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A Critical Legal Analysis of the Supreme Court Decision Delivered on 13 February 2017 in the Case Concerning the Interviews for the Position of Chief Justice of Zimbabwe

By Caleb Mucheche¹

Introduction

On 13 February 2017, a three member bench of the Supreme Court of Zimbabwe² delivered an unanimous instant decision allowing the appeal by the Judicial Service Commission and setting aside a previous High Court judgment in the case of Romeo Zibani v Judicial Service Commission & Ors³ that had granted an interdict against the holding of public interviews for the position of Chief Justice of Zimbabwe. The purpose of this paper is to critically analyse the legal basis, import and impact of the aforesaid Supreme Court decision.

Brief background to the case

A fourth year University of Zimbabwe law student, Romeo Taomberwa Zibani, filed an urgent chamber application at the High Court of Zimbabwe citing the Judicial Service Commission (JSC) and other respondents. In that urgent chamber application, the applicant sought an interdict to stop the respondents from proceeding with interviews for the appointment of the successor⁴ Chief Justice in terms of section 180 of the Constitution of Zimbabwe on the basis of an allegation of impropriety in the interview process. This impropriety was occasioned by the fact that the candidates for the position of Chief Justice were being interviewed by some of their subordinates who constituted the interviewing panel thereby compromising the credibility of the interview process itself. Thus the applicant sought an order for the suspension of the interview process to allow an amendment to the Constitution giving the President the discretion to appoint the Chief Justice on his own volition and, alternatively, for the composition of the interview panel to be changed and be constituted by retired judges.

On 11 December 2016, the High Court⁵ heard the application and granted an order temporarily suspending the interviews for Chief Justice pending an amendment to the Constitution to give the President the unfettered discretion to appoint the Chief Justice. The Court availed the full reasons for the judgment on 12 December 2016. Aggrieved by the High Court judgment, the JSC, as one of the respondents in the High Court matter, filed a notice of appeal against the High Court judgment at the Supreme Court on 12 December 2016. Relying on the common law principle that the noting of any appeal against a judgment of a superior court automatically suspends the operation of that judgment, the JSC proceeded to conduct public interviews for the position of Chief Justice in sync with section 180(2)(c) of the Constitution on 12 December 2016. The Supreme Court appeal was heard on 13 February 2017 and the decision of the court was delivered orally on the same date.

Legal basis of the Supreme Court decision

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2 Comprising Hlatshwayo JA, Patel JA & Ziyambi AJA
3 HH-796-16
4 To replace the outgoing Chief Justice Honourable G Chidyausiku retiring at the end of February 2017 after reaching his mandatory retirement age of 70 years as provided for in terms of section 186(1)(a) of the Constitution of Zimbabwe.
5 Per Hungwe J
In the absence of full reasons for the decision but based on the verbatim decision by the Supreme Court, the basis of the appeal court’s decision is that the interviews for the position of Chief Justice were lawfully held in terms of legally valid provisions of the Constitution of Zimbabwe. The High Court had made an order stopping the interviews on the basis that the executive had initiated a process for the amendment of the Constitution to change the procedure for the appointment of Chief Justice among others. The High Court merely wanted a suspension of the process of the appointment of Chief Justice and not the law relating to the appointment of the same. By so doing, the High Court judgment deferred to the wisdom of the executive mindful of the fact that, ultimately, the executive has the final say in the appointment of the Chief Justice no matter what process is followed.

However, the Supreme Court differed with the High Court and premised its decision on law as it is and not law as it ought to be, a jurisprudential principle that finds its manifestation in legal positivism⁶. It is a trite legal principle that the role of a court of law is to interpret and apply the law as it stands. The decision of the court seems to have a firm legal foundation in the supremacy of the Constitution which is deeply embedded in terms of section 2(1) of the Constitution of Zimbabwe in the following salutary terms, “… 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.” The meaning of the supremacy of the Constitution of Zimbabwe over any law, custom or conduct inconsistent with it means that the provisions of the Constitution are sacrosanct and constitute a barometer for measuring compliance with the letter and spirit of the Constitution.

The question that needs to be asked is: Was the conduct of holding interviews for the position of Chief Justice consistent with the Constitution of Zimbabwe? If the answer is yes, then that conduct meets the constitutionality test entrenched in terms of section 2(1) of the Constitution of Zimbabwe. Conversely, the other question to be asked is: Was the conduct of not holding interviews for the position of Chief Justice consistent with the subsisting provisions of the Constitution of Zimbabwe? If the answer is in the negative, then such failure to hold interviews will run foul of section 2(1) of the Constitution of Zimbabwe which exalts the constitution over any law, practice, custom or conduct. Section 180 (1) of the prevailing Constitution of Zimbabwe provides for similar provision for the appointment of the Chief Justice, the Deputy Chief Justice, the Judge President of the High Court and all other judges by the President in accordance with section 180(2), (3) and (4) of the Constitution. It worth noting that section 180(2) (c) of the Constitution provides for public interviews of prospective candidates for the position of Chief Justice just like any other judge.

It is imperative to note that section 2(2) of the Constitution of Zimbabwe makes it abundantly clear that the legal fetters imposed by the constitution equally bind all the three arms of the State, namely executive, legislature and judiciary, in the following terms:

“… 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 must be fulfilled by them.”

Legal import of the Supreme Court decision

The legal import of the Supreme Court decision is that the interviews for the Chief Justice which were done by the JSC are valid at law but that does not mean that the President is legally bound to appoint any of the candidates that underwent an interview. In terms of section 180(3) of the Constitution, the President has the unfettered discretion to decline to

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⁶ Some of the notable stalwarts and proponents for legal positivism are English jurist John Austin (1790-1859) and English philosopher Jeremy Bentham (1748-1832).
appoint any of the persons from the list prepared in terms of section 180(2)(d) and submitted to him by the JSC in terms of section 180(2)(e) of the Constitution but, in the event that he declines to appoint the Chief Justice from the initial list of three names, section 180(3) of the Constitution imposes a mandatory obligation on him to appoint a nominee as Chief Justice from a further list of three qualified persons submitted to him, without having any further discretion to appoint or not to appoint.

Thus, in terms of section 180(3) of the Constitution of Zimbabwe, the President has the final say on the choice of candidate for appointment as Chief Justice by virtue of the following provisions:

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

The wording of section 180(3) of the current Constitution may potentially create a constitutional crisis if the President declines to appoint the Chief Justice from the initial list submitted to him by the Judicial Service Commission and the JSC fails to submit a further list of three qualified persons. Although the Constitution is silent on whether the names of applicants in the initial rejected list must be included in the further list of qualified persons, a reasonable presumption is that the second list may exclude the three rejected candidates in the initial list.

The fact that the Supreme Court has set aside the High Court judgment and upheld the interviews for the Chief Justice does not mean that the President is legally bound to appoint any of the candidates who attended the interviews for the position of Chief Justice as he still retains the discretion reposed to him in terms of section 180(3) of the Constitution. However, if the President chooses to appoint the Chief Justice under the current Constitution, he is constitutionally obliged to appoint the office holder in terms of the entire legal procedure laid down under section 180 of the Constitution and, in particular, section 180(3) of the Constitution and not outside such legal confines.

**Impact of the Supreme Court decision**

The court’s decision simply means that the appointment of the next Chief Justice of Zimbabwe now rests with the President's prerogative. Both the Supreme Court and High Court decisions reached the same destination that the President has the final say in the appointment of the Chief Justice but using different routes. The President is not under any legal deadline to appoint the Chief Justice to replace the outgoing Chief Justice because section 181(1) of the Constitution closes any lacuna or gap in the event that the current Chief Justice leaves office by providing for the Deputy Chief Justice to assume the position of Acting Chief Justice as follows:

If the office of Chief Justice is vacant or if the office holder is unable to perform the functions of the office, the Deputy Chief Justice acts in his or her place, but if both offices are vacant or both office-holders are unable to perform their functions, the most senior judge of the Constitutional Court acts as Chief Justice.

The President is at liberty to appoint the Chief Justice in terms of the provisions of the current Constitution or await the legal enactment of the proposed amendments to the Constitution and appoint the office holder in terms of the provisions of the amended Constitution.
Conclusion

It is not clear at this juncture as to which procedure will lead to the appointment of the Chief Justice between the current Constitution and the proposed amendments to the Constitution. Suffice to say that it is legally unnecessary and inconsequential to speculate on how the President will exercise his discretion in the appointment of the Chief Justice but it is preferable to await the outcome of that discretion which will find expression in the suitable candidate to be appointed as Chief Justice of the Republic of Zimbabwe.