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**PRESIDENTIAL RESCISSION OF THE APPOINTMENT OF RAY GOBA AS PROSECUTOR-GENERAL: BREACH OF THE CONSTITUTION OR NOT?**

**1. Brief background**

Following public interviews before the Judicial Services Commission for a new Prosecutor General, Mr Raymond Hamilton Goba was appointed in September 2017. His appointment with immediate effect was announced in an Extra Ordinary Government Gazette General Notice 493 of 2017 published on the 13th of September 2017, which was signed by Chief Secretary to the President and Cabinet Misheck Sibanda. Mr Goba was appointed to take over from the recently removed Johannes Tomana, who was removed from office for incompetence and abuse of office.

Barely two months later, an Extraordinary Government Gazette published on the 27th of October 2017, General Notice 642 of 2017 repealed the earlier notice on the appointment of the Prosecutor General. The first report that Mr Goba’s appointment might be reversed appeared less than a week following his appointment.[[1]](#footnote-1) Indications were that Dr Misheck Sibanda had blundered in releasing the Extra-ordinary Gazette, and his conduct was “irregular and unauthorised”, and that the appointment was “null and void”.[[2]](#footnote-2) The reports were that “there was manipulation and doctoring of the JSC [Judicial Service Commission] recommendations leading to the hurried gazetting of Goba’s name without the usual security clearance required in such high-profile constitutional appointments. The security clearances are done by the Central Intelligence Organisation”.[[3]](#footnote-3) Additionally, unconfirmed reports are that Raymond Goba did not receive any appointment letter.

This brief is an enquiry into the legality of both the appointment and repeal of the appointment of Mr Raymond Goba. The National Prosecuting Authority Act of 2014 [Chapter 7:20] is silent on the appointment or removal of the Prosecutor General, and the Constitution is the only legal instrument addressing the subject.

**2. The law on appointment**

Section 259 of the Constitution provides 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.

4. The Prosecutor-General must be a person qualified for appointment as a judge of the Supreme Court.”

This procedure for the appointment of judges is laid out in the Constitution, and involves public interviews, and a list of three candidates being submitted to the President for consideration. The President is required to appoint only from that list, but can refuse to appoint anyone on that list and request the JSC to supply another list.

Having settled on a candidate, section 259(6) requires that: “*Before taking office*, the Prosecutor-General must take, before the President or a person authorised by the President, the oath of office in the form set out in the Third Schedule.” (my emphasis).

**3. The law on removal**

Section 259(7) of the Constitution stipulates that:

“7. The provisions relating to the removal of a judge from office apply to the removal of the Prosecutor-General from office.”

These provisions being referred to are in section 187, as follows:

**“187. Removal of judges from office**

1. A judge may be removed from office only for—

a. inability to perform the functions of his or her office, due to mental or physical incapacity;

b. gross incompetence; or

c. gross misconduct;

and a judge cannot be removed from office except in accordance with this section.

2. If the President considers that the question of removing the Chief Justice from office ought to be investigated, the President must appoint a tribunal to inquire into the matter.

3. If the Judicial Service Commission advises the President that the question of removing any judge, including the Chief Justice, from office ought to be investigated, the President must appoint a tribunal to inquire into the matter.

4. A tribunal appointed under this section must consist of at least three members appointed by the President, of whom—

a. at least one must be a person who—

i. has served as a judge of the Supreme Court or High Court in Zimbabwe;

ii. holds or has held office as a judge of a court with unlimited jurisdiction in civil or criminal matters in a country whose common law is Roman-Dutch or English, and English is an officially recognised language;

b. at least one must be chosen from a list of three or more legal practitioners of seven years' standing or more who have been nominated by the association, constituted under an Act of Parliament, which represents legal practitioners in Zimbabwe.

5. The association referred to in subsection (4)(b) must prepare the list referred to in that subsection when so required by the President.

6. The President must designate one of the members of a tribunal appointed under this section to be chairperson of the tribunal.

7. A tribunal appointed under subsection (2) or (3) must inquire into the question of removing the judge concerned from office and, having done so, must report its findings to the President and recommend whether or not the judge should be removed from office.

8. The President must act in accordance with the tribunal's recommendation in terms of subsection (7).

9. A tribunal appointed under this section has the same rights and powers as commissioners under the Commissions of Inquiry Act [Chapter 10:07], or any law that replaces that Act.

10. If the question of removing a judge from office has been referred to a tribunal under this section, the judge is suspended from office until the President, on the recommendation of the tribunal, revokes the suspension or removes the judge from office.

...”

Under these provisions, the President cannot *mero motu* decide to institute a tribunal to investigate the suitability of a Prosecutor General to hold office. It must come from the Judicial Service Commission.

Prior to Ray Goba’s appointment, Mr Johannes Tomana held office, and prior to that, Mr Sobusa Gula-Ndebele was the incumbent. We therefore have precedent in how Prosecutor Generals have been removed.

***a. How was Mr Sobusa Gula-Ndebele removed?***

Mr Tomana’s predecessor Mr Sobusa Gula-Ndebele was also removed from the then Attorney-General’s office following recommendations of a tribunal. In December 2007, the President appointed a three-member tribunal consisting of Justice Chinembiri Bhunu as chair, Justice Samuel Kudya and Harare lawyer Mr Lloyd Mhishi. The Tribunal was appointed in terms of the then section 110 of the Constitution, 1979. The Tribunal found Gula-Ndebele guilty of failing to properly discharge his duties, and recommended his removal. The President obliged and removed him from office in May 2008.

Mr Gula Ndebele subsequently lost his challenge before the courts (High Court and Supreme Court), asking the court to set aside the tribunal’s recommendation on the grounds of gross unreasonableness. He had challenged the manner in which he was removed.

***b. How was Johannes Tomana Removed?***

Johannes Tomana was removed from office through General Notice 292 of 2017 published in the Government Gazette on 9 June 2017. The General Notice was signed by Mrs. Virginia Mabiza, secretary for Justice, Legal and Parliamentary Affairs and read:

“… In terms of section 187 (8) of the Constitution (of Zimbabwe), the prosecutor general is removed from office with effect from the date of publication of this notice.”

This was, however, a last step following a period of suspension and enquiry. Mr Tomana was suspended in March 2016. In May 2016, the Judicial Service Commission made recommendations to the President for the establishment of a tribunal to investigate and assess whether Mr Tomana was still fit to hold his office. The President then convened a judicial tribunal in June 2016 to inquire into Tomana’s fitness and suitability to hold office that was chaired by retired High Court judge, Justice Moses Chinhengo. The tribunal’s other members were University of Zimbabwe Dean of Law Emmanuel Magade and Harare lawyer Melania Matshiya. The tribunal specifically investigated Mr Tomana on charges of defying court orders and criminal abuse of office when he withdrew sabotage charges against two military officers who were allegedly caught in a foiled attempt to bomb Mugabe’s Gushungo dairy plant in Mazowe in January 2016. The other charges included failure to prosecute several cases that involved high-profile personalities and failure to issue certificates of private prosecution to Telecel Zimbabwe and Francis Maramwidze – matters that ended up in an adverse judgment against the Prosecutor General by the Constitutional Court in 2015.[[4]](#footnote-4) The tribunal concluded its work early 2017 after which it forwarded its report to the President. The Tribunal heard evidence from at least 23 witnesses. The tribunal found Mr Tomana unfit to hold office and recommended his removal from office.

The General Notice removing the Prosecutor General made mention that:

“It is hereby notified that His Excellency the president has received the report of the tribunal appointed under section 187(3) as read with section 259(7) of the Constitution to inquire into the question of removing the prosecutor general Johannes Tomana, from office for incompetence and misconduct. In that report, the tribunal has advised His Excellency the president that the prosecutor general ought to be removed from office for incompetence.”

Accordingly, in terms of Section 187(8) of the Constitution, the Prosecutor General was removed from office with effect from the date of publication of the notice, vis, 9 June 2017.

We therefore have settled constitutional understanding of how the process of removing a Prosecutor General ought to unfold.

**4. Analysis**

All things being equal, the processes above ought to apply to Mr Goba. There are, however, peculiar circumstances that make Mr Goba’s situation different.

***a. Was the appointment of Mr Goba above board?***

Advocate Ray Goba was appointed in March 2016 to act as Prosecutor General following Tomana’s suspension and subsequent removal. He was therefore in that office at the time the Extra Ordinary Gazette of September 2017 announced his substantive appointment. The question is: was the public announcement via a government gazette sufficient to make Mr Goba’s appointment constitutionally substantive and legally binding?

From the perspective of applications and nominations, public interviews and submission of a list to the President, there were no irregularities that are known of. To that extend, and as far as we know, there were no irregularities in the actual appointment. What this means is that the appointment itself, was above board. This is independent of the fact that enquiries were raised regarding Mr Goba’s suitability as he has a standing criminal conviction in the Republic of Namibia. That is a separate legal challenge, if anyone is interested, but with the recent rescission, the issue has been overtaken by events.

***b. Implications of not taking oath of office***

The implications of section 259(6) are that if the Prosecutor General has not yet taken his or her oath of office, he or she cannot be considered to have taken office. There is no timeline within which the prospective Prosecutor General must take the oath of office. This constitutional position stands notwithstanding the Extraordinary Notice that announced the appointment of Mr Raymond Goba with “immediate effect”. The position is that announcement of an appointment does not in itself satisfy the constitutional prescriptions and does not override the stipulated requirement to take oath before assuming office. The requirement for an oath of office is a peremptory provision.

The long accepted position at law, is that one cannot forfeit or be removed from that which he has never had.[[5]](#footnote-5) One cannot be considered as having accepted or taken a post simply because their appointment was announced. In this case, acceptance of office and conferment of responsibilities, are incumbent upon taking the oath of office being taken. This position was clearly articulated by the US Attorney General in an opinion to a County Prosecuting Attorney, albeit in the context of a judge:

“[W]here a person elected to the office of county judge fails and refuses to take the oath of office as required by Section 1907.09, Revised Code, the office is, under the provision of Section 3.30, Revised Code, to be considered as vacant and such vacancy shall be filled by the governor as provided in Section 13, Article IV, Ohio Constitution”.[[6]](#footnote-6)

In the present case, Mr Goba did not take the oath of office before the President or his assignee in terms of Schedule Three of the Constitution, as read with Section 259, for reasons unknown to us. For that reason alone, he had not as yet taken the office of Prosecutor General. The repealing of the gazette notifying the public of the impending appointment simply means the office of the Prosecutor General remains vacant of a substantive appointee.

***c. The de facto officer doctrine***

There exists in English and common law jurisdictions a doctrine termed the de facto officer doctrine. In the US in *Furtney v. Simsbury Zoning Commission*, 159 Conn. 585, 595-97 (1970), the Connecticut Supreme Court restated the de facto officer doctrine. Among other circumstances, the Court stated that an officer not legally holding office by reason of a procedural defect, such as failing to take an oath, may be a de facto officer when there has been a publicly known and valid appointment or election. The practical effect of this rule is that up until the de facto officer's title to office is adjudged insufficient, *all of his or her actions that are not otherwise illegal are valid and binding on third parties and the public*. The practical effect of the doctrine is only to the extent emphasised in the preceding.

There is a string of cases in common law jurisdictions in which English courts clearly accepted that the de facto officer doctrine could apply in cases in which someone had failed to swear a prescribed oath office.[[7]](#footnote-7)

The Australian position has been articulated as follows:

“Where the making of an oath, affirmation or declaration is a condition which must be satisfied before a person can be regarded as the lawful occupant of a public office, and thus entitled to exercise the powers given to occupants of that office, then logically it would seem to follow that no legal force or effect can be accorded to the acts of persons who have presumed to exercise the powers of office without having taken the prescribed oath, affirmation or declaration. But under the common law of England and of legal systems derived from it such acts may be recognised as legally valid by virtue of the de facto officer doctrine. Such acts may be so recognised if they are acts which would have been valid had they been performed by an officer de jure and if the defect in the title of the person who has performed the acts is not readily discoverable by members of the public”.[[8]](#footnote-8)

In South Africa, which is a closely comparable constitutional jurisdiction, there are no reported cases that have dealt with the taking of oath of a National Director of Public Prosecutions or a Director of Prosecutions in terms of sections 32(2)(a) and 43(5) of the National Prosecuting Authority Act 32 of 1998, as read with section 179 of the Constitution, 1996.

The meaning of the de facto officer doctrine is that certain actions would not be invalidated because the official was not appointed properly, or did not take office properly. This is only limited to decision, actions or omission of the officer, and not their actual holding of the office – that is, the legality of the appointment itself. In the present case, however, the matter is not the legality of any of Mr Goba’s actions, but rather whether his appointment was consummated as required by the Constitution. To that end, the doctrine does not seem to apply to the specific question posed in this brief. Should one choose to argue, however, that Mr Goba was now in that office by virtue of his substantive appointment and not his acting appointment, the de facto officer doctrine would apply to the actions he took during that period, and there would be little scope of legal challenge.

Although Mr Goba was no longer being referred to as “Acting Prosecutor General”, at law he had not yet taken office of substantive Prosecutor General. There was therefore no requirement that he be removed through the constitutional process applicable to the removal of a judge.

***d. The effect of the oath Mr Goba took before assuming office in an acting capacity***

Ray Goba took oath when he assumed office as acting Prosecutor General. Although the Oath he took is the same as that taken by a substantive appointee, the oath he took was for an acting capacity. This does not then mean that he need not take a new oath for a new substantive appointment. One can find parallels. If a judge is being promoted to a higher court, he cannot skip the oath taking on the basis that he was already a judge in a lower court, and had already taken oath. Similarly, if a Minister is reshuffled from one ministry to another, he cannot skip oath on the basis that he was already a minister and had already taken a ministerial oath. Mr Goba’s acting appointment oath was for exactly that, and cannot be extended to apply to his substantive appointment.

***e. Was the repeal of the September Extra Ordinary Gazette above board?***

The Extraordinary Government Gazette published on the 27th of October 2017, General Notice 642 of 2017, titled ‘Constitution of Zimbabwe: Repeal of General Notice 493 of 2017 Concerning the Appointment of Prosecutor General of Zimbabwe’, and which repealed General Notice 493 of 2017, is technically not a removal of Mr Goba from office. Mr Goba was never in office in his substantive position as announced in the September Extra Ordinary Gazette. Rather, General Notice 642 of 2017 was simply a repeal of an announcement made that Mr Goba had been appointed as Prosecutor General. While it may be so for other offices, that announcement is not what gives legal effect to the assumption of office of a Prosecutor General.

**5. Is Mr Goba entitled to administrative justice?**

My answer is no. To answer this, one has to turn to the Administrative Justice Act (Chapter 10:28). Section 3 of the Administrative Justice act requires that an administrative authority when taking action which may affect the rights, interests or legitimate expectations of any person to, inter alia, act lawfully, reasonably and in a fair manner; where it has taken the action, supply written reasons therefor; give adequate notice of the nature and purpose of the proposed action; provide the affected person(s) a reasonable opportunity to make adequate representations; and adequate notice of any right of review or appeal, where applicable.

Of relevant importance here is the fact that the exercise of Presidential executive powers is excluded from administrative justice in terms of the Administrative Justice Act, specifically, according a hearing to an executive appointee and supplying reasons *and* matters related to the appointment of judges (and the prosecutor General is appointed in a similar way as a judge in terms of section 259(3) of the Constitution, thus mutatis mutandis application) Authority for this is section 11(1) of the Act as read with Part I of the Schedule. Section 11(1) states as follows:

 “11 Application of Act to certain administrative authorities or actions limited or excluded

(1)  The following provisions⎯

 (a) paragraph (c) of subsection (1) of section *three*; and

 (b) subsection (2) of section *three*; and

 (c) section *six*;

shall not apply to any of the administrative actions specified in Part I of the Schedule.

…”

Part I of the Schedule to the Act reads as follows:

**“Part I**

**Actions to which Sections 3(1) (c), 3(2) and 6 do not Apply**

 1. Any exercise or performance of the executive powers or functions of the President or Cabinet.

 2. Decisions to institute or continue or discontinue criminal proceedings and prosecutions.

 3. Decisions relating to the appointment of judicial officers.”

One can therefore not rely on the Administrative Justice Act to claim administrative justice for Mr Goba.

This case can only be properly challenged using the principle of legality (specifically rationality) as opposed to administrative justice - as per D*emocratic Alliance v President of RSA* 2013 (1) SA 248 (CC) - wherein the challenge to the appointment of the National Director of Public Prosecutions (NDPP) in South Africa was considered by the Constitutional Court. I express no opinion as to the prospects of success on a rationality challenge.

**6. Conclusion**

My conclusion is that there is no unconstitutionality or a breach of administrative justice in the conduct of the President in repealing his earlier Extra Ordinary Gazette announcing the appointment of Mr Ray Goba. The removal process stipulated by the Constitution does not kick-in as Mr Goba had not assumed office just yet. Mr Goba continues to hold office now in an acting capacity – a capacity for which he took oath of office. The President can now appoint from the existing candidates from the list of three that he was given by the JSC. If he is not happy with that list, the President can request the JSC to supply another list. The latter would necessitate holding fresh interviews.

1. See “Mnangagwa hit again: new PG faces axe” *The Standard*, 17 September 2017, <https://www.thestandard.co.zw/2017/09/17/mnangagwa-hit-new-pg-faces-axe/>. [↑](#footnote-ref-1)
2. Ibid. [↑](#footnote-ref-2)
3. Ibid. [↑](#footnote-ref-3)
4. #  *In Re: Prosecutor General of Zimbabwe on his Constitutional Independence and Protection from Direction and Control* (CCZ 13/2017 Const. Application No. CCZ 8/15) [2017] ZWCC 13 (28 October 2015).

 [↑](#footnote-ref-4)
5. Opinion issued in 15 January 1958 by United States Attorney General William Saxbe. Available at <http://www.ohioattorneygeneral.gov/getattachment/79f5d567-325e-4f41-9002-390f0e66a81c/1958-1540.aspx> [↑](#footnote-ref-5)
6. Ibid. [↑](#footnote-ref-6)
7. This list of cases gores back to the 19th century: *Margate Pier Co v Hannam* (1819) 3 B & Ald 266 at 271 (106 ER 661 at 663): *R v Mayor, Aldemen and Burgesses of the Borough of Cambridge* (1 840) 12 Ad & E 702 (1 13 ER 980). See generally CL Pannam, "Unconstitutional Statutes and De Facto Officers" (1996) 2 *Federal Law Review* 37 at 434. [↑](#footnote-ref-7)
8. Enid Campbell ‘Oaths and Affirmations of Public Office’ (1999) 25(1) *Monash University Law Review* 132, 154-155, citing E Campbell, "De Facto Officers" (1994) 2 *A JAdmin L* 5. [↑](#footnote-ref-8)