

ZIMBABWE LAWYERS FOR HUMAN RIGHTS
versus
ROBERT GABRIEL MUGABE N.O
and
JUDICIAL SERVICE COMMISSION
and
RAY HEMINGTON GOBA
and
MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS N.O

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 8, 14, 15, 22 November 2017

Urgent Chamber Application

E. Matinenga, for the applicant
Mamombe, for the 1st and 4th respondents
Nzarayapenga, for the 2nd respondent
D. Drury, for the 3rd respondent

CHIGUMBA J. The Constitution of Zimbabwe is the supreme law of the land. It is trite that this document is binding on all Zimbabwean citizens, and that, any conduct or action which is inconsistent with it is invalid to the extent of the inconsistency. See s 2 Constitution of Zimbabwe Amendment number 20 Act of 2013.¹This matter came to me via the urgent chamber

¹ 2 Supremacy of Constitution

(1) This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is **invalid to the extent of the inconsistency**.

(2) The obligations imposed by this Constitution are **binding** on every person, natural or juristic, including the State and all **executive**, legislative and **judicial institutions** and agencies of government at every level, and

book, and I directed that it be set down for hearing on 3 November 2017 at half past two in the afternoon. It announces itself to be an ‘urgent chamber application for a temporary interdict and consequential relief’. It is an application which is challenging the legal validity of Government Gazette Extraordinary Notice number 642-2017 which was published on 27 October 2017. This gazette purported to invalidate the appointment of the third respondent as Prosecutor General. The applicant contends that the reversal of the third respondent’s appointment to the office of the Prosecutor General through a Government gazette is unlawful and ultra vires the Constitution and the Administrative Justice Act [*Chapter 10:28*], and the common law right to be heard before civil liberties are adversely interfered with.

The word ‘Power’ is a noun which is used to define ‘a legal discretion’, as opposed to a ‘duty’ to carry out or refrain from carrying out any act. See *Oxford Dictionary of Law*². Power is a legal discretion, an election, a choice made within the confines of some lawful authority. A duty to act or not to act suggests a lack of choice, it is an obligation which must be carried out. When the exercise of power affects the rights of others, it can be challenged in the courts. An act which goes beyond the scope of a power is invalid. Any act carried out in abuse of a power is invalid. A duty is a legal requirement to carry out or refrain from carrying out any act, it is distinguishable from a power, which denotes a measure of discretion. Both are legal, but one leaves room for discretion, and the other does not. The underlying question raised by this application is whether the Constitution of Zimbabwe confers a power or a duty on the appointing authority in all ‘Constitutional appointments’. If it confers a power, then the appointing authority has a measure of legal discretion which may be subject to judicial scrutiny. If it confers a duty, a legal requirement with no measure of discretion, then the fulfilment of that duty is not subject to judicial scrutiny. Put differently, is the right of the President to make ‘Constitutional appointments’ justiciable, and if so, at which stage of the stipulated procedure, to what extent and with what consequences? That is what we have to decide.

The applicant is a non- governmental organization whose aims and objectives includes the protection of human rights, and the Constitution of Zimbabwe. ‘It is a membership based

must be fulfilled by them. (my emphasis)

² 8th ed p 467

organization. Its members consist mainly of legal practitioners with interests in human rights, constitutional law, observance of the rule of law, strengthening and fostering of a culture of human rights at all levels of society the protection of Constitutional rights and freedoms in Zimbabwe and ensuring that those tasked with upholding and defending the Constitution do so without fear, favor, prejudice and in accordance with the provisions of the Constitution and in the public interest. Through its members, the applicant carries on its duties of protecting of defending human rights through sustainable litigation, education and advocacy in Zimbabwe’.

The first respondent is Robert Gabriel Mugabe N.O, the President of the Republic of Zimbabwe who is cited in his official capacity as the person responsible for the appointment of the Prosecutor General in terms of s 259 (3) of the Constitution. The second respondent is the Judicial Service Commission (JSC), a commission established in terms of s 189 of the Constitution, cited is the commission responsible for providing advice to the first respondent in the appointment of the Prosecutor General in terms of s 259 (3) of the Constitution. The third respondent is Ray Hemington Goba, an adult male who was appointed Prosecutor General (PG) in terms of s 259 (3) of the Constitution.

A provisional order is sought in the following terms;-

INTERIM RELIEF GRANTED

IT IS ORDERED THAT;

1. Pending the determination of this matter, and a pronouncement on the validity or otherwise of Government Gazette Extraordinary 642-2017, the 1st and 2nd respondents be and are hereby temporarily interdicted from instituting any process for the appointment of a Prosecutor General.
2. That the 3rd respondent remains in office until the final determination of the matter.
3. If the application is not opposed, there be no order as to costs. If opposed, that the party opposing same pay the costs of suit.

TERMS OF FINAL ORDER SOUGHT

IT IS ORDERED THAT;

1. The Government Gazette Extraordinary 642-2017, published on 27th October, which purports to repeal Government Notice 493-2017 be and is hereby declared invalid and of no legal force and effect.
2. Consequently, it is hereby declared that Government Notice 642-2017 does not have any legal effect on the appointment of the 3rd respondent as the Prosecutor General through Government Notice 493-2017 published on 13 September 2017.
3. The 1st respondent be and is hereby directed to administer the prescribed oath of office on the 3rd respondent as provided for in s 259(6) of the Constitution within thirty (30) days of the granting of this order, failing which the oath administered to the 3rd respondent, by the 1st respondent, on the 7th of July 2016 be and is hereby confirmed as being sufficient for the appointment of the 3rd respondent as the Prosecutor General.
4. The 1st and 2nd respondent be and are hereby interdicted from removing or in any other way interfering with the 3rd respondent's constitutional appointment without following the removal from office procedures provided for in s259(7) of the Constitution of Zimbabwe as read with s187 of the Constitution of Zimbabwe.
5. If the application is not opposed, that there be no order as to costs. If opposed, that the party opposing same pay costs of suit.

At the first case management conference, counsel for the applicant advised that service of the application on the first respondent had hit a snag. The return of service advised that there had been attempted service but "...failed to effect service at Monomotapa Building East Wing after being barred by a security detail of two men manning East Wing entrance. Advised to serve on Ministry of Justice". Applicant advised that it intended to file an application to join the Attorney General and the Minister of Justice as parties to the proceedings, because they have a 'real and substantial interest in the constitutional issues raised in the application'. An Urgent letter had been addressed to The office of the Chief Justice on 2 November 2017, in which a request that the matter be heard by a panel of three Judges in terms of s 4 (5) of the High Court Act [*Chapter 7: 06*] was conveyed, and copied to the Judge President of the High Court and to the Presiding Judge. When the parties appeared before me for the first time, another letter, this time addressed to the Judge President with the same request, had been served on me. I advised

the parties that a hearing would commence once the Judge President had responded to the applicant's request. The applicant's request was subsequently abandoned in a letter dated 8 November 2017.

On 7 November 2017, a copy of the application was served on Mrs Chamisa a receptionist at the office of the Attorney General, and on the Minister of Justice Legal and Parliamentary Affairs secretary. A second case management conference was held on the 8th November 2017. The applicant advised that, by serving the application on the Attorney General, valid service on the first respondent had been effected in terms of the Constitution. It was agreed that the applicant would file a formal application for the joinder of the Attorney General and the Minister of Justice by 4 o'clock on 8 November 2017 and serve the same on all the parties and file certificates of service by 10am on 9 November 2017; that all opposing papers to the application for joinder and the main application be filed by four o'clock on 9 November 2017, and served on all other parties, and certificates of service filed by 10 am on 10 November 2017; all opposing papers to be filed by 10 am on 13 November 2017, certificates of service by 4 o'clock of that day; that heads of argument be filed by 14 November 2017 together with mutual certificates of service. It was agreed that the application for joinder, as well as the main application would be heard in chambers on the 15th November 2017 at 10am.

A letter dated 13 November 2017 found its way into the record. It was written by counsel for the second respondent the JSC. It contained instructions to all parties concerned that the second respondent had taken no issue with the pending applications and would abide by the decision of the court. The application for the joinder of the Minister of Justice Legal and Parliamentary Affairs N.O as fourth respondent, and of the Attorney General of Zimbabwe N.O as fifth respondent, was filed of record on the 8th November 2017. The applicant stated that these two officers presided over departments that had a direct bearing on the administration of justice, and that it was just and equitable that they be joined to the proceedings, and that the omission to join them in the first instance had been inadvertent. It was submitted that the court be guided by s 114 (3) (a) and (b) of the Constitution in determining the application for joinder.

A notice of opposition to this application, was filed on behalf of the Attorney General (the AG) on 9 November 2017, by the Civil Division of the AG's office. The opposing affidavit was deposed to by the incumbent AG *Mr. Prince Machaya*, who averred that it is correct that the AG

appears in courts of law to represent the Government in all civil and constitutional proceedings. He averred further, that it was part of the functions of his office and his duties to appear in the main matter HC10280-17 as advisor and counsel to the President, first respondent, and possibly on behalf of the proposed fourth respondent, the Minister of Justice as well. He declined to be joined as a party because that "...would create a degree of awkwardness and impropriety..." for him, to appear in court in his own right and also as his own counsel. In his view, his office is not directly involved in the cause of action raised by the applicant. He averred that the current Constitution does not require him to be a party to proceedings against government, but that, it merely enjoins him to act as counsel to Government in such litigation. In his opinion, the applicant's interest in the main matter falls short of a legal interest, and the National Prosecution Authority and its board of directors would have a more significant and direct interest in the main matter.

Section 114 (4) of the Constitution³, provides that;-

- (4) The functions of the Attorney-General are—
- (a) to act as the principal legal adviser to the Government;
 - (b) to represent the Government in civil and constitutional proceedings;
 - (c)...
 - (d) to promote, protect and uphold the rule of law and to defend the public interest;** and
 - (e) ...

Although the court was not specifically referred to s 114 (5), it took note that the AG may, with its leave, appear as its friend, *amicus curiae* in any civil proceedings, even where government is not a party to the proceedings. This is what s 114 (5) says;-

- (5) The Attorney-General may—
- (a)
 - (b) ...
 - (c) with the leave of the court concerned, appear as a friend of the court in any civil proceedings to which the Government is not a party.

It is my considered view that, in terms of the High Court Rules 1971, the issue of joinder is governed by Order 13 rule 86 which provides that;-

Subject to rule 86 two or more persons may be joined together in one action as plaintiffs or defendants whether in convention or in reconvention where—

³ Constitutional Amendment number 20 Act 2013,

- (a) if separate actions were brought by or against each of them, as the case may be, some **common question of law or fact would arise** in all the actions; and
- (b) **all rights to relief claimed** in the action, whether they are joint, several or alternative, are in respect of or **arise out of the same transaction** or series of transactions. (my emphasis)

Order 13 appears to refer to action proceedings, but I see no reason why the same test for joinder may not be applied to application proceedings. If some common question of law or of fact arises, and if all rights and relief claimed arise out of the same transaction, then joinder is permissible. I accept that if the AG is already representing the first and the fourth respondents (the President and the Minister of Justice) then there really is no need in this case, for appearance in his official capacity. However, it is my considered view that it is still open to the court to grant leave to the AG to appear as a friend of the court. This suggests in my view those instances where legal issues may be complex and vexatious, and the view or stance taken by those government departments being advised and represented by the AG, are so polarized that the court may need some assistance. The application for the joinder of the AG to these proceedings as the fifth defendant N.O be and is hereby dismissed, with costs remaining in the cause. The Minister of Justice, Legal and Parliamentary Affairs be and is hereby joined to the proceedings as the fourth respondent.

There was a third case management conference on the 14th of November 2017 at which the it was advised that the AG was out of the country and unable to appear on behalf of his clients, and that, due to the constitutional significance of the matter he wished to appear in person and not through other officers in his office. The court had initially refused to postpone the matter any further, because it had come via the urgent chamber book, but reversed its decision the next day after a letter had been addressed to it by the secretary for Justice, Legal, and Parliamentary Affairs, Mrs. V, Mabiza. In the letter, it was confirmed that the AG was indeed out of the country on government business and would only be available to argue the matter on 22 November 2017. The parties were reminded that this was an urgent matter which ought to be disposed of as such and the matter postponed for that reason.

FACTUAL AND LEGAL BACKGROUND

None of the parties took issue with the question of urgency. It seemed to me that the applicant's averments with regards to the urgency of the matter resonated with the respondents.

Applicant averred that this matter is absolutely urgent and must be determined ahead of other matters which may be waiting to be heard because the purported removal of the third respondent from office has thrown the entire criminal justice system into uncertainty because the notice which purported to repeal the notice of his appointment is silent as to what will happen in the interim. It was contended that such a vacuum would adversely affect the smooth administration of the criminal justice system.

The other reason submitted is that the second respondent has been instructed by the first respondent to start the process of finding the third respondent's successor. It is common cause that members of the public have been asked to nominate suitable candidates for interview, in an advertisement which appeared in the Herald newspaper on 1 November 2017. The certificate of urgency was signed by Taona Wayne Nyamakura. He stated that this case involves the important issue of the interpretation of s259 (6) of the Constitution, particularly, the issue of whether a Constitutional appointee can be recalled for any reason after his appointment has been confirmed by notice in the Government Gazette. The parties seem to agree that the issue of whether the President can review his own decision which was published by notice in a government gazette and correct it or reverse it without recourse to the Constitutional provisions is one that must be determined as a matter of urgency.

Clearly, the matter could not wait once the process of selecting the third respondent's successor had been initiated. The applicant and its members will be irreparably prejudiced if it turns out that the process of reversing third respondent's appointment was PG was not done in accordance with the Constitution. The applicant treated the matter as urgent. We are satisfied that the applicant has no other remedy which is legal, satisfactory, and adequate. The matter is undoubtedly urgent. None of the respondents took issue with the applicant's *locus standi*. We are satisfied that this is a matter which deserves to be heard urgently.

Turning to the merits of the matter, the applicant's founding affidavit was deposed to by *Ms. Roselyn Hanzi*, its executive director, who made the following averments;-

The Constitution came into effect on 22 May 2013. It introduced the office of the PG as the head of the National Prosecuting Authority (NPA). In terms of par 19 of the 6th schedule of the Constitution, the person who held office as Attorney General (AG) immediately before the Constitution came in force would continue in the office as PG. That person was Mr. Johannes

Tomana, who automatically became PG for a period of six years thereafter, subject to renewal for one more similar term. In 2016, first respondent set up a Tribunal in terms of s 187 of the Constitution to determine Mr. Johannes Tomana's suitability to continue to hold the office of the PG. The Tribunal had been set up to investigate allegations that the PG had committed acts of misconduct which included defying court orders and other acts which were deemed to be conduct inconsistent with the constitutional obligations of the office of the PG. The PG was suspended from office pending the Tribunal's proceedings. First respondent appointed the third respondent as the acting PG, swore him into office, and allowed him to commence his duties on the 7th of July 2016.

The Tribunal conducted an inquiry into Mr. Tomana, the suspended PG's alleged conduct and submitted its report to the first respondent who, on the strength of that report, removed Mr. Tomana as substantive PG in terms of s 187 (8) of the Constitution on 9 June 2017. The second respondent (JSC) initiated the process of the appointment of a substantive PG in terms of s 259 of the Constitution, as read with s 180 (2). It flighted advertisements to all members of the public in which it invited nominations of any persons deemed suitable for appointment to the office of the PG. Eight candidates, including the third respondent were shortlisted for public interviews which were conducted on the 19th of August 2017. Presiding over the selection process and the appointment of a PG is a constitutional mandate placed on the JSC and the President by the Constitution. It is initiated by the JSC, whose constitutional obligation is to advertise for a vacancy in the office of the PG, call for nominations, conduct public interviews, prepare a list of three qualified nominees for the office and submit that list to the first respondent for consideration. The list is usually not made public after its referral to first respondent by second respondent.

It is common cause that third respondent was one of the candidates who participated in the interviews for the position of PG. It is common cause that, on 13 September 2017, the following General Notice 493-2017 was published:-

“Appointment of the Prosecutor-General of Zimbabwe

It is hereby notified that his Excellency, the President of the Republic of Zimbabwe has **appointed** Ray Hamilton Goba as **Prosecutor General with immediate effect**”. (My emphasis)

It is clear that third respondent who had been acting PG since 7 July 2016, was appointed substantive PG on 13 September 2017. It was averred that the third respondent began to perform the duties of substantive PG on 13 September 2017 because the oath of office which he had taken as acting PG was still binding on him. It is common cause that, on 27 October 2017, through General Notice 642-2017, a notice was published which read as follows;-

“Repeal of general Notice 493-2017 concerning the **Appointment** of Prosecutor-General of Zimbabwe

It is hereby notified that the captioned General Notice that was published in the Government Gazette Extraordinary on 13 September 2017 is repealed”.

It is further common cause that that the first General Notice which appointed third respondent PG was signed by the Permanent Secretary to the Ministry of Justice Legal and Parliamentary Affairs Mrs. V. Mabiza, and that the second and third notices were signed by Dr. MJM Sibanda, the Chief Secretary to the President and Cabinet. It was submitted on behalf of the applicant that the first respondent delegated his power to the two offices to publish the notices in accordance with his instructions. The applicant contended that the Constitution does not provide for the removal of a duly appointed PG through a repeal of the Government Gazette that announced the appointment. It was contended further that a duly appointed PG may only be removed by;-

- (a) Effluxion of time-expiry of two six year terms in office
- (b) Resignation
- (c) Death or other natural causes
- (d) S259(7) as read with s 187 of the Constitution

And, that none of these apply to the circumstances in which the 3rd respondent was purportedly removed from office.

A notice of opposition was filed on behalf of the first respondent, on 13 November 2017. The opposing affidavit was deposed to by the Attorney General of Zimbabwe, *Mr. Prince Machaya*, who averred that;-

Applicant’s cause of action is premised on the erroneous belief that 3rd respondent is still the Prosecutor General of Zimbabwe, and that General Notice 642-17 (GN 642-17) which repealed GN493-17 (in which 3rd respondent was appointed PG) is unlawful and of no force or effect as being *ultra vires* s 259 (7) of the Constitution. First respondent’s view is that s 259 (7)

of the Constitution applies to the removal from office of an incumbent to office, and that it cannot be applied to the third respondent because he had not been installed in office, having not been sworn in. The oath must be administered before the PG can take office, s 259 (6) of the Constitution states that this is a condition precedent. The taking of the oath is not a mere formality. First respondent was entitled to remove the third respondent by the powers conferred upon him by s 340 (1) (f) of the Constitution. It is common cause that publication of the third respondent's appointment was correctly done in terms of s 180 (4) of the Constitution. The position taken on behalf of the first respondent is that the act of taking the prescribed oath cannot be divorced from the act of appointment, that appointment in itself does not confer the powers that are exercised by a Prosecutor General, those powers become vested in one who has not only been appointed, but has taken the prescribed oath.

Third respondent filed a 'notice to abide by the decision of the court on 13 November 2017. In his affidavit he describes himself as the PG of Zimbabwe appointed in terms of s 259 (1), (3), and (6), as read with s 180 of the Constitution. No useful purpose would be served by regurgitating the contents of this affidavit. Ad paragraphs 9-20 of the affidavit are instructive in giving us an idea of the arduous and rigorous process that saw third respondent being appointed PG.

THE LAW

Applicant filed its heads of argument on the 15th of November 2017. It submitted that the starting point is the supremacy of the Constitution as enshrined in its section 2 which stipulates that any conduct inconsistent with it is invalid to the extent of the inconsistency. It is trite that the obligations imposed by the Constitution are binding on every person, including the state and all executive, legislative and judicial institutions. See *Biti & Anor v Minister of Justice, Legal & parliamentary Affairs & Anor*⁴, *Judicial Service Commission v Zidane & Ors*⁵. It was submitted on behalf of the applicant that s 90 (1) of the Constitution sets out the nature of the duties of the President as follows;-

⁴ 2002 (1) ZLR 177 (S) @ 190 A-B

⁵ SC68-2017

“The President must uphold, defend, obey and respect this Constitution as the supreme law of the nation and must ensure that this Constitution and all other laws are faithfully observed”.

The applicant charges the first respondent with failing to act in accordance with his duties as set out in s 90 (1), in the purported rescission of the third respondent’s appointment, and in the instruction of the second respondent to commence the process of finding his successor. The applicant contends that there is no provision in the Constitution which allows the President to rescind an appointment in the manner which he did in the circumstances of this case, therefore the rescission is *ultra vires* the Constitution. We were referred to *Administrative Law in South Africa*⁶, as authority for this proposition, and to a South African case which is on all fours with this matter.

In the case of *-Pharmaceutical Manufacturers Association of South Africa in Re The Ex Parte President of the Republic of South Africa & Ors*⁷, it was held that Legislative power, including power to determine when particular measures to come into operation, conferred by the Constitution of South Africa, must be exercised within the limits of the authority which conferred such power. The President in that case was found to have exercised his discretion prematurely and without authority. The Proclamation which had been made by President was held to be of no force or effect.

The applicant goes on to say that section 259 (3) of the Constitution is predicated upon a process set out in s180 (3). Section 259 (3) reads as follows;-

“(3) The Prosecutor-General is appointed by the President on the advice of the Judicial Service Commission following the procedure for the appointment of a judge

S180 (3) stipulates that;-

“180 Appointment of judges

- (1) ...
- (2) Whenever it is necessary to appoint a judge, the Judicial Service Commission must—
 - (a) advertise the position
 - (b) invite the President and the public to make nominations;
 - (c) conduct public interviews of prospective candidates;
 - (d) prepare a list of three qualified persons as nominees for the office; and
 - (e) submit the list to the President; whereupon, **subject to subsection (3), the President must** appoint one of the nominees to the office concerned.
- (3) **If the President considers that none of the persons on the list submitted to him or her in terms of subsection (2) (e) are suitable for appointment to the office, he or she must require the Judicial**

⁶ Hoexter, 2nd ed p282

⁷ CC 31-99

Service Commission to submit a further list of three qualified persons, whereupon the President must appoint one of the nominees to the office concerned.

(4) The President must cause notice of every appointment under this section to be published in the *Gazette*. (My emphasis).

Applicant contends that the first respondent may only refuse to appoint where the first list of three proposed appointees is submitted to him, if he formulates the view that none of the three listed candidates are suitable for appointment. When that happens, he may instruct the third respondent to start afresh. In the case of a second submission of three names, it was submitted that the first respondent has no option but to choose one candidate on that list. In short, once the President has chosen a candidate and gazzetted the appointment in terms of s180 (4), he cannot change his mind. The applicant contends that the taking of the oath of office merely perfects the appointment. The power to appoint third respondent as PG is derived from s 340 of the Constitution. Applicant contends that the first respondent failed to perform his constitutional obligation diligently and without delay as required by s 324 of the Constitution. The President's executive power is derived from s110 of the Constitution. It follows, that the first respondent's executive power to appoint, if it is derived from the Constitution in respect to any particular appointment, must be exercised in accordance to the provisions of the Constitution. The applicant's heads of argument dealt with the requirements of an interim interdict as a final submission, and referred us to the case of *Airfield Investments Private Limited v Minister of Lands & Ors*⁸, as authority.

The heads of argument which were filed on behalf of the first and fourth respondent firstly dealt with the contention that the interim relief sought by the applicant is incompetent because it is premised on the belief that the third respondent is already in office. The next point of contention raised is that, s 259 (7) of the Constitution relates to the removal of a PG "from office", and does not apply to the third respondent who was never in office. The PG ought to take the oath of office "before taking office" s 259 (b). There can be no PG unless and until the oath is administered. The court was invited to make a comparative analysis between being elected into office and being appointed.

Section 94 (1) and paragraph 14(5) of the sixth schedule relating to the assumption of office by the President and the Vice President reads;-

⁸ 2004 (10 ZLR 511 (S) @ 517

“9. “Persons elected as Presidents **assume office when they take** before the Chief Justice or the next most senior Judge ...the oaths...”

S104 (6) which relates to the assumption of office by Ministers and Deputy Ministers reads;-

“**Before taking office**, a person appointed as Minister or Deputy Minister **must take** before the President the appropriate Ministerial oath...”

S185(1) relating to the assumption of office by a Chief Justice and Deputy Chief Justice and Judges reads as follows;-

1. “**Before** the Chief Justice or Deputy Chief Justice assumes office, he or she must take before the President or a person authorized by the President, the judicial oath”.
2. Before a Judge, assumes office, he or she must take, beforethe judicial oath”.

S 114(1) which relates to the assumption of office by the AG reads;-

“A person who has been appointed as Attorney General **assumes office upon taking** before the President....the oath of loyalty and office”.

The contention that the act of appointment and assumption of office are two separate things appears to be common cause. The court was referred to the principles which ought to guide it in interpreting the provisions of the Constitution in the case of *Hewlett v Minister of Finance*⁹. The court was enjoined to use the ordinary principles of statutory interpretation and to give the provisions of the Constitution their literal meaning. In para 14 of the heads of argument the AG concedes that the act of appointing the PG is evidenced by publication in the gazette in terms of s 180 (4) of the Constitution, and that the Constitution provides for the removal of a PG who is in office, but does not specifically provide for the removal of a person who has been appointed PG by gazetting, but has not yet assumed the office of PG by taking the oath. This concession is crucial, in my considered view. It allows us to formulate the real issue for determination.

⁹ 1981 ZLR 571

THE LAW AND THE FACTS

The issue that falls for determination in this matter is whether it is competent to rescind the appointment of a PG by way of a Government Notice, in circumstances where the appointment has not been followed by the administration of the oath of office, by an assumption of office. Put differently, what is the appointing authority of a Constitutional appointee permitted to do in order to set aside a Constitutional appointment which has not been perfected by the administration of the oath of office? Or better still, does a nominated PG start exercising the powers of that office when he is appointed or when he takes the oath of office, and at what stage does he become a Constitutional appointee, when the appointment is gazetted or when the oath of office is administered?

It is common cause that the PG is appointed in the same way as a Judge, using the procedure set out in s180 of the Constitution. It would follow that a PG is removed from office in the same way as a Judge. Is it not disingenuous to say, that after a PG has been through the same selection process as a Judge, and been appointed with immediate effect by a Government Gazette, the failure to take the oath of office entitles the appointing authority to remove that PG by means of another gazette as opposed to following the procedure for the removal of a constitutional appointee PG? The submissions made on behalf of the third respondent that s 68 (1) of the Constitution was violated by the publication of GN642-2017 are highly persuasive. It is stipulated that:-

“Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both procedurally and substantively fair.”

Section 68 (2) stipulates that written reasons must be given, and given promptly for any administrative decision which adversely affects a person. It is arguable that after being appointed PG, third respondent now had an interest in assuming office, and that, before his interest was adversely affected he was entitled to be advised in writing of the reasons why his appointment was to be rescinded. It is arguable that third respondent’s interest as an appointed PG could NOT have morphed into a right, or a legitimate expectation until he had assumed office, but in my view he still had an interest in the office of the PG. That interest could NOT be trammelled without giving him written reasons in advance.

We were referred to the case of *Law Society of Botswana & Anor v The President of Botswana & 2 Ors*¹⁰, which concerned the power of the President to decline to fill a vacancy which became imminent in the High Court Bench notwithstanding the specific recommendation of an appointment by the Judicial Service Commission. The majority of Judges in that case held that the President was constitutionally bound to fill the appointment and could not unilaterally turn a blind eye to the advice of the JSC and withhold his appointment. I am persuaded that, once the first respondent had nominated, and appointed 3rd respondent from a list provided by the second respondent in terms of s 180 (2), he was no longer at liberty to instruct the second respondent to proceed in terms of s180 (3).

The third respondent never assumed the office of PG, in my respectful view. The process was not perfected. But he is a Constitutional appointee to the office of the PG. What rights does his appointment to that office with immediate effect give him? The first and fourth respondents blurred the lines when they allowed him to exercise the duties of the PG, and to physically occupy the office of the PG, on the strength of an oath of office which he took when he was merely acting PG. For them to turn around now and argue that he does not have the right to be removed from office in the same way as a constitutionally appointed Judge, is disingenuous. The third respondent went through the process of appointment of Judges set out in s 180 of the Constitution. He was nominated and appointed to the office of the PG in terms of s 180 (2) (a) - (e). The first respondent appointed him from a list of three nominees. He exercised his power to appoint, he used his legal discretion, meaning he **chose** the third respondent out of a list of three nominees.

Having exercised his legal discretion the first respondent may not turn to the provisions of s 180 (3), in my respectful view. That section only applies where the first respondent has deemed none of the three nominees of the first round suitable or acceptable to him. It is my view that once the third respondent was appointed by way of a gazette (notice to the whole world) in terms of s 180 (2), then in these circumstances the first respondent is not permitted to turn to s180(3) and instruct the second respondent to submit a further list of three nominees. First respondent may do so only after removing the third respondent as an appointed nominee, in terms of s 187

¹⁰ CACGB 31-17

which provides for the removal from office of Judges. Third respondent is entitled to be advised if he was unable to perform the functions of the office of the PG due to mental or physical incapacity, or; if he is grossly incompetent, or if he has performed an act of gross misconduct.

When the first respondent, received three names for consideration and possible appointment to the substantive position of PG, as provided by s 180 (2) (a)-(e) as read with s 180 (3), he indisputably made his decision to formally appoint the third respondent as PG. We know this because Gazette Extraordinary GN493-17 tells us that the first respondent has appointed third respondent as PG “with immediate effect”. It is my view that there was no condition precedent, the appointment was not conditional or transient. It was an appointment which was made by the first respondent “... on the advice of the second respondent following the procedure for the appointment of a judge”. The second respondent completed its Constitutional mandate in terms of s180 when it submitted three nominees to the first respondent. I hold the view that, once the first respondent had used his legal discretion, or power, to select and appoint one of the three nominees, he had elected to proceed in terms of s180 (2) (a)- (e). If he had rejected the three nominees and elected to proceed in terms of s 180 (3), then, in my view, when a second list of three nominees was submitted to him, he would have a duty to appoint one of those three , as opposed to a mere power to do so.

I am persuaded that, once the first respondent exercised his prerogative powers and appointed the third respondent PG on 13 September 2017 he became functus. It was no longer open to him to take a second bite of the cherry. The 1st respondent would have only been entitled to proceed in terms of s 180 (3) if he had found none of the first three nominees suitable, and declined to appoint any of them. Once he chose one nominee and appointed him PG in the manner prescribed in s 180 (4), the appointment was perfecta. The submissions proffered by the AG are persuasive, that a PG may only be removed from office if he had assumed office in the first place. There is no doubt in my mind that the third respondent needed to take the oath of office in terms of s 259 (b), as read with s 114 (2) of the Constitution before he could exercise the powers of that office. It is abundantly clear that the office of the PG is assumed when the oath is taken in the prescribed manner. A comparison of the requirements for the taking of office in terms of s 94 (1), and par 14 (5) of the sixth schedule to the Constitution , and s 104 (6), for Ministers, and s 185(1) and (2) for Judges, as well as s122 (5) and 266 (5) for President of the

Senate, s126(5) for the Speaker will show that, the problem arises from not having specific procedures in the Constitution for the appointment and removal of a PG. We are instructed to borrow from the provisions relating to Judges. This creates an anomaly in my view.

The AG conceded that the act of appointing the PG is evidenced by publication in the gazette in terms of s 180 (4) of the Constitution, and that the Constitution provides for the removal of a PG who is in office, but does not specifically provide for the removal of a person who has been appointed PG by gazetting, but has not yet assumed the office of PG by taking the oath. This concession is crucial, in my considered view. **The drafters of the Constitution did not provide for the removal of a PG elect who has been appointed but had not assumed office.** Section 340 of the Constitution does not confer power or authority for the President to repeal or revoke or rescind the PG's appointment unilaterally and without reason, in my opinion. There is no provision in the Constitution for the repeal of a constitutional appointment through a general notice such as GN 642-17. It is my considered view that this makes GN642-17 invalid.

It follows that a duly appointed PG may only be removed following the procedure for the removal of a Judge. That procedure is found in s 187 of the Constitution. A Judge cannot be removed from office except in accordance with this section. In my view, neither can a duly appointed PG. An appointed PG becomes a Constitutional appointee. He must take the oath before assuming office, but oath or not, he remains a PG who is duly appointed in terms of s180 (2) (a)-(e). Third respondent is the PG ELECT, for want of a better description. He is an appointed PG who must either take the oath of office or have his appointment ventilated in terms of the provisions for the removal of a Judge s187 of the Constitution.

We have been given the following guidance:-

“Generally speaking, it is not permissible to interdict the lawful exercise of powers conferred by statute. See *Gool v Minister of Justice and Anor* 1955 (2) SA 682 (CPD) @ 688F-G. This approach applies *a fortiori* where the court is called upon to interdict the lawful and *bona fide* performance of a Constitutional duty”.

See *Judicial Service Commission v Romeo Taombera Zibani & Ors*¹¹. It is my view that the purported rescission of the third respondent's appointment as PG cannot be termed *bona fide*

¹¹ SC68-17 p13, p11 “It cannot be doubted that the courts are bound not only to respect the provisions of the Constitution but also to enforce them insofar as they dictate substantive and procedural requirements to be fulfilled by constitutional bodies.

performance of a Constitutional duty. It is distinguishable in my view in that, the Constitution does not provide for the removal of an appointed PG by way of a Government Notice. As a Constitutional appointee a PG may only be removed in terms of s 187 of the Constitution. This makes RGN493-17 invalid, to the extent of its inconsistency with s 187, as read with s 180 (2) (a) - (e), as read with s180 (3) of the Constitution.

Accordingly, we make the following findings;- That;-

1. The 1st respondent did not have the power to cause RGN493-17 to be gazetted in terms of the Constitution.
2. The 1st respondent does not have the power to rescind the appointment of the 3rd respondent other than in accordance with the provisions of s187 of the Constitution.
3. The 1st respondent is obliged to give the 3rd respondent reasons why his appointment was purportedly rescinded, and to remove him from his appointment in terms of the Constitution, by s68 of the Constitution.
4. The 1st respondent was not entitled to a second bite of the cherry, to instruct the 2nd respondent to begin the process of finding a replacement for the 3rd respondent as PG, because he had already elected to proceed in terms of s180 (2) (a) - (e), and was precluded from subsequently invoking s 180 (3), unless and until the nominee appointed in terms of s180 (2) had been removed in terms of s187 of the Constitution.

It was submitted on behalf of the applicant that *prima facie* evidence establishing the existence of a right in terms of substantive law has been established in its papers. On a well-grounded apprehension of irreparable harm, it was submitted that the 2nd respondent's advertisement of a vacancy and invitation for nominations proved this point, the deadline for nominations being 20 November 2017. Applicant contended that the balance of convenience favored it, and insisted that there was no suitable legal alternative relief which was adequate in these circumstances. We find that the papers establish the requirements of an interim interdict.

DISPOSITION

The inescapable conclusion is that there was no lawful exercise of Constitutional authority in the purported rescission of the third respondent's appointment as PG. There was no bona fide exercise of Constitutional authority in the instruction to the second respondent to

commence the process for the replacement of the third respondent. Third respondent's right to administrative justice had not been upheld and his right to be removed in a dignified manner befitting a Constitutional appointee was trampled upon. Third respondent ought not to have been allowed to conduct himself as a substantive PG from the date of his appointment to the date of publication of GN642-2017. The oath of office should have been administered within a reasonable period after his appointment. There is *prima facie* evidence of conduct inconsistent with provisions of the Constitution. It follows that such conduct can be interdicted. The following order be and is hereby granted;-

INTERIM RELIEF GRANTED

1. Pending the determination of the matter, and final pronouncement on the validity or otherwise of Government Gazette Extraordinary 642-2017, the 1st and 2nd respondents be and are hereby interdicted from continuing any process for the appointment of a Prosecutor General.
2. The 3rd respondent shall remain an appointed Prosecutor General until the final determination of the matter.

Zimbabwe Lawyers for Human Rights, applicant's legal practitioners
Attorney General, 1st, 4th respondents' legal practitioners
Judicial Service Commission,
Messrs. Honey & Blanckenburg, 3rd respondent's legal practitioners