

**IN THE HIGH COURT OF ZIMBABWE**

**HC 2128/21**

**BEFORE: ZHOU J, CHAREWA J and MUSHORE J**

**HARARE CIVIL TRIAL, 15 MAY 2021**

**MUSA KIKA**

**APPLICANT**

**VERSUS**

**MINISTER OF JUSTICE, LEGAL &**

**PARLIAMENTARY AFFAIRS + 19**

**RESPONDENTS**

**Adv T. Mpofu, for the Applicant**

**Adv T. Magwaliba, for 1<sup>st</sup> Respondent**

**ABC Chinake, for 2<sup>nd</sup> – 19<sup>th</sup> Respondents**

### **J U D G M E N T**

ZHOU J: What we have is a summary of the judgment in respect of that two matters. The full detailed judgment will be availed in due course with full reasons. So this will be brief and so part of it will be delivered by my sister Mushore J.

This judgment is in respect of two matters HC2128/21 and HC2166/21. The two matters were heard together because the substance of their complaints is the same. Both matters were brought by way of application. HC 2128/21 was instituted as a court application while HC 2166/21 was brought as a chamber application. Both applications are opposed by some of the Respondents. Papers were filed following a case management meeting with the parties representatives at which the dates for filing papers were set by consent.

In case number HC2128/21, the Applicant's legal practitioner and director of the Zimbabwe Human Rights NGO Forum cited the Minister of Justice Legal and Parliamentary Affairs and all the Judges of the Constitutional and supreme Courts as well as some Judges of the High Court on the basis that there are acting judges of the Supreme Court who have been called upon to act as such. The Judiciary Service commission was joined in the proceedings at its instance at the case management conference. In HC2166/21 the Respondents cited are the Judicial Service Commission, the Chief Justice of Zimbabwe, Honourable Luke Malaba NO and the Attorney General NO.

### BACKGROUND

On 7 May 2021, the Constitution of Zimbabwe amendment number 2 Act of 21 became more after being assented to by the President. The contentious aspects of the Amendment Act which are the subject of the instant applications are found in section 13 of the Act. That section repealed section 186 of the Constitution of Zimbabwe and substituted it with a new section 186. Upon gathering that section 186 introduced by the amendment would apply to the 2<sup>nd</sup> to the 18<sup>th</sup> Respondents. The Applicants instituted the two applications. The 2<sup>nd</sup> to 18<sup>th</sup> Respondents did not file opposing papers. They therefore be taken not to have opposed the Applications. We do not accept the submission by their counsel that they oppose the application without opposing papers. That is not sustainable because the directions issued on 12 May 2021 required the Respondents to file opposing papers if they were opposing the matter.

The parties raised preliminary issues and objections. The first issue pertained to the recusation of the Judges seating in this matter. We dismissed the application. The full reasons would be contained in the full judgment which will be availed in due course. What is contained herein is a summary of the reasons. The application for recusal. The application

by the 2<sup>nd</sup> to 19<sup>th</sup> Respondents pertained only to Zhou J who happens to be myself. The grounds advanced are that the judges conflicted in that he was a commissioner of the JSC for a period of six years. Having left the Commission in February 2020, a period of about 15 months has passed. The matters in this case do not arise from what happened up to mid-February 2020. Mr Chinake referred to a resolution by which the deponent to the 19<sup>th</sup> Respondent's affidavit was authorised to act. The resolution speaks for itself and there is no evident outside it or pertaining to how it came into existence was debated in this case.

The second ground was that Zhou J participated in the interviews for Constitutional Court Judges which were held in September 2020. The issue of those interviews does not arise in this case. The provisions which are the subject matter of these applications introduce a new regime for appointment of seating judges to the Constitutional court and Supreme Court. The move for the recusation of the entire panel of judges was predicated upon two grounds as advanced by Mr Magwaliba for the first Respondent and the Attorney General. The first ground was that the amendment disadvantage High Court judges because their age limit was not extended to 75 years. This startling submission which was directed at all the High Court judges including those who are not on the panel assumes that extension of working age to 75 years is a benefit. That is a misapprehension not based on an interview of any of the High Court Judges.

The third ground was that the Judges seating in this matter were constituted by the Judge President who is a commissioner of the JSC. The allocation of matters is an administrative function which Judges have no control over. The involvement of the office of the Judge President is purely in the discharge of his administrative function. The insinuation that the judges may have been picked for some other improper purpose in this matter is not based on evidence and is a reckless submission by a legal practitioner who is an officer of this court. The suggestion that the panel of judges was biased because they had truncated the

deadline for filing papers is unfound. Firstly, the court has inherent jurisdiction to control its own processes and procedures. Secondly, the dates were established with the involvement and consent of those who instructed Mr Magwaliba. The directions issued in respect of the filing of papers could therefore not be evidence of bias where interest in the matter is suggested. For these reasons we dismissed the application for recusation. I will defer to Judge Mushore to deal with the other preliminary points.

MUSHOR E J: The preliminary points were, I am going to take judicial notice of Mr Chinake who is appearing for the first Respondent and the 19<sup>th</sup> Respondent in either matter abandoning the following points; agency, consolidation and costs. I am going to, just for ethicacy I am going to refer to the other Respondents as the Respondents. I am going to address those points very briefly. The conclusions reached on the points *in limine*. Agency was in issue which is raised at the commencement of the matter during the proceedings all the parties agreed that due to the fact that the court had congregated to return this matter on an urgent basis, that should availed, the matter was urgent.

And the issue of loca standi of the Applicant in HC2128 was made ultimately on the applicants in 2166. However, in so far as the matter 2128 the court has considered the loca standi of any of the parties. in other words this matter it has a much more like jess intention behind it. On the question of fame bear in mind that the fact that the matter was involved as an urgent application and the parties having agreed at the case management that the matter was urgent. The court was at large to set down the matter guided in terms of section 176 of our constitution In order overcautiously deliver a result and hear the matter. To that and therefore we did not find the aspect of the form to really bore whatsoever. We take it in mind that the parties considered the case management system.

On the question of joinder and non-joinder, I am just giving brief reasons on both aspects and I am doing this following the Judge President, Parliament, the Judicial Services Commission, the President and the 3<sup>rd</sup> to 17<sup>th</sup> Respondents. The question of joinder and non-joinder of the parties in either respect was not bearing on the issue before the court. As articulated by the litigants themselves.

And finally on the issue of costs, this is and I remind the parties, this is a constitutional matter which requires resolving and in any event to approach the court with urgent matters is not to burden any litigant with costs. I defer to my Senior Judge.

ZHOU J: The merits of the matter dispute stands to be resolved on an interpretation of the effect of section 186 of the Constitution of Zimbabwe as introduced by the constitution of Zimbabwe amendment number 2 of 2021 in light of the provisions of section 328 of the Constitution of Zimbabwe. The new section 186 provides as follows;

“186 term of office of Judges. The Chief Justice and the Deputy Chief Justice hold office from the date of their assumption of office until they reach the age of 70 years when they must retire unless before they attain that age they elect to continue in office for an additional five years provided that such election shall be subject to the submissions to and acceptance by the President after consultation with the Judicial Service Commission of a medical report as to their mental and physical fitness so to continue in office.

Subsection 2. The Judges of the Constitutional Court are appointed for a non-renewable term of not more than 15 years but they must retire earlier if they reach the age of 70 years unless before they attain that age they elect to continue in office of an additional five years provided that such election shall be subject to the submission to and acceptance by the president after consultation with Judicial Service Commission of a medical report as to the mental or physical fitness of the Judge so to continue in office.

b. After the completion of their term, they may be appointed as judges of the Supreme Court or the High Court at their option if they are legible for such appointment.

Subsection 3, Judges of the Supreme court hold office from the date of their assumption of office until they reach the age of 70 years when they must retire unless before they attain their age they elect to continue in office for an additional five years provided that such election shall be subject to the submission to and acceptance by the President after consultation with the Judicial Service Commission of a medical report as to the mental and physical fitness of the judge so to continue in office.

Subsection 4. Notwithstanding subsection 7 of section 328, the provisions of subsections 1, 2 and 3 of this section shall apply to the continuation in office of the Chief Justice, Deputy Chief Justice, Judges of the Constitutional Court and Judges of that Supreme Court.

Subsection 5. Judges of the High Court and any other judges hold office from the date of their assumption of office until they reach the age of 70 years when they must retire.

Subsection 6. A person may be appointed as a judge of the Supreme Court, the High Court or any other Court for a fixed term but if a person is so appointed other than in an acting capacity, he or she ceases to be a judge on reaching the age of 75 years in the case of a Judge of the Supreme Court or 70 years in the case of a Judge of the High court or in any other court even if the term of his or her appointment has not expired.

Subsection 7 even though a Judge has resigned or reached the age of retirement or in the case of a Judge of the Constitutional Court reached the end of his or her term of office, he or she may continue to seat as a Judge for the purpose of dealing with any proceedings commenced before him or her while he or she was a Judge.

Subsection 8. A Judge may resign from his or her office at any time by written notice to the President given through the Judiciary Service Commission.

Subsection 9. The office of the a Judge must not be abolished during his or her term of office”

The effect of section 186 which is relevant to this matter is to extent the retirement age of the Chief Justice, Deputy Chief Justice and Judges of the Constitutional Court and Supreme Court as will be dealt with in due course. Section 328 of the Constitution provides as follows;

“From subsection 2, an act of Parliament that amends this constitution must do so in express terms.

Subsection 3. A constitutional bill may not be presented in the select of the National Assembly in terms of section 131 unless the speaker has given at least 90 days notice in the Gazette of the precise terms of the bill.

Subsection 4. Immediatley after the speaker has given notice of a constitutional bill in terms of subsection 3, Parliament must invite members of the public to express their views on the proposed bill in public meetings and through written submissions and must convene meetings and provide facilities to enable the public to do so.

Subsection 5. A Constitutional bill must be passed at its last reading in the National Assembly and the Senate by the affirmative vote of 2/3 of the membership of each house.

Subsection 6. Where a constitutional bill seeks to amend any provision of chapter 4 or Chapter 16;

- a. Within three months after it has been passed by the National Assembly and the Senate in accordance with Subsection 5, it must be submitted to a national referendum.
- b. If it is approved by a majority of the voters voting at the referendum, the speaker of the national assembly must cause it to be submitted without delay to the President who must ascend to and sign it forthwith.

Subsection 7. Notwithstanding any other provision of this section, an amendment to a 10 minute provision, the effect of which is to extend the length of time that a person may hold or occupy any public office does not apply in relation to any person who had or occupied that office or an equivalent office at any time before the amendment.

Subsection 8. Subsection 6 and 7 must not both be amended in the same constitutional bill nor may amendments to both law section be put to the people in the same referendum.

Subsection 9. This section maybe amended only by following the procedures set out in subsections 3, 4, 5 and 6 as if the section were contained in Chapter 4.

Subsection 10. When a Constitutional bill is presented to the President for ascent and signature, it must be accompanied by;

- a. A certificate from the speaker that at its final vote in the National Assembly, they receive the affirmative votes of at least 2/3 of the membership of the assembly.
- b. A certificate from the President of the Senate that at its final vote in the senate, the bill received the affirmative votes of at least 2/3 of the membership of the Senate”

We draw particular attention to the provisions of section 328 (7) because this matter revolves around its relationship with section 186 and the effect of that relationship on the



tenure of office of the Honourable Justice Luke Malaba and the other Judges who are cited as Respondents in case number HC2128/21

I deal with the interpretation of section 186(4) and section 328(7). It is an established principle that sections of the constitution must not be read in isolation but must be read together. And in the context of the whole text. In this case, the two sections are not in conflict but must be read together and with the constitution as a whole. Section 328 which deals with the amendment of the Constitution entrenches certain provisions. This entrenchment is by requiring in addition to the usual procedures for passing an amendment to the Constitution that such amendments be submitted to a referendum and to get approval from a majority of the voters voting at the referendum. One such provision which is entrenched is section 328(7) which provides as I have read. There can be no question that Judges occupy public office therefore could fall within the armpit of section 328(7).

There was debate as to whether section 186 has the effect of extending the length of time that the second Respondent and the other Judges of the Constitutional Court and Supreme Court may all occupy office.

We come to the conclusion that this section has that effect. It increases the retirement age of the Judges in these courts from the original 70 to 75 years. The fact that this extension of the tenure of office is subject to election by the concerned judge and acceptance by the President after consultation with the Judicial Service Commission and production of medical report does not change its nature as an extension of a term limit. In respect of the Judges of the constitutional Court, the term limit is based on two dimensions. The period of 15 years which is provided in section 186(2) and the age of the affected Judge.

