

PATRICIA DENZEZI

v

**(1) MUNYARADZI NYAMURURU (2) XOLISAN MOYO
(3) CHAMPIONS INSURANCE COMPANY LIMITED
(4) THE COMMISSIONER GENERAL OF POLICE
(5) MINISTER OF HOME AFFAIRS**

**CONSTITUTIONAL COURT OF ZIMBABWE
MALABA CJ, GWAUNZA DCJ, GARWE JCC, MAKARAU JCC, GOWORA JCC,
HLATSHWAYO JCC AND PATEL JCC
HARARE: 11 JANUARY 2023 & 20 NOVEMBER 2023**

T. Biti, for the applicant

O Zvedi, with *T Tembo*, for the fourth and fifth respondents

No appearance for the first, second and third respondents **Judgment No. CCZ 13/23**

Constitutional Referral No. – CCZ 59/22

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GARWE JCC:

[1] This is a referral from the High Court (“the court *a quo*”) of a constitutional matter in terms of s 175(4) of the Constitution of Zimbabwe, 2013 (“the Constitution”). The question referred to this Court for determination is:

“Whether or not section 70 of the Police Act which sets the prescription period of eight (8) months for any person to institute civil proceedings against the Police is ultra vires section 56(1) and 69(3) of the Constitution and therefore unconstitutional.”

[2] It seems to me that the matter ought to be struck off the roll for two reasons. The first is that the referral was improperly made. I say this because, the issue of prescription not having arisen in proceedings before the court *a quo*, that court could not have properly referred the matter to this Court for determination in terms of s 175(4) of the Constitution. The second, though ancillary reason, is that

the matter set down before the court *a quo*, at the commencement of which this referral was made, was rendered abortive following the death of the presiding Judge. The referral of the matter to this Court suffers from these deficiencies and must, as a consequence, be struck off the roll. The reasons for the foregoing now follow.

FACTUAL BACKGROUND

[3] The applicant is Patricia Dengezi who operates as an informal trader. The first and second respondents are, respectively, Munyaradzi Nyamururu and Xolisan Moyo. The first respondent was employed by the second respondent as a driver of a commuter minibus owned by the second respondent. The third respondent is Champions Insurance Company (Private) Limited, the third-party insurer of the commuter minibus owned by the second respondent. The fourth and fifth respondents, respectively, are the Commissioner General of Police and the Minister of Home Affairs.

[4] The facts of this matter are largely common cause. The applicant was in the informal business of vending. On 17 April 2017, while selling her wares from a pavement on Chinhoyi Street close to Robert Mugabe Avenue in Harare, she was involved in a tragic accident. In her company was her son who was aged one year and two months.

[5] In her declaration, she stated that on that fateful day, three officers of the Zimbabwe Republic Police who were carrying out their duties along Robert Mugabe Street threatened to arrest and intimidated certain commuter minibus drivers who were driving their vehicles in the area. Consequently, the commuter

minibuses haphazardly sped off, in the process driving against oncoming traffic moving along Chinhoyi Street, which is a one-way street. The applicant alleges that as a result of the unlawful actions of the Zimbabwe Republic Police, the commuter minibus that was being driven by the first respondent, though travelling in the proper vehicular direction, veered off the road, hit the applicant and “smashed” her son who was killed immediately.

[6] On 9 April 2018, almost a year later, the applicant sued out a summons commencing action out of the High Court at Harare claiming damages arising out of the said road traffic accident. In her declaration she made several claims for damages against the respondents. The applicant’s case before the court *a quo* was that, although the accident was caused by the first respondent, it was members of the Zimbabwe Republic Police who instigated the police that resulted in the fatal incident. She alleges that the details from the Zimbabwe Republic Police were reckless and negligent and that they ought to have realised that their unlawful actions and intimidatory behaviour would “unleash [a] foreseeable chain of events including the loss of life”.

[7] The third, as well as the fourth and fifth respondents, entered appearance to defend and in their pleas denied liability. The third defendant essentially pleaded that it has no knowledge of the facts forming the applicant’s cause of action. On their part, the fourth and fifth respondents have pleaded that the actions of the officers of the Zimbabwe Republic Police were not unlawful and that they were not responsible for the death of the applicant’s minor child. That was the essence of their plea. They said nothing about prescription and whether the claim should

be dismissed on that basis. In their separate pleas, they simply prayed that the claim be dismissed with costs.

[8] The applicant replicated to the pleas. Following that replication, a pre-trial conference was convened before a Judge of the court *a quo*. For the purpose of that pre-trial conference, the fourth and fifth respondents proposed three issues for determination in their pre-trial minute filed *a quo*. The proposed issues for determination were stated to be:

- “1. Whether or not the Plaintiff’s claim has prescribed in terms of section 70 of the Police Act, Chapter 11:10.
2. Whether or not the police officers negligently caused the accident in question.
3. Whether or not the plaintiff is entitled to damages which are claimed.”

[9] The record of the proceedings of the court *a quo* revealed that on 16 May 2022, following a pre-trial conference, three issues were referred for trial. These were whether the Police Officers controlling the traffic along Robert Mugabe Avenue were negligent; if so, the *quantum* of damages payable by the State and, lastly, the extent of damages recoverable from the insurance company. It bears mention at this stage that the parties did not regard as an issue for determination the question whether or not the applicant’s claim had prescribed in terms of s 70 of the Police Act [*Chapter 11:10*] (“the Police Act”).

[10] Just before the trial commenced in the court *a quo* on 14 February 2022, following what appear to have been informal discussions with the fourth and fifth respondents’ counsel, the applicant filed an affidavit in support of a request to refer a matter to this Court in terms of s 175(4) of the Constitution. Therein, the

applicant alleged that two issues had arisen, namely, the constitutionality of s 23(3)(b) and (c) of the Road Traffic Act [*Chapter 13:01*] (“the Road Traffic Act”) and of s 70 of the Police Act. The applicant pertinently averred that:

- “24. During the course of proceedings today, despite the fact that the Commissioner General and the Minister of Home Affairs had not insisted on prescription today they insisted that my matter was prescribed.
25. I could not bring legal proceedings within six months as I was ill and in any event mourning the loss of my child.
26. I however contend that Section 70 of the Police Act is clearly unconstitutional.
27. Why for instance should the police have protection when every other Defendant including the President or large corporations like Delta or Econet do not have the same six months protection.
28. Clearly, Section 70 is unconstitutional and I make reference to the judgment of Justice Tsanga in another related matter.”

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[11] Two days later, on 16 February 2022, ~~Constitutional Referral No. CCZ 59/22~~ **Constitutional Referral No. CCZ 13/23** a statement of agreed facts “for reference to the Constitutional Court in terms of rule 108(4) of the High Court Rules, SI 202/2021”. Therein, the parties outlined the facts that they considered to be “common cause”. However, contrary to the fourth and fifth respondents’ plea, to which reference has already been made, the parties purported to agree that “the fourth Defendant, [the] Commissioner General of Police, had pleaded prescription based on the fact that the summons was issued way after the 8 months provided for by section 70 of the Police Act.”

[12] The request for the referral of the questions relating to the constitutionality of s 23(3)(b) and (c) of the Road Traffic Act and s 70 of the Police Act was heard by the court *a quo*, per MAKOMO J, on 14 May 2022 on the basis of the applicant’s affidavit filed in support of the said request and the statement of agreed facts. The

reasons for the court *a quo*'s determination on the request were delivered on 10 October 2022. The court *a quo* concluded that the request to refer the question relating to the constitutionality of s 70 of the Police Act was not frivolous and vexatious and accordingly granted the request. However, the request relating to the question of the constitutionality of s 23(3)(b) and (c) of the Road Traffic Act was found to be frivolous and vexatious and was therefore refused. Consequently the court *a quo* only referred the question relating to the constitutionality of s 70 of the Police Act to this Court for determination and stayed the proceedings before it pending the determination of the question referred to this Court.

[13] Sadly, on 25 December 2022, before this matter could be heard and finalised by this Court, Mr Justice MAKOMO, the presiding Judge *a quo*, passed on.

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APPLICANT'S SUBMISSIONS BEFORE THIS COURT

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[14] At the commencement of the hearing, the Court directed the parties to advance submissions on the question whether or not the referral was properly made.

[15] Mr *Biti*, for the applicant, submitted that the matter was properly referred to this Court. This, so he submitted, was because, if a constitutional matter arises in non-constitutional proceedings before a lower court, the lower court has no jurisdiction to itself determine the constitutional matter but must refer the matter to this Court. In Mr *Biti*'s view, the fact that the defence of prescription had not been pleaded by the respondents, as defendants, was not a bar to the raising of a constitutional matter.

[16] Further asked during oral submissions whether the death of the presiding judge *a quo* had any effect on the validity of the referral, Mr *Biti* contended that the Judge *a quo* had become *functus officio* on the referral and that his judgment referring the constitutional question to this Court remained extant. As such, the referral can properly be determined by this Court and thereafter the matter can proceed before another judge of the High Court for a final determination of all the issues raised in the pleadings before the court.

FOURTH AND FIFTH RESPONDENTS' SUBMISSIONS BEFORE THIS COURT

[17] Ms *Tembo*, counsel for the fourth and fifth respondents, submitted that although no evidence had been led before the late Mr Justice MAKOMO, the proceedings had indeed commenced before him. She stated that the “special plea” on prescription was raised in the fifth respondent’s pre-trial conference minute but conceded that it was not identified as an issue requiring **Judgment No. CCZ 13/23. Constitutional Referral No. – CCZ 59/22**

[18] On whether the question relating to the constitutionality of s 70 of the Police Act had arisen before the court *a quo*, it was her submission that the issue indeed arose before MAKOMO J.

ISSUES ARISING FOR DETERMINATION

[19] The main issue that arises before this Court is whether the court *a quo* properly referred the matter to this Court. Put otherwise, this Court essentially has to determine whether or not s 175(4) of the Constitution, regulating the referral of constitutional matters to this Court, was complied with. A further but incidental issue that arises from the facts of this case is whether the passing on of

MAKOMO J had any effect on the referral. Put another way the question is whether the referral, in any event, became a nullity following his demise.

[20] This Court, in various decided cases, has stressed that, in respect of matters referred in terms of s 175(4), it is always obliged to determine whether a referral was properly made. If a referral is not properly before the Court, it will be disposed of, without further ado, on that ground alone. See *S v Nyathi* CCZ–16–19 at 7; *Muhala & Others v Mukokera* 2019 (1) ZLR 294 (CC); *Nyagura v Ncube & Others* 2019 (1) ZLR 521 (CC) at 529C-E and *S v Mwonzora & Others* CCZ–9–15 at p. 6, paras. 19 – 20.

WHETHER OR NOT THE REFERRAL OF THE CONSTITUTIONAL MATTER WAS PROPERLY MADE

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[21] The resolution of the question whether the instant referral was properly made requires this Court to examine whether there was a valid plea of prescription before the court *a quo*, taken on the basis of the prescriptive period set out in s 70 of the Police Act. There would have been a need for the court *a quo* to have decided whether the validity of s 70 of the Police Act had been engaged by the facts that were before it the moment a request to refer a constitutional matter to this Court was made. If the constitutionality of s 70 had not arisen before the court *a quo*, there would have been no basis to refer a constitutional matter to this Court. In considering whether there was a valid plea raising the constitutionality of s 70 of the Police Act before the court *a quo*, there is need for this Court to examine the law governing the raising of special pleas. Such an examination does not directly involve the interpretation, protection or enforcement of the

Constitution but is a matter connected with a decision on a constitutional matter. I digress momentarily to discuss what constitutes an issue connected with a decision on a constitutional matter.

[22] Section 167(1)(b) of the Constitution provides that:

“(1) The Constitutional Court—
(a) ...
(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;”

[23] We have not, as a jurisdiction, had occasion to clearly define what constitutes “issues connected with decisions on constitutional matters” as provided in s 167(1)(b). In this regard it may be necessary to have regard to a number of decisions by the South African Constitutional Court. **Judgment No. CCZ 18/21 Constitutional Referral No. – CCZ 59/22** 9
decides constitutional matters, an issue connected with a decision on a constitutional matter must be preceded by a constitutional matter and the determination of the issue must essentially be inseparable from the decision on the constitutional matter. In *Rushesha & Others v Dera & Others* CCZ–24–17, at 11, this court expressed the view that the word “connected” in s 167(1)(b) means that the issue must bear a relationship to the decision on a constitutional matter.

[24] In the leading South African case of *Alexkor Ltd and Another v Richtersveld Community and Another* 2004(5)SA 460(CC), at para 30, the Constitutional Court remarked that “when any *factum probandum* of a disputed issue is a constitutional matter, then any *factum probans*, bearing logically on the existence or otherwise of such *factum probandum*, is itself an issue ‘connected with [a]

decision on [a] constitutional matter’.” In *S v Basson* 2005 (1)SA 171 (CC), at para 22, the court further remarked that “legal and factual matters that need to be decided in order to determine a constitutional matter are issues connected with a decision on a constitutional matter.”

[25] The enquiry that this Court sets out to make of whether or not s 70 of the Police Act had been engaged and pleaded *a quo* so as to give rise to a constitutional matter is clearly an issue connected with a decision on a constitutional matter. The issue is connected with the decision that this Court is required to make on the constitutional question as to whether or not the present referral is valid. Any question as to whether or not a referral was made in accordance with the provisions of the Constitution and is valid is no doubt an important question that this court must determine. In the past, this Court has held that it has no discretion to condone a departure from the Constitutional provisions regulating the referral of constitutional matters. See *Mukoko v Commissioner General of Police & Others* 2009 (1) ZLR 21 (S) at 22E – F and *S v Kisimusi & Others* CCZ–1–14 at 8–9.

[26] Bearing the above in mind, I now turn to consider whether the provisions of s 70 of the Police Act had been properly engaged in the proceedings before the court *a quo* so as to give rise to a constitutional matter. Put another way the issue that now arises is whether the validity of the prescriptive period in s 70 of the Police Act had been specially pleaded and therefore arose in proceedings before the court *a quo*. It is only if the validity s 70 of the Police Act properly arose in the proceedings that the question of its constitutionality could have arisen.

[27] It is a settled position in our adjectival law that the appropriate procedure available in a situation where a party intends to plead the defence of prescription is through a special plea. In *Brooker v Mudhanda & Anor: Peace Mudhanda & Anor* 2018(1) ZLR 33, 38F-G, a decision of the Supreme Court of Zimbabwe, the court remarked as follows at p 38 F-G:

“The defence of prescription should not be raised by way of exception but must be specifically pleaded. The plea must set out sufficient facts to show on what the defence is based. However, due to its nature, the plea of prescription is a special plea. Such a plea is provided for in the High Court Rules 1971. Order 21, r 137 specifies the manner in which a party wishing to rely on a special plea may raise such.”

[28] Similarly, in *Tendayi v Twenty Third Century Systems (Pvt) Ltd* S-135-20 at para. 9, the Supreme Court reiterated the position that the defence of prescription must be raised as a special plea. In no uncertain terms, the Court stated that:

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“It is settled that the defence of prescription is a special plea for the reason that a plaintiff confronted with a claim of prescription may wish to replicate to the objection. This is particularly pertinent where a defendant pleads that a claim has prescribed with a plaintiff replicating that prescription has been interrupted.”

[29] Section 70 of the Police Act and Part IV of the Prescription Act [*Chapter 08:11*] (“the Prescription Act”), are in *pari materia*. The provisions of the two statutes, considered together, accentuate the need to raise a plea of prescription by way of special plea. In this regard I first cite s 70 of the Police Act which states as follows:

“Any civil proceedings instituted against the State or member in respect of anything done or omitted to be done under this Act shall be commenced within eight months after the cause of action has arisen, and notice in writing of any such civil proceedings and the grounds thereof shall be given in terms of the State Liabilities Act [*Chapter 8:15*].”

In turn, s 13 of the Prescription Act provides that:

“13 Debts to which Part IV applies

- (1) This Part shall, save in so far as it is inconsistent with any enactment which—
- (a) provides for a specified period within which—
 - (i) a claim is to be made; or
 - (ii) an action is to be instituted;
in respect of debt; or
 - (b) imposes conditions on the institution of an action for the recovery of a debt; apply to any debt arising on or after the 1st January, 1976.” (*underlining is for emphasis*)

[30] It is clear, from the foregoing, that s 13 of the Prescription Act applies to any claim to be made or action to be instituted in respect of a debt except to the extent different provision is made in another statute. Given that the Police Act provides for a specific prescriptive period for actions against the State, s 13(1) of the Prescription Act must be interpreted to mean that the Prescription Act applies to and regulates the defence of prescription to the extent that its provisions would not be inconsistent with the Police Act, and in particular, the prescriptive period delineated in s 70 of that Act. **Judgment No. CCZ 13/23**
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[31] There are provisions of the Prescription Act that have direct application in proceedings in which a special plea has been raised on the basis of s 70 of the Police Act. The first is s 2 of the Prescription Act which defines the term “debt” to mean, without limiting the meaning of the term, anything which may be sued for or claimed by reason of an obligation arising from statute, contract, delict or otherwise.

[32] The second significant provision of the Prescription Act is s 16, which states thus:

“16 When prescription begins to run

- (1) Subject to subsections (2) and (3), prescription shall commence to run as soon as a debt is due.
- (2) If a debtor wilfully prevents his creditor from becoming aware of the existence of a debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.

(3) A debt shall not be deemed to be due until the creditor becomes aware of the identity of the debtor and of the facts from which the debt arises:

Provided that a creditor shall be deemed to have become aware of such identity and of such facts if he could have acquired knowledge thereof by exercising reasonable care.” (underlining is for emphasis)

[33] Section 17 then provides that if a creditor is prevented by superior force from interrupting the running of prescription in terms s 19(2), and the period of prescription would, but for the subsection, be completed before or on or within one year after the date on which the relevant impediment has ceased to exist, the period of prescription shall not be completed before the expiration of a period of one year which follows that date. Section 18, in turn, provides for the interruption of prescription by an acknowledgement of liability whilst s 19 itemises instances of judicial interruption of prescription.

[34] Several decisions of the courts in this jurisdiction have passed upon the necessity of determining when prescription began to run in any action in which the defence of prescription is raised and whether or not it was interrupted. It is trite that, as a general proposition, prescription generally begins to run from the date when the event giving rise to the claim occurs. However, the date on which a debt becomes due may be different. Prescription may also be delayed or interrupted. For this reason, in the majority of matters coming before the courts, there is usually need for evidence to be led to establish when it started to run. The other party may also wish to lead evidence to show that the running of prescription was delayed or interrupted. Thus, in *Mudhanda, supra*, at 39F, the Court pertinently remarked that:

“In a plea of prescription the *onus* is on the defendant to show that the claim is prescribed but if in reply to the plea the plaintiff alleges that prescription was

interrupted or waived, the *onus* would be on the plaintiff to show that it was so interrupted or waived.”

And further, at 41A–B, the Court added:

“... a special plea enables a litigant to obtain prompt resolution of a dispute because it either delays the proceedings or quashes them. Because of its ability to extinguish a claim there is need for a judge faced with such a plea to hear evidence from the parties.” (*underlining for emphasis*)

[35] In light of the above, the defence of prescription has to be specifically pleaded and properly established by evidence. Indeed the Prescription Act itself provides, in s 20, that the defence of prescription must be specifically pleaded. In *casu*, it is evident that the defence of prescription was not specifically pleaded. A reading of the record of proceedings shows that, although the issue first arose only in the fourth and fifth respondents’ draft pre-trial conference minute, it was never persisted with. Nor was any attempt made by the respondents, as fourth and fifth defendants, to amend their plea in order to introduce such a defence. Before us, Ms *Tembo*, for the fourth and fifth respondents, accepted this to be the correct position. The pleadings did not reflect that prescription was an issue. As a defence, it was not even mentioned during the pre-trial conference that took place before a judge or in the conference minute prepared shortly thereafter. When the parties appeared before the court *a quo* on the first day of trial, it was not one of the issues requiring determination by the court.

[36] In its judgment on the request to refer a constitutional matter to this Court, the court *a quo*, clearly misled by the statement of agreed facts, incorrectly stated that “on filing her summons for damages and other claims, the applicant was met with a plea of prescription” by the fourth and fifth respondents in terms of s 70 of the

Police Act. That could not have been the case given that no such plea of prescription was ever made.

[37] I conclude, therefore, that the defence of prescription was never properly raised. It is apparent that counsel for both the applicant and the fourth and fifth respondents had informal discussions just before the commencement of the trial. It was during these discussions that it appears the respondents indicated they were of the view that the claim had prescribed. In the circumstances of this case, one can safely assume that the issue arose *in vacuo*. The court *a quo* could not purport to refer a constitutional matter to this Court in respect of an issue that was not procedurally before it. Accordingly, the referral to this Court was not proper as the issue referred to this Court was not necessary for the court *a quo* to dispose of any of the issues arising in the matter before it.

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[38] In addition, without the benefit of a replication from the applicant on the claim of prescription informally raised by the fourth and fifth respondents, the court could not have assumed that prescription had run its course. The procedure for a referral made it incumbent for the court *a quo* to verify, in light of the pleadings filed in the matter before it, the accuracy of the statement of agreed facts. In accordance with the procedure set out in several judgments of this Court, there was a need for the court *a quo* to determine when the debt became due. A reading of s 70 of the Police Act reveals that the court *a quo* had to make a specific finding that eight months had elapsed after the applicant obtained knowledge that her cause of action against the fourth and fifth respondents had arisen. The court should also have determined when the debt became due and whether the fact of applicant's stay in hospital, captured in the parties' statement of agreed facts, would have,

pursuant to s 17(1) of the act, had any effect on such prescription. In the absence of these factual findings, the referral was fatally defective.

[39] In light of the foregoing, the undoubted corollary must be that the referral was improper and the matter should be disposed of on this basis. That said, for the sake of completeness, I proceed to consider the effect, if any, of the demise of the trial Judge on the proceedings before him, including the issues he had referred to this Court. This too is an issue connected with a decision on a constitutional matter.

THE EFFECT ON THE PROCEEDINGS A QUO OF THE DEATH OF THE PRESIDING JUDGE

[40] Even if prescription had been properly pleaded **Judgment No. CCZ 13/21h** respondents, a further issue relating to the validity of these proceedings would still have arisen. This question arises from the common cause fact that the presiding Judge *a quo*, MAKOMO J, died pending the determination of this referral. **Constitutional Referral No. – CCZ 59/22**

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[41] It is a hallowed principle of the law that the death of a judicial officer has a juridical effect on matters that were partly heard by him or her. In this regard, Herbstein and Van Winsen, *The Civil Practice of the High Courts and Supreme Court of Appeal of South Africa*, 5th ed, (2009), state at 918:

“Where a judge is removed from office, whether on account of misbehaviour or infirmity of body or mind, or where a judge is suspended pending a decision on removal from office, he may not thereafter complete matters outstanding at the date of removal or suspension. But where a judge has resigned from office, such resignation is not a bar to concluding unfinished matters. If the judge does not conclude such matters he becomes *functus*

officio and the same principles that operate when a judge dies or becomes incapacitated will apply. The matters must be tried *de novo*.”

[42] The point was made more incisively by the High Court in *S v Tsangaizi* 1997 (2) ZLR 247 (H). As pp 248–249 *Gillespie J* remarked as follows:

“In order to determine whether this trial can be commenced afresh, it is therefore necessary to examine the common law relating to the incapacity or unavailability of a judicial officer. ...

The first proposition, that the death or incapacity of a magistrate brings about the nullity of the incomplete proceedings, is entirely correct. The point is exemplified in a number of cases, which I shall shortly examine below. The principle is that if during the course of proceedings a judicial officer ceases to have jurisdiction then the proceedings up to that point are abortive.” (*underlining for emphasis*)

See also *S v Nqobile Sibanda* HH 59/2005 in which similar remarks were echoed by the same court.

[43] A number of other decided cases on this point, **Judgment No. CCZ 13/23 Constitutional Referral No. CCZ 59/22** commenced before a deceased judicial officer are rendered abortive by his or her death. The circumstance presented by the case of *Charmfit of Hollywood Inc v Registrar of Companies & Anor* 1964 (2) SA 765 (T) is helpful. In that case, the Court had to determine whether it could award costs of a previous hearing that was conducted before a Judge who had died before he could give judgment. Departing from the conclusion that had been reached in an earlier case that a second Judge taking over a matter after the first Judge had become incapacitated could not issue an order of costs of the abortive hearing, the Court stated, at 770B-D, that:

“With great respect I must differ from that view. The previous hearing merely represents an uncompleted stage of the proceedings with which this Court was and is seized until it gives its final judgment therein. It therefore retains full jurisdiction and discretion in regard to the costs of that hearing as with all

other stages and incidents in the proceedings, and can make any special order appropriate to the circumstances in regard thereto in the course of finally deciding and disposing of all issues between the parties still outstanding at this stage of the proceedings (cf. *van der Merwe's Engineering Works v Raath*, 1948 (4) SA 758 (T); *Union Government v Modderfontein 'B.' Gold Mines Ltd.*, 1925 T.P.D. 61 at p. 68). If no such special order is made probably such costs would simply follow and be taxed as the costs awarded in the cause, because they would be costs necessarily incurred in the cause of those proceedings...

In the result the application is dismissed with costs, such costs to include the costs of the previous hearing before the late Mr Justice KUPER". (*underlining is for emphasis*)

[44] Similarly, in the case of *Protea Assurance Co, Ltd v Gamlase & Others* 1971 (1) SA at 464G – 465B, the Court held that:

“In the *Philipp* case the Court was concerned with a situation where an appeal had been argued before a Judge who had resigned on account of ill-health before giving judgment. In the course of his judgment, BREBNER, A.J., said:

‘It seems to me that, as in the case of the death of a Judge before giving judgment, the case must be tried *de novo*.’

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This passage in my opinion is undoubtedly correct and it is indeed **Judgment No. CCZ 59/22** that precisely the same reasoning must apply in the present circumstances. To paraphrase the words used by TROLLIP, J., in the *Charmfit of Hollywood* case, this Court has retained full jurisdiction in regard to all stages and incidents in the proceedings and can make any special order appropriate to the circumstances existing. I have come to the conclusion therefore that the proper course to adopt is to regard the application for leave to sue *in forma pauperis* as a pending and uncompleted application in this Division and to direct that it be dealt with as if the hearing on 25th May, 1965 had not taken place.”

[45] The position is therefore settled that the death of a Judge before giving a final judgment renders any proceedings commenced before him abortive. Such proceedings must be tried *de novo*. A subsequent Judge cannot competently take the matter up from where the deceased Judge would have left it. It may be worth mentioning at this stage that there are certain statutes in this jurisdiction which have modified the common law in this regard, especially where a number of Judges hear a matter and one of them becomes incapacitated or dies before the

delivery of judgment. In most cases, the remaining number of Judges are permitted to finalise the matter or a new Judge is assigned to proceed from where the former Judge left. See, for example, s 4(3) of the Supreme Court Act [*Chapter 7:13*], s 4(3) of the High Court [*Chapter 7:06*] and s 5(2) of the Constitutional Court Act [*Chapter 7:22*].

[46] During oral arguments, both counsel conceded that the action by the applicant was already before MAKOMO J when the putative referral was made. Following the death of MAKOMO J, the hearing before him and any procedural stages taken before him were rendered abortive. It follows from this that the pleadings filed by the parties in the matter were not affected by the death of the judge and that such pleadings will form a basis for a fresh hearing before another Judge of the High Court.

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[47] Mr *Biti*, for the applicant, sought to contend that the judgment by MAKOMO J on the request to refer a constitutional matter to this Court stood on its own and “did not die with Judge”. He added that the late Judge, by the time of his death, was *functus officio* on the request to refer a constitutional matter to this Court. Put differently, Mr *Biti* contended that the High Court had already discharged its jurisdiction on the request to refer the constitutional matter to this Court and, thus, the death of the Judge who granted the request cannot alter the fact that the High Court has already discharged its jurisdiction on that question.

[48] I am unable to find any merit in the above submission. The misapprehension in counsel’s argument stems from his understanding that the stage of the proceedings *a quo* in which the referral of the constitutional matter to this Court

was made is severable from the pending trial action. Indubitably, the hearing conducted on the request to refer a constitutional matter to this Court and the judgment which was passed subsequent to that hearing are part and parcel of the part-heard trial action that was before MAKOMO J.

[49] A request to refer a constitutional matter to this Court must arise during the non-constitutional proceedings of a subordinate court. The determination of the constitutional matter must be necessary for the resolution or completion of the pending non-constitutional matter before the court. What is of importance is that a determination as to whether a request to refer a constitutional matter would not be frivolous and vexatious lies with the presiding judicial officer in terms of s 175(4). In other words, a presiding judicial officer must be satisfied that the resolution of the constitutional matter raised by a party is necessary to enable him or her to dispose of the non-constitutional matter before the court. **Judgment No. CCZ 13/23** Constitutional Referral No. CCZ 159/22
passed, imputed or foisted on a subsequent judicial officer.

[50] Regard being had to the rationale underlying the principle that, upon the death of a Judge, any case commenced before him must be tried *de novo*, the submissions by Mr *Biti* in this regard cannot therefore succeed. It bears restating that only the Judge who would have commenced the proceedings and received evidence on the request to refer a constitutional matter to this Court would be in a position to finalise that matter after the determination of the referral by this Court.

[51] In light of the foregoing, it is clear that the court that hears the proceedings that are rendered abortive by the death or incapacity of a Judge retains full jurisdiction and discretion to entertain, afresh, all stages of the pending proceedings. The late

Judge had not, as argued by Mr *Biti*, become *functus officio* following the referral of a constitutional matter to this Court because the request for the referral, pending determination of the question referred to this Court, represented an incomplete stage of the proceedings before the court. It evidently became abortive upon the death of the Judge who had intended to rely on the resolution by this Court in the finalisation of the matter before him.

[52] Assuming, *arguendo*, that this Court determines the present constitutional matter referred to it, and, as a consequence, remits the matter to the court *a quo* together with its determination, the question that would immediately arise is whether another judge of the High Court would have the jurisdiction to resume the proceedings from where the late MAKOMO J left. The answer must lie in the negative. Although the court *a quo* had determined the request for the referral of a constitutional matter to this Court, a second Judge of that court who takes over the matter cannot competently start from the point where the late MAKOMO J left the matter. The obvious reason, well articulated in the above authorities, is that the part-heard hearing before MAKOMO J became abortive upon his death. Thus, even if the constitutional matter is determined by this Court, another Judge cannot complete a part-heard hearing that is terminated by operation of law. It is for this reason that the High Court retains full jurisdiction in regard to all stages and incidents of the hearing, including any prospective request for the referral of a constitutional matter to this Court on similar grounds.

[53] Accordingly, for the additional reason that the presiding Judge *a quo* has since died, the referral became a nullity. The referral must therefore be struck off the

roll and, by operation of law, the trial may be recommenced *de novo* before a different judge, that is, on the basis of the pleadings filed of record in the matter.

DISPOSITION

[54] By way of summary, therefore, the referral that is before this Court is invalid for two reasons. First, there having been no special plea of prescription, a constitutional matter relating to the constitutionality of s 70 of the Police Act could not have properly arisen before the court *a quo*. Second, and in any event, the death of the presiding Judge *a quo* operated to render any proceedings that were pending before him abortive. It is axiomatic that the proceedings referred to this Court were intended, on remittal, to enable him to determine all the issues arising in the matter before him.

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[55] On the question of costs, none of the parties to this matter have sought costs. There is also no cognisable ground on which costs may be awarded in this matter. Although the matter was improperly referred, the settled principle followed by this Court on the question of costs in constitutional matters is that costs are generally not to be awarded unless there are exceptional circumstances warranting a departure from the rule.

[56] In the result, the Court makes the following order:

“The matter be and is hereby struck off the roll with no order as to costs.”

MALABA CJ

:

I agree

GWAUNZA DCJ : I agree

MAKARAU JCC : I agree

GOWORA JCC : I agree

HLATSHWAYO JCC : I agree

PATEL JCC : I agree

Tendai Biti Law, applicant's legal practitioners

Civil Division of the Attorney-General's Office, fourth and fifth respondents' legal practitioners.

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