labuschagne"), who was his business partner in a safari venture, so that his (Labuschagne's) passport could be released to enable him to travel abroad on business for their common benefit, knowing very well that Labuschagne was awaiting judgment in a murder case in which he was an accused.

It is common cause that after the initial telephone conversation with the applicant, Mr Justice Cheda approached the police and informed them of the criminal contents of the conversation. The police made arrangements for Mr Justice Cheda to tape-record a subsequent telephone conversation with the applicant to obtain evidence of the alleged commission of an offence by the applicant. On 16 January 2003 Mr Justice Cheda surreptitiously tape-recorded the telephone conversation he had with

the applicant. The applicant is alleged to have sought to induce Mr Justice Cheda to show favour to his business partner by varying or cancelling the bail conditions imposed on him (Labuschagne).

When the proceedings of the tribunal commenced for the first time on 5 April 2004 the officer assisting it with leading evidence indicated that she intended using the tape-recorded conversation between Mr Justice Cheda and the applicant and its transcript to establish the truth of the allegations of misbehaviour levelled against the applicant.

Counsel for the applicant indicated to the tribunal that an application was to be made to this Court in terms of s 24(1) of the Constitution, alleging that the appointment of the tribunal was unconstitutional in that its members were not selected by the President within the meaning of s 87(4) of the Constitution, and that the adduction of the tape-recorded evidence of the telephone conversation between Mr Justice Cheda and the applicant would infringe the applicant's constitutional right to a fair hearing, entrenched in s 18(9) of the Constitution, because the evidence was obtained as a result of a breach of the applicant's right to the privacy of telecommunication enshrined in s 20(1) of the Constitution.

A plea was made to the tribunal to temporarily stay its proceedings pending determination of the constitutional application that was yet to be made to this Court. As the matter was not for its determination, the tribunal held that it would not grant the applicant the relief sought unless there was an order of a competent court of law to stay its proceedings. An application was then made to the High Court (case

no. HC 4128/04) on 7 April 2004 for an interdict restraining the tribunal from proceeding with the inquiry pending determination of the questions of the constitutionality of the appointment of the tribunal and the intended use of the tape-recorded telephone conversation between Mr Justice Cheda and the applicant. On 8 April 2004 the High Court dismissed the application with costs. The applicant appealed against the judgment in case number SC 129/04.

Upon resumption of proceedings on 14 April 2004 submissions were made once again on behalf of the applicant to the effect that he would suffer serious prejudice should the inquiry into the question of his removal from office be proceeded with in the event of a determination by this Court that the tribunal had not been appointed in accordance with the constitutional requirements. Upon further reflection the tribunal decided to adjourn the proceedings pending determination of the constitutional application that had been made on 13 April 2004.

The applicant averred in his founding affidavit that members of the tribunal were not selected by the President. According to him, selection required that the President should be shown to have compared the qualities or attributes of each of the members of the tribunal with those of other persons in category (b) of s 87(4) of the Constitution before choosing them in preference to others. He said the President did not consciously apply his mind to the question of the suitability of the first, second and third respondents for selection as members of the tribunal because he had no information on their personal attributes.

According to the applicant, the Minister usurped the powers of the President to select members of the tribunal by communicating with the Chief Justices of the three countries through their respective High Commissioners as if he was the repository of the power to appoint the tribunal. The applicant based his allegation on the fact that in the letters of request the Minister expressed it as being his own desire that the tribunal should consist of judges from foreign countries.

It was on the interpretation of the letters of request that the applicant alleged that there was an unlawful delegation of the President's power of selection of members of the tribunal by the Minister to the Chief Justices of Zambia, Tanzania and Malawi. He averred that the selection of the first, second and third respondents as members of the tribunal was done for the President by the Chief Justices of the three countries, who nominated them. According to him, the nominations were conclusive. There was therefore no selection of the first, second and third respondents by the President.

The applicant contended that in the circumstances his right to protection of the law, enshrined in s 18(1) of the Constitution, was likely to be violated if he was compelled to appear before a tribunal whose members were not selected by the President in terms of subs (4) of s 87 of the Constitution.

On the question of the tape-recorded conversation between him and Mr Justice Cheda, the applicant said the effect of the decision in the case of *The Law Society of Zimbabwe v Minister of Transport and Communication* ("the *Law Society* case") S-59-03 was that the evidence of the conversation was obtained in

contravention of his right to privacy of telecommunication, enshrined in s 20(1) of the Constitution, and its admission in the proceedings of the tribunal would be in violation of his right to a fair hearing guaranteed under s 18(9) of the Constitution.

In the *Law Society* case *supra* a declaratory order was made to the effect that ss 98(2) and 103 of the Postal and Communications Act [*Chapter 12:05*] (Act No. 4 of 2000), conferring on the President unfettered powers to direct any telecommunication licensee or employee of such licensee to intercept any telecommunication if in his opinion it was necessary to do so in the interests of national security or the maintenance of law and order, were unconstitutional.

The President and the Minister opposed the application. In his affidavit, the President said that in requesting the Chief Justices of Zambia, Tanzania and Malawi to nominate judges of their courts for the purposes of s 87(4) of the Constitution the Minister was acting on his behalf. He averred that s 31H of the Constitution authorised him to perform acts which were incidental or ancillary to the exercise of the power of selection of members of the tribunal through the Minister.

The President said that he chose the first, second and third respondents as members of the tribunal. They were not selected for him by the Chief Justices of their respective countries.

In paras 4 and 5 of his affidavit the President stated:

"4. Ad Para 20

> … The word 'select' as used in section 87(4) only confers upon myself the right to choose from categories listed under section 87(4). I have discretion to select from any of the said categories. It does not mean that I must have a written list of persons to choose from. I decided to select from outside Zimbabwe. In choosing from outside the country I cannot be expected to globe-trot and just appoint. I have to go through relevant authorities in those countries. The process done here cannot be faulted.
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> 5. Ad Para(s) 21 and 22
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> As aforesaid, I exercised my discretion in choosing judges from category (b) of subsection (4) of section 87. There is no allegation that the tribunal panel is biased and I do not see any reason why the applicant wants to use his own discretion when the power to choose members is not vested in him."

On the question of the intended use of the tape-recorded evidence of the conversation between Mr Justice Cheda and the applicant, the Minister deposed that it was for the tribunal to determine the admissibility of the evidence. He said the tribunal was not a court of law bound by strict rules of evidence. The Minister said the judgment of this Court in the *Law Society* case *supra* was not applicable to the circumstances of the tape-recording of the telephonic conversation between Mr Justice Cheda and the applicant.

At the beginning of the hearing of argument in this application, the parties agreed that the application for condonation of the late filing of opposing papers by the President be granted and it be ordered that such costs as were occasioned by the application be paid by the President. It is so ordered by this Court.

An application had been made in case no. SC 344/04 for dismissal of the applicant's application for want of prosecution. Ms *Maxwell* indicated that the fourth and fifth respondents were abandoning that application. The usual rule that costs follow the result was to apply.

It is also important to mention that, although the President and the Minister had deposed that the applicant had no *locus standi* to make the application in terms of s 24(1) of the Constitution, Ms *Maxwell* conceded that the applicant had *locus standi*. The concession was properly made.

Although the provisions of s 87 of the Constitution are unentrenched and do not guarantee a fundamental right to a judge, it is clear that the application was based on the allegation that failure by the President to comply with the mandatory provisions of s 87(4) of the Constitution violated the applicant's right to protection of the law enshrined in s 18(1) of the Constitution and that compelling him to appear before a tribunal appointed in breach of s 87(4) of the Constitution was likely to violate the same right to protection of the law. "Law" is defined in s 113 of the Constitution to mean, *inter alia*, "any provision of this Constitution".

Sections 86 and 87 of the Constitution secure for a judge of the Supreme Court or the High Court tenure of office and independence in that, except by voluntary resignation or retirement, his appointment cannot be terminated except for inability to discharge the functions of his office or for misbehaviour and even then he "shall not be removed except in accordance with the provisions of" s 87.

It is clear that s 87 of the Constitution provides a procedure, and an exclusive procedure, for termination of a judge's appointment that must be strictly observed at every stage of the process if judicial independence is to mean anything. It is in that context that the applicant alleged that failure by the President to select

members of the tribunal as required by s 87(4) of the Constitution violated his right to protection of the law requiring that his appointment be not terminated except in accordance with the special procedure provided, which included the appointment of a tribunal consisting of members selected by the President from one or each of the categories of persons prescribed under s 87(4) of the Constitution. In other words, the applicant had a fundamental right that the law which affected his rights be complied with strictly in its application. See *Martin v AG and Anor* 1993 (1) ZLR 153 (S) at 157G; and *Chavunduka and Anor v Commissioner of Police and Anor* 2000 (1) ZLR 418 (S).

By entrenched provisions, s 20(1) of the Constitution guarantees the applicant freedom from interference with his correspondence, which includes telecommunication. Section 18(9) of the Constitution secures the applicant from infringement of his fundamental right to be afforded a fair hearing within a reasonable time by an independent and impartial court or other adjudicating authority established by law in the determination of the existence or extent of his civil rights or obligations.

Unless he was being merely frivolous or vexatious, the applicant was entitled to make the application in terms of s 24(1) of the Constitution, alleging as he did that the tape-recording of his telephone conversation with Mr Justice Cheda was in breach of his fundamental right to privacy of telecommunication guaranteed under s 20(1) of the Constitution and that the admission of the evidence in the proceedings of the tribunal was likely to violate his right to a fair hearing guaranteed under s 18(9) of the Constitution.

I now turn to determine the questions raised by the applicant.

The determination of the first question, whether or not the members of the tribunal were selected by the President within the meaning of s 87(4) of the Constitution, depends on the construction and interpretation of the relevant provisions.

The alleged unconstitutionality of the appointment of the tribunal takes a specific form, in that the allegation is of a complete failure by the President to comply with the mandatory provisions of s 87(4) of the Constitution. The constitutional point at issue therefore requires an interpretation or recognition of the scope of the powers vested in the President by the provisions of s 87(4) of the Constitution and its application to what is found to have been done by the President and others accused of having caused his alleged failure to act in terms of the Constitution.

I note as a starting point that the steps to be taken in the special procedure for the removal of a judge from office show that there are specific powers vested in the President, which he is required to exercise personally. One such power is the power to select members of the tribunal from one or each of the categories of persons prescribed under s 87(4) of the Constitution.

It is in that context that the submission was made on behalf of the applicant that the Minister, who in the scheme of the provisions of s 87 of the Constitution has no function to discharge in the process of the removal of a judge

from office, usurped the independent functions of the President and unlawfully delegated the power of selection vested in him to the Chief Justices of Zambia, Tanzania and Malawi by the letter of 9 December 2003.

Considerations of the validity of the submission must take into account the effect of s 31H(1) of the Constitution, which vests all the executive authority of the State in the President. Subject to the provisions of the Constitution, s 31H(1) gives the President discretion to exercise executive powers vested in him directly or through the Cabinet, a Vice-President, a Minister or a Deputy Minister. Not every executive power of the State vested in the President can be exercised by him through the subordinate functionaries. Those powers, such as the power to select members of the tribunal in terms of s 87(4) of the Constitution, must be exercised by the President personally.

The Minister's action in writing the letters of request on 9 December 2003 was in the exercise of executive authority. Under our Constitution, a Minister has no executive authority of his own outside the executive authority of the State vested in the President. See *Quinnell v Minister of Lands, Agriculture and Rural Development and Ors* SC-47-04 at 30-31. When a Minister performs an act in his or her capacity as a Minister it must be presumed, in the absence of proof of formal assignment, that he or she is exercising the executive authority vested in the President under administrative agency.

In the case of a Minister exercising executive powers under an administrative agency, it is the President exercising his powers through him or her.

In that case, the only question on the validity of the Minister's action would be whether or not the powers he exercised are those the Constitution vested in the President to be exercised by him exclusively.

In this case, it is clear that the action taken by the Minister in the form of writing the letters of request on 9 December 2003 was to enable the President to exercise his power of selection of members of the tribunal. It was an act of pure administrative agency. Enabling a person to effectively exercise his powers is not usurpation of his functions. What happened here did not amount to usurpation of the President's power to select members of the tribunal.

The President was entitled under s 31H(1) of the Constitution to perform the purely executory acts that were essentially incidental or ancillary to his exercise of the power of selection of members of the tribunal through the Minister. Indeed the President averred in his affidavit that the Minister acted on his behalf. The actions of the Minister did not have the effect of usurping the powers of selection vested in the President by the provisions of s 87(4) of the Constitution.

Once the President decided to choose members of the tribunal from persons in category (b) of s 87(4) of the Constitution, he was bound to communicate his intentions to the appropriate authorities responsible for the administration of courts in the three foreign countries from whose judges he intended to select members of the tribunal. The Chief Justices who nominated the first, second and third respondents are heads of judicial administration of their respective countries. The President could have done so himself without surrendering his power to select the members of the

tribunal. In other words, he could have asked the Chief Justices of the three countries to give him the names of persons to be selected as members of the tribunal without surrendering the power vested in him to do the selection himself. So the Minister, in writing the letters of request, did not do anything not sanctioned by the Constitution. It is important to note that s 87, which sets up the stages of the process for removal of a judge from office, is silent as to the procedure to be followed by the President at the stage of selection of members of the tribunal and as a matter of interpretation it is not to be construed as necessarily excluding the use by the President of the Minister to perform administrative acts which enable him to exercise his powers.

The contention that the Minister usurped the powers of selection vested in the President by subs (4) of s 87 of the Constitution and unlawfully delegated them to the Chief Justices of Zambia, Tanzania and Malawi was based on what the Minister said in the letters of request. The words relied upon were:

> "It is my desire to have the tribunal appointed, mainly, from Judges who come from outside Zimbabwe."

There is nothing in these words to justify the submission that the Minister usurped the powers of the President to select members of the tribunal. The object of the Minister's desire was the appointment of a tribunal by someone other than himself. The words do not suggest that the Minister considered himself as having the power to appoint the tribunal. It is common cause that the tribunal was appointed by the President. It is also not in dispute that the letters of request were written after a decision had been taken by the President to select members of the tribunal from persons in category (b) of subs (4) of s 87 of the Constitution to the exclusion of persons in the other two categories.

The argument that the members of the tribunal were not selected by the President from persons in category (b) of subs (4) of s 87 of the Constitution is fallacious.

The *Concise Oxford Dictionary* defines the word "selected" to mean, *inter alia*, "chosen for excellence or suitability; picked". Mr *Gauntlett*, for the applicant, referred to the meaning of "select" in the *Shorter Oxford Dictionary,* given as "to choose or pick out in preference to another or others". He emphasised the words "in preference to another or others" to underscore the point that the President was not shown to have undertaken the exercise of comparing the qualities or attributes of the first, second and third respondents with those of other persons in category (b) of subs (4) of s 87 of the Constitution before choosing or picking them out in preference to those others.

Paragraphs 29 and 30 of the applicant's heads of argument also reveal the inferences of fact the applicant wanted drawn from the meaning of the word "selected", as applied to the nominations of the first, second and third respondents by their respective Chief Justices. It is stated:

> "29. To this in each instance there was ultimately a response confirming that each Chief Justice concerned (not, as the fourth respondent had specifically required, the Minister of Justice in consultation with the Chief Justice) 'nominated' one judge. No information whatever is proved as to why the 'nominee' should suitably be selected. Clearly each foreign Chief Justice understood – correctly – that all he was being asked to do was to designate one member of the tribunal, not to offer a possible candidate who, on the basis of information provided, might or might not be selected. In each case his 'nomination' was understood to be conclusive – and, in the event, was conclusive.

30. On these common cause facts, the result is clear. Each Chief Justice selected one judge. The fifth respondent thus both split up and abdicated the act of conscious preference central to selection to three other individuals."

In para 5 of his affidavit the President avers that he chose the first, second and third respondents as members of the tribunal. He clearly states that he exercised his discretion "in choosing judges from category (b) of subsection (4) of section 87" of the Constitution. It is surprising that the fact sought to be inferred from the allegations in paras 29 and 30 of the applicant's heads of argument, which was also the subject of the argument in Court, was that the President did not "choose" the first, second and third respondents as members of the tribunal.

But the examination of the meaning of the word "selected", as used in subs (4) of s 87 of the Constitution, reveals that it connotes the making of a final decision by the President as to who, amongst the persons in category (b), should become a member of the tribunal. In submitting the names of the first, second and third respondents to the Minister in response to the letters of request of 9 December 2003, the Chief Justices of Zambia, Tanzania and Malawi cannot, by any stretch of the imagination, be said to have made final decisions that the nominees had become members of the tribunal. In fact, without the acknowledgement of the nominations by the President as enabling him to exercise his power of selection of members of the tribunal, the nominations would have had no constitutional relevance except, perhaps, as contended by the applicant, to deceive the President into believing he had chosen the members of the tribunal when in fact he had not done so. The Chief Justices had no power to select members of the tribunal and did not purport to do so.

Two conditions must exist before a person can become a member of the tribunal. He or she has to be in possession of the relevant qualifications prescribed for persons falling within the categories. The first, second and third respondents undoubtedly fell within category (b) of subs (4) of s 87 of the Constitution. They are judges of the Supreme Courts of their respective countries. Accordingly, they were qualified to be selected as members of the tribunal. Their professional eminence and ability were not impugned in these proceedings.

The second pre-condition for a person to become a member of the tribunal is that the President must make the final decision that he or she should become a member of the tribunal. No other person has the power to select a person in the prescribed category as a member of the tribunal. The reposition of the power to choose members of the tribunal in the President is also the condition of its exercise over any person in the prescribed category. As stated above, the President deposed to the fact that he chose the first, second and third respondents as members of the tribunal. It is clear that at some point in time prior to him appointing the tribunal in terms of subs (3) of s 87 of the Constitution the President had the names of the first, second and third respondents and had become cognitive of the fact that they were judges of the Supreme Courts of their respective countries and were qualified for selection as members of the tribunal.

The President had a right to select the first, second and third respondents as members of the tribunal from the list of the names submitted by the Chief Justices of the three foreign countries and on the information relating to their professional qualifications. The applicant did not say what additional information

should have been made available to the President to enable him to perform his functions. The fact that the President chose the same persons whose names were submitted does not detract from the fact that he had the right to reject any or all of the nominees if, for any reason, he considered them unsuitable for selection as members of the tribunal. He was not bound by the nominations.

It was for the President, in the exercise of his powers, to ask for additional information on each of the judges whose names were submitted by the Chief Justices of Zambia, Tanzania and Malawi. To say that the Chief Justices of the three foreign countries "selected" the members of the tribunal for the President is a contradiction, as one cannot talk of "members of the tribunal" when they have not been selected by the President because under the Constitution he is the only person vested with the power of selection.

There was no material on the basis of which the President's sworn statement that he chose the members of the tribunal could be rejected. The applicant's contention that there was a complete failure by the President to discharge the duty of selecting members of the tribunal in terms of s 87(4) of the Constitution must be dismissed.

The second question for determination anticipated a determination that the tribunal was appointed in accordance with the provisions of the Constitution. It is whether or not the tape-recorded evidence of the telephone conversation between Mr Justice Cheda and the applicant was obtained in breach of the applicant's fundamental right to privacy of his telecommunication and whether admission of it in the inquiry

into his removal from office would violate his right to a fair hearing enshrined in s 18(9) of the Constitution.

I consider the second part of the question first. Section 18(9) of the Constitution provides that:

> "Subject to the provisions of this Constitution, every person is entitled to be afforded a fair hearing within a reasonable time by an independent and impartial court or other adjudicating authority established by law in the determination of the existence or extent of his civil rights or obligations."

I have no doubt in my mind that the provisions of s 18(9) of the Constitution do not apply to a person when he or she appears before a body whose duty is to investigate and report on the facts found and make recommendations to some other person or body.

In this case the tribunal appointed to inquire into the question of the removal of the applicant from office is not a court or an adjudicating authority established by law to determine the existence or extent of the applicant's civil rights or obligations. Its duty is to investigate and report on the facts relating to the question of his removal from office to the President. It does not decide whether or not he should be removed from office. The applicant would, of course, be entitled to a fair hearing by the tribunal, but not in the context of the cocktail of rights guaranteed to a person appearing before a court of law under s 18(9) of the Constitution. See *Mutasa v Makombe* 1997 (1) ZLR 330 (S); and *Austin and Anor v Chairman of the Detainees' Review Tribunal and Anor* SC-168-87 at 23.

It would be pointless to make a declaration that the effect of the judgment in the *Law Society* case *supra* is that the evidence of the telephone conversation between Mr Justice Cheda and the applicant was obtained illegally and "accordingly the intended use of the alleged recording and transcript is inadmissible" when the Constitution makes it clear that the tribunal is not to be bound by strict rules of evidence as it is not a court of law or adjudicating authority. It does not administer justice.

The *ratio decidendi* in the *Law Society* case *supra* was that sections 98(2) and 103 of the Posts and Telecommunications Act [*Chapter 12:05*] were *ultra vires* s 20 of the Constitution of Zimbabwe because they were too wide and vague and did not provide sufficient mechanisms to prevent abuse of the powers conferred therein. The judgment recognised that s 20 of the Constitution was not absolute in its prescription of interference with communications.

In any case it is not our law that evidence obtained as a result of an unlawful interception of a telephone conversation should be excluded from use in court proceedings. The rule applicable to courts is that the admissibility of illegally or improperly obtained evidence is a matter for determination by the court in the exercise of its discretion. Evidence is therefore not excluded simply because of the manner in which it was obtained. The court has to take into account all the circumstances of the case, including the manner in which the evidence was obtained, in determining the question whether or not to exclude the evidence from use in the proceedings. See *Tswangira v S* S-184-95; *S v Motloutsi* 1996 (1) SA 584; *Protea*

Technology Ltd and Anor v Waiver and Anor [1997] 3 All SA 594; and *S v Naidoo and Anor* [1998] 1 All SA 189.

Section 48(1) of the Civil Evidence Act [*Chapter 8:01*] enacts the above-stated common law rule on the admissibility of illegally or improperly obtained evidence. It provides that:

> "(1) Notwithstanding anything in this Act but subject to subsection (2), a court may exclude or refuse to allow the giving of any evidence which –
>
> (a) has been obtained illegally or improperly; or
>
> (b) … (not relevant); or
>
> (c) … (not relevant).
>
> (2) In deciding whether or not to exclude or refuse to allow the giving of any evidence in terms of subsection (1), the court shall have regard to –
>
> (a) the nature and extent of the illegality, impropriety, …; and
>
> (b) the probative value of the evidence; and
>
> (c) the interests of justice as between the parties; and
>
> (d) the general public interest." (The underlining is mine for emphasis)

It is clear from the provisions of s 48 of the Civil Evidence Act that it is on the effect of the consideration of all the factors cumulatively that the court must decide whether to exclude the evidence or not. But this rule of evidence would apply to proceedings of a court or adjudicating authority. The question of admissibility of the evidence of the telephone conversation between Mr Justice Cheda and the applicant in the inquiry was for the tribunal to determine in the exercise of its discretion. The mandate for the tribunal was to investigate and establish the truth of

the allegations of misbehaviour levelled against the applicant within the terms of its appointment. It is not bound by strict rules of evidence. If the evidence of the tape-recorded conversation between Mr Justice Cheda and the applicant is probative of the truth of the allegations being inquired into, the tribunal would be abdicating its duty under its terms of appointment if it excluded the evidence on the ground that it was obtained illegally or improperly if that were to be its finding.

I also do not think it would be proper for this Court to declare that the evidence is inadmissible in proceedings of an investigating body, whose duty is to collect information and report on the facts to the President who appointed it for that purpose and is therefore entitled to receive the information. Investigating bodies carrying out their constitutional functions should not be prevented from performing their functions unless they are in breach of the rules of natural justice shown to be applicable in the particular circumstances. The tribunal in this case is a body that is carrying out an investigation and does not decide the question of the removal of the applicant from office. It is performing a constitutional function.

The order is therefore made that, apart from it being ordered that the fourth and fifth respondents pay costs of the application in case no. SC 344/04 jointly and severally, the one paying the other to be absolved, and that the fifth respondent pay costs in the application for condonation of the late filing of opposing papers, the application is dismissed with costs.

CHIDYAUSIKU CJ: I agree.

ZIYAMBI JA: I agree.

GWAUNZA JA: I agree.

SANDURA JA: I have read the judgment prepared by MALABA JA, but disagree with the finding that the three members of the Tribunal were selected by the President as required by s 87(4) of the Constitution. In addition, there can be no doubt that the participation of the official designated by the Minister to lead evidence before the Tribunal for the purpose of assisting the Tribunal with the State's position is unconstitutional.

In October and December 2003 the Minister wrote, in identical forms, to the Zimbabwean High Commissioners in Zambia and Tanzania, and to the

Malawian High Commissioner in Harare. The relevant part of his letter reads as follows:

> "It is my desire to have the Tribunal appointed, mainly, from Judges who come from outside Zimbabwe. Such an arrangement does, in my view, assist in the area of transparency and fairness.
>
> I should, in view of the foregoing, be grateful if Your Excellency would kindly approach, on my behalf, the Minister of Justice and request him to consult with the Chief Justice … who would nominate a Judge of his Court to be a member of the tribunal." (emphasis added)

On 26 November 2003 the Zambian Minister of Legal Affairs and Attorney-General wrote to the Zimbabwean High Commissioner in Lusaka as follows:

> "I thank you for your communication of 22nd October, 2003 and regret the delay in replying thereto.
>
> Kindly note that His Lordship the Chief Justice of Zambia has nominated Mr Justice D.K. Chirwa of the Supreme Court of Zambia to serve on the tribunal.
>
> You may kindly communicate this to my counterpart the Hon. Mr P.A. Chinamasa, M.P." (emphasis added).

Thereafter, on 2 December 2003 the Zimbabwean High Commissioner to Tanzania wrote to the Minister as follows:

> "As per my telecommunication of today, 2nd December, 2003 I wish to confirm that Chief Justice B.A. Samatta has advised that the nominee is Honourable Mr Justice John Mroso, a Justice of the Court of Appeal." (emphasis added)

Subsequently, on 7 January 2004 the Malawian High Commissioner in Harare, whose official title had changed to Ambassador, wrote to the Minister as follows:

> "I refer to your letter dated 9th December, 2003 in which you kindly asked me to approach the Minister of Justice and the Chief Justice of Malawi to consider nominating a Judge who would be a member of the tribunal that is scheduled to enquire into the conduct of Mr Justice B. Paradza. I wish to inform you that His Lordship the Chief Justice of Malawi has nominated Justice Isaac Mtambo, Judge of the Malawi Supreme Court of Appeal, to be on the tribunal. The *curriculum vitae* of Justice Isaac Mtambo can be forwarded to your office if need be." (emphasis added)

In due course, the three judges, being the first, second and third respondents, whose names had been submitted to the Minister, were sworn in as members of the Tribunal by the President.

The above facts were common cause. In my view, those facts indicate beyond reasonable doubt that the first, second and third respondents were not selected by the President, but by their Chief Justices. The contemporaneous correspondence set out above is decisive of the issue.

The Minister wrote to each of the three High Commissioners requesting him/her to approach "the Minister of Justice and request him to consult with the Chief Justice … who would nominate a judge of his Court to be a member of the Tribunal". It is pertinent to note that each Chief Justice was requested to nominate only one judge of his Court, and not two or more from whom the President might select a member or members of the Tribunal

In each case, the response to the Minister's request indicated that the Chief Justice concerned had nominated one judge to be a member of the Tribunal, and gave his name. The response did not give any information as to why the judge concerned should be selected as a member of the Tribunal.

Quite clearly, each Chief Justice understood, correctly in my view, that all he was being asked to do was to select one of his judges who would be a member of the Tribunal, and not to nominate a judge who, on the basis of the information provided, might or might not be selected by the President as a member of the Tribunal.

In the circumstances, bearing in mind the fact that in terms of s 87(4) of the Constitution, the Tribunal should consist of not less than three members, one of whom should be designated by the President as chairman, and the fact that each of the three Chief Justices was requested to nominate only one of his judges who would be a member of the Tribunal, it is clear beyond doubt that the selections made by the three Chief Justices were intended by the President to conclusively determine the three members of the Tribunal. This was an impermissible delegation of the President's power of selecting the members of the Tribunal.

Consequently, the first, second and third respondents were not selected by the President, as required by s 87(4) of the Constitution, but were selected by the Chief Justices of Zambia, Tanzania and Malawi, respectively, who had no powers to do so in terms of the Constitution. The Tribunal was not, therefore, constituted in compliance with s 87(4) of the Constitution.

Finally, I wish to deal with the participation of the official designated by the Minister to lead evidence before the Tribunal. Commenting on the participation by that official, the Minister averred as follows in his opposing affidavit:

"The State attorney is there to assist the Tribunal with the State's position."

Quite clearly, s 87 of the Constitution does not provide for the participation by such an official in the proceedings of the Tribunal. The Tribunal is supposed to be a wholly impartial body whose function is set out in s 87(6) of the Constitution, which reads as follows:

> "A tribunal appointed under subsection (2) or (3) shall inquire into the matter and report on the facts thereof to the President and recommend to the President whether or not he should refer the question of the removal of the judge from office to the Judicial Service Commission, and the President shall act in accordance with such recommendation."

The rôle of the person leading evidence before the Tribunal is not "to assist the Tribunal with the State's position", because the State does not have a position in such an enquiry, but to assist the Tribunal by selecting the evidence to be placed before the Tribunal and by calling the witnesses and examining them. An enquiry held in terms of s 87 of the Constitution is not a criminal prosecution in which the State alleges that an accused person is guilty of the offence with which he is charged.

In addition, s 87(7) of the Constitution, which provides that the provisions of the Commissions of Inquiry Act [*Chapter 10:07*] shall, *mutatis mutandis*, apply in relation to a tribunal appointed under subsection (2) or (3) of s 87 of the Constitution as they apply to Commissioners appointed under that Act, does not authorise the participation of an official "to assist the Tribunal with the State's position". That is so because there is no provision for the appointment of such an official in the Commissions of Inquiry Act.

In the circumstances, I would have made the following order –

1. The selection of the Tribunal comprising the first, second and third respondents was unconstitutional.

2. The evidence before a properly constituted Tribunal shall not be led by an official designated by the fourth respondent, but by an independent legal practitioner selected by the Tribunal.

3. The costs of this application shall be borne by the fourth and fifth respondents, jointly and severally, the one paying the other to be absolved.

Byron Venturas & Partners, applicant's legal practitioners

Civil Division of the Attorney-General's Office, fourth and fifth respondents' legal practitioners