

REPORTABLE (3)

PRAYMORE MAKANDA

V

**(1) MAGISTRATE SANDE N.O (2) MAGISTRATE KADYE N.O
(3) MAGISTRATE NDIRAYA N.O (4) THE STATE**

**CONSTITUTIONAL COURT OF ZIMBABWE
GOWORA AJCC, HLATSHWAYO AJCC & PATEL AJCC
HARARE: 22 MARCH 2021 & 17 MAY 2021**

Applicant in person

F. Nyahunzvi, for the respondents

Judgment No. CCZ 03/21
Constitutional Application No. CCZ 15/20

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PATEL AJCC: This is an application for direct access to the Constitutional Court made in terms of s 167(5)(a) of the Constitution of Zimbabwe. The allegation is that the conduct of the respondents violated the applicant`s fundamental rights as enshrined in ss 69(1) and 70(1)(d),(e) and (f) of the Constitution.

The background

The brief facts of the matter are as follows. In 2017 the applicant was arraigned before the magistrates court at Harare facing charges of fraud as defined in s 136 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. Three separate trials were held before the first, second and third respondents and he was convicted and sentenced to three separate terms of imprisonment.

It is the applicant's allegation that during the conduct of the trial proceedings the first and second respondents violated his right to legal representation because they did not advise him of that right at the commencement of the trial. This is alleged to be a violation of s 70 (1)(d), (e) and (f) of the Constitution. In the same respect, it is also alleged that the first and second respondents "failed to take heed to the laws governing the commencement of criminal trials" and therefore violated s 163A(1) and (2) of the Criminal Procedure and Evidence Act [Chapter 9:07] (the CP&E Act). It is further alleged that such conduct infringed the applicant's right to a fair trial as entrenched in s 69(1) of the Constitution.

As regards the third respondent, it is averred that the magistrate did advise the applicant of his right to legal representation in terms of s 191 of the CP&E Act, but then failed to make an enquiry as to whether or not the applicant had understood those provisions. This is said to have led to unfair proceedings in violation of ss 69(1) and 70(1)(d), (e) and (f) of the Constitution. Judgment No. CCZ 03/21 Constitutional Application No. CCZ 15/20

Allegations are also made against the fourth respondent in that it failed to assist the applicant in protecting his fundamental rights as aforementioned. Consequent to these alleged violations, the applicant has approached this Court for relief.

The application is opposed by the fourth respondent. It contends that the applicant has not demonstrated that it is in the interests of justice that he be granted direct access to the court. It is also argued that the mere reference to constitutional provisions does not mean that a constitutional matter has been raised. It is important to note that the fourth respondent concedes that the proceedings before the first, second and third respondents were irregular, but nevertheless avers that competent relief could have been granted by the High Court or the

Supreme Court thus obviating the need to approach the court directly. In fact, it is alleged that the applicant has since approached the High Court for relief under Case No. HC 7066/20. It is prayed that the application be dismissed as it is without merit.

Requirements for direct access

An application for direct access is regulated by the Constitutional Court Rules and an applicant must satisfy all the requirements contained therein. Compliance with the Rules is not a mere formality. As was stated in *Liberal Democrats & Ors v The President of the Republic of Zimbabwe E.D. Mnangagwa N.O. & Ors* CCZ 7/18, at p. 10 of the judgment:

“Direct access to the Constitutional Court is an extraordinary procedure granted in deserving cases that meet the requirements prescribed by the relevant rules of the Court.”

Rule 21 (3) of the Rules contains the requirements that ought to be satisfied in an application of this nature. It states the following: Judgment No. CCZ 03/21
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“(3) An application in terms of subrule (2) shall be filed with the Registrar and served on all parties with a direct or substantial interest in the relief claimed and shall set out

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- (a) the grounds on which it is contended that it is in the interests of justice that an order for direct access be granted; and
- (b) the nature of the relief sought and the grounds upon which such relief is based; and
- (c) whether the matter can be dealt with by the court without the hearing of oral evidence or, if it cannot, how such evidence should be adduced and any conflict of facts resolved.”

Rule 21(8) itemises some of the factors to be taken into account in determining whether it is in the interests of justice for a matter to be brought directly to this Court. These include the prospects of success if direct access is granted, the availability of an alternative remedy and whether there are disputes of fact in the matter.

The importance of the requirement that an applicant should show that it is in the interests of justice that the application be granted is explained by Currie and de Waal: *The Bill of Rights Handbook* (6th ed. 2013) at p. 128. The learned authors state as follows:

“Direct access is an extraordinary procedure that has been granted by the Constitutional Court in only a handful of cases. ... The Constitutional Court is the highest court on all constitutional matters. If constitutional matters could be brought directly to it as a matter of course, the Constitutional Court could be called upon to deal with disputed facts on which evidence might be necessary, to decide constitutional issues which are not decisive of the litigation and which might prove to be of purely academic interest, and to hear cases without the benefit of the views of other courts having constitutional jurisdiction. Moreover, ... it is not ordinarily in the interests of justice for a court to sit as a court of first and last instance, in which matters are decided without there being any possibility of appealing against the decision given.”

Jurisdiction of the Court

It is settled law that the jurisdiction of the court is triggered only where a constitutional issue arises or where an issue connected with a decision on a constitutional matter arises.

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Section 332 of the Constitution defines a constitutional matter as a matter in which there is an issue involving the interpretation, protection or enforcement of the Constitution. In *Moyo v Chacha & Ors* 2017 (2) ZLR 142 (CC), the court defined a constitutional matter in the following words, at 150D:

“The import of the definition of a ‘constitutional matter’ is that the Constitutional Court would be generally concerned with the determination of matters raising questions of law, the resolution of which require the interpretation, protection or enforcement of the Constitution.

The Constitutional Court has no competence to hear and determine issues that do not involve the interpretation or enforcement of the Constitution or are not connected with a decision on issues involving the interpretation, protection or enforcement of the Constitution.”

Also germane in the present context are the twin doctrines of constitutional avoidance and subsidiarity which ordinarily operate to militate against the assumption of jurisdiction by this Court, even where a constitutional question or matter might otherwise arise for determination. This position was articulated succinctly in *Zinyemba v Minister of Lands and Rural Resettlement & Anor* 2016 (1) ZLR (23) CC, at 274F:

“Two principles discourage reliance on the constitutional rights to administrative justice. The first is the principle of avoidance which dictates that remedies should be found in legislation before resorting to constitutional remedies. The second principle is one of subsidiarity which holds that norms of greater specificity should be relied upon before resorting to norms of greater abstraction.”

Whether the matter is properly before the court

In casu, the circumstances of the case demand that an analysis of whether the matter is properly before the Court ought to be made before any enquiry into the merits.

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In his founding affidavit, the applicant purports to bring the present application before the court in terms of s 167(5)(a) of the Constitution. This is clearly irregular as such an application cannot be brought before the court in terms of that provision. Section 167(5)a) of the Constitution provides as follows:

“(5) Rules of the Constitutional Court must allow a person, when it is in the interests of justice and with or without leave of the Constitutional Court—

(a) to bring a constitutional matter directly to the Constitutional Court;”.

The above provision clearly makes reference to the Rules of the Constitutional Court in terms of which a litigant must approach the court. Section 167(5)(a) cannot be read as a standalone provision independent of other constitutional provisions and the Rules that it mentions. As pointed out by GWAUNZA JCC in *Prosecutor General, Zimbabwe v Telecel Zimbabwe (Pvt) Ltd* 2015 (2) ZLR 422 (CC), at 425H:

“...s 167 does not elaborate as to who, on what conditions or how, a party may approach the court for it to exercise the jurisdiction conferred upon it by that provision.”

The Court went further to explain the true status of the provision, at 426A:

“In order to give full effect to s 167(1) in relation to any constitutional matter sought to be brought before the court, the provision must be read in conjunction with the various provisions that do confer a right to approach the Constitutional Court directly or indirectly through another process.”

Whilst the above remarks were made in relation to s 167(1) of the Constitution, they apply with equal force to the circumstances *in casu*. Section 167(5)(a) of the Constitution, in terms of which the applicant seeks to approach this Court, must be read together with other provisions of the Constitution and the Rules which were enacted to give effect to that provision. In that regard, s 85(1) of the Constitution and r 21 of the Rules are pertinent. Section 85(1) of the Constitution provides as follows:

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“85 (1) any of the following persons, namely-

- (a) any person acting in their own interests;
- (b) any person acting on behalf of another person who cannot act for themselves;
- (c) any person acting as a member, or in the interests, of a group or class of persons;
- (d) any person acting in the public interest;
- (e) any association acting in the interests of its members;

is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this Chapter has been, is being or is likely to be infringed, and the court may grant appropriate relief, including a declaration of rights and an award of compensation.”

Having regard to the above provision, it is apparent that the applicant ought to have approached the Court in terms of s 85(1) of the Constitution, claiming the vindication of his fundamental rights. Section 167(5)(a) *in se* does not confer upon anyone the right to approach the Constitutional Court directly, even where there is a constitutional matter for determination.

It is also necessary to point out that the applicant has not attached a draft of the substantive application which he intends to place before the Court should direct access be granted. This is a requirement in terms of r 21(4) of the Rules which provides as follows:

“(4) The applicant shall attach to the application a draft of the substantive application he or she seeks to file with the court.”

It is trite that, generally speaking, the use of the word “shall” is indicative of the legislature’s intention to make the provision under scrutiny peremptory or imperative rather than merely directory or permissive. See *Shumba & Anor v The Zimbabwe Electoral Commission & Anor* 2008 (2) ZLR 65 (S), at 80E-81C. The consequences of a failure to comply with a mandatory provision are explained by Francis Bennion: *Statutory Interpretation*, at p. 22, as follows:

“Where the relevant duty is mandatory, failure to comply with it invalidates the thing done. Where it is merely directory the thing done will be unaffected (though there may be some sanction for disobedience imposed on the person bound).”

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The applicant’s failure to attach a draft of the substantive application that he intends to file with the court should direct access be granted is a clear violation of r 21(4) of the Rules. In the absence of such a draft application, the court is severely hamstrung as regards the assessment of the merits of this application. A determination of whether or not it is in the interests of justice to grant direct access is made impossible without the court having sight of that draft application.

Furthermore and finally, the applicant’s founding affidavit, in contravention of the peremptory provisions of r 21(3)(c) of the Rules, does not indicate whether the matter can be dealt with by the court without the hearing of oral evidence or, if it cannot, how such evidence should be adduced and any conflict of facts resolved.

Irregularities before the Magistrates Court

There is a further disconcerting aspect of this matter that we think it necessary to comment upon before it is disposed of. This relates to the mandatory provisions of ss 163A and 191 of the CP&E Act which enjoin the courts in criminal cases to advise accused persons of their right to legal representation at the commencement of criminal trials.

The nub of the applicant's case is that the first and second respondents violated this crucial procedural requirement and thereby denied him the right to proper legal representation. As for the third respondent, it is averred that he did advise the applicant of this right but then failed to make the further enquiry as to whether or not the applicant had understood the import of the governing provisions.

The fourth respondent quite correctly concedes that in the trials before the first and second respondents there was no compliance with s 163A of the CP&E Act. The State also concedes that the third respondent failed to record the exchange with the applicant pertaining to his right to legal representation and his comprehension or otherwise thereof.

It is openly acknowledged by counsel for the fourth respondent that these omissions on the part of the first, second and third respondents constituted gross irregularities. Nevertheless, the State appears to have displayed a dogged reluctance to take heed of these irregularities or the applicant's justifiable grievances in that regard.

Regrettably, unlike the High Court and the Supreme Court, this Court is not presently endowed with any statutory powers of review that might be invoked and exercised

mero motu to address or redress these patent irregularities. Nevertheless, we think it necessary in the interests of justice to bring them to the attention of the Judge President to enable him to refer the matter to a judge of the High Court for review. The Registrar of this Court is accordingly directed to submit a copy of this judgment to the Judge President for appropriate action to be taken.

Disposition

Having considered the totality of the aforementioned circumstances *apropos* the present application itself, the inescapable conclusion is that it is fraught with fundamental irregularities and is therefore not properly before the court. The gravity of the irregularities marring the application precludes and obviates the need to assess and determine the merits thereof.

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It is accordingly ordered that the application, being improperly before the court, be and is hereby struck off the roll with no order as to costs.

GOWORA AJCC : I agree

HLATSHWAYO AJCC : I agree