

REPORTABLE (5)

CUTHBERT TAPUWANASHE CHAWIRA & 13 ORS
v
**(1) MINISTER OF JUSTICE LEGAL AND PARLIAMENTARY
AFFAIRS**
**(2) THE COMMISSIONER OF PRISONS AND CORRECTIONAL
SERVICES**
(3) THE ATTORNEY GENERAL.

**CONSTITUTIONAL COURT OF ZIMBABWE
MALABA DCJ, ZIYAMBI JCC, GWAUNZA JCC,
GARWE JCC, GOWORA JCC, HLATSHWAYO JCC,
PATEL JCC, BHUNU JCC & UCHENA JCC
HARARE, January 13, 2016 & MARCH 20, 2017**

T. Biti, for the applicants

O. Zvedi, for the respondents

BHUNU CCJ: This matter was heard on 13 January 2016 with judgment being reserved. On 27 January 2016 this court determined that in view of the fact that this case raises similar issues as that of *Farai Lawrence Ndlovu & Anor v The Minister of Justice Legal & Parliamentary Affairs* Constitutional Application No.50 of 2015, it was convenient that the two cases be consolidated and heard simultaneously. To that extent the court issued the following order:

“IT IS ORDERED THAT:

The matter be and is hereby postponed *sine die* to enable this case to be heard by the same bench that heard the matter of *Cuthbert Chawira & Ors vs Minister of Justice* CCZ 47/2015. The Registrar is directed to set this matter at the earliest convenient date for hearing.”

In view of the above directive the handing down of judgment in this case was postponed pending the completion of Case No. 50/15. The matter however dragged on and on until it was eventually struck of the roll on 1 January 2017 thereby paving way for the completion and delivery of judgment in this case.

The application is in terms s 85 (1) (a) and (d) of the Constitution which entitles both natural and juristic subjects to approach this court for relief as a court of first instance whenever their fundamental human rights enshrined in Chapter 4 have been infringed or threatened.

All the fifteen applicants are condemned prisoners on death row awaiting execution after being sentenced to death by the High Court. They have been on death row for varying periods of time ranging from 2 to 18 years of incarceration.

They have now approached this court complaining that the length of their stay on death row is an affront to their human dignity and freedom from torture or cruel, inhuman or degrading treatment or punishment in violation of ss 51 and 53 of the Constitution.

Section 51 provides that:

“51 Right to human dignity

Every person has inherent dignity in their private and public life, and the right to have that dignity respected and protected.”

Section 53 goes on to protect subjects against torture, cruel, inhuman and degrading treatment or punishment. It provides that:

“53 Freedom from torture or cruel, inhuman or degrading treatment or punishment

No person may be subjected to physical or psychological torture or to cruel, inhuman or degrading treatment or punishment.”

Initially the applicants sought commutation of their respective death sentences to life imprisonment. That relief was, however, abandoned at the hearing through an amended draft order seeking to quash the sentences of death and remittal of the cases to the High Court for resentencing. The amended draft order reads:

“IT IS ORDERED THAT:

1. In remedy, the sentences of death imposed **on** the Applicants, namely, **Cuthbert Tapuwanashe Chawira, Masimba Mbaya, George Munyaradzi Manyonga, Jack Sikala, Livingstone Sithole, Jack Nyati, Busani Tshuma, Killian Mpofo, Wisdom Gochera, Ezra Manenji, Kudakwashe Taonangwere, Farai Lawrence Ndlovhu, Governor Masawaire and Lyton Mathe** be quashed and determination **of the appropriate substituted punishment for each Applicant be remitted for hearing.**
2. **The First Respondent pays costs of suit.”**

The applicants’ cases are at varying stages of progress to finality. Some are yet to appeal to the Supreme Court whereas others have had their appeals dismissed but are yet to exercise their right to seek presidential pardon in terms of s 48 (2) (e) of the Constitution. Thus, they are all approaching this court without first exhausting the statutory legal remedies available to them comprising:

1. Seeking **review** of the administrative action or omission complained of under the Administrative Justice Act [*Chapter 10:28*].
2. **Appealing** to the Supreme Court in terms of s 70 (5) (b) of the Constitution.
3. Seeking **Presidential pardon or commutation** under s 48 (2) (e) of the Constitution.

The crisp issues which then arise for determination are:

1. Whether or not this court has the jurisdiction to grant the order requested by the applicants and, if so, whether the issues raised are ripe for determination.
2. Whether or not the delay in carrying out the death sentences is a violation of the applicants’ fundamental human rights under s 51 and 53 of the Constitution.

In retaining the death penalty *albeit* under very restricted circumstances, the new Constitution has laid out an elaborate procedure which must be meticulously followed under s 48 which provides as follows:

**“FUNDAMENTAL HUMAN RIGHTS AND FREEDOMS
48 Right to life**

- (1) Every person has the right to life.
- (2) A law may permit the death penalty to be imposed only on a person convicted of murder committed in aggravating circumstances, and—
 - (a) the law must permit the court a discretion whether or not to impose the penalty;
 - (b) the penalty may be carried out only in accordance with a final judgment of a competent court;
 - (c) the penalty must not be imposed on a person—
 - (i) who was less than twenty-one years old when the offence was committed; or
 - (ii) who is more than seventy years old;
 - (d) the penalty must not be imposed or carried out on a woman; and
 - (e) the person sentenced must have a right to seek pardon or commutation of the penalty from the President
- (3) An Act of Parliament must protect the lives of unborn children, and that Act must provide that pregnancy may be terminated only in accordance with that law.” (Emphasis provided)

Both the judiciary and everyone concerned are dutifully obliged to scrupulously observe the above mandatory constitutional provisions.

I now turn to determine the two issues which fall for determination in sequence.

1. **Whether or not this court has the jurisdiction to grant the order requested by the applicants.**

The Constitutional Court is a creature of the Constitution whose jurisdiction is to be found squarely within the four corners of the Constitution under s 167 of which subsection (1) provides as follows:

“167 Jurisdiction of Constitutional Court

(1) The Constitutional Court—

- (a) is the highest court in all constitutional matters, and its decisions on those matters bind all other courts;
- (b) decides only constitutional matters and issues connected with decisions on constitutional matters, in particular references and applications under section 131(8)(b) and paragraph 9(2) of the Fifth Schedule; and
- (c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.

(2) Subject to this Constitution, only the Constitutional Court may—

- (a) advise on the constitutionality of any proposed legislation, but may do so only where the legislation concerned has been referred to it in terms of this Constitution;
- (b) hear and determine disputes relating to election to the office of President;
- (c) hear and determine disputes relating to whether or not a person is qualified to hold the office of Vice-President; or
- (d) determine whether Parliament or the President has failed to fulfil a constitutional obligation.” (My emphasis).

Considering that the applicants’ complaint is that the delay in executing the sentences of death passed by the High Court is a violation of their constitutional rights under ss 51 and 53 of the Constitution, there can be no doubt that this is a constitutional matter over which this Court has jurisdiction under s 167. Despite that finding, it does not follow that every matter that has some constitutional connotations must necessarily be laid at this court’s door.

The Constitution as the mother of all laws encompasses all other laws with the result that every legal contest has some constitutional implications. If all such cases were to be taken to this court it would be overwhelmed to the extent of being dysfunctional. The existence of other courts and administrative authorities would be rendered nugatory. This brings me to the doctrine of ripeness and constitutional avoidance.

Whether or not the constitutional issues raised are ripe for determination by the constitutional Court.

Zimbabwe operates a self-correcting hierarchical judicial system where in the ordinary run of things cases start from the lower courts progressing to the highest court of the land. Generally speaking higher courts are loathe to intervene in untermiated proceedings within the jurisdiction of the lower courts, tribunals or administrative authorities.

In the recent case of *Munyaradzi Chikusvu v Magistrate Mahwe* HH – 100 – 15, the High Court had occasion to observe that:

“It is trite that judges are always hesitant and unwilling to interfere prematurely with proceedings in the inferior courts and tribunals. In the ordinary run of things, inferior courts and tribunals should be left to complete their proceedings with the superior courts only coming in when everything is said and done”

In *Masedza & Ors v Magistrate Rusape & Anor* 1998 (1) ZLR 36 DEVITTIE J observed that a higher court will intervene in untermiated proceedings of a lower court:

“only if the irregularity is gross and if the wrong decision will seriously prejudice the rights of the litigant or the irregularity is such that justice might not by other means be attained.”

Although the above judicial pronouncements were made by the High Court on review, they are equally relevant to this Court’s criteria for intervention in untermiated proceedings before lower courts, tribunals and administrative authorities. Those sentiments find expression in the words of GUBBAY CJ in the leading case of *Catholic Commission for*

Justice and Peace in Zimbabwe v A-G & Ors 1993 (1) ZLR 243 (S) at 250G – A, where the learned Chief Justice had this to say;

“Clearly it (Supreme Court) has jurisdiction in every type of situation which involves an alleged breach or threatened breach of one of the provisions of the Declaration of Rights and particularly, where there is no other judicial procedure available by which the breach can be prevented. Compare *Martin v Attorney-General & Anor* 1993 (1) ZLR 153 (S) (My emphasis).”

It is implicit in the learned Chief Justice’s remarks that where there are other judicial remedies to prevent the breach of fundamental human rights, the Constitutional Court may withhold its jurisdiction. What then distinguishes this case from the *Catholic Commission for Justice* case is that, in that case, the Supreme Court only intervened at the last moment when all available remedies had been exhausted and all hope lost. The applicants’ appeals to the Supreme Court and pleas for presidential pardon and clemency had failed and the date of execution announced. Undoubtedly that case was ripe for the Supreme Court’s intervention as the highest court of last resort and final arbiter before execution.

The same cannot be said in this case where the applicants still have some alternative remedies at their disposal which I have already enumerated above. I now proceed to consider the efficacy of those alternative remedies.

1. Review

The applicants’ main bone of contention is that they have been subjected to prolonged inhuman and degrading prison conditions while awaiting execution on death row. The question of prison conditions is an issue which can be properly addressed by recourse to the review powers of the High Court. If the prison conditions and conduct of prison authorities are repugnant to law the High Court can provide a remedy on review in terms of the Administrative Justice Act [Cap. 10:28]. The remedy will ensure that the applicants are

subjected to lawful humane prison conditions while awaiting execution or reprieve from death row. That court can also effectively deal with the question of delay on review.

2. Appeal

All convicts sentenced to death have an automatic right of appeal to the Supreme Court. As I have already stated some of the applicants' cases are yet to be determined by the Supreme Court on appeal. These applicants stand a very good chance of getting the relief they are seeking in the Supreme Court on the merits without setting foot in this court. It is, therefore, inappropriate and improper that they should be resentenced by the High Court which is now *functus officio* when the relief they seek is available in the Supreme Court.

The Supreme Court has the competence and discretion of determining the appropriate sentence in view of the undisputed submission that the State has no capacity to employ a hangman.

3. Presidential pardon

The Constitution confers on the President the authority and power to grant free pardon or commutation of death sentences to convicted prisoners. On the other hand, s 48 (2) (e) of the Constitution confers an unfettered right on the applicants to seek free presidential pardon or commutation of their respective death sentences. The President in discharging his function may take into account the non-availability of the executioner and the harsh prison conditions complained of.

Thus those who have already lost the battle to evade the hangman's noose on appeal still have recourse to presidential prerogative of mercy.

It is an immutable principle of our law that no one may be executed without due process. What this means is that all the applicants are not in danger of extra judicial execution

as they still have at their disposal various other alternative avenues of escape and redress of the alleged prison wrongs.

The applicants are seeking to upset the sentences passed by the High Court without alleging, let alone proving, that it erred or was at fault in any way. It seems they want to pre-empt and upset lawful valid sentences purely on the basis of events which occurred after they had been convicted and sentenced. In my view this sounds more of an appeal disguised as a constitutional application.

In my considered view events which occur in prison after conviction and sentence are wholly irrelevant to warrant reconsideration of the conviction or sentence by the trial court.

Once a court has completed a case it washes its hands and moves forward without looking back. The time honoured *functus officio* and *res judicata* doctrines militate against the same court revisiting the same completed case except in exceptional circumstances which are absent in this case.

If the High Court erred in any way, the remedy for those who are yet to appeal resides in the Supreme Court and for those who have already lost their appeals, in the invocation of the President's prerogative of mercy.

It would be a travesty of procedural justice for this court to bypass both the Supreme Court and the President before they have exercised their constitutional mandates to determine the applicable remedies according to the prescribed laws of the land.

As we have already seen, in the normal run of things courts are generally loathe to determine a constitutional issue in the face of alternative remedies. In that event they would

rather skirt and avoid the constitutional issue and resort to the available alternative remedies. This has given birth to the doctrine of ripeness and constitutional avoidance ably expounded by EBRAHIM JA in *Sports and Recreation Commission v Sagittarius Wrestling Club and Anor* 2001 (2) ZLR 501 (S) at p 505 G where the learned judge had this to say:

“There is also merit in Mr Nherere’s submission that this case should never have been considered as a constitutional one at all. Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of rights.” (See also *Zantsi v Council of State, Ciskei & Ors* 1995 (4) SA 615 (CC).

The doctrine of ripeness and constitutional avoidance gives credence to the concept that the Constitution does not operate in a vacuum or isolation. It has to be interpreted and applied in conjunction with applicable subsidiary legislation together with other available legal remedies. Where there are alternative remedies the preferred route is to apply such remedies before resorting to the Constitution. That conceptualisation of the law as previously stated finds recognition in the leading case of *Catholic Commission of Justice and Peace in Zimbabwe (supra)* heavily relied upon by the applicants. In that case the applicants waited until they had exhausted their alternative remedies before approaching the Constitutional Court for relief.

In this case, the complaint has to do with delays in executing a court judgment. Admittedly the wheels of justice tend to turn very slowly but that is no reason for this court to prematurely intervene usurping the authority and functions of the High Court, the Supreme Court and the President under the guise of determining a constitutional issue. For that reason, this court would rather wait until the wheels of justice have turned full circle, for doing otherwise in the circumstances of this case, would be inconsistent with this Court’s status as the highest court of last resort in constitutional matters. In the interim the applicants may have

recourse to the available alternative remedies. When the time is ripe, this Court will have its say.

In view of the finding that none of the applicants are due for execution the issue whether delay in executing them constitutes a breach of their constitutional rights falls away.

Costs normally follow the result but in this case, I find it undesirable to load persons on death row with costs of suit. They had an arguable case *albeit*, misplaced and unsustainable at law. One cannot however fault them for fighting for survival with all the means at their disposal.

It is accordingly ordered that the application be and is hereby dismissed with no order as to costs.

MALABA DCJ: I agree

ZIYAMBI JCC: I agree

GWAUNZA JCC: I agree

GARWE JCC: I agree

GOWORA JCC: I agree

HLATSHWAYO JCC: I agree

PATEL JCC: I agree

UCHENA CCJ: I agree

Tendai Biti Law, applicants' legal practitioners

Civil Division of the Attorney-General's Office, respondents' legal practitioners