

REPORTABLE (5)

MISHECK MUZA

v

- (1) REGGY FRANCIS SARUCHERA (in his capacity as liquidator of J.W. Jagers
Wholesalers (Pvt) Ltd)**
(2) PRICE TRUST
(3) MASTER OF THE HIGH COURT
(4) REGISTRAR OF DEEDS

**CONSTITUTIONAL COURT OF ZIMBABWE
HARARE, 23 OCTOBER, 2018 & FEBRUARY 27, 2019**

The applicant in person

Ms M G Nhare, for the first respondent

Mr N Mutandagumbo, for the second respondent

No appearance for the third and fourth respondents

Before: MALABA CJ, In Chambers

The applicant approached the Constitutional Court (“the Court”) in terms of r 32(2) of the Constitutional Court Rules, 2016 (“the Rules”) seeking leave to appeal against an order of the Supreme Court (“the court *a quo*”) which was couched as follows:

“**WHEREUPON**, after reading documents filed of record,

IT IS ORDERED THAT:

The appeal having been withdrawn, the appeal be and is hereby dismissed with no order as to costs.” (emphasis added)

The facts leading to the application are as follows.

The applicant owned an immovable property which was sold to the second respondent by the first respondent. It is averred that the property was subsequently transferred into the second respondent’s name by the fourth respondent at the instance of the first respondent. The applicant was aggrieved by the sale and transfer of the property and approached the High Court seeking an order setting them aside.

The applicant’s case in the High Court was that the sale and transfer of the property was driven by unfairness, impartiality and lack of independence. The High Court did not find in his favour. The applicant noted an appeal against the decision to the court *a quo*. On the day of the hearing of the appeal, the court *a quo* issued the order set out at the beginning of the judgment. It is against the order that the applicant seeks leave to appeal to the Court.

In his founding affidavit, the applicant contended that the court *a quo* infringed his right to a fair hearing by acting as if it had no power to reverse an illegal transfer of a property. The applicant alleged that the court *a quo* had not acted impartially. He said the court *a quo* acted unfairly when it failed to set aside the transfer of the property when it had been made aware that there was a court action to stop the transfer of the property. He alleged further that the court *a quo* ignored evidence to the effect that “Court Officers manipulated processes by misleading a High Court Judge that culminated in the appellant being evicted from the property in question”.

According to the applicant, the court *a quo* had to call the respondents to account for what he said was criminal behaviour. Failure to do so showed lack of independence on the part of the court *a quo*. The applicant also alleged that he withdrew the appeal as a result of pressure put on him by the court *a quo*.

In his notice of opposition, the first respondent stated that he sold the property in question to a properly regulated trust and the sale of the property was above board. The first respondent denied the allegation that a *caveat* had been placed on the property to prevent it from being sold. The first respondent prayed that the application be dismissed with costs on the higher scale because he had been put out of pocket by defending the applicant's claims.

In its opposing affidavit, the second respondent contended that the applicant voluntarily withdrew the notice of appeal because it was fatally defective, in that the relief sought differed materially from the relief sought in the High Court. The second respondent averred that the applicant was given time to make submissions to the court *a quo*, hence his right to a fair trial was not violated. It contended that the intended appeal would serve no purpose, as the property in question had already been transferred into the second respondent's name.

Ms *Nhare*, for the first respondent, submitted that an application for leave to appeal may be brought in terms of r 32(2) of the Rules only where a party is aggrieved by a decision of a subordinate court on a constitutional matter. She submitted that, since the applicant had withdrawn the appeal, there was no determination of the court *a quo* which could be the subject of an appeal to the Court.

Ms *Nhare* further submitted that the applicant had failed to satisfy r 32(3)(c) of the Rules, which requires that in an application of this nature one has to attach a clear and concise statement

as to the constitutional matter that had been raised in the subordinate court. She prayed that the application be dismissed with costs on the higher scale, as no constitutional issues had been brought before the Court. She was of the view that the application was frivolous and vexatious.

Mr *Mutandagumbo*, for the second respondent, submitted that it was important to take note of the legal effects of a withdrawal. He submitted that the withdrawal of a matter is the end of it and no appeal can be made attacking that withdrawal. In the absence of a judgment of the court *a quo*, there was no basis on which the decision on whether the requirements of the procedure of an application for leave to appeal have been met could be made. He also argued that no constitutional issues were raised and determined by the court *a quo*.

In reply, the applicant insisted that he be granted leave to appeal despite the concession that there was no judgment to appeal against. The applicant also submitted that he could not have raised any constitutional issues in the High Court or the court *a quo* because no constitutional issues had arisen at the time that the hearing of the dispute was playing out in either of the two courts.

DETERMINATION OF THE ISSUES

WHETHER IT IS IN THE INTERESTS OF JUSTICE TO GRANT THE APPLICANT LEAVE TO APPEAL

In terms of s 167(5)(b) of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013 (“the Constitution”), the Rules must allow a person, when it is in the interests of justice and with or without leave of the Court, to appeal directly to the Court from any other court.

Rule 32 (2) and (3) of the Rules give effect to s 167(5)(b) of the Constitution. It provides as follows:

“Leave to appeal

32. (1) ...

(2) A litigant who is aggrieved by the decision of a subordinate court on a constitutional matter only, and wishes to appeal against it to the Court, shall within fifteen days of the decision, file with the Registrar an application for leave to appeal and shall serve a copy of the application on the other parties to the case in question, citing them as respondents.

(3) An application in terms of subrule (2) shall be signed by the applicant or his or her legal practitioner and shall contain or have attached to it –

- (a) the draft notice of appeal; and
- (b) the decision against which an appeal is brought and the grounds upon which such decision is disputed; and
- (c) a statement setting out clearly and concisely the constitutional matter raised in the decision and any other issues, including issues that are alleged to be connected with a decision on the constitutional matter; and
- (d) such supplementary information or submissions as the applicant considers should be brought to the attention of the Court.” (emphasis added)

Section 167(1)(b) of the Constitution makes it clear that the jurisdiction of the Court is limited to deciding only constitutional matters and issues connected with decisions on constitutional matters. It is the highest court in all constitutional matters.

In *Lytton Investments (Pvt) Ltd v Standard Chartered Bank Zimbabwe Ltd and Anor* CCZ 11-18 at p 9 of the cyclostyled judgment the Court said:

“The Court is a specialised institution, specifically constituted as a constitutional court with the narrow jurisdiction of hearing and determining constitutional matters only. It is the supreme guardian of the Constitution and uses the text of the Constitution as its

yardstick to assure its true narrative force. It uses constitutional review predominantly, albeit not exclusively, in the exercise of its jurisdiction.”

The applicant sought to enforce his right of access to the Court by filing an application for leave to appeal against a non-existent decision of the court *a quo*. The court *a quo* did not make any decision, the substance and effect of which threatened violation of a provision of the Constitution.

The purpose of the right of appeal granted to a person under r 32(2), the procedure of an application for leave to appeal provided therein, and the contents of the application required under r 32(3)(c), of the Rules are premised on the existence of a decision by a subordinate court on a constitutional matter.

The purpose of the Rules is to ensure proper exercise of jurisdiction by the Court. The matter that gives rise to the need for the Court to exercise its jurisdiction must be a constitutional matter decided by the subordinate court.

The object of the exercise of jurisdiction by the Court is always the protection, promotion and enforcement of the supremacy of the Constitution. Where there is no decision by a subordinate court to justify the allegation of actual or threatened violation of a constitutional provision, the Court would have no cause for the exercise of its jurisdiction.

There has to be proof of a decision which was made by the subordinate court. That decision has to be on a constitutional matter. Where proceedings in the subordinate court were terminated by a withdrawal of a cause of action, there cannot be a decision of the subordinate

court to be appealed against. There is a decision of the person who instituted the proceedings to terminate them.

In *The Cold Chain (Pvt) Ltd t/a Sea Harvest v Makoni* CCZ 8/17, the Court, at pp 3-5 of the cyclostyled judgment, said:

“... 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 a matter it was never called upon to decide for the purposes of the resolution of the dispute between the parties. ...

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.” (emphasis added)

The decision to withdraw a matter from a court’s roll is a personal one, contrary to the allegation by the applicant that the court *a quo* withdrew the matter on his behalf.

COSTS

The applicant seemed to be the victim of a deep-seated bitterness over the manner in which his property was sold. He had the belief, which is shared by many self-actors prosecuting their cases in the Court, that the Constitution has a remedy for every conceivable legal dispute regardless of procedural requirements and merits of the case. It was out of the consideration of

the fact that the applicant is a victim of this genuine misconception of the Constitution as a document containing remedies for all conceivable disputes that the Court did not find the submissions that the applicant be ordered to pay costs on a legal practitioner and client scale convincing.

DISPOSITION

The application is dismissed with no order as to costs.

PATEL JCC: I agree

GUVAVA JCC: I agree

C. Nhemwa & Associates, first respondent's legal practitioners

T.K. Takaindisa Law Chambers, second respondent's legal practitioners