

REPORTABLE (6)

THE COLD CHAIN (PRIVATE) LIMITED T/A SEA HARVEST
v
ROBSON MAKONI

CONSTITUTIONAL COURT OF ZIMBABWE
HARARE, FEBRUARY 17, 2017

F Mahere, for the applicant

The respondent in person

IN CHAMBERS

MALABA DCJ: This is a chamber application for leave to appeal to the Constitutional Court, from a decision of the Supreme Court in terms of r 32(2) of the Constitutional Court Rules S.I. 61/2016. The rule provides that “a litigant who is aggrieved by the decision of a subordinate court on a constitutional matter can apply to the Constitutional Court for leave to appeal against such decision”.

In 2008 the respondent sued the applicant for damages arising out of a motor vehicle accident that occurred on 21 December 1999 between the respondent and a driver employed by the applicant. On 23 January 2008 the High Court found the applicant vicariously liable for the accident and awarded the respondent various heads of general and special damages. The damages were expressed in Zimbabwe currency and Botswana currency.

The applicant appealed to the Supreme Court against the judgment. It was partly successful in that the quantum of damages in Botswana currency were reduced on some of the heads. The applicant abandoned the appeal against the damages expressed in Zimbabwe currency. It subsequently paid the damages expressed in Botswana currency to the respondent. What remained unpaid were various awards of damages expressed in Zimbabwe currency.

In the intervening period between the hearing of the appeal and the handing down of the decision by the Supreme Court, Zimbabwe adopted a basket of foreign currencies to be used in the country. The exercise was generally referred to as dollarization. The dollarization rendered the Zimbabwe currency valueless. The respondent was left in possession of a judgment he could not enforce to get the value of the damages. He made an application to the High Court for an order converting the Zimbabwe dollar denomination of the damages to the equivalent United States dollars.

The High Court declined to hear the application on two jurisdictional grounds. Firstly, it held that it was *functus officio* as it had already decided the main matter and given a final and definitive judgment. The High Court also held that the matter was *res judicata*.

The respondent appealed to the Supreme Court which held that the matter relating to the conversion of currency in which the damages were expressed placed before the High Court for determination was a new question different from the main matter which related to assessment of the damages. The Supreme Court held that the application had not been meant to interfere with the substance of the award as the High Court had not been asked to re-visit its judgment. The court had been asked to take judicial notice of the fact that the

currency in which the damages had been denominated had become valueless and that foreign currency had officially been adopted in the country as the legal tender. The High Court had been asked to order the conversion of the moribund Zimbabwe currency to United States dollars.

The Supreme Court held that the High Court erred in the application of the principles of *res judicata* and *functus officio* to the facts of the case. The judgment of the High Court was set aside and the matter remitted to that court for hearing and determination of the application. It is in respect of the judgment of the Supreme Court that the applicant seeks leave to appeal to the Constitutional Court.

The requirements for leave to appeal to the Court from a subordinate court are these:

- a) Firstly, there must be a constitutional matter for determination by the Constitutional Court on appeal. The reason is that in terms of s 167(1) of the Constitution the Constitutional Court is the highest court in all constitutional matters and decides only constitutional matters and issues connected with decisions on constitutional matters. Rule 32(2) of the Constitutional Court Rules makes it clear that only a litigant who is aggrieved by the decision of a subordinate court on a constitutional matter only has a right to apply for leave to appeal to the Constitutional Court (the underlining is for emphasis).

Rule 32(3)(c) of the Constitutional Court Rules requires that the application for leave to appeal should contain or have attached to it “a statement setting out clearly and concisely the constitutional matter raised in the decision”. In other

words, there must have been a constitutional matter raised in the subordinate court by the determination of which the dispute between the parties was resolved by that court. If the subordinate court had no constitutional matter before it to hear and determine, no grounds of appeal can lie to the Constitutional Court as a litigant cannot allege that the subordinate court misdirected itself in respect of matter it was never called upon to decide for the purposes of the resolution of the dispute between the parties. See *Nyamande & Anor v Zuva Petroleum* CCZ 8/15.

Under s 332 of the Constitution a constitutional matter is one in which there is an issue involving the interpretation, protection or enforcement of the Constitution. Absence of an issue raised in the proceedings in the subordinate court requiring the interpretation, protection or enforcement of a provision of the Constitution in its hearing and determination would invariably be sufficient evidence of the fact that no constitutional matter arose in the subordinate court.

- b) Secondly, the applicant must show the existence of prospects of success for leave to be granted. In *Nehawu v University of Cape Town* 2003(2) BCLR 154 (CC), the Constitutional Court of South Africa held that the applicant must show that there are reasonable prospects that the Constitutional Court “will reverse or materially alter the judgment if permission to bring the appeal is given”.

In *S v Basson* [2004] ZACC 13, the Constitutional Court of South Africa held at para 17 of the judgment that:

“... in considering an application for leave to appeal against a decision of the Supreme Court of Appeal ... the first question that has to be answered therefore is whether the application concerns a constitutional matter.”

Ms *Mahere*, who appeared for the appellant argued that the Supreme Court allowed the appeal upon a construction of s 176 of the Constitution, which gives the High Court inherent power to protect and regulate its own process, and to develop the common law taking into account the interests of justice. The contention was that the Supreme Court based its decision on the questions for determination on the interpretation of the provisions of s 176 of the Constitution which it applied in the context of seeking to develop the common law principles of *functus officio* and *res judicata*. The effect of the argument was that the Supreme Court misapplied the provisions of s 176 of the Constitution. According to Ms *Mahere* it was in the public interest that the Constitutional Court pronounces on the meaning of s 176 of the Constitution to assist subordinate courts appreciate the limits to the exercise of the power of inherent jurisdiction in the development of common law.

The principles to be applied in the determination of the question whether the Supreme Court determined a constitutional matter are clear. It is not one of those principles that the court against whose judgment leave to appeal is sought should have referred to a provision of the Constitution. There ought to have been a need for the subordinate court to interpret, protect or enforce the Constitution in the resolution of the issue or issues raised by the parties. The constitutional question must have been properly raised in the court below. Thus, the issue must be presented before the court of first instance and raised again at or at least be passed upon by the Supreme Court, if one was taken.

For an applicant to succeed in an application of this nature, he or she must show that the constitutional issue raised in the court *a quo* is one which the determination by the court was necessary for the disposition of the dispute between the parties. In other words, the decision on the constitutional matter must have been so inextricably linked to the

disposition of the controversy between the parties that the success or failure of the relief sought was dependent on it. A Karger, in his book, *Powers of the New York Court of Appeals*, 3 Ed, at p 245 states the principle thus:

“The constitutional question must be both directly involved in the Appellate Division order and substantial. The appellant has the burden of establishing the direct involvement of the constitutional question.”

The applicant has not discharged the *onus*. Whilst it is not disputed that the Supreme Court discussed in its judgment the import of s 176 of the Constitution, with regard to the question whether the High Court could use the section to extend the common law principles of *functus officio* and *res judicata* beyond their accepted limits, the court’s decision on the issues before it was not dependent on the interpretation and application of the provisions of the section.

The court had already decided the issues before it by analysing the common law principles of *functus officio* and *res judicata* and applying them to the facts. The question before the Supreme Court was whether in failing to identify and address the issue the respondent had asked it to determine the High Court placed itself in a situation where it ended up declining jurisdiction on the basis of a misapplication of the common law principles of *functus officio* and *res judicata*. The High Court had failed to appreciate the fact that the question it was required to determine was whether it had power to make an order of conversion of the moribund Zimbabwe currency in which the damages were expressed into United States dollars to give the damages realistic monetary value. The determination of the question did not require the Supreme Court to interpret and apply s 176 of the Constitution. It was not a constitutional matter.

In deciding whether the High Court had jurisdiction to hear the application, the Supreme Court observed at pp 4 and 5 of the cyclostyled judgment:

“It is apparent from what the court *a quo* said, that it correctly states the common law principle of *res judicata* but erroneously mistook the appellant’s application for conversion of the damages he was awarded in 2008 as an application for a remedy he should have included in the case the High Court decided in 2008... He could not in 2008 have sought payment in American dollars for the injuries he sustained, as at that time the Zimbabwean dollar was the only legally usable currency in Zimbabwe ... The dispute arising from dollarization only arose when the appellant and the respondent disagreed on how the appellant was to be paid his Zimbabwean dollar awards. It arose when the appellant asked for the respondent to pay him in United States dollars what was awarded to him in Zimbabwean dollars. The principle of *res judicata* is therefore not applicable in this case. It does not prevent the court from hearing a dispute over already granted awards. A dispute arising from an already granted award is not the same as a further claim arising from a cause of action the parties have already litigated upon.” (emphasis)

Having decided the question whether the principle of *res judicata* was applicable to the facts of the case, the Court turned to the question of the applicability of the principle of *functus officio* and at p 9 of the judgment said:

“The court *a quo*’s mistaken view that it was being asked to reassess the awards it had made in 2008, led to the erroneous conclusion that it could not protect its own processes or extend the *functus officio*, common law principle. The appellant did not apply for the reassessment of the award, but its conversion to American dollars.”

The court had examined the evidence in the record of proceedings and come to the conclusion that the issue that had been placed before the High Court was one of conversion of one currency to another. It held that the issue had not been before the High Court for determination to attract the application of the common law principles of *functus officio* and *res judicata*. In other words, the Supreme Court held that had the High Court not misdirected itself on the issue that it was required to determine, it would not have declined jurisdiction.

It is clear that the Supreme Court definitively answered the issues that were before it. The judgment could have ended there. The court, however, went on to comment at p 10 of the judgment as follows:

“The above is in tandem with the provisions of s 176 of the Constitution which give superior courts inherent jurisdiction to protect and to regulate their own processes in the interests of justice. This means that in appropriate cases superior courts can develop the *functus officio* rule beyond the currently accepted exceptions.”

The mere reference to the Constitution did not make what was said a constitutional matter. Reference by the Supreme Court to s 176 of the Constitution was an *obiter dictum*. The Constitution was referred to after the *ratio decidendi* had been arrived at and declared by the court. The effect of what the Court said in relation to s 176 of the Constitution was that its reasoning was not inconsistent with the provisions of that section. That is different from saying the decision on the issues before the court were based on the interpretation and application of s 176 of the Constitution.

It follows that where a subordinate court did not take a view of the case that required it to interpret and apply a constitutional provision to determine the issue raised, the matter does not pass for a constitutional matter. Application for leave to appeal will be dismissed as the subordinate court will have rested its decision on an independent non-constitutional ground.

The application is dismissed with costs.

GOWORA JCC: I agree

PATEL JCC: I agree

Atherstone & Cook, applicant's legal practitioners