

REPORTABLE (61)

PROSECUTOR GENERAL, ZIMBABWE
v
TELECEL ZIMBABWE (PRIVATE) LIMITED

CONSTITUTIONAL COURT OF ZIMBABWE
CHIDYAUSIKU CJ, MALABA DCJ, GWAUNZA JCC,
GOWORA JCC, GUVAVA JCC, MAVANGIRA AJCC,
CHIWESHE AJCC, MAKONI AJCC, BHUNU AJCC
HARARE, OCTOBER 8, 2015

A. Mambosasa, for the applicant

Advocate *Fitches*, for the respondent

Advocate *L Uriri*, *Amicus Curiae*

GWAUNZA JCC: The court did not hear argument on the merits of this application, but determined it on the preliminary point of whether or not the matter had been properly brought before the Constitutional Court. At the end of the hearing the court issued the following order:-

“The application be and is hereby dismissed with costs on the legal practitioner and client scale.”

It indicated that the full reasons for this order would follow in due course.

These are they.

At the hearing of this matter, counsel for the applicant, Mr *Mambosasa*, was asked to address the court on the basis upon which the matter had been brought before the court in view of the following;

- i) according to its Notice, the application was brought directly to this court, purportedly in terms of s 167(1) and 176 of the Constitution and not s 85(1) or other constitutional provisions that provide for such direct approach;
- ii) it was neither an appeal against the judgment of the Supreme Court, nor was it referred by that court in terms of s 175(4) of the constitution; and
- iii) the matters that he wished the court to determine were neither raised before, nor determined by the Supreme Court, as constitutional issues.

In short, the court wished to hear from the applicant whether he had established a basis for approaching the Constitutional Court with the application in question.

Mr *Mambosasa* conceded all the three points raised by the court. He further conceded that the papers before the Supreme Court did not properly challenge the constitutionality of ss 13 and 16 of the Criminal Procedure and Evidence Act [*Chapter 9:01*]. Doing so would have entitled the applicant to either appeal to this Court if the Supreme Court had ruled against him, or seek a referral of the matter to this Court in terms of s 175(4)) of the Constitution. He also conceded that consequently, the application had “no leg to stand on”, as it were. In light of these concessions, counsel for the applicant belatedly sought to withdraw the matter. The court ruled against him and proceeded to hear argument on the question of costs, as discussed later in this judgment. Despite not having filed any heads of argument, Mr *Uriri*, the *amicus curiae* was allowed to briefly address the court. He emphasised the need for

parties wishing to apply directly to the Constitutional Court, to do so only upon establishing a proper basis for such an approach. This would insulate the court against a potential flood of undeserving cases at the instance of parties who may be disgruntled at decisions of lower courts, including the Supreme Court.

Even though this matter was not heard on the merits, I consider it necessary nevertheless to set out the backdrop to the order that the court issued. This necessitates a cursory look at some of the papers presented before the court.

The applicant aptly summarised the background to this application as follows in its heads of argument;

- “1. On 28 January 2014 the Supreme Court handed down its judgment in the matter of *Telecel Zimbabwe (Pvt) Ltd v Attorney General* SC 1/2014. The judgment directed and ordered the Attorney general (as he then was) to issue a certificate *Nolle Prosequi* to Telecel Zimbabwe (Pvt) Ltd. Dissatisfied with the judgment the applicant approached the Constitutional Court for an order setting aside the Supreme Court judgment on the basis that same (sic) interferes with the independence of his office and as such it is *ultra vires* provisions of s 260 of the Constitution of Zimbabwe.”

Section 260 of the Constitution provides as follows:-

“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 criminal proceedings.”

The order of the Supreme Court that the applicant sought to impugn was to the following effect:

- “1. The decision by the respondent (applicant *in casu*) to refuse to grant a certificate *nolle prosequi* to the applicant be and is hereby set aside.
2. The respondent is directed and ordered, within 5 days of the date of this order, to issue a certificate to the applicant (respondent) that he declines to prosecute the fraud charge at the public instance.
3. The respondent shall pay the costs of this application.”

The applicant explained the nature of the application in paragraph 3 of his founding affidavit:-

- “3. This is an application calculated at upholding the independence of my office as guaranteed by s 260 of the Constitution of Zimbabwe. This Honourable Court is implored to exercise its inherent jurisdiction and powers in terms of s 167(1) and 176 of the Constitution and declare as follows:- ...”

The declaratory orders that he wished to seek before this Court are outlined in his draft order and included the following:

“Whereupon, after reading documents filed of record and hearing counsel, it is hereby ordered as follows:-

- 1)
- 2)
- 3)
- 4) The order of the Supreme Court in the matter between *Telecel Zimbabwe (Private) Limited v Attorney-General* No. SC 1/2014 be and is hereby set aside.”

For the reasons outlined below, the court found that counsel for the applicant properly made the concessions referred to.

1. Direct approach to the Constitutional Court

The applicant sought to bring this application before the Court, in terms of s 167(1(a) as read with s 176 of the constitution.

A closer look at these two provisions suggests that he could not have properly done so.

Section 167 (1) provides as follows:-

“167 Jurisdiction of Constitutional Court

- (1) The Constitutional Court-
- (a) is the highest court in all constitutional matters, and its decisions on those matters bind all other courts.
- (b) decides only constitutional matters and issues connected with decisions on constitutional matters, in particular references and applications under s 131 (8) (b) and paragraph 9(2) of the Fifth Schedule; and
- (c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.”

Section 176 provides as follows:-

“176 Inherent powers of Constitutional Court, Supreme Court and High Court

The Constitutional Court, the Supreme Court and the High Court have inherent power to protect and regulate their own process and to develop the common law or the customary law, taking into account the interests of justice and the provisions of this constitution” (*my emphasis*)

As is evident from a reading of s 167(1), all that it does is state that the Constitutional Court is the highest (and final) court in all constitutional matters, and that it decides such matters only. “All constitutional matters” in my view refers to matters properly brought before this Court in accordance with the Constitution.

Except for the specific instances stipulated in s 167(1)(b) and s 167(2)(b),(c) and (d), s 167 does not elaborate as to who, on what conditions or how, a party may approach the court for it to exercise the jurisdiction conferred upon it by that provision. These details are to be found in other provisions of the constitution. Thus s 167(1), apart from the paragraphs mentioned, does not confer on anyone the right to approach the Constitutional Court directly, even if they have, or perceive themselves to have, a constitutional matter needing the court's determination.

In order to give full effect to s 167(1) in relation to any constitutional matter sought to be brought before the court, the provision must be read in conjunction with the various provisions that do confer a right to approach the constitutional court directly or indirectly through another process. Section 176 as will be explained later, is not one of such provisions.

Thus the applicant's attempt to file this application in terms of this section is based on a misapprehension of the meaning and effect of s 167(1).

Direct applications to the Constitutional Court are to be made only in terms of the provisions referred to above, as well as in terms of and as provided for in s 85(1). The specialised nature of the applications referred to in s 167(1)(b) and s 167(2)(b),(c)and(d), however, makes these provisions irrelevant to this case.

Therefore the only way the applicant could have validly brought an application directly to this court would have been in terms of s 85(1). As conceded by his counsel, the applicant did not do so, but sought to rely on the two provisions mentioned.

Section 85 is entitled “**Enforcement of fundamental human rights and freedoms**” and stipulates as follows in its subsection (1);

- “85 (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.”
(my emphasis)

What is clearly evident from this provision is that the relief sought and to be granted by the court in terms of this section must relate to fundamental rights and freedoms enshrined in the relevant Chapter, and nothing else. Such relief may include a declaration of the rights said to have been or about to be violated. The applicant did not allege that the right he alleges was violated by the Supreme Court was an enshrined fundamental right.

The applicant also sought to rely on s 176 of the constitution in an attempt to bring the application within the jurisdictional parameters of the Constitutional Court. His position seems to be that the inherent power conferred on the court by this section should have been invoked in his favour, and specifically to allow his application to be brought directly to this Court. This Court, being a creature of statute, can only operate within the

confines of its constitutional mandate. It is evident that s 176 confers inherent powers on the court to do the various acts listed therein. However what the section does not do is vest the court with the power to arrogate to itself jurisdictional authority that reaches outside and beyond the limits imposed in the Constitution. In other words the court, in the exercise of the powers conferred on it in this section, is restricted to the ambit of its constitutionally mandated jurisdiction. The words **“taking into account the provisions of this Constitution”** in my view put this fact beyond any doubt. This is thus not a section that can be read together with s 167(1)(a) in order to avail to litigants the right of direct access to the Constitutional Court.

The applicant’s papers therefore, did not demonstrate a constitutional basis for the direct approach that he sought to adopt in bringing the application before this court. To that extent, the concession made for him that the application ‘had no leg to stand on’ was validly made.

1. Neither a referral nor an appeal

In relation to the referral to this court that the applicant concedes was not requested from the court *a quo*, the relevant provision is s 175 which deals with the powers of courts in constitutional matters. It specifically provides in s 175(4) that;

“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 merely frivolous or vexatious.”

Because no constitutional matter was raised in the Supreme Court, and none was referred, this provision is not relevant to the matter at hand.

With regard to an appeal, the applicant correctly conceded that, on the face of it, the issues that he sought this Court to determine were also not brought before it as an appeal against the decision of the Supreme Court. However, because he sought to impugn a decision of that court, it is pertinent to quote s 169 of the Constitution, which reads as follows:-

“169 Jurisdiction of Supreme Court

- (1) The Supreme Court is the final court of appeal for Zimbabwe, except in matters over which the Constitutional Court has jurisdiction.”(my emphasis)

My reading of s 169(1) suggests that while the Supreme Court can make a decision on a constitutional matter, such decision is not final, since only the Constitutional Court can make a final decision on that matter in terms of s 167(1)(a). In other words, an appeal lies to the Constitutional Court against an order of the Supreme Court, only on a constitutional matter determined by it. Another type of appeal to the Constitutional Court could be one in terms of s 175(3). This is a position that this Court confirmed in its recent decision in the case of *Don Nyamande & Anor v Zuva Petroleum (CCZ 8\15)*. ZIYAMBI CCJ stated as follows;

“In my view, such a right (of appeal) may be read into s 175(3) of the Constitution which applies where an order of constitutional invalidity of any law has been made by a court. Failing that, a right of appeal could only arise where the Supreme Court makes a decision on a constitutional matter.

Since no constitutional case was determined by the Supreme Court, no appeal can lie against its decision.”

In that case, the applicants who had not raised a constitutional issue before the Supreme Court sought leave to appeal against its decision, purportedly (and erroneously) in terms of s 167(5) of the constitution. The application was dismissed with the court correctly holding as follows:-

“Section 167(5 relates to rules of procedure regulating the manner of approach to this Court on appeal from lower courts. It does not confer a right to appeal to the Constitutional Court on a litigant who has no right of appeal” (my emphasis).

The court thus effectively affirmed the finality of the Supreme Court judgment on a matter that was not determined by that court as a constitutional issue. By that token, the matter was not one that fell into the category of those over which the Constitutional Court had jurisdiction. As already stated, these are matters that are properly brought to the Constitutional Court.

I find the *dicta* cited above to be eminently apposite *in casu*. This is because while the applicant did not specifically state so in his application, in reality the matter was an appeal brought to this Court under the guise of an application. This is abundantly evident from the relief that is outlined in his draft order. It is even more evident from his summary of the background to the intended application, as already indicated. He indicated that he wished to approach this Court “*for an order setting aside the Supreme Court judgment on the basis that it interferes with the independence of his office and as such it is ultra vires provisions of s 260 of the Constitution of Zimbabwe...*”. Like in the case referred to above, the issue that I have underlined, and others that the applicant sought to bring before this Court, similarly ‘arose’ after the Supreme Court judgment was pronounced. They could not have been and in fact were not, raised before the Supreme Court and needless to say, not determined by it as constitutional matters. The issues therefore did not meet the requirement for inclusion into “matters over which the Constitutional Court has jurisdiction”.

On the basis of the authority cited above, and upon a proper interpretation of the relevant provisions alluded to in this context, the judgment of the Supreme Court on these

matters, which the applicant sought to have reversed, was final and definitive. It is a decision that may not be interfered with by this Court.

Thus, in as much as the application failed to meet the test for a direct approach to this Court, it meets the same fate in relation to any notion (expressed or implied) of an appeal against the decision of the Supreme Court.

2. Costs

As indicated at the beginning of this judgment, the parties made submissions on the question of costs. Advocate *Fitches*, for the respondent, urged the court to order costs against the applicant on the legal practitioner and client scale. He argued that this was because,

- (i) the application was wrongly filed before this Court,
- (ii) the respondent had been unnecessarily ‘dragged’ to court in order to defend the application, and
- (iii) the respondent had been put to the cost of preparing opposing papers thereto.

Mr *Fitches* relied for these arguments on the case of *Mudzimu v Municipality of Chinhoyi & Anor* at page 16(H),¹ where the following *dictum* is cited from the leading case of *Nel v Waterberg Landbouwers Ko-operative Vereeniging*²;

“The true explanation of awards of attorney and client costs not expressly authorised by statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to action or from the conduct of the losing party, the court in a particular case considers it just by means of such order, to ensure more effectually than it can do by means of a judgment for party and party costs that the

¹ 1986 (1) ZLR 12 (HC)

² 1946 AD 597

successful party will not be out of pocket in respect of the expense caused to him by the litigation”

Mr *Mambosasa* for the applicant in response urged the Court not to grant the order sought by the respondent on the issue of costs, on the basis that this would be to ‘punish’ the client for the legal practitioner’s fault.

The court found merit in Mr *Fitches*’ submissions. The application was indeed not brought properly before the court, and further, it purported to be an application when in reality it was meant to be an appeal against a final order of the Supreme Court. The applicant engaged counsel and must have instructed him on the nature of the application to place before the court. Therefore there can be no question of ‘punishing’ him for the legal practitioner’s ‘mistakes’. Finally, the respondent was put to the unnecessary cost of preparing opposing papers to the application, and appearing before the court for the hearing thereof. In the light of this, the court was satisfied that an order of costs on the higher scale was justified.

It was for the reasons outlined in this judgment that the Court dismissed the application with costs on the legal practitioner and client scale.

CHIDYAUSIKU CJ: I agree

MALABA DCJ: I agree

GOWORA JCC: I agree

GUVAVA JCC: I agree

MAVANGIRA AJCC: I agree

CHIWESHE AJCC: I agree

MAKONI AJCC: I agree

BHUNU AJCC: I agree

Mambosasa, appellant's legal practitioners
Messrs Scanlen & Holderness, respondent's legal practitioners