

DISTRIBUTABLE: (4)

[1] JOANAH MAMOMBE [2] CECILIA REVAI CHIMBIRU
v
[1] FAITH MUSHURE N.O. [2] THE STATE

**CONSTITUTIONAL COURT OF ZIMBABWE
MAKARAU JCC
HARARE: 27 APRIL & 10 JUNE 2022**

URGENT CHAMBER APPLICATION

E. Mubaiwa and A Muchadehama, for applicants

F.I. Nyahunzvi and T Mapfuwa, for second respondent

**Judgment No. CCZ 4/22
Constitutional Application No. CCZ 29/22**

1

MAKARAU JCC: This is an urgent application for an order staying certain unterminated criminal proceedings against the applicants. The proceedings are underway before the first respondent, a Regional Magistrate. The applicants seek to stay the proceedings pending determination of two applications that they filed with this Court for direct access. If successful in the applications for direct access, the applicants intend to file an application in terms of s 85(1) of the Constitution, allegedly for the enforcement of their fundamental rights and or freedoms.

Background

As stated above, the applicants are jointly appearing before the first respondent. They stand accused of publishing or communicating false statements that are prejudicial to the State in contravention of s 31(a) (i) of the Criminal Law (Codification and Reform) Act

[Chapter 9.23]. The charge has two other alternatives whose particulars are not material in the determination of this application.

At the commencement of their trial, the applicants requested that certain constitutional questions be referred to this Court in terms of s 175(4) of the Constitution. The request was dismissed and the trial of the matter commenced. In dismissing the request, the first respondent formed the view that the request was not *bona fide* but was generally marked by a lack of seriousness.

Dissatisfied with the refusal of their request, the applicants filed two applications to this Court seeking the leave of the court to approach it directly. In these applications, filed on 12 April 2022, the applicants contend in the main that the refusal of their request by the first respondent to refer the matter to this Court violates their rights to protection of the law. Arguing that they have no alternative remedy to approaching this Court directly, the applicants further contend that it is in the interests of justice that this Court considers the questions that they had requested the first respondent to refer to this Court.

In the request for referral, the applicants had raised the constitutionality of s 31(a) (i) and (iii) of the Criminal Law (Codification and Reform) Act [Chapter 9.23], under which they are being charged and tried. They also sought to challenge the admissibility as evidence against them of the statements that they had given to the police at some stage during the investigation of the matter. They alleged that such statements were forcefully extracted from them. They further contended that their trial has received wide adverse media coverage which has compromised their rights to a fair trial.

On 26 April 2022, the applicants filed this urgent application in which as stated above, they seek an order staying the criminal proceedings against them before the first respondent, pending determination of the applications for direct access.

The applicants have not simultaneously with, or alternatively to the urgent application before me, filed an application seeking directions that the applications for direct access be heard urgently or that such be summarily disposed of in terms of r 21 of the Constitutional Court Rules. They appear content to simply apply for a stay of the ongoing proceedings before the first respondent pending determination of their applications for direct access. This manner of proceeding has, and deservedly so, given rise to the perception and argument by the second respondent that the applicants are merely bent on delaying the finalisation of the criminal trial that is before the first respondent.

Judgment No. CCZ 4/22
Constitutional Application No. CCZ 29/22

3

The urgent application was opposed by the second respondent. As a preliminary point, the respondent argued that an application to postpone the hearing of the matter could have been made before the trial court under ss 165 and 166 of the Criminal Procedure and Evidence Act [*Chapter 9.07*]. Regarding the merits of the application, the second respondent argued that the inherent jurisdiction conferred upon this Court to regulate its own processes does not entail a power to regulate the criminal proceedings before the first respondent. In the final analysis, the respondent argued that the matter is not urgent.

At the hearing of the application, I requested the parties to address me on whether this Court has jurisdiction to grant the relief that the applicants are seeking. This was so because in my view, the preliminary issue that falls for determination in this application is

whether this Court, before it determines the applications for direct access, has the requisite jurisdiction to interfere with the untermiated proceedings before the first respondent.

The law

In a long line of cases from this jurisdiction and elsewhere, the admonition is repeatedly sounded and explained, that superior courts should be very slow in interfering with the untermiated proceedings of lower courts. The exception is made for cases where there is a gross irregularity or a wrong decision by the lower court that will seriously prejudice the rights of a litigant or accused person and which irregularity or wrong decision cannot be corrected by any other means. (See *Attorney- General v Makamba* 2005 (2) ZLR 54 (S); *Rasher v Minister of Justice* 1930 TPD 810; *Ginsberg v Additional Magistrate of Cape Town* 1933 CPD 357; *Walhaus v Additional Magistrate, Johannesburg & Anor* 1959 (3) SA 113 (A); *Masedza & Others v Magistrate, Rusape and Others* 1998 (1) ZLR 36 (H); *Mentzaris v University of Durban -Westville & Others* (2000) 10 BLLR 1203 LC; *Rose v S* HH71/2002; *Mutumwa and Anor v S* HH104/2008.; *Chikusvu v Magistrate, Mahwe* HH100/2015; *Chawira and Others v Minister, Justice, Legal and Parliamentary Affairs and Ors* CCZ3/17 and *Shava v Magomere* HB 100/17).

The above admonition is sounded to a superior court that has inherent or legislatively-conferred review powers over the proceedings or decisions of the lower court. It is meant to guide the approach to be taken by such a court. This is so because the power to interfere with the untermiated proceedings of a lower court either permanently or as affording interlocutory relief, is nothing but an exercise of review jurisdiction by the superior court over the proceedings or decisions of the lower court. The authorities clearly establish the position at law that proceedings in a lower court or its decision are only interfered with if

there is a gross irregularity in the proceedings or the interlocutory decision is clearly wrong. Both instances respectively encompass the common law review grounds of gross irregularity in the proceedings and/or gross unreasonableness in the decision. By established practice of the courts, it is thus accepted that the existence of these two grounds of review may, in appropriate circumstances, justify a superior court of competent jurisdiction interfering with the ongoing proceedings of a lower court.

This Court decides only constitutional matters and issues connected with decisions on constitutional matters. It is not a court of inherent jurisdiction and thus lacks inherent review powers over lower courts.

The Court however has legislatively-conferred review powers. These are set out in s 19 of the Constitutional Court Act [*Chapter 7.22*]. Whilst fairly wide, the review powers of this Court are correspondingly and in conformity with the Constitution, limited in scope to constitutional matters only. Section 19 of the Constitutional Court Act thus provides:

“19 Review Powers

- (1) Subject to this section, the court and every Judge shall have, **in constitutional matters**, the power to review the proceedings and decisions of the Supreme Court, the High Court and all other subordinate courts, tribunals and administrative authorities.
- (2) The power, jurisdiction and authority conferred by subs (1) may be exercised whenever it comes to the notice of the court or a Judge that an irregularity has occurred in any proceedings or in the making of any decision, notwithstanding that such proceedings are, or such decision is, not the subject of an appeal or application to the court.
- (3) Nothing in this section shall be construed as conferring upon any person any right to institute any review in the first instance before the court or a Judge, and provision may be made in rules of court, and a Judge may give directions, specifying that any class of review or any particular review shall be instituted before, or shall be referred or remitted to the Supreme Court, the High Court or the Labour Court, as the case may be, for determination.” (The emphasis is mine.)

If it is accepted, which it must, that this Court lacks inherent jurisdiction to review the proceedings and decisions of lower courts in non-constitutional matters, it stands to reason that this Court must be dead slow in interfering with the unterminated proceedings of any lower court and proceed only after it is satisfied that there is a constitutional matter arising in the matter. Put differently, the review jurisdiction of this Court is only triggered and engaged after this Court has satisfied itself that the matter involved is a constitutional matter. I venture to suggest that where the matter is intended to be brought before this Court as a court of first instance, as in *casu*, this Court must only proceed to interfere with the unterminated proceedings of a lower court where it intends, in the interests of justice, to grant direct access in the matter and determine the matter itself. Put differently, this Court must only interfere with unterminated proceedings in the lower courts where it has jurisdiction in the matter.

Judgment No. CCZ 4/22

Constitutional Application No. CCZ 29/22

6

If it were to proceed in any other manner, this Court would run the risk of rushing in and interfering with unterminated proceedings in a lower court that on final analysis turn out to have been on a non-constitutional matter. In such an instance, the interference by this Court would lack legitimacy as having been made in breach of the Constitution that confines the jurisdiction of this Court only to constitutional matters and decisions in issues involving a constitutional matter.

Analysis

In this application, it is common cause that the applicants have filed two applications for direct access. The applications are yet to be determined. This in turn means that this Court has not yet determined that the two applications raise constitutional matters that will engage its jurisdiction.

The submission was made by *Mr Mubaiwa* that the urgent application before me seeks to protect the integrity of whatever decision this Court will make in the applications for direct access. It was thus submitted that on that basis alone, this Court has the jurisdiction to stay the proceedings in the magistrates courts. I am unable to agree. The submission would have been cogent and dispositive if the two applications pending before the Court were on constitutional matters. They are not.

An application for leave to access the court directly as its name suggests, is an indulgence craved for a constitutional matter to be placed before the court directly. It prepares and paves the way for the filing of a constitutional matter proper. Whilst it is an issue in connection with a constitutional matter in terms of s 167 (1) (b) of the Constitution, it is itself not the constitutional matter. This is so because its determination does not entail the interpretation or protection of the Constitution. Its determination is an exercise of the court's discretion in the interests of justice, to establish whether the court's jurisdiction is triggered and engaged in accordance with the law and established practice.

Further, the determination of an application for direct access by this Court is not in my view an exercise of the inherent power of this Court to protect and regulate its own processes as submitted by *Mr Nyahunzvi*. The determination of such an application serves to confirm or deny the presence of a constitutional matter which, in the interests of justice, this Court must determine as a court of first and final instance.

Thus, it stands to reason that before an application for leave to access the court directly is granted, there is no constitutional matter before the court. Absent a constitutional

matter before the court, its review jurisdiction, as contemplated in the application before me, cannot be triggered.

Mr Mubaiwa drew my attention to the case of *Moyo v Chacha and Others* CCZ 15/17. In that matter, this court stayed the proceedings of the magistrates court pending determination of an application on a constitutional matter that had been filed before it. In a somewhat terse ruling, the court was persuaded that there were gross irregularities attendant upon the process that had been invoked against the applicant. In its own words:

“The papers before the court clearly reveal that there is a real possibility that due process was not complied with in the handling of this matter. In the light of that, the concession by the Prosecutor General is based on sound legal considerations in this matter.

Quite clearly, a definitive decision on whether or not there was failure of due process in the handling of this matter can only be determined by the Constitutional Court, as opposed to a Judge sitting in Chambers. It is for the Constitutional Court, if it so finds that there were procedural failures of due process in this matter, to decide what remedies are available to the applicant.”

Judgment No. CCZ 4/22
Constitutional Application No. CCZ 29/22

8

I however find the above case to be of marginal relevance to the application before me.

The facts of the application before me are to be distinguished from the facts in *Moyo v Chacha and Others (supra)*. As stated above, in that case, the substantive constitutional application was pending before this Court, unlike in *casu*.

It therefore presents itself clearly to me that an application for leave to access this court directly is precisely what its name suggests. It seeks leave to place the constitutional matter before the court. It is itself not the constitutional matter and until it is granted, the constitutional matter is not before the Court and the review jurisdiction of this Court is neither triggered nor engaged. The mere filing of an application for leave to access this Court

directly is insufficient to confer jurisdiction upon this Court to interfere with the untermiated proceedings of the magistrates' courts. It does not afford the applicants the proverbial foot in the door that they had hoped for.

It is therefore my finding that I do not have jurisdiction to interfere with the untermiated proceedings that are before the first respondent. In view of this finding, I am unable to proceed any further and, in particular, I am unable to determine the issues of urgency or the availability of alternative remedies to the applicants, points that the second respondent raised in opposition to the application.

Disposition

Regarding costs, there is no justification that I depart from the general position not to make an order as to costs in favour of any of the parties in an application of this nature.

Judgment No. CCZ 4/22
Constitutional Application No. CCZ 29/22

9

In the result, I make the following order:

The application is dismissed with no order as to costs.

Mbidzo, Muchadehama & Makoni, applicant's legal practitioners.

The National Prosecuting Authority, 2nd respondent's legal practitioners.