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JUDICIAL SERVICE COMMISSION
REGISTRY
11 JUN 2021
P.O. BOX CY 28, CAUSEWAY
ZIMBABWE TEL: 04-704118

3013

IN THE HIGH COURT OF ZIMBABWE
HELD AT HARARE

CASE NO HC ___/21
Ref HC 2513/21

In the matter between:

MUSA KIKA

REGISTRAR OF THE HIGH COURT
OF ZIMBABWE
CIVIL DIVISION
11 JUN 2021
P.O. BOX 275, CAUSEWAY
ZIMBABWE

metleza

APPLICANT

And

LUKE MALABA

1ST RESPONDENT

And

MINISTER OF JUSTICE, LEGAL &

REGISTRAR
CONSTITUTIONAL COURT
11 JUN 2021
P.O. BOX 870, CAUSEWAY
ZIMBABWE TEL: 04-798634/5

2ND RESPONDENT

PARLIAMENTARY AFFAIRS

And

THE JUDICIAL SERVICE COMMISSION

3RD RESPONDENT

And

THE ATTORNEY GENERAL OF ZIMBABWE

4TH RESPONDENT

URGENT COURT APPLICATION

FOR AN ORDER FOR LEAVE TO EXECUTE PENDING APPEAL

FILED BY: ZIMBABWE HUMAN RIGHTS NGO FORUM

64B CONNAUGHT ROAD, AVONDALE

HARARE

IN THE HIGH COURT OF ZIMBABWE

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In the matter between:

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2ND RESPONDENT

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And

THE ATTORNEY GENERAL OF ZIMBABWE

4TH RESPONDENT

CERTIFICATE OF URGENCY

I **VIOLET ARETHA DZINGIRAI** a legal practitioner duly registered and practising at ChivoreDzingirai Group of Lawyers certify that:

- 1 I have considered the papers in this matter and wish to pass on to the court the view that this important matter is urgent and must be related to (i) as a court application and (ii) on an urgent basis in line with the decisions in **Kika v Minister of Justice, Legal & Parliamentary Affairs & Ors HH-264-21** and **Pascoe v Ministry of Lands & Rural Resettlement & Ors HH-391-17** for the following reasons:
- 2 First respondent filed his appeal on the 27th of May 2021 against the judgment sought to be executed pending that appeal. The judgment had been rendered on the 15th of May 2021.
- 3 When the appeal was filed, an application for Contempt of Court had already been brought. Through this application, applicant was seeking enforcement of the judgment of this court. The application for contempt was filed on the 25th of May 2021 after first respondent had returned to work on the 24th of May 2021.

- 4 The judgment of the court in the contempt of court matter was rendered on the 10th of June 2021. In response to that judgment and in accordance with its terms, this application was prepared and filed.
- 5 The conduct of the first respondent that must be arrested is ongoing. The fears that are raised cannot be dealt with later but must be dealt with as a matter of priority.
- 6 There would be no point hearing this matter after the appeal has been heard and determined.
- 7 The public interest involved in this matter requires that this application be dealt with as a matter of priority.
- 8 Applicant has not wasted time in approaching the court. It is at any rate in the public interest that the matter be dealt with urgently.
- 9 For these reasons, I certify that the matter is urgent and that it must be related to as such.
- 10 In accordance with the case made by the applicant, it is my opinion that the following proposals bearing on the management of this urgent court application are eminently sensible, consistent with the nature of the matter and may be adopted wholesome by the court:
 - 10.1 Respondents must if they are so inclined file their opposing papers within 3 days of service upon them of this application.
 - 10.2 Applicant must then be required to file both his affidavit in answer and Heads of Argument within 2 days of receipt by him of respondent's papers.
 - 10.3 Upon receipt of applicant's Heads of Argument, the Registrar must set the matter down.
 - 10.4 Respondents will in the intervening period file their own heads of argument.
- 11 I accordingly certify that this is a matter that must be dealt with as an urgent court application and that the court may adopt the suggestions in paragraph 10 above.

DATED AT HARARE THIS 11th DAY OF JUNE 2021



VIOLET ARETHA DZINGIRAI

IN THE HIGH COURT OF ZIMBABWE
HELD AT HARARE

CASE NO HC ____/21

Ref HC 2513/21

In the matter between:

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APPLICANT

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1ST RESPONDENT

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And

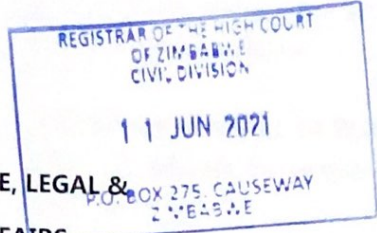
THE JUDICIAL SERVICE COMMISSION

3RD RESPONDENT

And

THE ATTORNEY GENERAL OF ZIMBABWE

4TH RESPONDENT



APPLICANT'S FOUNDING AFFIDAVIT

(a) **The deposition and the parties**

I **MUSA KIKA** make oath and state as follows:

- 1 I am an adult Zimbabwean male, a legal practitioner and the Executive Director of **THE ZIMBABWE HUMAN RIGHTS NGO FORUM**. I am applicant in this matter. The facts to which I depose are known to me and are true and correct. Where I make averments regarding the law, I do so on the advice of my legal practitioners.
- 2 My address for service is care of the **ZIMBABWE HUMAN RIGHTS NGO FORUM** my legal representatives of 64B Connaught Street, Avondale, Harare.
- 3 First respondent is **LUKE MALABA** the former **CHIEF JUSTICE** of Zimbabwe. He is cited in his personal capacity. His address for service is care of Constitutional Court building, Samora Machel Avenue where he is practising the contempt, the subject matter of these proceedings.
- 4 Second respondent is the **MINISTER OF JUSTICE, LEGAL & PARLIAMENTARY AFFAIRS** the Government of Zimbabwe minister responsible for the administration of

justice in the republic. His address for service is care of 5th Floor, New Government Complex, Harare.

5. Third respondent is the **JUDICIAL SERVICE COMMISSION** the constitutional commission tasked with the administration of the judiciary and with ensuring its independence and accountability. Its address for service is 2nd Floor, Causeway Building, Corner Third and Central Avenue, Harare.
6. Fourth respondent is the **ATTORNEY GENERAL OF ZIMBABWE**, who is the principal legal advisor to government. His address for service is care of New Government Complex, Samora Machel, Harare.

(b) Nature of the application

7. This is an **URGENT COURT APPLICATION** for leave to execute a judgment of this court pending appeal. The **judgment of the** court sought to be executed is attached hereto and is marked as **Annexure "A"**.
8. First respondent has on the strength of notices of appeal filed in the aftermath of the judgment purported to exercise the functions of **CHIEF JUSTICE** of the republic of Zimbabwe. The exercise of such functions comes with certain consequences and may:
 - 8.1 Result in the purported exercise by him of function being declared a nullity to the prejudice of the administration of justice.
 - 8.2 Will result in a continued assault on my rights and liberties as recognised by the court in the judgment marked as annexure "A" already attached.
 - 8.3 Has the undoubted effect of putting the judiciary into disrepute.
9. In view of the fact that this is an **URGENT COURT APPLICATION**, I draw the attention of the respondents and in particular the first respondent, to the reduced dies induciae as set out in the court application. I also draw attention to the certificate of urgency filed herewith. I also ask whether the court seized with this matter may issue such further directives as it may deem appropriate.

(c) Relief sought

10. I seek the following relief:

- 10.1 That leave to execute the judgment of this court of the 15th of May 2021 given under **HH-264-21** be and is hereby granted notwithstanding the appeals noted under **SC 131/21, SC 130/21 or SC 156/21**.
- 10.2 That first respondent, **LUKE MALABA** shall immediately cease and desist from exercising the functions of **CHIEF JUSTICE OF ZIMBABWE** either in a judicial or administrative capacity unless allowed to do so pursuant to the outcome of the appeals filed under **SC 131/21, SC 130/21 or SC 156/21**.
- 10.3 That there shall be no order as to costs.

(d) **The basis of the application**

11. On the 15th of May 2021, this court per **ZHOU, MUSHORE AND CHAREWA JJJ** issued an abridged judgment in terms of which it found that first respondent's tenure as a judge and **CHIEF JUSTICE OF ZIMBABWE** had come to an end at 00:00hrs on the 15th of May 2021. The abridged judgment was followed upon by annexure "A".
12. The judgment followed upon urgent court application proceedings that commenced at 14:30 hours on the 14th of May 2021 and ended at around 00:30hrs on the 15th of May 2021.
13. I draw attention to the fact that the judgment of the court is a declaratur and accordingly pronounces what the position in law is.
14. After the judgment of the court was issued, the third respondent immediately issued **a statement** which I attach and mark as **Annexure "B"**. In terms of that statement, the judgment of the court was acknowledged, and the correct position taken in line with provisions of section 181 of the Constitution of Zimbabwe, 2013, that the **DEPUTY CHIEF JUSTICE** had assumed the position of the **ACTING CHIEF JUSTICE OF ZIMBABWE**. That position has not been retracted.
15. I am aware that second and fourth Respondents immediately appealed the judgment. Their **two appeals** are attached hereto and marked as Annexures **C1 and C2**.

16. In the meantime, the **DEPUTY CHIEF JUSTICE** began to exercise in earnest the functions of the **ACTING CHIEF JUSTICE**. It is a matter of public record that she did the following, amongst others:

16.1 As the **ACTING CHIEF JUSTICE** she swore in the judges of the Constitutional Court who had been acting for quite sometime. This was after second respondent had noted its appeal.

16.2 As **ACTING CHIEF JUSTICE**, she also toured the Chinhoyi court house that is has been under construction and is nearing completion.

16.3 As **ACTING CHIEF JUSTICE** she exercised administrative functions as head of the judiciary and head of the Judicial Service Commission.

17. First respondent was therefore clear at all times that a judgment that affected him had been issued. It had been read in the presence and hearing of his counsel. All the respondents, proceeded on that understanding. At any rate, the matter has been of huge public interest and virtually every Zimbabwean knows about it.

18. I wish to point out, that first respondent did not file opposing papers when the main matter was heard. An affidavit purportedly filed on behalf of third respondent simply claimed that he, together with other judges, was opposed to the relief sought. The court however, found that the indication in that affidavit was ineffectual.

19. When the judgment of the court was issued, first respondent did not immediately appeal it. He acquiesced in it. Indeed the developments that I have highlighted above, would amount to peremption of an appeal assuming that one had been noted. The developments are of moment and must be considered in that light.

(e) **The aftermath**

20. On the 24th of May 2021, first respondent simply decided that he was going to return to "work". He did. He was defiant in doing so.

21. From that day on, first respondent began to exercise the functions of the **CHIEF JUSTICE OF ZIMBABWE**. It did not bother him that the country has an **ACTING CHIEF**

JUSTICE. It also did not bother him that he had not noted any appeal. His position was that the appeals noted and marked as Annexures C1 and C2 also pertained to him.

- 22. In adopting the position that the appeal noted by second and fourth respondents suspend the operation of the judgment of this court, first respondent did not consider that:
 - 22.1 He had not noted an appeal himself.
 - 22.2 He was not in a position to note an appeal because this court essentially found that he was in default.
 - 22.3 He had already taken certain steps and conducted himself in a manner consistent with the dictates of the judgment of the court even after the second and third respondents had noted their appeals.

(f) **The response**

- 23. I took the position that the judgment of the court was a declaratur and was not suspended by the noting of an appeal.
- 24. In accordance with the position that I took, I brought an application for Contempt of Court under HC 2513/21.
- 25. The application under HC 251/21 was brought on the 25th of May 2021 that is to say, a day after first respondent had returned to work.
- 26. First respondent eventually purported to note an appeal on the **27th of May 2021**. The **appeal** is attached hereto and is marked as **Annexure "D"**.
- 27. The application for **Contempt of Court** was resisted and on the 10th of June 2021, the court rendered a judgment dismissing it. I mark the **judgment** as **Annexure "E"**.
- 28. The judgment effectively finds that the appeals that had been noted were effectual and that further action on my part was necessary if I am to realise the fruits of the judgment rendered in my favour. I wish to realise such fruits.

(g) **The requirements**

- 29. I am advised that in an application of this nature, the court considers the following factors:
 - 29.1 The preponderance of equities, that is to say the potentiality of irreparable harm and prejudice to me if leave is refused or to first respondent if leave is granted.
 - 29.2 The prospects of success on appeal and in particular, as to whether the appeal is frivolous and is meant to buy time, having been noted for such or some such ulterior purpose.
 - 29.3 If the two interests set out above are equal, where the balance of hardship lies.

- 30. I point out that I stand as of today as the successful party. I also wish to point out that it is of moment that what the court granted is a declaratur.

(h) **The requirements met**

- 31. It is my submission that the factors that are considered by the court in such a matter are on the facts met in my favour.

- 32. Regarding the preponderance of equities, I advise the court as follows:
 - 32.1 At issue are my constitutional rights and in particular the right to the protection of the law. If first respondent continues in office illegally, that right is breached without recourse. The breach of such a right is irreparable.

 - 32.2 On the other hand, if it should turn out that the judgment of this court was not correct, first respondent would not suffer any prejudice on account of having been required to cease and desist from exercising the functions of the position of **CHIEF JUSTICE OF ZIMBABWE**. His benefits would be due him and would be paid in terms of the law. He may at that stage then resume sitting as a judge and making decisions as an administrative head.

- 32.3 If first respondent remains in office and makes decisions that he should not make, nullity will visit all his discharge of function to the prejudice of the good administration of justice.
- 32.4 First respondent is aware of this fact. On the day the application for Contempt of Court was heard, six judges of the Supreme Court were sworn in. Although first respondent was in the country and I believe in good health, he did not attend that ceremony nor did he swear the judges in. He is acutely aware that his position is tenuous.
- 32.5 I have previously made the point that first respondent wants to be around so that he can affect the manner the litigation that concerns him is progressing. It is not good for his shadow to be cast on judicial officers in such an important matter.
- 32.6 In this regard I point out that litigation has been brought in the Constitutional Court by a certain Marx Mupungu. That litigation brought under CCZ 13/21 is meant for the direct benefit of the first respondent. In trying to secure an early hearing, Marx Mupungu authored the letter attached hereto and marked as **Annexure "F"**. It is addressed to the first respondent and seeks that he issues certain directives on the hearing of a matter in which he is a party. This is clumsy. This is a charade. This is possibly corrupt.
- 32.7 Such situations can and would be avoided if first respondent were to be made to step aside and allow the appeal to be heard and determined in the interests of propriety, justice and decency.
33. I submit that the first factor is satisfied in my favour.
34. Regarding the prospects of success, I point out to the following:
- 34.1 First, first respondent did not file any papers before this court and was in default when the matter was heard. A party in default has no right of appeal.
- 34.2 Second, the findings of the court on the question of first respondent's tenure are impeccable. These being issues of law, I adopt the court's reasoning and will in argument deal with the legal position that pertains to the matter. I also attach hereto and incorporate **my heads of argument** which deal with the issue. I mark them as **Annexure "G"**. Quite evidently, first respondent is retired.

34.3 Third, there has been an issue about a letter which was written by the Chief Secretary in the Office of the President and Cabinet. That letter resolves the matter against first respondent. It is common cause that first respondent relies not on an appointment but an extension. It is equally common cause that first respondent turned 70 at 00:00hrs on the 15th of May 2021. It is finally common cause that **the extension letter**, attached hereto and marked as **Annexure "H"** was to take effect from the 16th of May 2021. It does not therefore constitute an extension but a reappointment. First respondent cannot be validly in office under the circumstances.

34.4 Fourth, I will make brief observations on the grounds of appeal filed on behalf of the first respondent. I will in the process and to the extent it may be deemed necessary, also address the contentions put forward by the other respondents:

34.4.1 The application for recusal was made in bad faith and raises issues that have nothing to do with this court's exercise of function.

34.4.2 The issue before the court did not deal with a challenge to President or Parliament but took the law as it currently stands and sought the interpretation thereof.

34.4.3 As regards the letter of the Chief Secretary in the Officer of the President, the court found that it was irrelevant in that it did not constitute the cause of action. At any rate, as already observed above, the letter is simply not fit for purpose.

34.4.4 The question of whether leave is required to sue judges is answered by judgments of the Supreme Court and is not applicable in applications and indeed in constitutional litigation. At any rate, first respondent had ceased being a judge.

34.4.5 The tenure of the first respondent ended by operation of law when he turned 70. The addition of a five-year fixed term would amount to an extension which would violate section 328 of the Constitution and cannot therefore pertain to him as an incumbent. Purposefully, the court read the law in a manner that would bring constitutional harmony. At any rate, the law speaks of a Chief Justice and not the person of first respondent.

34.4.6 The fact that the amendment to the constitution mentions in section 186(4) provisions of section 328(7) can only lead to one conclusion being the conclusion arrived at by the court. Any other

construction would make the mention of that provision superfluous.

34.4.7 Regarding first respondent's default, the matter is settled. He did not file an affidavit although being required by a directive of the court to do so. An application, particularly a court application, can only be resisted by the filing of a Notice of Opposition and Opposing Affidavit.

35. Counsel will make further submissions on the frivolity of these grounds of appeal. They are not serious and are not taken with any intention that they will succeed. The mala fide intention is to retain first respondent in the picture as he impacts the manner the litigation in this matter progresses.

36. The third factor is the balance of hardship and on it I observe as follows:

36.1 On this matter what tilts the scales is that first respondent's presence and discharge of function can result in his actions being declared a nullity to the prejudice of the administration of justice. Thus even if the finding were to be made that he has prospects of success, he must pursue them whilst seated at home.

36.2 There is need that the integrity of the judiciary be maintained.

36.3 I also point out that first respondent has over the years discharged judicial function and the whole country has obeyed and respected him. He must now respect the process of this court and not give the impression that he seeks to undermine it. The judiciary must not be put into disrepute.

37. For all these reasons, I submit that the application must be granted.

38. I submit that this matter is patently urgent and must be related to as such. I have however, considered that in line with the authorities, the matter must be resolved once and for all as it is not susceptible of provisional relief. The importance of the matter requires that a final and definitive pronouncement be made.

(i) **On urgency**

39. The following considerations justify the hearing of this matter not just on an urgent basis but as an urgent court application:

39.1 First respondent filed his appeal on the 27th of May 2021.

39.2 When the appeal was filed, an application for Contempt of Court had already been brought. I had thus not sat by twiddling my fingers.

39.3 The judgment of the court on the contempt of court matter was rendered on the 10th of June 2021 and I immediately filed this application.

39.4 The conduct of the first respondent that must be arrested is ongoing. The fears that I raise cannot be dealt with later but now.

39.5 There would be no point hearing this matter after the appeal has been heard and determined. This is a matter that must by nature be heard on an urgent basis.

39.6 The public interest involved in this matter requires that this application be dealt with as a matter of priority.

40. For all these reasons, I submit that the matter is urgent and must be related to as such.

41. In accordance with precedent, I make certain proposals bearing on how this matter is to be handled. I point out however, that the final decision is that of the court which will consider this matter and may even call the parties for a case management meeting:

41.1 First respondent together with whoever else may be opposed to the application must file their opposing papers within 3 days of service upon them of this application.

41.2 I must then be required to file both my affidavit in answer and heads of argument within 2 days of receipt of respondent's papers.

41.3 Upon receipt of my heads of argument, the Registrar must set the matter down.

41.4 Respondents will in the intervening period file their own heads of argument.

(j) **Costs**

42. As regards costs, I submit in accordance with the judgments of this court in this dispute, that the issue does not arise. This is an important constitutional matter with massive public interest.

(k) **Conclusion and prayer**

- 43. In the premises, I submit that I have made a case for the relief that I crave.
- 44. I accordingly pray for an order in terms of the draft hereto attached.



DEPONENT-MUSA KIKA

SIGNED AND SWORN TO BEFORE ME AT ZIMBABWE ON THIS THE 11 DAY OF JUNE 2021, THE DEPONENT HAVING ACKNOWLEDGED THAT HE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT, HAS NO OBJECTION TO TAKING THE PRESCRIBED OATH, AND CONSIDERS THE OATH TO BE BINDING ON HIS CONSCIENCE.

BEFORE ME:

EMMANUEL TAFADZWA NHACHI
 LEGAL PRACTITIONER,
 COMMISSIONER OF OATHS

SIGN 

COMMISSIONER OF OATHS