

DISTRIBUTABLE: (8)

IGNATIUS MORGEN CHIMINYA CHOMBO
v
**[1] THE NATIONAL PROSECUTING AUTHORITY [2] THE
PROSECUTOR GENERAL [3] THE ATTORNEY GENERAL**

**CONSTITUTIONAL COURT OF ZIMBABWE
GARWE JCC, MAKARAU JCC & PATEL JCC
HARARE: 22 MARCH 2022 & 27 JULY 2022**

Mr L Madhuku for applicant

Mr E. Makoto for first and second respondent

**Judgment No. CCZ 8/22
Constitutional Application No. CCZ 33/21**

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APPLICATION FOR LEAVE TO APPEAL.

MAKARAU JCC: This is an application for leave to appeal against a decision of the Supreme Court handed down on 25 November 2021. Holding that there was no proper appeal before it, the Supreme Court struck from its roll the appeal that the applicant had noted against a judgment of the High Court. Using its review powers, the Supreme Court proceeded to set aside the proceedings of the High Court. In doing so, it held that the High Court did not have the requisite jurisdiction to determine the matter as it did or at all.

It is this order that the applicant intends to appeal against, with leave.

Background

The applicant was arrested by the police on 23 November 2017. He is facing one count of contravening the Prevention of Corruption Act [*Chapter 9.16*], and one count each of contravening ss 174(1)(a) and 126 of the Criminal Law (Codification and Reform) Act [*Chapter 9.23*]. These relate to abuse of office as a public officer and fraud respectively. He is appearing before the Magistrates Court.

Prior to his arrest by the police, the applicant alleges that he was unlawfully arrested by the military police, in particular, seven men in military uniform and armed with assault rifles. He further alleges that these seven men in military uniforms armed with assault rifles blindfolded him and took him to an unknown place where they forcibly held and interrogated him for nine days.

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Thereafter the applicant was formally arrested by the police.

Upon being arraigned before a magistrate, the applicant pleaded with the court not to be placed on remand for the alleged offences as his arrest was unlawful. In essence, he was seeking as consequential relief, a permanent stay of his prosecution on the three charges. In this regard he contended that his arrest, for the purposes of the law, had commenced when he was arrested by the unknown military personnel, agents of the State and that such arrest was patently unconstitutional as he was not brought before a court within the forty-eight hours stipulated in the law.

The arrest and torture of the applicant by the men in military uniform was not challenged by the first and second respondents before the magistrate or in any proceedings thereafter. In arguing that the applicant's rights had been duly observed upon his arrest, the first and second respondents confined their submissions to the events that unfolded after the formal arrest of the applicant by the police.

Ruling on the unlawful arrest and torture of the applicant, the trial magistrate found that the applicant had failed to prove that the seven men in military uniform and armed with assault rifles were agents of the State. After further finding that his subsequent arrest by the police was procedural, the trial magistrate placed the applicant on remand, denied him bail and remanded him in custody.

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The applicant was in due course granted bail by the High Court. In doing so, the High Court expressed its disquiet over the failure by the trial magistrate to properly investigate the alleged infringements of the applicant's rights and freedoms.

The trial of the applicant commenced. Whilst it was underway, the applicant approached the High Court under s 85(1) of the Constitution, once again seeking a permanent stay of the criminal proceedings against him on the basis that his rights and freedoms had been infringed as detailed above.

At the hearing of the matter before the High Court, the issue of the jurisdiction of that court to determine the matter during the pendency of the criminal trial before the magistrates

court arose. The High Court dismissed the contention that it did not have the requisite jurisdiction to determine the matter. It nevertheless went on to dismiss the matter on the basis that the torture of the applicant was for no apparent reason in that it had not elicited any evidence or confession from the applicant. Being gratuitous, the torture of the applicant by the military was at law not a sound basis for permanently staying the criminal proceedings against him, the High Court went on to rule.

Dissatisfied with the dismissal of his application by the High Court, the applicant noted an appeal to the Supreme Court. It is not necessary that I set out the grounds of the appeal. This is so because, in its decision, the Supreme Court neither determined nor adverted to these grounds. It is however pertinent to record that the finding by the High Court that it had jurisdiction in the matter was not appealed or cross-appealed against.

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Mero motu, the Supreme Court raised the issue. It thereafter properly invited the parties to make additional submissions addressing the legal position governing the jurisdiction of the High Court in the matter.

It was the view of the Supreme Court, and correctly so, that the provisions of s 175(4) of the Constitution were integral to the appeal that was before it and, in particular, on the issue it had raised with the parties. This is the provision that details the procedure to be adopted when a constitutional matter arises during any court proceedings. The Supreme Court was keenly alive to the pending criminal proceedings before the magistrate's court, and during which

proceedings the constitutional question of the legal redress of the applicant's unlawful arrest and torture had arisen.

Consequently, the Supreme Court found that by approaching the High Court during the pendency of the proceedings before the Magistrates Courts, the applicant had contradicted the precepts of certainty of process as articulated by this Court in *Chihava & Ors v Principal Magistrate & Anor* 2015 (2) ZLR 31 (CC). I advert to this point in greater detail below.

In the final analysis, the Supreme Court held that the *ratio decidendi* in *Chihava* applied in full force to the facts before it. It also made the following four observations:

1. That the Magistrates Court had vantage over the High Court in that it had heard evidence on the matter whereas the High Court was relying on an affidavit;
2. That the Magistrates Court had jurisdiction in the matter; **Judgment No. CCZ 8/22**
3. That the proceedings before the High Court had the potential to disrupt the **Constitutional Application No. CCZ 33/21** proceedings in the Magistrates Court; and
4. That the approach to the High Court was novel and was not supported by an elaborate procedure as the one set out in the rules of the Constitutional Court.

As a result, the decision by the High Court was found, rather euphemistically, to have been made on no sound jurisdictional basis and was accordingly set aside. In short, the Supreme Court held that the High Court had no jurisdiction in the matter.

The intended appeal

In the event that he is successful in the application for leave, the applicant intends to appeal against the decision of the Supreme Court on the following three grounds:

1. “The court *a quo* misdirected itself in not finding that the fact that the High Court is a “superior court of record “ under s 170 of the Constitution prohibited the Supreme Court from regarding the High Court as one of the “inferior courts of justice” referred to in s 25 of the Supreme Court Act [*Chapter 7.13*].
2. The court *a quo* misdirected itself and erred in law in applying the precepts set out in *Chihava & Ors v Principal Magistrate & Anor* 2015 (2) ZLR 31 (CC) to take away the jurisdiction of the High Court to determine the appellant’s application brought to it under s 85 of the Constitution, notwithstanding the pendency of criminal proceedings in the magistrates court.
3. The court *a quo* erred and misdirected itself in not finding that once the High Court, rightly or wrongly, assumed jurisdiction and determined on the merits, an application under s 85 of the Constitution, the resultant judgment could not be a nullity.”

The broad issue that falls for determination in this application is whether it is in the interests of justice that the applicant be granted leave to appeal to this Court against the order of the Supreme Court. The narrow and more specific issue is whether the decision of the Supreme Court was on a constitutional issue that was clearly articulated and, additionally, whether the intended appeal enjoys prospects of success. I define the issues narrowly in this fashion following the requirements of the law governing the determination of applications for leave to appeal to this Court.

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The law

The law that governs applications for leave to appeal to this Court is settled and appears in a line of cases that remain undisturbed since the adoption of the Constitution. A judge or court determining such an application must be satisfied that the matter raised in the intended appeal is a constitutional matter that has been clearly and concisely set out. This is so because this Court, being a specialized court, only enjoys jurisdiction in constitutional matters. Further, the judge or court must be satisfied that the constitutional matter enjoys prospects of success on appeal. This in turn serves to reserve the jurisdiction of this Court only to deserving cases. (See

Cold Chain (Pvt) Ltd t/a Sea Harvest v Makoni 2017 (1) ZLR 14 (CC), *Muza v Saruchera* CCZ 5/19, *Bonnview Estate (Pvt) Ltd v Zimbabwe Platinum Mine (Private) Limited & Ministry of Lands and Rural Resettlement* CCZ 6/19, *Mbatha v National Foods* CCZ6/21 and *Konjana v Nduna* CCZ 9/21).

Applications for leave to appeal to this Court are made in terms of r 32 of the Constitutional Court Rules, 2016. I note in passing that r 32 does not, as does its counterpart r 21(8) which deals with applications for direct access to this Court, set out the factors to be considered as being in the interests of justice. Therefore, in assessing whether or not it is in the interests of justice to grant an application for leave to appeal, the practice of this Court has been guided by the past decisions of this Court as set out in the authorities referred to above. Regarding prospects of success, the practice has been to look for more than an arguable case. Prospects of success are established if on appeal, this Court is likely to reverse the finding of the lower court or to materially change the order *a quo*.

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Analysis

I find that the intended appeal will raise a constitutional matter. This is the issue of the jurisdiction of the High Court in an application brought in terms of s 85(1) of the Constitution for the enforcement of a fundamental right or freedom during the pendency of other court proceedings.

Section 85(1) of the Constitution is the provision that confers the requisite constitutional jurisdiction on courts to enforce a fundamental right or freedom. Conversely, it is

the provision that guarantees the right of all persons to access a court for the enforcement of fundamental rights and freedoms. The issue of the jurisdiction of the High Court in the circumstances of this matter will entail an interpretation of the right of access to a court as provided for in s 85(1) and whether it is to be enjoyed in all circumstances, at all times and without any impediment. It is without a doubt a constitutional matter.

I draw confidence in my finding above from the fact that the determination of whether or not this Court had jurisdiction in *Chihava* was, unavoidably and correctly so, regarded by this Court as a constitutional matter. That matter similarly involved an interpretation of s 85(1) of the Constitution. Indeed, the facts in *Chihava* to a large extent, mirror the facts of the intended appeal. In both instances, the applicants approached another court for the purported enforcement of their fundamental rights and freedoms during the pendency of other proceedings.

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The applicant having cleared the first hurdle, I now turn to consider whether the issues raised in the intended appeal have any prospects of success. As stated above, prospects of success are established if, on appeal, this Court is likely to reverse the decision of the Supreme Court or to alter it in a material respect. A *prima facie* case, or an interesting or arguable case is not the requisite criterion and, as a result, fails to clear the bar.

The first ground of appeal raises the issue of the review jurisdiction of the Supreme Court over the proceedings and decisions of the High Court. It is the appellant's contention that the High Court is a "superior court of record" under s 170 of the Constitution and that this in turn

prohibits the Supreme Court from regarding it as one of the “inferior courts of justice” referred to in s 25 of the Supreme Court Act [*Chapter 7.13*].

As correctly noted by the applicant, s 170 of the Constitution provides that the High Court is a superior court of record. The term “superior court of record” is however not defined in the Constitution.

Mr Madhuku for the applicant relied on the remarks by the Supreme Court in *Chidyausiku v Nyakabambo* 1987 (2) ZLR 119 (S) where the court held that the High Court was not an inferior court as contemplated by s 25 of the Supreme Court of Zimbabwe Act. Whilst this decision has not been specifically overruled subsequently, it has been studiously and routinely ignored by the Supreme Court itself. Quite apart from the fact that the Supreme Court is not bound by its own decisions, this is one decision that is well known in the jurisdiction for the fact that it has been ignored more times than it has been applied.

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For the purposes of determining this application, it is not necessary that I debate and determine the *stare decisis* effect of *Chidyausiku v Nyakabambo (supra)* generally or seek to reconcile it with the numerous later decisions of the Supreme Court that have clearly gone against it. This is so because it is my considered view that this application and the intended appeal turn and fall by the way side on the basis of the second issue raised by the applicant.

In the second ground of the intended appeal, the applicant contends that “the court *a quo* misdirected itself and erred in law in applying the precepts set out in *Chihava & Ors v*

Principal Magistrate & Anor ...to take away the jurisdiction of the High Court to determine the appellant's application brought to it under s 85 of the Constitution, notwithstanding the pendency of criminal proceedings in the Magistrates Court". I cite in the contention the first ground of the intended appeal in full.

That the decision of the Supreme Court was squarely based on the *ratio decidendi* in *Chihava* is not in dispute.

The *ratio decidendi* in *Chihava*, correctly understood, has a fairly broad and far-reaching impact on the right of persons to access a court in terms of s 85(1) of the Constitution for the enforcement of fundamental rights and freedoms in circumstances where s 175(4) can also and should consequently apply.

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I understand the *ratio decidendi* of the case to lay down the legal proposition, unequivocally and without exception, that any person who is appearing before any court and intending to raise and rely on any alleged violation of their fundamental rights or freedoms for any relief, must invoke the provisions of s 175(4) of the Constitution or forever lose their right to claim relief for such violations. Put differently, *Chihava* holds that the right of any person to access a court in terms of s 85(1) of the Constitution, if that person is already a party to proceedings before another court, is completely negated and the constitutional jurisdiction of all other courts is ousted.

I pause to note that this negation of the right to access other courts or the complete ouster of the jurisdiction of other courts other than the court wherein the proceedings are

underway, is not a mere rule of practice and procedure which, in the interests of justice, may be departed from. It is an interpretation of the Constitution by this Court. It therefore forms part of the body of the constitutional law of this jurisdiction on access to the courts to enforce a fundamental right or freedom.

In consequence of the above, the broad position of the law then becomes that where a person is already before a court in any proceedings, an approach to any other court in terms of s 85(1) for the enforcement of a fundamental right or freedom outside the provisions of s 175(4) is legally incompetent. It begets a nullity for want of jurisdiction. The other court so approached is stripped of its constitutional jurisdiction under s 85(1) by the availability of the procedure under s 175(4).

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The above interpretation of the Constitution, by implication, rightly or wrongly, also supersedes and overrules the common law position that grants the High Court inherent jurisdiction over all persons and all matters.

It would appear that the legal position that I have outlined above, unduly restrictive on the right to access courts for the enforcement of fundamental rights and freedoms as it seems to be, is the position that obtained under the repealed constitution. It was the settled position under that constitution that any constitutional issues arising in a lower court during the course of any proceedings had to be referred to this Court in terms of s 24(2) and could not be brought, pursuant to s 24 (3), as a fresh cause of action under s 24(1). (See *Jesse v Attorney-General* 1999 (1) ZLR 121 at 122D (S)).

Notwithstanding the adoption of the current Constitution, the position of the law remains unchanged. Section 175(4) of the Constitution is the equivalent of S 24(2) of the repealed Constitution whilst s 85(1) is the current version of s 24(1), albeit improved. That the two provisions are located in different chapters of the Constitution detracts not from their effect and import as interpreted by this Court.

If I have correctly understood its *ratio decidendi*, then *Chihava* is authority for the simple proposition that where any person is before any court on any non-constitutional matter, but intends to seek redress for the alleged breach of his or her fundamental rights and or freedoms arising in connection with that matter, he or she must raise the alleged breach before that court and invoke the provisions of s 175(4) if he or she intends to have the matter determined by this Court. The party may also petition that court directly for any appropriate relief. The net effect of this position is that any purported approach to another court in terms of s 85(1) under the circumstances, is not only impermissible but is a nullity as the constitutional jurisdiction of all other courts, the High Court included, is not only arrested but is lost by operation of law.

The import of the decision in *Chihava* is thus not only to render s 175(4) as regulating access to the Constitutional Court on issues arising during proceedings before any court as argued by *Mr Madhuku*, but to render s 85(1) redundant and of no force and effect where proceedings involving the applicant are pending before a court.

On the basis of the above, I must reject the argument by *Mr Madhuku* that s 85(1) of the Constitution creates unimpeded access to the High Court. It does not always do so. It only does so where there are no pending proceedings before any other court to which the applicant is a party.

In *casu*, the applicant was appearing before the magistrates court where he correctly raised the allegations of the breach of his fundamental rights. By the mere fact that he was appearing before the magistrates court where he was obliged to raise such allegations, the constitutional jurisdiction of all other courts under s 85(1), the High Court and this Court included, was thereby extinguished and lost. This is the import of the *ratio* in *Chihava* which the Supreme Court correctly applied.

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The *ratio* of the *Chihava* case however does not extinguish the right of the applicant to access this Court under s 85(1) of the Constitution, alleging that a lower court has wrongfully refused a request for a referral made under s 175 (4) of the Constitution. The cause of action in that matter will be the refusal by the lower court to refer the matter to this Court and not the alleged violation of the fundamental rights or freedoms giving rise to the referral.

It is therefore my finding that the applicant enjoys no prospects of success on the second ground of the intended appeal. It is most unlikely that this Court will reverse the order of the Supreme Court and find instead that the High Court enjoyed jurisdiction, inherent or otherwise, in the matter.

By parity of reasoning the third ground of the intended appeal falls by the wayside. The assumption of jurisdiction by the High Court in the circumstances of this matter was erroneous and grievously so. It begot nothing that can be salvaged. Once it is accepted that the High Court did not have any jurisdiction in the matter that concludes the inquiry. Its proceedings fall away automatically by operation of law.

There is thus no possibility in the circumstances of this matter that this court will find, as contended by the applicant, that “the court *a quo* erred and misdirected itself in not finding that once the High Court, rightly or wrongly, assumed jurisdiction and determined on the merits, an application under s 85 of the Constitution, the resultant judgment could not be a nullity”.

Disposition

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The applicant has no prospect of success on its main contention that the High Court had jurisdiction in the matter that was placed before it. Accordingly, his application for leave to appeal cannot succeed.

Regarding costs, I see no justification for making an award of costs in this matter.

In the result, I make the following order:

The application is dismissed with no order as to costs.

GARWE JCC: I agree

PATEL JCC: I Agree

Lovemore Madhuku Lawyers, applicant's legal practitioners.

National Prosecuting Authority, 1st and 2nd respondents' legal practitioners.

Civil Division of the Attorney-General's Office, 3rd respondent's legal practitioners.

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