REPORTABLE (68)

IGNATIUS RUVINGA
v
PORTCULLIS (PRIVATE) LIMITED

CONSTITUTIONAL COURT OF ZIMBABWE
CHIDYAUSIKU CJ, MALABA DCJ, GWAUNZA JCC,
GARWE JCC, GOWORA JCC, HLATSHWAYO JCC,
PATEL JCC, GUVAVA JCC, AND MAVANGIRA AJCC
HARARE: MARCH 11, 2015 & OCTOBER 25, 2017

The applicant in person

T. Nyamasoka, for the respondent

MAVANGIRA AJCC: This is a Constitutional Court Application in terms of s 85 (1) of the Constitution of Zimbabwe (the Constitution). The applicant's contention is that an award of costs made against him in litigation in the High Court of Zimbabwe infringes his rights as enshrined in s 69 (4) of the Constitution.

The factual background of the matter is that the applicant issued summons out of the High Court of Zimbabwe. The respondent was one of two defendants cited. The respondents raised an exception to the Plaintiff's claim in terms of Order 21 r 137 (1) (b) of the High Court Rules and also made an application to strike out in terms of subpara (c) of the same Rule. The applicant opposed the application and also applied for summary judgment in terms of r 64. The exception and application to strike out were upheld and the application for summary judgment was dismissed with costs.

The premise of this application is that the costs allowed by the court *a quo* against the applicant infringe his rights enshrined in s 69 (4) of the Constitution (s 69 (4)). The section provides that:

> "(4) Every person has a right, at their own expense, to choose and be represented by a legal practitioner before any court, tribunal or forum."

The applicant further contends that S.I. 12/2011 as amended by S.I. 107/2011, in terms of which the bill of costs that was raised was taxed, is inconsistent with s 69 (4).

The issue that appears to arise for determination is whether the rationale of costs in our courts contradicts s 69(4) and whether the section therefore precludes a successful litigant from claiming costs from the losing party. But before that discourse can arise or be entertained, it is of importance to first establish whether this application is properly before this court, for, if it is not, then the issue cannot properly be determined in these proceedings. Has the applicant approached the correct forum for relief?

During the course of the applicant's submissions before this Court it was posited to him that s 69 (4) does not preclude a successful party from claiming costs from the losing party. In his response the applicant said that s 167 (5) (b) gives him the right to approach the court. Section 167 (5) (b) reads:

> "Rules of the Constitutional Court must allow a person, when it is in the interests of justice and with or without leave of the Constitutional Court –
> …
> (b) to appeal directly to the Constitutional Court from any other court."

The applicant further made several submissions. He submitted that the court should treat his case as an appeal; that he had not had a fair hearing; that the order of costs

against him is in fact punishment; that his application before this Court is not frivolous and vexatious and that what he is seeking from this court is what he would call clemency.

In terms of s 167 (1) (a), (b) and (c) the Constitutional Court is the highest court dealing with constitutional matters. It decides only constitutional matters and issues connected with decisions on constitutional matters. The Constitutional Court also 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 332 of the Constitution defines a "constitutional matter" thus:

> "… a matter in which there is an issue involving the interpretation, protection or enforcement of this Constitution."

The applicant purports to challenge the constitutionality of the order of costs that was awarded against him in the court *a quo*. He, in oral submissions, asked the court to treat his application as an appeal. The fact of the matter is that the applicant did not file an appeal against the court a *quo's* decision. He filed an application and it must be treated as such. It is not an appeal to this court in terms of the Constitution.

It is not open to a litigant to change midstream the jurisdictional basis upon which he or she approaches the court. Even if it was legally permissible to change the nature of the proceedings as vainly attempted by the applicant, this Court would, in any event, be handicapped to deal with the matter as an appeal for the reason that no grounds have been raised pointing to the alleged error or misdirection of the court *a quo* by reason of which this Court would interfere with the lower court's order of costs.

The applicant's request that his matter be treated as an appeal is further made untenable by the fact that the constitutional issue purported to be raised before this Court was not raised before the court *a quo*. An appeal by definition relates to a request being made to a higher tribunal or court for the alteration of the decision of a lower one. In *casu* the court *a quo* was not invited to and neither did it make a decision on the issue now sought to be determined by this Court.

The applicant's request that his application be dealt with as an appeal lays bare the reality that the applicant's reason for approaching this court is the fact that he is aggrieved by the High Court's decision to award costs against him. In *Everjoy Meda v Maxwell Matsvimbo & Others*, CCZ 10/2016 MALABA DCJ (as he then was) stated:

> "… the court also accepts Mr *Mpofu's* preliminary point that the applicant should have exhausted the remedy of an appeal instead of making a constitutional application. The law provides a clear remedy of an appeal where an applicant is not happy with a decision of a lower court. Competent relief could have been granted by the Supreme Court on appeal …"

In the South African case of *State v Mhlungu* 1995 (3) SA 867 (CC) at para 59, cited with approval in *Everjoy Meda v Maxwell Matsvimbo Sibanda & 3 Others*, CCZ 10/2016, it was stated that where it is possible to decide any case, whether civil or criminal, without reaching a constitutional issue, that is the course that should be followed. Also cited with approval is the United States Supreme Court decision in *Spector Motor Service, Inc v Mclaughlin,* 323 US 101, 103 (1944), where the following remark is made:

> "… if there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not pass on questions of constitutionality … unless such adjudication is unavoidable."

In *Livera Trading (Pvt) Ltd & Ors v Tornbridge Assets Ltd & Ors* CCZ 13/2016 ZIYAMBI JCC stated at para [13]:

> "Decisions of this Court have indicated that where there are other remedies available, an applicant must pursue those remedies before approaching the Constitutional Court. If the applicant's grievances may be remedied by proceedings in another court that is the route that the applicant must take."

In casu the applicant had other options to pursue in seeking relief, before approaching the highest court in the land with regards to constitutional matters. The applicant had the option to appeal to the Supreme Court in terms of s 43 of the High Court Act [*Chapter 7:06*]. The section provides:

> "**43 Right of appeal from High Court in civil cases**
> (1) Subject to this section, an appeal in any civil case shall lie to the Supreme Court from any judgment of the High Court, whether in the exercise of its original or its appellate jurisdiction."

The applicant could have noted an appeal against the decision by the court *a quo* in awarding costs against him. By seeking redress from this Court the applicant has adopted the wrong approach. He ought to have exhausted the avenues otherwise available to him before approaching the Constitutional Court as he has done.

In essence this application falls foul of the doctrine of constitutional avoidance as the relief sought could have been granted by the Supreme Court. The doctrine is closely related to the doctrine of ripeness which entails that the court should not adjudicate a matter that is not ready for adjudication. The court is prevented from prematurely deciding on an issue that could be decided on a basis other than a constitutional one.

This application is thus not properly before the Court.

Accordingly, it is ordered as follows:

"1. The application is struck off the roll.
2. There is no order as to costs."

CHIDYAUSIKU CJ: I agree

MALABA DCJ: I agree

GWAUNZA JCC: I agree

GARWE JCC: I agree

GOWORA JCC: I agree

HLATSHWAYO JCC: I agree

PATEL JCC: I agree

GUVAVA JCC: I agree

Atherstone & Cook, respondent's legal practitioners.