

REPORTABLE (7)

LEVI NYAGURA

v

(1) LANZANI NCUBE, N.O.

(2) THE PROSECUTOR-GENERAL OF ZIMBABWE

(3) TAPIWA FRESH GODZI (4) MICHAEL CHAKANDIDA

CONSTITUTIONAL COURT OF ZIMBABWE
HARARE, OCTOBER 29, 2018 & MARCH 6, 2019

T R Mafukidze, with him *J C Muzangaza* and *B Muzeba*, for the applicant

O Zvedi, for the first respondent

J Uladi, for the second, third and fourth respondents

Before: MALABA CJ, In Chambers

This is a chamber application for an order for direct access to the Constitutional Court (“the Court”) made in terms of r 21(2) of the Constitutional Court Rules SI 61/2016 (“the Rules”).

FACTUAL BACKGROUND

In 2014 the University of Zimbabwe awarded a Doctor of Philosophy degree to Mrs Ntombizodwa Grace Mugabe (nee Marufu) (“Mrs Mugabe”). The applicant was the Vice-Chancellor of the University at the time. The applicant stated that, to his knowledge, the degree was awarded in accordance with the University of Zimbabwe Act [*Chapter 25:16*] as well as the statutes and ordinances of the University. In February 2018 the applicant was arrested by members of the Zimbabwe Anti-Corruption Commission. He was charged with criminal abuse

of office as defined in s 174(1)(a) of the Criminal Law (Codification and Reform) Act [Chapter 9:23], on the allegation that he had improperly awarded the degree to Mrs Mugabe.

The applicant was arraigned before the Harare Magistrates Court on initial remand. He was suspended from his position as the Vice Chancellor of the University of Zimbabwe by the President pending finalisation of the criminal charges. On 23 July 2018 the second respondent issued authority to prosecute to the third and fourth respondents. He purported to do so in terms of s 259 of the Constitution of Zimbabwe Amendment (No. 20) Act 2013 (“the Constitution”). The third and fourth respondents are members of the Special Anti-Corruption Unit in the Office of the President and Cabinet (“the Unit”).

When the trial began on 5 September 2018 the third and fourth respondents appeared as prosecutors in the case. The applicant objected to their right to prosecute at the public instance. The applicant raised three constitutional questions. The questions were –

- i. Whether the grant of authority to prosecute to the third and fourth respondents, purportedly under s 259 of the Constitution, being persons other than employees of the National Prosecuting Authority, was *ultra vires* s 259 of the Constitution?
- ii. Whether the grant of the said authority is *ultra vires* s 263 of the Constitution and a wilful abdication of constitutional power by the Prosecutor-General, thereby infringing his rights aforesaid?
- iii. Whether, in any event, the grant of the said authority undermines the protective scheme of inherent prosecutorial independence afforded him by s 258 through to s 263 of the Constitution, and as such a breach of his rights aforesaid?”

The third and fourth respondents opposed the application, which they perceived to be an application for referral of the three constitutional questions to the Court for determination. They did not deny being employed by the Unit, but argued that the authority to prosecute was under s 5(2) of the Criminal Procedure and Evidence Act [Chapter 9:07] (“the CP&E Act”) and as such was lawful.

The court *a quo* found that while it was correct that the second respondent had no power under s 259 of the Constitution to grant prosecutorial authority, s 5(2) of the CP&E Act allowed him to delegate prosecutorial functions to any legal practitioner entitled to practise in Zimbabwe.

To put the reasoning of the court *a quo* and its decision into context, it is important to refer to the constitutional provisions and the law governing the delegation of authority to prosecute.

Section 259 of the Constitution provides generally for the Office of the Prosecutor-General and other officers of the National Prosecuting Authority (“the NPA”). Section 259(10) provides:

“(10) An Act of Parliament must provide for the appointment of a board to employ persons to assist the Prosecutor-General in the exercise of his or her functions, and must also provide —

- (a) for the qualifications of those persons;
- (b) for the conditions of service, conduct and discipline of those persons;
- (c) that in exercising their functions, those persons must be independent and impartial and subject only to the law and to the direction and control of the Prosecutor-General;
- (d) for the structure and organisation of the National Prosecuting Authority; and
- (e) generally, for the efficient performance and well-being of the National Prosecuting Authority.”

Sections 260 and 261 of the Constitution entrench the independence of the Prosecutor-General and officers of the NPA. They provide:

“260 Independence of Prosecutor-General

- (1) Subject to this Constitution, the Prosecutor-General —

- (a) is independent and is not subject to the direction or control of anyone; and
- (b) must exercise his or her functions impartially and without fear, favour, prejudice or bias.

(2) The Prosecutor-General must formulate and publicly disclose the general principles by which he or she decides whether and how to institute and conduct criminal proceedings.

261 Conduct of officers of National Prosecuting Authority

(1) The Prosecutor-General and officers of the National Prosecuting Authority must act in accordance with this Constitution and the law.

(2) No officer of the National Prosecuting Authority may, in the exercise of his or her functions —

- (a) act in a partisan manner;
- (b) further the interests of any political party or cause;
- (c) prejudice the lawful interests of any political party or cause; or
- (d) violate the fundamental rights or freedoms of any person.

(3) Officers of the National Prosecuting Authority must not be active members or office-bearers of any political party or organisation.

(4) An Act of Parliament may make further provision to ensure the political neutrality of officers of the National Prosecuting Authority.”

While the authority to prosecute was given in terms of s 259 of the Constitution, as appears *ex facie* the heading of the letter granting authority, s 259 does not make specific reference to granting of authority to prosecute by the Prosecutor-General. Section 259(10) of the Constitution leaves the details of the powers of appointment of officers to assist the Prosecutor-General in the exercise of his or her functions to an Act of Parliament. The Act of Parliament required by s 259(10) of the Constitution is the National Prosecuting Authority Act [Chapter 07:20] (“the Act), the preamble to which makes reference to ss 258 to 263 of the Constitution and seeks to give effect to them.

Section 27 of the Act gives the Prosecutor-General power to engage any person with the relevant qualifications to perform services for the NPA in specified cases. It provides:

“27 Engagement of persons to perform services in specific cases

(1) The Prosecutor-General may, in consultation with the Minister, engage under agreement in writing any person having suitable qualifications and experience to perform services for the Authority in specific cases.

(2) The terms and conditions of service of a person engaged under subsection (1) shall be determined from time to time by the Minister in consultation with the Minister responsible for finance.”

Section 5(2) of the CP&E Act more specifically authorises the Prosecutor-General to grant prosecutorial authority to any legal practitioner with the requisite qualifications. It provides:

“5 Delegation of functions by Prosecutor-General

(2) The Prosecutor-General may, when he or she deems it expedient, appoint any legal practitioner entitled to practise in Zimbabwe to exercise (subject to the general or specific instructions of the Prosecutor-General) all or any of the rights and powers or perform all or any of the functions conferred upon the Prosecutor-General by section 259 of the Constitution, this Act or any other enactment, whether or not they relate to criminal proceedings.”

The court *a quo* found that reference to s 259 of the Constitution in the provisions of s 5(2) of the CP&E Act made the mention of s 259 in the heading of the letters of appointment to the third and fourth respondents an innocuous inadvertence.

The applicant accepted that the third and fourth respondents are legal practitioners entitled to practise law in Zimbabwe. The fact that they are members of the Unit in the Office of the President and Cabinet does not disqualify them from being appointed to perform prosecutorial functions in terms of s 5(2) of the CP&E Act.

In the result, the court *a quo* directed that the trial should proceed. The matter was postponed to 17 September 2018 for commencement of the trial.

The substantive application sought to be filed with the Court is based on the allegation that the decision by the court *a quo* that the constitutional questions raised by the applicant were frivolous and vexatious breached his right to equal protection of the law enshrined in s 56(1) of the Constitution.

The applicant intends to approach the Court in terms of s 85(1) of the Constitution. Section 85(1) of the Constitution provides as follows:

“85 Enforcement of fundamental human rights and freedoms

- (1) Any of the following persons, namely —
 - (a) any person acting in their own interests;
 - (b) any person acting on behalf of another person who cannot act for themselves;
 - (c) any person acting as a member, or in the interests, of a group or class of persons;
 - (d) any person acting in the public interest;
 - (e) any association acting in the interests of its members;

is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this *Chapter* has been, is being or is likely to be infringed, and the court may grant appropriate relief, including a declaration of rights and an award of compensation.”

The first respondent indicated that he was abiding by the decision of the Court. The second, third and fourth respondents opposed the application for leave for direct access. The grounds of opposition were the following -

1. The application is not properly before the Court as it does not cite the Office of the President and Cabinet which, according to the applicant, made the appointments.
2. There are no prospects of success if direct access is granted, in view of the fact that there are no constitutional issues raised in the application.
3. The applicant has other remedies available to him. The issues complained of are procedural issues of “Plea” covered by s 180(g) of the CP&E Act. The principle of subsidiarity dictates that those issues be dealt with in the lower court.
4. There are disputes of fact in the matter. The second respondent disputes the allegation that the third and fourth respondents were appointed by the Office of the President and Cabinet to carry out prosecutorial duties. The second respondent stated that he delegated his prosecutorial functions to the third and fourth respondents in terms of the law.

At the hearing of the application, Mr *Mafukidze* submitted that the Office of the President and Cabinet is not a necessary party because no relief is sought against it. He indicated that what the applicant was seeking was to set aside the authority granted by the Prosecutor-General to the third and fourth respondents. He submitted that, in terms of r 51 of the Rules, non-joinder is not a basis for removing a matter from the roll. He also argued that the issues *in casu* related to prosecutorial authority, an issue the Court could determine and as such a non-joinder plea was without merit.

Mr *Mafukidze* argued that the argument by the respondents that the matter ought to be dealt with in the court *a quo* and not by the Court, as dictated by the principle of subsidiarity,

was flawed. He averred that the issue that the court *a quo* was requested to refer to the Court related to the constitutionality of the authority to prosecute the applicant. He argued that the court *a quo* held that the constitutional questions raised were frivolous and vexatious. The trial could only proceed after the question whether the decision of the court *a quo* violates the applicant's fundamental right to equal protection of the law had been determined by the Court. Mr *Mafukidze* argued that there were no disputes of fact.

Mr *Uladi* submitted that the application was not properly before the Court. He argued that the applicant did not cite the President, whom he alleged made the appointments of the third and fourth respondents. The second, third and fourth respondents denied that the appointments were made by the President. They averred that the appointments were made by the Prosecutor-General, who issued certificates of authority to prosecute on his behalf. He submitted that the authority to prosecute was lawfully given as the conduct of the Prosecutor-General was within the terms of s 5(2) of the CP&E Act. In his view, the fact that the third and fourth respondents were members of the Unit did not disqualify them from being appointed as prosecutors. Mr *Uladi* argued that the law authorised the Prosecutor-General to appoint a legal practitioner to conduct a prosecution on his behalf. The authority was not limited to legal practitioners employed in specific institutions.

DETERMINATION OF THE ISSUES

WHETHER THE MATTER IS PROPERLY BEFORE THE COURT

Section 175(4) of the Constitution provides as follows:

“(4) If a constitutional matter arises in any proceedings before a court, the person presiding over that court may and, if so requested by any party to the proceedings, must refer the matter to the Constitutional Court unless he or she considers the request is merely frivolous or vexatious.” (My emphasis)

A constitutional matter, as defined in s 332 of the Constitution, must arise or be raised in the proceedings in the subordinate court. The person presiding may, if he or she is of the view that the determination of the constitutional issue by the Court is necessary for the purposes of the proceedings before him or her, *mero motu* refer the matter to the Court. If the matter is raised by any party to the proceedings, there must be a request by that party or any other party that the matter be referred to the Court for determination.

If the presiding person is of the view that the determination of the constitutional matter by the Court is necessary for the purposes of the proceedings and that the request for a referral is not frivolous or vexatious, he or she is obliged to refer the matter to the Court for determination. If the presiding person is of the opinion that the request for a referral is frivolous or vexatious, he or she shall refuse the request.

There must be a moment in the procedure set out in s 175(4) of the Constitution when the presiding person must address his or her mind to factors that answer a number of questions, such as whether what is raised is a constitutional question, whether the request to refer the matter to the Court is frivolous or vexatious, and whether the determination by the Court is necessary for the purpose of the proceedings before him or her. There must be evidence that a request for a referral of a constitutional matter to the Court was made to the presiding person.

It is not compliance with the requirements of the procedure of referral of a constitutional matter to the Court prescribed under s 175(4) of the Constitution to say the constitutional question was raised and the presiding person declined to refer it to the Court. The reason is that it is the request to refer a constitutional question to the Court which must have been found to

be frivolous or vexatious. It is not the constitutional matter itself that has to be found to be frivolous or vexatious.

The reasons for approaching the Court set out in the applicant's founding affidavit do not make mention of a request for referral being made to the court *a quo*. In para 8 of the applicant's founding affidavit the applicant stated that:

- “8. I set out the facts upon which the application is founded below. In short, I raised constitutional questions in criminal proceedings pending before the first respondent. The first respondent declined to refer the said constitutional questions that arose before him to this Court on the basis that the said constitutional questions were frivolous and vexatious in circumstances wherein, with respect, the questions raised were neither frivolous nor vexatious. Such refusal was, therefore, a breach of my right to the equal protection and benefit of the law. ...
37. In short, the first respondent did not even attempt to consider the submissions made before him. It was not sufficient, with respect, to simply hold that ‘the application is frivolous and vexatious’ without illustrating that he had applied his mind to it and found the same frivolous and vexatious for given reasons. In the ABSENCE of a reasoned and considered ruling that the application was frivolous and vexatious, the refusal to refer to this Court the questions raised was a breach of the provisions of section 175(4) which oblige the first respondent to refer an application of this nature to this Court upon a consideration of the request in accordance with set criteria”

An application for leave for direct access to the Court on an application in terms of s 85(1) of the Constitution, alleging that the refusal by a presiding person to refer a constitutional matter is a violation of a fundamental right enshrined in *Chapter 4*, must comply with the requirements of s 175(4) of the Constitution.

An applicant for leave for direct access to the Court who seeks relief on the ground that the refusal by the presiding person to refer a matter is a violation of his or her or its fundamental right or freedom must show compliance on his or her or its part with the requirements of s 175(4) of the Constitution in the proceedings before the court *a quo*.

The applicant accepts that the court *a quo* decided that the constitutional questions raised were frivolous and vexatious. According to him, the decision violated his right to equal protection of the law in terms of s 56(1) of the Constitution. The applicant does not take issue with the fact that the court *a quo* did not determine the question whether the “request” for referral of the constitutional questions, if it was made, was frivolous or vexatious.

The case intended to be placed before the Court in terms of s 85(1) of the Constitution is that the decision by the court *a quo* that the constitutional questions were frivolous and vexatious violated the applicant’s right to equal protection of the law. The allegation is that the decision was made in the context of s 175(4) of the Constitution. For the right of access to the Court under s 85(1) of the Constitution to achieve the intended purpose, it must be shown that in the exercise of its power the court *a quo* violated the applicant’s right to equal protection under s 175(4) of the Constitution.

What is clear from the papers is the fact that the court *a quo* did not proceed in terms of s 175(4) of the Constitution. The court *a quo* decided the constitutional questions on the merits. The record of proceedings shows that the court *a quo* addressed its mind to the issue of the legality of the authority to prosecute given to the third and fourth respondents forming the subject of the constitutional questions. The court *a quo* decided that the authority to prosecute given to the third and fourth respondents was lawful, as it fell within the terms of s 5(2) of the CP&E Act.

The controversy between the parties arising from the question of the legality of the authority given to the third and fourth respondents terminated with the decision that gave victory to the Prosecutor-General.

There was no consideration of the question whether a request for a referral of the constitutional questions raised by the applicant was frivolous or vexatious.

The jurisdiction of a subordinate court under s 175(4) of the Constitution is mandatory and especially focused, in that it has to be exercised in respect of a specific question whether a request for a referral of a constitutional matter to the Court is merely frivolous or vexatious. At the time the decision is made, the subordinate court must be engaged with the question.

In this case, the evidence shows that the court *a quo* was not engaged with that question. It was, instead, engaged with the question whether the authority to prosecute was lawfully given to the third and fourth respondents. It looked at the merits of the question and decided that the authority to prosecute was lawfully given in terms of s 5(2) of the CP&E Act.

The purpose of the exercise of the jurisdiction of a subordinate court under s 175(4) of the Constitution is to protect the process of the Court against frivolous or vexatious litigation. Section 175(4) of the Constitution does not authorise a subordinate court to determine the constitutional matter on the merits. If the subordinate court exercises its general power to determine the constitutional matter on the merits, it does so on the basis of some other law, not s 175(4) of the Constitution. The determination of a constitutional question by a subordinate court is of itself a judicial protection, unless the court has no jurisdiction over the matter. The remedy for the enforcement of the law prescribing the standard of jurisdiction is the appeal.

A determination by a subordinate court of a constitutional matter on the merits cannot be taken as a failure to provide the applicant with the judicial protection provided under s 175(4) of the Constitution. The determination of a constitutional matter on the merits cannot provide a ground for approaching the Court, alleging a violation of the right to equal protection

of the law. Section 175(4) of the Constitution applies to cases where the constitutional matter raised is to be decided upon by the Court.

The subordinate court decides the question whether a request to refer the constitutional question to the Court is merely frivolous or vexatious. Once the subordinate court decides the constitutional question on the merits, s 175(4) of the Constitution ceases to be applicable. In other words, the alleged violation of the right to equal protection of the law, forming the ground on which the substantive application is intended to be filed with the Court in terms of s 85(1) of the Constitution should leave for direct access be granted, cannot, in the circumstances, be based on alleged failure to act in terms of s 175(4) of the Constitution.

The court *a quo* could not have addressed its mind to the question whether a request for referral of the constitutional questions was merely frivolous or vexatious after determining the constitutional questions itself.

There is a discordance between what happened and the relief sought. The relief sought is based on the allegation that there was refusal by the court *a quo* to refer the constitutional questions to the Court. There was no refusal. There was a determination of the constitutional questions on the merits. The decision terminated the controversy between the parties on the question whether the authority to prosecute was lawfully given to the third and fourth respondents, by giving victory to the Prosecutor-General. The applicant was bound by the decision of the court *a quo* and had to stand trial.

The Court can only exercise its jurisdiction to interpret, protect and enforce the Constitution in respect of matters that reach it from lower courts through the procedures prescribed by the Constitution and given effect to by the relevant provisions of the Rules. The substantive and procedural requirements of the relevant constitutional provisions must be

complied with. It must be shown that the matter sought to be brought before the Court for determination falls within the ambit of matters for which the constitutional provisions invoked were designed.

The applicant invoked a wrong remedy in a bid to redress the decision of the court *a quo* on the constitutional questions he raised in the criminal proceedings in that court.

In *Mutero and Anor v Attorney-General* 2000 (2) ZLR 286 (S), it was held that it was incompetent for the court *a quo* to consider the issue of frivolity or vexatiousness of a request for a referral of a constitutional matter to the Court when it had already determined the question on the merits. It was held that once a subordinate court rendered a decision on the constitutional question, the dispute arising therefrom could only be resolved by way of appeal.

If the applicant was of the view that the decision by the court *a quo* was wrong, he had the remedy of appeal for the redress of the decision. A wrong judicial decision does not, however, give rise to a ground for an alleged violation of the right to equal protection of the law. No law provides protection to a litigant against the possibility of a judicial officer making a wrong decision.

DISPOSITION

In the result, it is ordered as follows:

“The application be and is hereby dismissed with no order as to costs.”

UCHENA JCC: I agree

MAKONI JCC: I agree

Muzangaza, Mandaza and Tomana, applicant's legal practitioners

Civil Division of the Attorney-General's Office, first respondent's legal practitioners

National Prosecuting Authority, second, third and fourth respondents' legal practitioners