

REPORTABLE: (13)

ERICA FUNGAI NDEWERE
v
(1) THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE
(2) SIMBI VEKE MUBAKO (3) CHARLES WARARA
(4) YVONNE MASVORA

**SUPREME COURT OF ZIMBABWE
MATHONSI JA, CHATUKUTA JA AND MWAYERA JA
HARARE: 17 NOVEMBER 2022 & 9 FEBRUARY 2023**

R. A. Sitotombe, for the appellant
No appearance for the first respondent
S. Sinyoro, for the second and fourth respondents
Ms V. Vengai, for the third respondent

MATHONSI JA: This is an appeal against the whole judgment of the High Court (“the court *a quo*”) handed down on 7 July 2022 in which it declined to assume jurisdiction in respect of an application filed by the appellant for the review of the recommendations of the second, third and fourth respondents in accordance with which the first respondent removed her from the office of Judge of the High Court.

FACTS

Until 17 June 2021, the appellant was a sitting Judge of the High Court. She was removed from that office by the first respondent, the President of the Republic of Zimbabwe, acting in terms of s 187(8) of the Constitution of Zimbabwe, 2013 (“the Constitution”). Whenever the question of the removal of a sitting Judge arises, the Judicial Service Commission informs the first respondent, who, in terms of s 187(3) of the Constitution, is required to appoint a Tribunal to inquire into that question. The second, third and fourth

respondents are members of the Tribunal appointed by the first respondent to inquire into the question of removing the appellant from the office of Judge of the High Court.

The salient facts are generally not in dispute and may be traced back to 9 October 2020, on which date the Judicial Service Commission advised the first respondent that a question of whether the appellant had to be removed from the office of Judge of the High Court had arisen. On 5 November 2020, by dint of Proclamation 7 of 2020 published in Statutory Instrument 261B of 2020, the first respondent established a Tribunal constituted by the second, third and fourth respondents to inquire into the aforementioned question of the removal from office of the appellant. The Tribunal would conduct its business for a period of five months from the date of the swearing in of its members.

The members of the Tribunal were duly sworn in on 18 November 2020, thereby triggering their mandate. On 8 December 2020, the Tribunal served the appellant with a letter informing her of the matters into which it would inquire, chief among which was whether she had been grossly incompetent in performing or omitting to perform the acts mentioned in that letter. The particulars of the matters into which the Tribunal would inquire are not germane to the resolution of this appeal.

The hearing before the Tribunal commenced on 18 March 2021 and was concluded on 22 April 2021 after several witnesses, and the appellant herself, had presented evidence. The parties appearing before the Tribunal were thereafter requested to file their closing submissions, with the appellant being requested to submit her final response on 4 May 2021.

On 17 June 2021, having concluded its investigations, the Tribunal presented its recommendations to the first respondent. The Tribunal found the appellant guilty of gross

incompetence. By letter of the same day, the Chief Secretary to the President and Cabinet advised the Honourable Chief Justice of Zimbabwe that the Tribunal had recommended the removal of the appellant from office for gross incompetence and that the first respondent had accordingly removed the appellant from office.

PROCEEDINGS BEFORE THE COURT A QUO

Against this background, the appellant harboured grievances. On 25 August 2021, she filed a court application for review in terms of ss 26 and 27 of the High Court Act [*Chapter 7:06*] as read with r 60 of the High Court Rules, 2021. The appellant advanced multiple grounds of review.

Among the grounds was that the Tribunal had no jurisdiction to inquire into the question of her removal after 18 May 2021 since its five-month tenure had lapsed. She added that it was grossly irregular for the Tribunal to disregard her preliminary objections on the basis of what had occurred during an earlier inquiry involving the removal of another Judge and not during her own inquiry. It was also contended that it was a gross irregularity for the Tribunal to find her guilty of gross incompetence when she had not been charged with such a misconduct.

All in all, the appellant advanced no less than eight grounds of review on the basis of which she craved the grant of relief in the following terms:

- “1. That the Applicant’s application for review of the recommendations of the 2nd, 3rd and 4th Respondents dated 17 June 2021 and the subsequent decision of the 1st Respondent be and is hereby succeeds. (*sic*)
2. The recommendation of the 2nd, 3rd, and 4th Respondents dated 17 June 2021 and the subsequent decision of the 1st Respondent be and are hereby reviewed and set aside.

3. The decision of the 1st Respondent to remove the Applicant from the office of a Judge of the High Court in terms of section 187(7) and (8) of the Constitution be and is hereby set aside.
4. The Appellant be and is hereby reinstated to her position as a Judge of the High Court of Zimbabwe without loss to salary and benefits from the date of publication of Proclamation 7 of 2020.
5. The Respondents shall pay costs of suit.” (*The underlining is for emphasis*)

The first respondent opposed the application averring that the Tribunal had not acted without jurisdiction and that, in removing the appellant from office, he had acted in accordance with s 187 of the Constitution. He, therefore, prayed for the dismissal of the application.

Raising a number of preliminary objections, *inter alia*, that the court *a quo* lacked jurisdiction because the appellant had already noted an appeal to the Labour Court against the decision she sought to have reviewed; that in terms of the Commissions of Inquiry Act [Chapter 10:07], they were not liable to any action or suit in respect of any matter or thing done by them while they were members of the Tribunal; and that there was a fatal non-joinder of the Judicial Service Commission, the second, third and fourth respondents also opposed the application.

On the merits of the application, the second, third and fourth respondents contended that none of the grounds of review had been established.

The hearing of the application proceeded before a panel comprising three Judges of the court *a quo*. At the commencement of the hearing, the court *a quo* requested counsel for the parties to address it on the question of whether it still had review jurisdiction given that the appellant had already been removed from office by the first respondent in terms of the recommendations made to him. What exercised the mind of the court *a quo* was whether it

could entertain the application when a decision in accordance with the Constitution had ensued.

In its judgment, the court *a quo*, recorded that invitation thus:

“[6] At the hearing before going into the preliminary issues raised and the merits of the matter, the court invited submissions from the legal practitioners on the following critical legal issue - given that the first respondent acted on recommendations submitted to him by a tribunal and made a decision in terms of the Constitution to remove the applicant, does the court have jurisdiction to hear the matter? It is trite that a court can raise *mero motu*, the question of jurisdiction – see *Boswinkel v Boswinkel*, 1995 (2) ZLR 58(H) as cited with approval in *Chikwenengere v Chikwenengere*, SC 75-06.”

I note in passing that during the hearing, counsel for the second, third and fourth respondents were put to task on the question of whether their clients had any real interest in the application. Following exchanges with the court *a quo*, they conceded that their interest in the matter was nominal and indicated that they would abide by the court *a quo*'s decision.

The judgment of the court *a quo* was solely devoted to resolving the question that it invited the parties to address. The court *a quo* considered, correctly in my view, that the issue of the removal of a sitting judge and a subsequent review application made to set aside recommendations of a Tribunal, to be novel in this jurisdiction. It made several findings and conclusions of law on the basis of which it declined jurisdiction.

Firstly, citing the decisions of this Court in *Moyo v Mkoba* 2013 (2) ZLR 137 (S) and *Marange v Marange* S-1-21, the court *a quo* stated that it is not and would not be the ultimate decision of the first respondent that is subject to review but only the process preceding it. It reasoned that what could be subjected to review was only the process by which the Tribunal makes its recommendations.

Secondly, it considered the legislative framework outlining its review jurisdiction and also made a survey of approaches followed in different jurisdictions in respect of the review of the decisions of *ad hoc* Tribunals enquiring into the question of the removal of judges. These comparator jurisdictions included Nigeria, Kenya, South Africa and India.

Following a lengthy discussion, the court *a quo* found that once the first respondent has acted upon a recommendation by a Tribunal on the question of whether a judge should be removed from office, that action becomes a decision in terms of the Constitution, whose validity cannot be reviewed. It stated;

“The question then becomes whether or not the decision made by the first respondent is subject to review by this court. Whatever recommendation is made, the President must act in terms of s 187(8). In my view, once removal or no removal is recommended and acted upon, it becomes a decision made in terms of the Constitution. It could not have been the intention of the legislature that once such removal is finalised in terms of the Constitution, that this court assumes jurisdiction even under the guise of ‘inherent’ jurisdiction as contended by Mrs Mtetwa. Conversely, in my view, it would be absurd for the Judicial Service Commission for instance, to seek a reversal of a recommendation not to remove a judge by way of an application for review in this court.” (*The underlining is for emphasis*)

Finally, while accepting that the President’s exercise of his prerogative power may be subject to review, the court *a quo* concluded that the first respondent did not exercise prerogative power in acting upon the Tribunal’s recommendations, which could be reviewed. In its finding, the only executive powers of the President that are subject to review are those in which he has discretion or where he is required to act by a specific piece of legislation. The court *a quo* reasoned that in the present matter, the first respondent had no discretion whatsoever once recommendations had been made concerning the question of the removal of a judge. In its view, he was required to act on those recommendations.

It was principally on the basis of the foregoing findings and conclusions of law that the court *a quo* declined jurisdiction.

PROCEEDINGS BEFORE THIS COURT

Again the appellant was disenchanted and, dissatisfied with the decision of the court *a quo*. She noted an appeal to this Court. She attacked the decision of the court *a quo* on several bases. Essentially, the grounds of appeal are an attack on the court *a quo* for declining jurisdiction and on its reasoning in arriving at the conclusion that it could not assume jurisdiction over the appellant's application. Thus, the preeminent issue commending itself for determination is whether or not the court *a quo* erred in concluding that it had no jurisdiction over the appellant's review application.

At the commencement of the hearing, the court inquired from counsel for the second to the fourth respondents whether they had any intention to oppose the appeal since they had not filed any heads of argument and were, in any event, barred. Mr *Sinyoro*, for the second and fourth respondents, stated that his clients were not opposing the appeal and that he had made an appearance out of courtesy. For her part, Ms *Vengai*, for the third respondent, indicated that her client was not opposing the appeal and that she had made an appearance simply to observe the proceedings. Both counsel stated that their clients will abide by the decision of this Court.

There was also the sticking issue of the first respondent's non-appearance when he had strenuously contested the application in the court below. In the end, following inquiry from counsel and examination of the record, the court was satisfied that counsel for the first respondent was aware of the set down. For unexplained reasons, he was not in attendance. It is for that reason that the court proceeded to hear Mr *Sitotombe* for the appellant on the merits

of the appeal, regrettably without the benefit of submissions from counsel for the first respondent.

Mr *Sitotombe*, for the appellant, motivated the appeal in two parts. In the first part, he argued that the court *a quo* had jurisdiction by dint of s 171(1)(a) of the Constitution and s 26 of the High Court Act [*Chapter 7:06*]. On the basis of those provisions, counsel argued that the original civil jurisdiction of the High Court is unlimited. The inherent power of the High Court, so it was argued, clothes it with the authority to adjudicate over any matter, being, in this case, the recommendations that were made by the second, third and fourth respondents and acted upon by the first respondent.

Relying on the decision of this Court in *Marange v Marange & Ors* S-1-21, counsel argued further that the court *a quo* grossly misdirected itself in holding that once the first respondent has acted upon the recommendations by the second to the fourth respondents, they become non-reviewable. He contended that there is no law that ousts the review jurisdiction of the High Court. Counsel questioned how the legality of the process of the removal of a Judge, which process must be in accordance with the law as held in *Bere v Judicial Service Commission & Ors* S-1-22, can be interrogated when the court “shies away” from its jurisdiction.

In the second part of his submissions, counsel for the appellant submitted that the mere act of the first respondent in terms of the Constitution does not take away the irregularities that bedevilled the process of the removal of the appellant. According to counsel, the first respondent has a duty to ensure that the Constitution and other laws are faithfully observed. Thus, in light of the duty of the first respondent, the irregularities alleged by the appellant

cannot be ignored once the first respondent has acted upon the recommendations. In his view, an unlawful process can never give rise to a lawful decision.

Counsel drew an analogy between what the appellant seeks to do and what occurred in the case of *Gonese & Anor v Parliament of Zimbabwe & Ors* CCZ-4-20. In that case, the Constitutional Court set aside the passage of a Constitutional Bill in the Senate after the President had assented to it. On this score, it was submitted that it is legally permissible for the court *a quo* to review the procedure followed in the appellant's removal even after the first respondent has acted upon the recommendations emanating from that process.

THE LAW

A focused discussion of the applicable law requires that it be prefaced with an examination of the nature of the proceedings before the court *a quo*, the nature of the jurisdiction it was called upon to exercise and the parties who were before it. As already observed, the appellant launched an application in terms of the High Court Act and the rules of the High Court for the review of the recommendations of the Tribunal that inquired into the question of her removal.

Had the application succeeded, not only did the appellant pray that the court *a quo* exercise its power to review and set aside the recommendations by the second, third and fourth respondents, but also review and set aside the subsequent decision of the first respondent. This much is readily apparent from the appellant's draft order filed in the court *a quo*.

It is common cause that the second, third and fourth respondents were mandated in terms of s 187 of the Constitution to consider the question of the appellant's removal from office and to thereafter provide recommendations to the first respondent. In turn, the first

respondent was required in terms of subsection [8] of s 187, which is of peremptory application, to act in accordance with the recommendations made to him.

Having said that, it is important, in developing the discussion further, to consider the rudimentary concept of jurisdiction. In essence, jurisdiction connotes the power reposed in a court to adjudicate upon, determine and dispose of a matter. See *Sadziwani v Natpak (Pvt) Ltd & Others* CCZ-15-19 at p 18. Ordinarily, a superior court such as the court *a quo* has inherent and unbridled jurisdiction.

However, such jurisdiction may and is often limited by a statute, and in some cases the common law may place or develop limitations on the jurisdiction of a court. Limitations may, among other aspects, be placed on the subject-matter, monetary value, persons or territory over which a court may exercise its jurisdiction.

The following passage in *Herbstein and Van Winsen, The Civil Practice of the High Courts and Supreme Court of Appeal of South Africa*, 5 ed, (2009) at p 52, illustrates the varying nature of limitations usually placed upon a court's jurisdictional powers:

“Generally speaking, limitations may be placed upon the power of a court in relation to factors such as territory, subject-matter, amount in dispute, and parties. Each High Court has jurisdiction with regard to a specific territory within the Republic of South Africa. The power of the High Courts may be limited by legislation which assigns certain types of matters to other courts.”

The learned authors go on to add that:

“The limitations upon the jurisdiction of the High Court and the Supreme Court of Appeal are mainly statutory, though the common law also imposes some limitations. The Constitution itself provides limitations by reserving certain matters for the exclusive jurisdiction of the Constitutional Court” (*The underlining is for emphasis*)

It is also instructive to examine the provisions of the Constitution which delineate the jurisdiction of the High Court in matters that are directly permeated by the Constitution. Section 171(1)(c) of the Constitution provides that:

- “(1) The High Court—
- (a) has original jurisdiction over all civil and criminal matters throughout Zimbabwe;
 - (b) has jurisdiction to supervise magistrates courts and other subordinate courts and to review their decisions;
 - (c) may decide constitutional matters except those that only the Constitutional Court may decide; and
 - (d) has such appellate jurisdiction as may be conferred on it by an Act of Parliament.” *(The underlining is for emphasis)*

Although the High Court has constitutional jurisdiction, its jurisdiction in such matters is ousted in respect of matters that are within the exclusive power of the Constitutional Court. So, by clear and unambiguous legislative pronouncement, that court has no jurisdiction whatsoever over those constitutional matters “that only the Constitutional Court may decide”.

It follows that subsections (2) and (3) of s 167, outlining part of the jurisdiction of the Constitutional Court, have a bearing on the resolution of this matter. They provide:

- “(2) Subject to this Constitution, only the Constitutional Court may—
- (a) advise on the constitutionality of any proposed legislation, but may do so only where the legislation concerned has been referred to it in terms of this Constitution;
 - (b) hear and determine disputes relating to election to the office of President;
 - (c) hear and determine disputes relating to whether or not a person is qualified to hold the office of Vice-President; or
 - (d) determine whether Parliament or the President has failed to fulfil a constitutional obligation.
- (3) The Constitutional Court makes the final decision whether an Act of Parliament or conduct of the President or Parliament is constitutional, and must confirm any order of constitutional invalidity made by another court before that order has any force.” *(The underlining is for emphasis)*

Section 167(2)(d) exclusively gives the jurisdiction to determine whether the President or Parliament has failed to fulfil a constitutional obligation to the Constitutional Court. The provision inherently implies that where the disposition of a matter is dependent on a finding relative to the question of whether the President or Parliament failed to fulfil a constitutional obligation, no other court besides the Constitutional Court will have jurisdiction over the subject-matter.

This point was emphasised by the Constitutional Court in *Chirambwe v President of the Republic of Zimbabwe & Others* CCZ-4-21 at p 22, para. 49, where the court said:

“[49] Section 110(2)(d) of the Constitution of Zimbabwe recognises, as an executive function, the making of appointments by the President. The question whether the President has failed to properly make an appointment as directed by the Constitution is a matter that requires the Court to intrude into the executive functions of the President and hence it falls squarely within the exclusive jurisdiction of this Court. In *Von Abo v President of the Republic of South Africa* 2009 (5) SA 345 (CC) the South African Constitutional Court held that a decision of the President that flows directly from the Constitution and that relates to the relationship between the judicial and executive branches of the State generally falls within the exclusive jurisdiction of this Court.” (*The underlining is for emphasis*)

There is also another provision of the Constitution that sheds light on the constitutional jurisdiction of the High Court. It is s 175(1), which provides for the powers of the courts in constitutional matters thus:

“(1) Where a court makes an order concerning the constitutional invalidity of any law or any conduct of the President or Parliament, the order has no force unless it is confirmed by the Constitutional Court.”

There is no gainsaying that s 175(1) is critical on the exercise of the constitutional jurisdiction of all courts in whom such jurisdiction is invested in matters that are not within the exclusive jurisdiction of the Constitutional Court.

The harmonious relationship between s 167(2)(d) of the Constitution which allows only the Constitutional Court to determine whether the President has failed to fulfil a constitutional obligation and s 175(1) which allows “a court” to make an order concerning the constitutional invalidity of the conduct of the President has implications on the jurisdiction of the High Court in matters involving the conduct of the President.

The reason for this is that there is a thin line between a failure by the President to fulfil a constitutional obligation and the conduct of the President that is constitutionally invalid. One may suppose that in most cases, a failure to fulfil a constitutional obligation will also involve conduct that is constitutionally invalid. In saying so, I am mindful of the celebrated principle of constitutional interpretation that the provisions of the Constitution must be considered holistically to find the legislative intent.

The Constitutional Court has had occasion to pronounce on that principle in a number of cases. In *Mupungu v Minister of Justice Legal and Parliamentary Affairs & Ors* CCZ -7-21 at pp 46 -47, PATEL JCC made the point that all relevant provisions that bear on the subject for interpretation must be considered together and as a whole, so as to give effect to the objective of the Constitution having regard to the nature and scope of the rights, interests and duties that form the subject matter of the provisions to be construed.

See also *Chamisa v Mnangagwa & Ors* CCZ – 21-19 at pp 32 – 33; *Museredza & Ors v Minister of Agriculture, Lands, Water and Rural Resettlement & Ors* CCZ 1 – 22 at p18 para 34 and *Mawere v Registrar General* CCZ - 4–15 at p 7 para 20.

Where a court of competent jurisdiction, other than the Constitutional Court, is faced with the question of whether the case before it involves a failure by the President to fulfil a constitutional obligation or constitutionally invalid conduct by the President, such a court must, perforce, be certain of the nature of the case before it lest it unlawfully assumes jurisdiction over a matter that is within the preserve of the Constitutional Court in terms of s 167(2)(d) of the Constitution.

In that regard, the views expressed by the Supreme Court of Appeal of South Africa in the case of *King and Others v Attorneys' Fidelity Fund Board of Control and Another* 2006 (1) 474 (SCA) at 482 *et seq.* are apposite;

“[12] The main question is whether this Court is precluded from pronouncing on the appellants' complaint. Though an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court, this Court and the High Courts have jurisdiction to 'make an order concerning the constitutional validity of an Act of Parliament' (s 172(2)(a)). Section 167(4)(e), however, allows only the Constitutional Court to 'decide that Parliament or the President has failed to fulfil a constitutional obligation'.

[13] Before the hearing, this Court invited the parties to make submissions on this issue, which was not argued before Chetty J. Both sides rightly submitted that the words 'constitutional obligation' in s 167(4)(e) must bear a restricted meaning. The Constitutional Court has said as much. In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*, a case concerning the conduct of the President, the Court pointed out that if s 167(4)(e) were construed as applying to all questions concerning constitutional validity of conduct of the President, it would conflict with s 172(2)(a). It therefore considered that when the two sections are read together, a 'narrow meaning' should be given to 'fulfil a constitutional obligation' in s 167(4)(e), though it found it unnecessary to decide what that meaning should be.

[14] The purpose of the constitutional provisions giving exclusive jurisdiction to the Constitutional Court is 'to preserve the comity between the judicial branch of government, on the one hand, and the legislative and executive branches of government, on the other, by ensuring that only the highest Court in constitutional matters intrudes into the domain of the principal legislative and executive organs of State'.

Since the Constitutional Court bears 'the responsibility of being the ultimate guardian of the Constitution and its values', s 167(4) vests it with exclusive

jurisdiction in ‘crucial political areas’, and it bears the duty ‘to adjudicate finally in respect of issues which would inevitably have important political consequences’.

[15] These are the clear premises. The question is whether they leave space for this Court and the High Courts to grant an order of statutory invalidity when the defect is alleged to arise from breach of a constitutional obligation. ...

[16] In our view these approaches [contended for by counsel in the case] impermissibly attenuate the jurisdictional exclusion in s 167(4). Although s 172(2) grants power to this Court and the High Courts ‘to make an order concerning the constitutional validity of an Act of Parliament’, the co-existence of the two provisions requires that we distinguish between different ways in which the Constitution envisages that statutes may be invalid.” (*The underlining is for emphasis*)

While I have selectively and carefully relied on the *King’s* case *supra* in light of the reservations expressed by the Constitutional Court in the *Chirambwe* case as to its compatibility with our jurisprudence, I find the observations made therein somewhat illustrative of the necessity to determine whether a matter involving an act, conduct or decision of the President would be in the exclusive jurisdiction of the Constitutional Court.

In the *Chirambwe* case *supra* at para. 48, the Constitutional Court set out the test to determine whether a matter falls within the exclusive jurisdiction of the Constitutional Court as being “whether the issues raised involve an intrusion into the domain of either Parliament or the President’s executive powers”. See also *Mujuru v The President of Zimbabwe & Ors* CCZ-8-18 at paras. 24 – 27 for a discussion on the term “constitutional obligation”.

The import of the above is that notwithstanding s 175(1) where a court with constitutional jurisdiction has been approached to set aside, either directly or as consequence of some other constitutionally invalid act or conduct, an act or decision of the President on the basis it falls short of the constitutional requirements, such a court must be certain that the matter

before it is not one involving a failure by the President to fulfil a constitutional obligation. Any such matter is obviously within the exclusive jurisdiction of the Constitutional Court.

The comity demanded among the arms of the state necessitates that only the highest court in constitutional matters pronounces upon the defiance of the Constitution by the President or Parliament. See *Mliswa v Parliament of the Republic of Zimbabwe* CCZ-2-21 at 8 and *Chirambwe supra*. In the words used in the *King's case supra* subordinate courts must not impermissibly attenuate the jurisdictional exclusion of s 167(2)(d) because it could not have been the intention of the legislature in enacting s175[1] to dilute the exclusivity enjoined by the Constitutional Court by opening the floodgates for courts inferior to it to join the fray on such matters.

This case also brings to the fore the presumption of constitutionality or constitutional validity. The presumption of constitutionality can be understood in a couple of senses. In the first sense, the presumption operates in favour of certain executive, administrative or legislative acts, which are taken to be constitutionally valid unless proven to be otherwise. The presumption was lucidly set out by BHUNU JA in *Econet Wireless (Pvt) Ltd v Minister of Public Service, Labour and Social Welfare & Ors* S-31-16 at 6 as follows:

“What this means is that all questioned laws and administrative acts enjoy a presumption of validity until declared otherwise by a competent court. Until the declaration of nullity, they remain lawful and binding, bidding obedience of all subjects of the law.” (*The underlining is for emphasis*)

In the case of *Gonese & Anor v Parliament of Zimbabwe & Ors* CCZ-4-20 at pp 42 – 43 the court held that the presumption of constitutionality also applies to the conduct of the business of the National Assembly.

In the most common sense, the presumption of constitutional validity is invoked in respect of legislation. Where legislation is capable of two meanings, one of which accords with the Constitution, it is always presumed that the meaning that is consistent with the Constitution is the meaning that Parliament intended to ascribe to the legislation.

In that regard any person alleging that a piece of legislation is unconstitutional bears the onus to rebut the presumption. See *Zimbabwe Electoral Commission & Anor v Commissioner-General, Zimbabwe Republic Police & Ors* 2014(1)ZLR 405 at p 411C – H; *In Re: Prosecutor General of Zimbabwe on his Constitutional Independence and Protection from Direction and Control* CCZ—13—17 at 7; *Mujuru v President of Zimbabwe & Ors* CCZ—8—18 at paras. 14 – 16 and *Kawenda v Minister of Justice, Legal and Parliamentary Affairs & Ors* CCZ-3–22 at p 17.

This case partly hinges upon the first sense in which the presumption of constitutionality is used. If a decision, act or conduct of the President is susceptible to being set aside on the basis that the President failed to fulfil a constitutional obligation, then only the Constitutional Court would have the jurisdiction to make such a declaration. In the meantime, that decision will remain valid until the presumption operating in its favour is appropriately negated following proceedings in a court with the requisite jurisdiction.

SYNTHESIS

The court *a quo*'s starting point was to ask the question whether its review jurisdiction had been ousted since a decision in terms of the Constitution had been made by the first respondent. It occurs to me that that was somewhat the wrong question to ask since the finality of the first respondent's decision is not a determinant factor on the question of

jurisdiction. All that the court *a quo* had to do was consider the statutory framework on its jurisdiction and then decide whether there was anything in that framework ousting its jurisdiction to review the recommendations of the Tribunal after the first respondent had acted upon them.

It is not the conclusiveness or finality of a constitutional step, act or conduct that ousts the jurisdiction of a court to review that step, act or conduct. The court *a quo*, in determining its review jurisdiction over what it called “a decision in terms of the Constitution to remove the [appellant]”, ought to have been guided by the presumption against the ouster of the jurisdiction of the High Court, which would have compelled it to identify a positive, clear and unambiguous provision limiting the jurisdiction of the High Court in constitutional matters, which is s 167(2)(d).

Drawing on an analogy of the facts in the case of *Gonese & Anor v Parliament of Zimbabwe & Ors* CCZ-4-20, Mr *Sitotombe*, for the appellant, correctly argued that it is possible for an act, law, conduct or decision to be set aside even after it has been concluded or finalised. Though that analogy is compelling, it does not establish a basis for the High Court to assume jurisdiction in this case. In any event, that case is distinguishable on the basis that the court which assumed jurisdiction there was the Constitutional Court and not the High Court.

It is correct, as argued by Mr *Sitotombe*, that the High Court has original civil jurisdiction to review the proceedings of any inferior court or tribunal. However, the provisions of s 171(1) of the Constitution are not the only provisions of the Constitution shedding light on the jurisdiction of the High Court. As already observed, the jurisdiction of the High Court in constitutional matters is limited to those matters that are not within the exclusive jurisdiction of the Constitutional Court.

Accordingly, the High Court does not have jurisdiction over a matter falling within the ambit of s 167(2)(d) of the Constitution. It is with this consideration in mind that I have already adverted to the exhortation that a court must be careful not to assume jurisdiction over a matter that only falls within the exclusive competence of the Constitutional Court.

I entertain the view that the question of whether or not the court *a quo* had the requisite jurisdiction over the appellant's *causa* is better understood and resolved in the context of the appellant's draft order wherein she sought relief to set aside the decision of the first respondent. In order to determine whether only the Constitutional Court would have the jurisdiction to set aside the decision of the first respondent, there is a need to ascertain that the constitutional invalidity of that decision is based on a failure to fulfil a constitutional obligation. But before that is even determined the appellant's founding affidavit *a quo* must set out the basis upon which the court *a quo* was called upon to review and set aside the decision of the first respondent.

The nature of proceedings before the court *a quo*

In carrying out the enquiry whether this matter is within the exclusive jurisdiction of the Constitutional Court, one must first be satisfied that there is a constitutional matter. In *Moyo v Chacha & Ors* 2017 (2) ZLR 142 (CC) at p. 150D, while commenting on the definition of a “constitutional matter” that is provided by the Constitution, the Constitutional Court stated as follows:

“The import of the definition of ‘constitutional matter’ is that the Constitutional Court would be generally concerned with the determination of matters raising questions of law, the resolution of which require the interpretation, protection, or enforcement of the Constitution.

The Constitutional Court has no competence to hear and determine issues that do not involve the interpretation or enforcement of the Constitution or are not connected with a decision on issues involving the interpretation, protection or enforcement of the Constitution.”

The defining character of a constitutional matter is the interpretation or enforcement or protection of the Constitution. Thus, it has been stressed that the mere reference to a provision of the Constitution does not imbue a matter with constitutional character. The opposite, though less persuasive, may also true.

The absence of a reference to the Constitution does not mean that a matter is not a constitutional matter although in most constitutional matters there generally would be reference to the Constitution. See *Bere v Judicial Service Commission & Ors* CCZ–10–22 at p 7. As stated in the *Moyo* case *supra*, one must simply be satisfied that a matter raises questions of law, the resolution of which require the interpretation, protection, or enforcement of the Constitution.

A related issue of important consideration is the point at which a matter assumes constitutional character. In the *Bere* case *supra*, the Constitutional Court held that a constitutional matter cannot arise for the first time on appeal when it was not available or in existence in the subordinate court. At p 14, it was stressed that:

“in order to determine whether or not there was a constitutional matter before the court *a quo*, the dispute must be traced back to the court of origin, in this case, the High Court”.

Turning to the facts of this case, the application *a quo* had all characteristics of a non-constitutional matter. The court application plainly declared that it was for review in terms of r 60 of the High Court Rules, 2021 as read with ss 26 and 27 of the High Court Act [*Chapter*

7:06]. The application further stated that the subject of the review was the first respondent's decision made in terms of s 187(7) and (8) of the Constitution on 17 June 2021. In para 12 of her founding affidavit, the appellant unequivocally stated that:

“The present application is for the review of the decisions of the Respondents that led to my removal from the office of a judge.”

The application *a quo* is ostensibly based on common-law grounds of review. There are scant references to any provisions of the Constitution. In fact those references were merely intended to buttress the common-law grounds on which the application is based. For instance, the appellant made reference to s 190(4) of the Constitution intending to explain that the Tribunal ignored the preliminary point that she raised.

As a preliminary point, she had argued that she was first supposed to be subjected to the constitutional disciplinary procedure provided for in s 190(4) of the Constitution before the Tribunal could proceed to enquire into the matters that were before it. The appellant also referred to s 69 of the Constitution suggesting that the preliminary points she raised were of crucial importance to her right to a fair hearing before an independent and impartial Tribunal. Given that the matter was not heard on the merits, it suffices for me to simply observe that the resolution of the allegation that the preliminary points she raised were not considered is unlikely to have yielded a constitutional matter.

Further on, the appellant also made reference to s 56 of the Constitution in para. 15.5 of her founding affidavit to support her contention that the Tribunal did not consider the preliminary objection that the Judicial Service Commission submitted her matter to the first respondent without following the provisions of Statutory Instrument 107 of 2012. She sought to make the point that the same provisions were followed in the case involving Mr Justice Bere

who had earlier on been subjected to an inquiry. Thus, reference to s 56 was intended to demonstrate, bearing in mind the imperativeness of the right to equality, that the Tribunal failed to pronounce on an important preliminary point.

Therefore, the ineluctable conclusion to be drawn from an analysis of the appellant's founding affidavit is that it did not present a constitutional matter. The issue however does not end there. It must be remembered that the appellant sought the review and setting aside of the second, third and fourth respondents' recommendations and the subsequent decision of the first respondent. In particular, there must be clarity as to the nature of the jurisdiction required to set aside the decision of the first respondent.

The appellant's pleaded jurisdictional basis for setting aside the first respondent's decision

It is important to specifically advert to the grounds upon which the appellant intends to have the decision of the first respondent set aside. The grounds appear to have been canvassed simultaneously in the founding affidavit with the basis upon which the appellant sought to have the recommendations of the second, third and fourth respondents set aside.

For good measure, regarding the allegation that the recommendations of the second, third and fourth respondents were made at a time when there was no longer any valid Tribunal, the appellant averred in para. 13.13 that:

“This means that the recommendations ... were made at a time when there was no valid Tribunal which could present a valid report and as such the recommendations are a legal nullity and ought to be set aside. Once the recommendations became unlawful, and therefore a legal nullity, the 1st Respondent could not act on them as he is constitutionally barred from acting on unlawful actions. Consequently, his accession to an unlawful recommendation is tainted and must itself be set aside.” (*The underlining is for emphasis*)

On the allegation that she was not given a right to address the Tribunal in mitigation and to be heard on the appropriate penalty, the appellant averred in para 14.7 of her founding affidavit that:

“the 1st Respondent was misled when the Tribunal members claimed that there were no extenuating circumstances when these could not be considered in the absence of a hearing in mitigation”.

On that score, she added that the recommendations to the first respondent and his subsequent decision ought to be set aside because he “ought only to act on recommendations properly reached after following due legal process”.

On the failure to determine the preliminary points she raised before the Tribunal, the appellant avowed that such a failure constituted a gross irregularity that vitiated the recommendation by the second, third and fourth respondents as well as the subsequent decision of the first respondent. This is set out in para. 15.7 of the appellant’s founding affidavit. Thereafter, the appellant canvassed the allegation that she was not provided with documents that would be relied on during the Tribunal proceedings. On that point, she concluded in para. 17 of her founding affidavit thus:

“It is my view that I have made a case for the review of the recommendations of the 2nd, 3rd and 4th Respondent to be set aside, together with the subsequent decision of the 1st Respondent on this additional ground.”

Beyond these averments, one would not find any other averment on the basis of which the decision of the first respondent would be reviewed and set aside. The effect of the application *a quo* would have been that the decision of the first respondent would be set aside as a consequence of findings made by the court *a quo* on non-constitutional grounds of review.

The question of the jurisdiction required to set aside the first respondent's decision

In light of the relief sought against the decision of the first respondent, the question that begs an answer on the jurisdiction of the court *a quo* is whether it would have had the power to set aside that decision on the basis of the averments in the applicant's founding affidavit.

A fortiori, would the High Court even have the jurisdiction to set aside the decision in the circumstances? The decision having been apparently made on the basis of the procedure and provisions of s 187 of the Constitution, it necessarily follows that the invalidity of the first respondent's decision must ordinarily be predicated upon a breach of the provisions of s 187.

To exemplify this conclusion, the logic behind the appellant's basis of review must be laid bare. Essentially, the appellant argues that the decision of the first respondent is invalid simply because it is predicated upon recommendations that are null and unlawful due to the procedural irregularities cited. It is trite that if an act is a nullity, then nothing can stand on it. Thus, taken to its logical conclusion, the appellant's basis for impeaching the first respondent's decision is that his decision is invalid since there were no lawful and valid recommendations in terms of which a decision could be taken as stipulated by s 187(8) of the Constitution.

Whether the recommendations of the second, third and fourth respondents are null and unlawful is a question that has not been adjudicated upon and determined. They can only be regarded as such when so declared by a court of competent jurisdiction. They are presumed to be valid. As things stand, the recommendations are only voidable. In this regard, the famous

remarks of LORD DENNING in *MacFoy v United Africa Company Limited* [1961] 3 All ER 1169 (PC) at p 1172 remain true:

“But if an act is only *voidable*, then it is not automatically void. It is only an *irregularity* which may be waived. It is not to be avoided unless something is done to avoid it. There must be an order of the Court setting it aside: and the Court has discretion whether to set it aside or not. It will do so if justice demands but not otherwise. Meanwhile it remains good and a support for all that has been done under it.”

For the decision of the first respondent to be set aside in turn, a competent court must also necessarily find that the decision is invalid because the first respondent acted on the basis of null recommendations. In other words, the first respondent would have constructively failed to comply with s 187(8) since, at law; there would not have been valid recommendations in accordance with which he could have made a decision. Surely, where the decision of the first respondent is set aside on the basis that it is predicated on null recommendations, that decision would have not have been made in accordance with the Constitution. The decision would essentially be set aside because the first respondent would have failed to comply with the Constitution.

We know of course that only the Constitutional Court can determine whether the first respondent has failed to act in accordance with the Constitution as he is obliged to. But to my mind, this outcome can only be achieved by a litigant who has properly pleaded a constitutional basis upon which the first respondent’s decision ought to be set aside.

In the case of *Sibangani v Bindura University of Science Education CCZ-7-22* at p 10, the Constitutional Court set out the importance of properly pleading jurisdiction in constitutional matters. The Court stated:

“[20]... An applicant must set out either the facts or the law that would form the basis of the jurisdiction of the Court in his or her cause. It is insufficient for an applicant, without

more, to merely cite a provision of the Constitution and assume that the Court's jurisdiction is triggered. The existence of jurisdiction is an objective fact derived from the founding affidavit. It must also find expression in a draft order which speaks to the relief concerned with a constitutional matter for adjudication by the Court." (*The underlining is for emphasis*)

The court went on to state:

"[22] The need to plead jurisdiction, which in our jurisdiction is laid down in the rules of this Court, was more incisively pronounced in another decision of the Constitutional Court of South Africa, namely, *Gcaba v Minister for Safety and Security* [2009] ZACC 26; 2010 (1) SA 238 (CC) at para 75. The Court held that:

'Jurisdiction is determined on the basis of the pleadings, as LANGA CJ held in *Chirwa*, and not the substantive merits of the case. ... In the event of the Court's jurisdiction being challenged at the outset (in *limine*), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the Court's competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the Court to say that the facts asserted by the applicant would also sustain another claim, cognisable only in another court.' (*My emphasis*)."
(*Emphasis in original*)

I have already demonstrated that the relief that the appellant sought against the first respondent would be, in effect, based on the invalidity of the decision as a result of the absence of valid recommendations that would trigger the provisions of s 187(8). That determination is a constitutional matter requiring a court to interpret and enforce the Constitution by ensuring that the first respondent makes his decision in accordance with s 187.

The appellant did not properly plead a jurisdictional basis upon which the court *a quo* could set aside the decision of the first respondent. It was incumbent on her to show in her founding affidavit that the court *a quo* had the requisite power to set aside the decision of the first respondent not having, as she impliedly contends, been made on the strength of recommendations contemplated by s 187.

But even if the appellant had properly pleaded a proper jurisdictional basis for the relief she sought, the High Court would still not have the competence to set aside the decision of the first respondent for yet another reason. It is that only the Constitutional Court has the jurisdiction to set aside the decision of the first respondent on the ground that it is at variance with and predicated upon a failure to fulfil his constitutional obligations.

The decision sought to be set aside, which relates to the role of the Executive in the removal of Judges, can also be said, on the authority of *Mliswa supra*, to be a constitutional decision bearing upon the comity between the Executive and the Judicial arms of the state. For that reason it must be passed upon by the highest court in constitutional matters. On the test espoused in *Chirambwe* for determining whether a matter falls within s 167(2)(d), the unavoidable conclusion is that the issues raised and the relief sought against the first respondent would demonstrably constitute an intrusion into the domain of the President's powers and obligations in the removal of Judges.

What fortifies this view is the fact that before this Court, the submissions made on behalf of the appellant strongly suggested that the basis upon which the decision of the first respondent would be set aside is that the first respondent has a duty to ensure that the Constitution and other laws are faithfully observed. That suggestion is reinforced in the appellant's heads of argument filed with this Court. In para 3.14. of the appellant's heads of argument, after citing s 90(1) of the Constitution providing for the first respondent's duty to uphold, defend, obey and respect the Constitution as the supreme law of the nation and to ensure that the Constitution and all the other laws are faithfully observed, the submission is made that:

“3.1.4. As is clear from this constitutional provision, the 1st Respondent has a duty to ensure that the constitution and all other laws of the land are

faithfully observed. That this duty extends to decisions made in terms of section 187(8) of the Constitution is without a doubt. Section 187(8) of the Constitution states that;

The President must act in accordance with the tribunal’s recommendation in terms of subsection 7.” (*The underlining is for emphasis*)

The appellant contends that it is compliance with the Constitution and all other laws of the land that makes the first respondent’s decision a decision in terms of the Constitution. In para 3.15 of her heads of argument, the appellant adds that the first respondent acts in accordance with the recommendation of a Tribunal established in terms of s 187(3) of the Constitution in his capacity as the President of Zimbabwe, and, thus, “he remains duty-bound to ensure that the removal of a Judge from office is in accordance with the Constitution and all other laws”. In para 3.16 she further argues that the word “ensure” means that the first respondent “has a constitutional responsibility to make sure that the removal process is done in accordance with the law”.

Without repeating what I have already said, it suffices to state that from the heads of argument, the appellant also appreciates that her basis for setting aside the decision of the first respondent would be his failure to fulfil a constitutional obligation. That requires a determination that can only be made by the Constitutional Court.

The decision in *Gula Ndebele v Bhunu* S–29–11:

Mr *Sitotombe* also sought to argue that the court *a quo* had jurisdiction on the basis of the decision of this court in *Sobusa Gula Ndebele v Bhunu* S–29–11. In that case, the appellant therein, a former Attorney-General, approached the High Court seeking the review

of the proceedings of the Tribunal whose inquiry led to a decision to have him removed from the office of Attorney-General by the President.

Having failed to cite the President, the High Court held that the President was a necessary party who ought to have been cited. On that basis, the High Court dismissed the application because of the non-joinder of the President. It was Mr *Sitotombe's* view that the fact that on appeal, this Court did not raise the jurisdictional question, meant that the High Court had jurisdiction to review the recommendations of a Tribunal after the President has acted upon them.

The *Gula Ndebele* case is distinguishable. This is principally because it predates the current Constitution in terms of which certain constitutional matters, such as the application *a quo* which invites a court to set aside a decision in the domain of the President's constitutional powers, fall within the exclusive remit of the Constitutional Court unlike in the *Gula Ndebele* case. Quite differently, this case concerns the jurisdiction of the High Court to review a decision of the President removing a judge from office. It inherently involves a question whether the President would have failed to fulfil a constitutional obligation.

As I have already stated, the power to determine the appertaining question and to set aside the decision is effectively reposed in the Constitutional Court by s 167(2)(d) of the current Constitution. It follows that the *Gula Ndebele* case may not be relied on to persuade this court to find that the court *a quo* could have jurisdiction that is manifestly at variance with the provisions of s 167(2)(d) of the Constitution, an obvious aberration of our current Constitution.

DISPOSITION

This appeal essentially requires this court to determine whether the court *a quo* would have jurisdiction to review the recommendations of the second, third and fourth respondents and the subsequent decision of the first respondent, especially considering that the decision of the first respondent completed the process of the removal of the appellant from office. For different reasons, than those advanced by the court *a quo*, I conclude, in light of the relief sought by the appellant in respect of the first respondent's decision and the apparent failure to plead a proper jurisdictional basis, that the High Court would not have the requisite jurisdiction to set aside the first respondent's decision.

Once it is accepted that the court *a quo* would not have had complete jurisdiction over the application that was before it, this appeal cannot succeed. The next important inquiry would be the appropriate order to be made. One has to advert to the decision of this Court in *Chombo v National Prosecuting Authority & Ors* S–158–21 at 6, on that score. The Court held that:

“In *Mutukwa v National Dairy Co-operative Ltd* 1996 (1) ZLR 341 (S), with respect to the High Court but applicable with equal force to this Court, it was held as follows:

‘In any case, a question of jurisdiction is one which a court imbued with review powers may raise *mero motu*; for parties cannot confer jurisdiction on an adjudicating authority where such jurisdiction has not been conferred on that adjudicating authority by statute.’

In fact, for a court with review and/or appellate jurisdiction to overlook or fail to address the lack of jurisdiction of the court or tribunal whose decision or proceedings have been placed before it is to compound the irregularity as that reviewing or appellate court's proceedings would be marred by the initial lack of jurisdiction of the court of first instance rendering them in turn to be a nullity.”

In the *Chombo* case the court struck the appeal off the roll because it was based on a decision reached without jurisdiction. In other words, no appeal could lie against a decision marred by lack of jurisdiction. However, in this case, the court *a quo* did not pass upon the

application before it. It only determined the question, which it was entitled to raise, of whether or not it had jurisdiction.

The instant appeal is restricted to the question of the court *a quo*'s findings on its lack of jurisdiction. The court *a quo* did not exercise jurisdiction which it did not have on the merits of the application, which would have afflicted the validity of this appeal. It stuck to the jurisdictional issue which it could lawfully determine. In turn, the appeal against the finding as to jurisdiction is valid. Having found that, indeed, the court *a quo* had no jurisdiction, this appeal cannot be allowed. It must accordingly fail and as such the appropriate order is the dismissal of the appeal.

On the question of costs, there is no basis for ordering the appellant to pay the costs of the appeal given that the appeal was not opposed. It would, in my view, be appropriate to dispose of the appeal with each party to bear its own costs.

In the result, it be and is hereby ordered as follows;

The appeal is dismissed with each party to bear its own costs.

CHATUKUTA JA:

I agree

MWAYERA JA :

I agree

Mtetwa & Nyambirai, appellant's legal practitioners

Sinyoro and Partners, second and fourth respondents' legal practitioners

Warara & Associates, third respondent's legal practitioners