

REPORTABLE (40)

(1) ANNA COLLETA CHIHAVA (2) BOAS MAPUVA (3)
ZISHE CHIZANI
vs
(1) THE PROVINCIAL MAGISTRATE FRANCIS MAPFUMO N.O
(2) THE PROSECUTOR GENERAL

**SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, MALABA DCJ, ZIYAMBI JCC,
GWAUNZA JCC, GARWE JCC, GOWORA JCC,
HLATSHWAYO JCC, GUVAVA JCC & CHIWESHE AJCC
HARARE, JUNE 11 2014 & JULY 15, 2015**

P. Mangwana, for the first, second and third appellants

S. Fero, for the first and second respondents

GWAUNZA JCC: This is an application in terms of s 85(1(a) of the Constitution of Zimbabwe. The appellants allege that their constitutional rights as enshrined in ss 70(1(b), 70(1)(d) and 70(1)(c) have been violated through the manner in which criminal proceedings against them were conducted in the Magistrates Court sitting at *Chivhu*. They seek an order that the proceedings be quashed and a trial *de novo* ordered before a different magistrate.

IN LIMINE

The respondents raise a point *in limine*, to the effect that the applicants are not properly before this Court. They contend that the applicants should have approached this Court through a referral of the matter to it by the Magistrates Court in terms of s 175 (4) of the Constitution. This is in view of the fact that the constitutional issue upon which the

application is premised arose during the course of proceedings in the Magistrates' Court. It is not in dispute that the applicants took the opportunity availed by a postponement granted by consent in the Magistrates' Court proceedings, to approach this Court directly.

Section 175(4) reads as follows:

Powers of courts in Constitutional Matters

“175(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 merely frivolous or vexatious.”

It is the respondent's contention, in light of this provision, that the applicants' failure to approach this Court in terms of s 175(4) of the Constitution was 'fatal' to the application.

Section 85(1)¹ 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 interest
- (b) ...
- (c) ...
- (d) ...
- (e) ...

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.”
(*emphasis added*)

The word “court” is not defined in s 332 of the Constitution, but in the context in which it is used appears to include the Constitutional Court. It seems to me therefore that

¹ It should be noted that reference in this judgment to paragraph(a) of ss (1) of s 85, and its effect, may apply equally to the other paragraphs of this subsection, which are not relevant in casu

on a strict, literal reading of s 85(1)(a), it could be argued, as the appellants briefly do *in casu*, that beyond what is expressly stated therein, the wording does not place any restrictions on the type of person who may approach the Constitutional Court directly.

Firstly, the section is not prefixed with the words “*Subject to ...*” or “*Save as otherwise provided in terms of ...*”

These phrases are normally used in legislative drafting parlance to indicate that the provision in question does not have unfettered application but is to be applied only to the extent that it does not contradict the specific other provisions mentioned. This is clearly not the case *in casu*.

Secondly, the applicants are clearly acting in their own interest, and are alleging a violation of their fundamental rights. Thirdly and more specifically, it could be argued that s 85(1) does not expressly exclude a direct approach to this Court where the violations alleged were perpetrated in the course of proceedings in a lower court.

This situation is to be contrasted with some provisions of s 24 of Zimbabwe’s old Constitution, which effectively are the precursor to some parts of both ss 85 and 175 of the current constitution. Section 24 read as follows in relevant parts:

“24. Enforcement of protective provisions

(1) if any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may, subject to the provision of subsection (3), apply to the Supreme Court for redress.

(2) If in any proceedings in the High Court or in any court subordinate to the High Court any question arises as to the contravention of the Declaration of Rights, the person presiding in that court may, and if so requested by any party to the

proceedings shall refer the question to the Supreme Court unless, in his opinion, the raising of the question is merely frivolous or vexatious.

(3) Where in any proceedings such as are mentioned in subsection (2) any such question as is therein mentioned is not referred to the Supreme Court then, without prejudice to the right to raise that question or any appeal from the determination of the court in those proceedings, no application for the determination of that question shall lie to the Supreme Court under subsection (1) (my emphasis)

In interpreting s 24(3) and its effect, a number of authorities ruled that it rendered the provisions of s 24 (2), mandatory. In other words, any constitutional issue that arose during proceedings in a lower court, had to be referred to the Supreme Court (sitting as a Constitutional Court), in terms of s 24(2). Section 175 (4) of the current constitution is an exact replica of the old s 24(2).

It was for instance held by **MALABA JA** (as he then was), in *Tsvangirai v Mugabe and Anor* 2006 (1) ZLR 148 S as follows;

“It is the duty of the party who wants a question as to the contravention of the Declaration of Rights arising in the proceedings in the High Court, or in a court subordinate to it, referred to the Supreme Court for determination, to ensure compliance with the provisions of s 24(2). The requirement to comply with the procedure prescribed thereunder is made mandatory by the provision of s 24(3)”.

In the earlier case of *Jesse v Attorney General* 1999 (1) ZLR 121 (S), **GUBBAY CJ** (as he then was) had similarly stated as follows;

“Put differently, the question is whether an applicant may, during the course of proceedings in the High Court, as in any court subordinate to it, simply ignore the provisions of s 24(2), and utilise the procedure laid down in s 24(1). I entertain not the slightest doubt that the resort by the applicant to s 24(1) of the Constitution was impermissible.”

GUBBAY CJ went on to dismiss the application before him, for contravening s 24 (3) of the Constitution. It is thus evident that the application *in casu* would have been

declared impermissible, and/or been dismissed, had it been brought in terms of the old s 24(1).

It should be noted however, that in the case of *Martin v A-G & Anor (1993 (1) ZLR 153 (S))* it was held that an exception to this general rule would arise in the situation where a lower court denied an application for referral in terms of s 24 (2) of the old constitution, for reasons other than those permitted under s 24.² In that case, the refusal to refer the matter to the Supreme Court was found to have been premised on a misunderstanding by the Magistrates' Court, of the meaning of the phrase 'frivolous or vexatious'. The court held that in such circumstances the unsuccessful applicant was entitled to approach the Supreme Court directly in terms of s 24(1).

While this is not the situation that the case at hand is concerned with, it is nevertheless pertinent to note that an applicant such as the one in *Martin's* case, would have had to initially make his application for referral to a lower court.

The last argument that could conceivably have been raised against a finding that the application *in casu* should suffer the same fate is that, despite subsection 175 (4) repeating word for word, s 24 (2) of the old Constitution, the section that followed it, that is s 24 (3), was not similarly imported into s 175 of the current Constitution. This is the subsection that the authorities cited above interpreted as outlawing a direct approach to the Supreme Court. In addition to this, reference to the same subsection, in the old s 24 (1) also failed to find its way into the new Constitution.

The sum total of all this, it appears to me, could be interpreted as evincing an intention, by the Legislature, to remove completely any "bar" that an applicant in terms of

² See also *Mukoko v Commissioner General of Police & Others 2009 (1) ZLR 21 (S)*

s 24 (1) might have confronted, arising from the fact that the constitutional issue in point arose during proceedings in a lower court. It could, further be interpreted as creating the impression that the options for redress that were open to an applicant envisaged in the old sections 24 (2) (now s 175 (4)), and 24 (3) have been widened.

The critical questions that then arise, against this background, are:

1. Has the absence of restrictive provisions in both s 85 and s 175 (4) (particularly the former), opened the door very widely, and given unfettered, direct access to the constitutional court, to any person who claims an existing, current or impending violation of their constitutionally guaranteed fundamental rights?, and
2. Was this the intention of the Legislature?

These questions in my view can only be answered on a proper consideration of relevant rules governing the interpretation of statutes generally and of the constitution in particular. In this respect, it is pertinent to note that a constitution is itself a statute of Parliament. Therefore, any rules of interpretation that are regarded as having particular relevance in relation to constitutional interpretation, can only be additional to the general rules governing the interpretation of statutes.

The starting point in relation the interpretation of statutes generally would be what is termed ‘the golden rule’ of statutory interpretation. This rule is authoritatively stated thus in the case of *Coopers and Lybrand & Others v Bryant* 1995 (3) SA 761 (A) at 767;

“According to the ‘golden rule’ of interpretation, the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the instrument” (*my emphasis*)

In his book ‘*Principles of Legal Interpretation - Statutes, Contracts and Wills*’

1st Ed. At page 57, E A Kellaway echoes this statement as follows:

“The dominating Roman-Dutch law principle is that an interpretation which creates an absurdity is not acceptable (that is ‘*interpretatio quae parit absurdum, not est admittenda*’)” (See among other authorities, *Exparte Fourie* 1962 (3) SA 614 (O); *S v Nyathi* 1978 (2) SA 20 (B) and *Canca V Mount Free Municipality* 1984 (2) SA 870 (TK) 833)

The learned author, at page 62, further states:

“Even if a (South African) court comes to the conclusion that the language is clear and unambiguous, it is entitled to reject the purely literal meaning if it is apparent from the anomalies which flow therefrom that the literal meaning could not have been intended by the legislature” (*my emphasis*)

Apposite to the circumstances of this case, the learned author, after considering a number of authorities, makes the following remarks at page 61:

“While it is not permissible to speculate as to the purpose of an enactment, the legislative purpose may be sought from the subject matter of the Act, the enacting clauses in the whole enactment, the state of the law before the enactment was passed and the surrounding circumstances” See *Hunter v R* 1907 TS 910; *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530; (*my emphasis*),

And lastly at page 293, in reference to the maxim “*in pari materia*” the learned author states:

“According to Roman-Dutch law, a later enactment not clear as to its meaning, which has analogous provisions with regard to, or clauses corresponding with, an earlier enactment, and particularly where the later enactment deals with the same subject matter, should, where feasible, be so interpreted that both provisions cohere, so that the contents of the earlier one can throw light on the later, unclear provision” (See among other authorities, *Brink v Alfred McAlpine & Sons South Coast Regional Rent Board*, 1971 (1) SA 741 (A); *Durban City Council v Shell and BP SA Petroleum Refineries (PTY) Ltd* 1971 (4) SA 466)

The principles set out in the *dicta* cited above can aptly and instructively be summarized as follows:

- i) the Legislature is presumed not to intend an

absurdity, ambiguity or repugnancy to arise out of the grammatical and ordinary meaning of the words that it uses in an enactment.

ii) therefore, in order to ascertain the true purpose and intent of the Legislature, regard is to be had, not only to the literal meaning of the words, but also to their practical effect.

iii) In this respect,

- a) the words in question must be capable of an interpretation that is 'consistent' with the rest of the instrument in which the words appear;
- b) the state of the law in place before the enactment in question, is a useful aid in ascertaining the legislative purpose and intention, and
- c) where an earlier and later enactment (or provision) deals with the same subject matter, then, in the case of uncertainty, the two should be interpreted in such a way that there is mutual consistency.

Turning now to the additional considerations that are particular to the interpretation of the constitution, I find the following *dictum* from the Namibian case of *Minister of Defence, Namibia v Mwandighi 1992 (2) SA 355 (Nm)* to be both apposite and instructive;³

...the whole tenor of Chapter 111 (of its constitution) and the influence upon it of international human rights instruments from which many of its provisions were derived, call for a generous broad and purposive interpretation that avoids the austerity of tabulated legalism. (my emphasis)

³ See also among others, *Rattigan vs Chief immigration Officer 7 Others 1994 (2) ZLR 54 (s)*; *Capital Radio (Pvt) Ltd v Broadcasting Authority of Zimbabwe 2003 (2) ZLR 236*

These remarks are echoed in the following summation by the learned author *EA Kellaway*⁴;

“The principle of interpretation of a state’s constitution incorporating a bill of rights may be stated thus:

An interpreter should follow the submitted triple synthesis of literalism, intentionalism and purposiveness principle, as is done in the interpretation of any other statute...”

Thus while a constitution is to be interpreted in accordance with the rules relating to statutes generally, the authorities suggest that a court called upon to interpret such a constitution should give a generous and purposive construction to its provisions, particularly the entrenched fundamental rights and freedoms. It appears to me that in this process the purpose of the provision in question is to be given particular attention.

When all this is applied to the circumstances of this case, there is in my view no gainsaying the fact that a literal and grammatical meaning ascribed to s 85(1) would be inconsistent with s 175 (4). This is to the extent that such meaning would give room to litigants in proceedings underway in a lower court to abandon such proceedings midstream and without any ceremony, in order to approach the Constitutional Court directly in terms of that section. Such a meaning would thus introduce an absurdity and possible chaos to a process that, in terms of the more expansive s 24 of the old Constitution, was free of such anomalies.

It is evident that the purpose of the old s 24 and in particular subsections (1) (2) and (3), was to inject order and certainty into the process by which constitutional issues arising during proceedings before the lower courts, were referred to the Constitutional Court

⁴ *Ibid* at page at page 216

order in the sense that the lower court had the opportunity to call and hear evidence on, and consider, the issue so as to determine whether it is not frivolous or vexatious. Only then did the court refer the issue to the Constitutional Court. Through this process, the Constitutional Court was shielded from a situation where frivolous and undeserving cases might have been directly brought to it. There was certainty in the process in that the lower court, where it referred the matter, was fully informed as to both the reason for, and the effect of, such referral. The effect would be a formal deferment of the proceedings in that court, pending a constitutional court determination of the issues referred to it. More importantly, the risk of parallel proceedings being pursued in the Constitutional and the lower courts, on different aspects of the same case but based on the same facts, was obviated.

It should be noted that the case at hand is an example of the absurdity that may arise from a strict, literal construction of s 85(1). The proceedings in the Magistrates' Court were postponed by consent of the parties. The next thing that happened was a direct application to this Court, in which aspects of those proceedings are being impugned. There is nothing on the record to suggest that the Magistrates Court was made aware of this development, or if so, through what procedure and to what effect. It may therefore be safe to assume that the lower court is still in the dark in this regard. Further to this, it appears from the facts of the case that evidence should have been led in the lower court, to enable the magistrate to determine whether or not the case merited a referral to the Constitutional Court. The end result is that the latter court is seized with a matter that might not only have required *viva voce* evidence to be led, but may, for all intents and purposes, have been ruled frivolous or vexatious by the magistrate. This Court is not able to call and hear *viva voce* evidence from the parties, and would thus be handicapped in terms of properly determining the matter.

I therefore entertain no doubt that the certainty order referred to above would be completely eroded were the courts to operate on the basis of a literal and grammatical interpretation of s 85(1). This circumstance is not only highly undesirable, it would also constitute an affront to the time honoured common law principle that a superior court should be slow to intervene in ongoing proceedings in an inferior court, except in exceptional circumstances. This principle is persuasively articulated as follows in the case of *Wahlhaus v Additional Magistrate, Johannesburg* 1959 (3) SA 113 (A);

“ ... a superior court would be slow to exercise any power upon the unterminated course of criminal proceedings in a court below, but would do so in rare cases where grave injustice might otherwise result or where justice might not by other means be attained.”

It seems to me that the *ratio* in the cases of *Tsvangirai v Mugabe* and *Anor and Jesse v Attorney General*, cited above, was a reaffirmation of this principle, and that it found fortification in s 24(3) of the old Constitution. Despite this ‘fortification’ not having found its way into the new Constitution, I am satisfied that the basic principle remains. It is, in any case, trite that a statute should, where possible, be construed in conformity with the common law rather than against it, except where the statute is clearly intended to alter the common law. (See *Johannesburg Municipality v Cohen’s Trustees*, 1909 TS 811). I do not find anything in the wording of s 85(1(a), that could be said to evince an intention to oust common law on the issue in point.

Sections 85(1) and 175 (4) of the current Constitution and s 24 of the old Constitution, all deal with the same subject matter, that is, the methods by which matters may be brought to the Constitutional Court. To that extent, I am satisfied no basis exists for interpreting the later provisions in such a way that they do not ‘cohere’ with the earlier

provisions. In other words, the provisions of the old s 24 should be taken as ‘throwing light’ on the provisions of s 85(1)(a) and 175 (4) of the current Constitution.

I find, when all is told, that the above *expose* and analysis of the law and authorities on statutory interpretation clearly favour a finding, *in casu*, that it was not the intention of the Legislature to oust a procedural regime that ensured order and certainty in the administration of justice in the courts, and to introduce in its place, one that would result in absurdity, disorder and ambiguity. Clearly, the anomalies that would flow from a literal meaning of s 85(1) (a) could not have been intended by the Legislature.

Consequently and except in circumstances akin to those in *Martin’s* case (*supra*), any constitutional issue that arises during proceedings in a lower court ought to and must be brought to this court only upon referral in terms of s 175 (4) of the constitution. It follows from this, that the instant application is not properly before this Court.

In the final result, I find that the point *in limine* raised by the respondent has merit and ought to be upheld.

In the result, it is ordered as follows,

1. The point *in limine* raised by the respondents be and is hereby upheld.
2. The application is struck off the roll.
3. There shall be no order as to costs.

CHIDYAUSIKU CJ: I agree

MALABA DCJ: I agree

ZIYAMBI JCC: I agree

GARWE JCC: I agree

GOWORA JCC: I agree

HLATSHWAYO JCC: I agree

GUVAVA JCC: I agree

CHIWESHE AJCC: I agree

Mangwana and Partners, applicants' legal practitioners

National Prosecuting Authority, first and second respondents' legal practitioners