**COURT WATCH 2017**

**[2nd March 2017]**

**Chief Justice Succession: The Continuing Saga**

**Introduction**

Zimbabweans have been regaled for many years with stories about the covert race to succeed the President.  Now another saga – more open but equally political – is unfolding.  It is the race to succeed the Chief Justice, who retired at the end of February.

**The Background**

In mid-October 2016 the Judicial Service Commission *[JSC]* advertised the forthcoming vacancy in the office of Chief Justice and invited the public to nominate qualified persons to fill it.  This was done in terms of section 180 of the Constitution.  *[Veritas explained the constitutional procedure in* [*Court Watch 4/2016*](http://www.veritaszim.net/node/1873)*.  That* [*e-bulletin*](http://www.veritaszim.net/node/1873) *and the* [*JSC’s advertisement*](http://www.veritaszim.net/node/1870) *are both available on the Veritas website.]*

Four candidates were nominated, and the JSC announced it would interview the candidates in public on the 12th December.

**First Court Case**

**On the 7th December:** only two court days before the interviews were to be held, an urgent application was lodged in the High Court for a provisional court order stopping the interviews until section 180 of the Constitution could be amended.  It was lodged by a Mr Zibani, a law student who apparently has the financial resources to engage in public-interest litigation – one of the fairy-tale elements of this saga.  He argued that the current procedure under section 180 of the Constitution is improper because it involves judges who sit on the JSC having a say in appointing the head of the Judiciary.  Mr Justice Hungwe treated the application as urgent even though the interviews had been public knowledge for months.  He heard the application on Friday 9th December

**Decision on Sunday 11th December:**Justice Hungwe ordered that the interviews should not be held.  He held that section 180 was inconsistent with the founding values of the Constitution and the JSC should not proceed further until it was amended –  something which the Permanent Secretary for Justice, in an affidavit produced at the hearing, said the government intended to do through a constitutional amendment Bill.  *[The judgment is available on the Veritas website]*

**Appeal Lodged:** The JSC immediately informed the judge that an appeal would be noted.  Lodging the appeal automatically suspended Judge Hungwe’s order so the JSC went ahead with the interviews on the 12th December.  Only three candidates were interviewed;  the fourth did not appear.

**In the Interim**

On the 3rd January 2017, a Bill to amend section 180 of the Constitution was gazetted.  It would replace the current procedure, whereby the JSC publicly interviews candidates for senior judicial posts and sends the President a list of three candidates from whom he must make the appointment, with a new procedure under which the President would be free to appoint whoever he wished, after consulting the JSC about his choice.  The Bill cannot be presented in Parliament before April *[see Constitution Watch 2/2017 of 25th January 2017 for an analysis of the Bill].*

In his speech at the start of the legal year in mid-January, the Chief Justice announced he had been told that an “Executive order” had been issued to stop the interviews of candidates for the post of Chief Justice.  He said he had refused to comply with the order and subsequently established that the President had never issued it.

**Appeal in Supreme Court**

**On the 13th February** a three-judge bench of the Supreme Court heard the JSC’s appeal against Judge Hungwe’s judgment.

Several points about the appeal need to be mentioned:

* One of the judges on the bench, Mrs Ziyambi, was recalled from retirement after other eligible judges had recused themselves *[i.e. declined to sit]*.
* Mr Zibani the law student tried to delay the hearing.  When that failed his lawyer refused to file written heads of argument because, so he said, the process was “tainted”.  As a result, under rules of court, he was barred from presenting his argument at the hearing.
* The court allowed lawyers representing the Law Society of Zimbabwe, Mrs Beatrice Mtetwa and a Bulawayo organisation called Abammeli Bamalungelo Abantu Network of Human Rights Lawyers to deliver arguments as “amici curiae” *[friends of the court]* in support of the appeal.

**Justice Hungwe’s order set aside:** The three judges unanimously allowed the appeal and set aside Justice Hungwe’s order.  They pointed out that the JSC had to follow the procedure laid down in the Constitution as it was currently written, and could not wait for an amendment which might or might not be passed by Parliament.  A detailed written judgment setting out their reasons will be released in due course.

**In the Interim**

The Ministry of Justice, Legal and Parliamentary Affairs then made two announcements:

1. that it had requested, and received from the JSC for submission to the President, the JSC’s list of three nominees in terms of section 180 of the Constitution.
2. that in terms of section 181(1) of the Constitution the Deputy Chief Justice will act as Chief Justice with effect from the 1st March until a substantive appointment is made.

**Application to Constitution Court to challenge Supreme Court Decision**

On the 22nd February Mr Zibani applied to the Constitutional Court for an order setting aside of the Supreme Court’s judgment on the ground that the appointment of retired Judge Ziyambi to preside in the appeal was unconstitutional.

And so the saga unfolds.  No doubt there will be many more twists and turns in its plot before it comes to a conclusion.

**Legal Issues Arising from the Appeal and Constitutional Court Application**

**1.  Correctness of the Supreme Court’s ruling:** The Supreme Court’s ruling, that the JSC had to comply with section 180 of the Constitution as it is currently written, is unimpeachable.  The Constitution is the supreme law and the JSC must obey it.  The argument that section 180 is itself unconstitutional verges on nonsense.  The Constitution is an integral whole, and no part of it can be regarded as invalid or unconstitutional.  The fact that the government, or a faction within the government, would like to amend section 180 cannot justify the JSC in disregarding it.

**2.  Legality of Mrs Ziyambi’s appointment as acting judge:** Section 168(2) of the Constitution states that if the services of an additional judge are required on the Supreme Court for a limited period, the Chief Justice can appoint a former judge to act as a judge of the court for that period.  This is what the Chief Justice did in the case of Mrs Ziyambi:  an additional judge was needed to hear the appeal because so many of the Supreme Court judges were either parties to the appeal (and so disqualified from sitting on the court) or had recused themselves.  Mrs Ziyambi, as a former judge, was eligible for appointment under section 168(2).  The fact that she was over the age of 70, and so past the retirement age for judges, is irrelevant.  Section 186(3) of the Constitution makes it clear that judges who are appointed for a fixed term in an acting capacity do not have to retire on reaching the age of 70.  Mrs Ziyambi was appointed for a fixed term – i.e. for the duration of the appeal proceedings – and so she could serve despite her age.  It was always accepted that under the equivalent provisions of the former constitution, retired judges could be called on to serve on the Bench when necessary.  Indeed the conditions of service of judges require them to undertake such service when asked to do so, failing which they will not be paid their pensions.

**3.  Effect of the latest Constitutional Court application:** Mr Zibani’s application to the Constitutional Court does not suspend the Supreme Court’s ruling.  An appeal automatically suspends the ruling that is appealed against, but an application does not – even if the application is made to a higher court.

**4.  Obligation to appoint a new Chief Justice promptly:** Filling a vacancy in the post of Chief Justice is a binding constitutional obligation, and it *“must be* *performed* *diligently and without delay”* *[Constitution, section 324].* The JSC has already fulfilled its part of the appointment process, as laid down by section 180(2) of the Constitution, culminating in the re-submission of its list of three qualified persons as nominees.  All that now remains is for the President to make the appointment of Zimbabwe’s next Chief Justice – and he must do so without delay.  Admittedly section 180(3) states that if he considers that none of the persons on the list are suitable for appointment, he can require the JSC to submit a further list of three qualified persons and then must appoint one of those persons to be Chief Justice.  It is difficult however to envisage anyone seriously suggesting that the President could do this, given the quality of the individuals whose names have been submitted to him.

**5.  Filling the Constitutional Court bench for the new application:** Nine judges must sit on the Constitutional Court bench when the court deals with constitutional cases.  It may be difficult to find judges to fill the bench when the court comes to consider Mr Zibani’s latest application.  None of the judges who are parties to the case  –  the (now former) Chief Justice and the candidates for his vacant post  –  will be able to sit, nor will the judges who dealt with the JSC’s appeal, nor the judges who recused themselves from the appeal (because the same grounds that induced them to recuse themselves from the appeal will presumably apply to the application).  Judges of the High Court will probably have to be called upon to sit in the Constitutional Court, which will give us the curious spectacle of junior judges determining the constitutional validity of a decision made by their seniors.

**Conclusion**

It is most unfortunate that the appointment of a new Chief Justice seems to have fallen prey to political factionalism.  Even the appearance of political involvement in the appointment process diminishes the authority and prestige that should attach to the office.  It is to be hoped that whoever finally becomes Chief Justice will be able to reassert the independence of his or her office and of the judiciary as a whole.

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