

REPORTABLE (1)

JOSEPH RICHARD CRNKOVIC

V

THABANI MPOFU

**CONSTITUTIONAL COURT OF ZIMBABWE
MAKARAU JCC, GOWORA JCC & MAVANGIRA AJCC
HARARE 18 SEPTEMBER 2023 AND 15 January 2024.**

Applicant in person

T. L. Mapuranga and M. Tshuma for the respondent.

Application for direct access.

Judgment No. CCZ 01/24
Court Application No. CCZ 33/23

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Makarau JCC-

Introduction

The applicant is a self-acting litigant who not only appeared before the Court in person, but also prepared the application and all the other papers filed of record in support of the application. He also filed extensive heads of argument to which I shall make reference.

This is an application for direct access. If granted, it is the applicant's intention to file an application with the Court in terms of s 85 (1) of the Constitution, alleging that the respondent has breached his rights to human dignity and to equality and non-discrimination.

Background facts

The facts giving rise to this application are largely common cause.

The applicant holds a Master's Degree in Finance. He was last employed as the Group Financial Officer of a mining company. He was also a board member of the company. At the time of the hearing of this application, he was no longer so employed. In fact, he was out of employment. He lost his employment with the mining company in circumstances that led in part to this application, which circumstances I detail below.

Employees at a subsidiary company approached their local Member of Parliament, ("MP"), making allegations of racism against the applicant and another executive of the company who is not before the Court. The MP in turn wrote letters to the Zimbabwe Human Rights Commission and to some labour unions whose details are not given in the papers before the Court. In the founding affidavit to the draft application for direct access attached to this application, the applicant suggests that the MP wrote to the Zimbabwe Lawyers for Human Rights instead of the Zimbabwe Human Rights Commission. The discrepancy in the identity of the body to whom the allegations were directed by the MP is immaterial in the determination of the application.

The MP also published the allegations in various social media.

The applicant's employer advised him that he was to face a hearing to inquire into the allegations. The hearing would be independent. I pause here momentarily to note that the applicant did not refer to the hearing as such but in his founding affidavit, termed it an "external non-labour Public trial for the crime of racism." Throughout his papers and in oral

submissions before the Court, he refers to the hearing in this fashion. I return to this description of the hearing later.

In due course, the respondent, who was to preside over the hearing, formally invited the applicant to the hearing. In the letter of invitation to the hearing, the respondent also advised the applicant of his right to be legally represented at the hearing.

The applicant engaged a legal practitioner to represent him at the hearing. The legal practitioner was also the legal practitioner of the subsidiary company in all its litigation as well as being its company secretary.

The other executive against whom similar allegations had been made was not subjected to the same inquiry and was consequently not invited to the hearing.

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The hearing was conducted over three days with the applicant voluntarily participating in its proceedings. He called a number of witnesses in his defence.

No witnesses testified against the applicant.

Again in due course, the respondent presented his findings report to the applicant's employer in the form of a report. The allegations of racism had not been established at the hearing and the report exonerated the applicant.

At some stage but after the hearing, the applicant was requested to process a payment to the respondent for presiding over the hearing, which he duly did. Prior to this, the applicant was unaware that the respondent would be paid for presiding over the hearing.

The payment to the respondent for presiding over the hearing appeared improper to the applicant. He viewed it as “corruption”, and, as a payment for the violation of his constitutional rights to dignity and non-discrimination. The applicant accordingly filed a complaint with the Zimbabwe Anti-Corruption Commission as well as with the Law Society of Zimbabwe.

The complaint filed with the Law Society of Zimbabwe was on allegations that are not material to the determination of this application. Although detailed in the applicant’s founding affidavit, no purpose will be served by repeating the allegation in this judgment.

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Shortly after the presentation of the report, the applicant was asked to resign from employment which he did. This was notwithstanding the findings by the respondent that the allegations of racism against the applicant had not been established.

Believing that his fundamental rights to human dignity and equality and non-discrimination were violated and continued to be violated by the respondent, the applicant filed this application. As indicated above, if the application is granted, it is his intention to bring an application under s 85 (1) of the Constitution not only to protect these rights but to seek an award of damages in the sum of US\$300 000.

The application for direct access was opposed.

In praying for the dismissal of the application, the respondent sought an order of costs on the legal practitioner and client scale. It was his view that the application was in its own class of frivolity, deserving censure.

Submissions by the Parties

At the hearing of the application, the applicant took a point *in limine*. He argued that the respondent was barred for failing to file his heads of argument within the time frame set by the Registrar in the letter inviting the filing of the heads.

Regarding the merits of the matter, the applicant reiterated the position he had taken in his written application. He maintained that he was making the application for direct access to enable him to bring an application under s 85 (1) of the Constitution to address the infringement of his rights at the hands of the respondent. The infringement arose when the respondent tried him for the crime of racism and ever since, his name is now synonymous with racism. He thus cannot obtain any employment. His relationship with his family is no longer as warm as it used to be and he is indigent, having exhausted his savings, to the extent that he cannot afford legal fees hence the appearance in person before us. In arguing thus, the applicant maintained that he was seeking direct access to this Court in the interests of justice.

Mr Mapuranga for the respondent argued that the application did not disclose a constitutional matter which would engage the jurisdiction of this Court. In this regard he drew the attention of the Court to the order that the applicant intends to seek if he is granted leave. The court's attention was particularly drawn to the paragraph wherein the applicant seeks damages in the sum of US\$300 000 for the alleged infringement of his fundamental

rights and freedoms. *Mr Mapuranga* further submitted that the applicant's claim is for damages and ought to have been instituted in the High Court as an action. He further argued that whilst the application did not disclose a constitutional matter and should have been brought in the appropriate forum under common law, on the facts alleged, the claim was unfounded even at common law.

Considering the application to be a nuisance and frivolous in the highest degree, *Mr Mapuranga* proceeded to argue that the application failed to meet all the requirements in r 21 of the Constitutional Court Rules. He concluded by seeking costs against the applicant on the legal practitioner and client scale urging the Court to depart from its general position of not awarding costs in constitutional matters.

The point *in limine*

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It is common cause that the Registrar addressed a letter to the respondent's legal practitioners calling for the filing of heads within 14 days of receipt of the letter. The invitation was specifically addressed to the respondent's legal practitioners as the rules of this Court do not require self-acting litigants, to file legal arguments in proceedings before the Court. This notwithstanding, the applicant filed heads and thereby displaced the application of the rule that required the respondent to file his heads within fifteen days of receipt of the letter from the Registrar. This is so because once the applicant filed his heads, the rules allow the respondent time to consider such heads and to file his own heads within ten days of being served with the applicant's heads. This is what ensued *in casu*. (See r 39 (4) of the Constitutional Court Rules, 2016).

The upshot of the above is that the respondent was not barred in terms of the rules, having filed his heads of argument within 10 days of receipt of the applicant's heads.

I now turn to determine the merits of the application.

The approach of the court

As observed right at the outset, the applicant is a self-actor. His right to appear before the Court in person is guaranteed by the Constitution itself.

The right of all litigants to appear before this Court in person if they so elect, creates a special duty on the part of the Court. In its even handedness, the Court must not only bend over backwards to accommodate any shortcomings in the procedures adopted by the litigants and in the legal submissions they make, it must ensure that the playing field is even. This, the court must do to the extent possible but without creating the perception that it has entered the arena and has substituted itself for the self-acting litigant.

It is with this role and special duty in mind that this Court approached the application for direct access. Thus, in assessing whether the applicant had discharged the onus resting on him to prove the essential requirements for the grant of the application, the Court bent over backwards and tried to establish if there was any saving aspect upon which it could grant the application for direct access.

Regrettably, the court failed. This is for the reasons that follow below.

The law

The Authors *Currie I and de Waal J* in *The Bill of Rights Handbook* 6th Ed, observe at page 128 that:

“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 any possibility of appealing against the decision given”.

Whilst the authors were writing of the South African Constitutional Court, their observation aptly applies to this Court. Indeed the applicant, who in his heads of argument draws the above quotation to the attention of the Court, also accepts that direct access is rarely granted by this Court. He has allegedly read all the cases on direct access that this Court has dealt with since 2017 and could only find one or two where direct access has been granted.

For the very cogent reasons given by the authors *Currie I and de Waal J*, rules have been enacted for this Court regulating the grant of direct access only in cases where it is in the interest of justice to do so. In particular r 21 of the Constitutional Court Rules 2016 provides for applications for direct access to this Court. Apart from setting out the procedural requirements for such an application, the rule also summarises the considerations that should guide the discretion of the Court in determining such an application.

Broadly speaking, an application for direct access must reveal, *prima facie*, a constitutional matter that will engage the jurisdiction of the Court and the basis upon which it is contended that it will be in the interests of justice that the constitutional matter be dealt with at first instance by this Court. The intended application must enjoy some prospects of success when prosecuted upon the granting of leave. (See *Sibangani v Bindura University of Science and Technology* CCZ 7/22; *Museredza & Others v Minister of Agriculture, Lands, Water and Rural Resettlement* CCZ 1/22 and *Russel Mwenye v Minister of Justice, Legal and Parliamentary Affairs* CCZ 5/23).

The jurisdiction of this Court is specialised. It is only triggered in constitutional matters. This is trite. Constitutional matters have been defined in s 332 of the Constitution as well as in a number of decided cases as meaning “a matter in which there is an issue involving the interpretation, protection or enforcement” of the Constitution. (*Lytton Investments (Pvt) Ltd v Standard Chartered Bank and Another* CCZ 11/18)

In giving effect to the definition of constitutional matter as given in the Constitution, this Court has held that mere reference to a provision of the Constitution does not convert a matter into a constitutional one if the matter does not in effect involve the interpretation, protection or enforcement of the Constitution. (See *Mukondo v S* CCZ 8/20).

By extension of reasoning, an issue is not a constitutional matter because the applicant describes it as such in his or her founding papers. A matter is not constitutional because the applicant genuinely believes that he or she has raised a constitutional matter. The

existence of a constitutional matter is objectively assessed not only from the facts giving rise to the dispute but more importantly, from the relief that the applicant is entitled to in the matter. A fine line must be drawn between the relief that the applicant seeks and the relief that he or she is entitled to at law. A constitutional matter arises where the relief that the applicant is entitled to is solely predicated on an interpretation, protection or enforcement of the Constitution and not on the application of any other legal principle. This is so because if the matter can be resolved by the application of any other legal principle or statutory provision, then, the two principles of constitutional avoidance and subsidiarity will jointly apply to make the matter non-constitutional for the purposes of the jurisdiction of this Court.

Because this Court enjoys concurrent jurisdiction over constitutional matters with other courts in the land, by design, the approach of the Court has been to allow the other courts to express their views on constitutional matters at first instance, whilst retaining its review and appellate jurisdictions. As explained by the authors *Currie I and de Waal J*, 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 the possibility of appealing against the decision given. Thus, unless it cannot be avoided, this Court will defer to the jurisdictions of lower courts to determine constitutional matters in the first instance. Only where it is in the interests of justice that a constitutional matter be determined by this Court in the first and final instance will an application for direct access be granted.

At this stage I wish to pause momentarily to observe that ordinarily, this Court will only proceed to determine whether or not it is in the interests of justice to determine a matter in the first and final instance where the issue to be determined is a constitutional matter. If the matter is not constitutional, then, it is not only idle but may be grossly irregular

for the Court to proceed to determine whether it is in the interests of justice to determine the non-constitutional issue. The Court has no such jurisdiction and therefore, it can never be in the interests of justice for this Court to determine a non- constitutional matter.

The same observation that I make above apply to the requirement that the matter must enjoy some prospects of success. Such an inquiry can only be made where the issue arising is a constitutional matter.

I now turn to apply the above law to the application.

Analysis

The applicant's matter suffers incurably from one or more faulty perceptions. These perceptions are all unsustainable at law and, with ~~domino effect, render the application~~ Judgment No. CCZ 01/24
Court Application No. CC2 33/23 unfounded, and consequently, liable to be dismissed.

Firstly, the applicant perceives the hearing that the respondent presided over as “a trial for the crime of racism.” It was not.

As indicated elsewhere above, the applicant consistently described and referred to the hearing as a trial throughout his papers and maintained the position in his oral submissions before the Court. He went further to allege that the trial was conducted in circumstances where the respondent had not obtained “a certificate” to prosecute him. He refers extensively to the crime of racism and its gravity in this jurisdiction and globally.

The perception of the applicant in this regard is not only very strong, it is difficult to understand. This is so because in his founding affidavit the applicant testifies that he was advised by his erstwhile employer that it, the employer was instituting the independent hearing into the allegations against him. He further testified that he was invited to the hearing and he attached the letter inviting him to the hearing. He participated in the proceedings of the hearing without demur. It is not clear at which stage he then came to the conclusion that he had been subjected to a “trial for the crime of racism.” This perception appears to have arisen after the hearing and from factors that are not readily apparent from the papers.

The applicant was not tried for the crime of racism or for any crime for that matter by the respondent. This is not a finding that this Court is making *mero motu*. It is the common position established by both parties in their respective papers. The respondent presided over an informal hearing, commissioned by the applicant's employer to inquire into the allegations that had been made against the applicant by workers at a subsidiary company. This is the clear evidence that both parties have placed before this Court.

The rest of the application is predicated on this faulty perception that the respondent presided over a trial in which the applicant stood accused of the crime of racism. As indicated above, there is no basis for this perception. Being without a base, the perception cannot found a valid application. It is not a fact.

I could end the inquiry with the above finding but in view of the status of the applicant as a self -acting litigant, I will proceed further to deal with the issues that the applicant has raised in his heads of argument.

The applicant wrongly perceives the inquiry held by the respondent as a wrongful act, actionable at law. Put differently, the applicant wrongly perceives the conduct of the respondent as violating his rights to human dignity and non- discrimination.

Without alleging illegality or some other gross irregularity in its establishment or conduct, the inquiry presided over by the respondent could not at law found any cause of action at the instance of the applicant. It could not have been a wrongful act absent allegations of illegality or irregularity. It could not have violated his rights as alleged or at all if it is not wrongful conduct. This is so because lawful conduct is not actionable until and unless the law authorising such conduct is first set aside.

The mere fact that the respondent presided over the inquiry, absent allegations of illegality and gross irregularity in the conduct of the hearing, is innocuous and is not actionable at law as alleged by the applicant.

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Finally and in passing, the applicant believes that the interests of justice in an application such as his are subjectively assessed. They are not.

In justifying why it is in the interests of justice that his application be granted, the applicant averred that he has grave concerns if this matter is dealt with by any of the courts of lesser jurisdiction than this Court. In his own words:

“I believe that it is in the interests of justice that the Constitutional Court protect me as per its jurisdiction under s 167 of the Constitution of Zimbabwe.”

And later on in the same breath:

“.....I have grave concern if this were to be handled by the lower courts and the relief was granted to me. The relief would not afford me the protection I seek as the (respondent) would simply make claims left right and centre so that the public do not believe he violated my constitutional rights.”

As indicated above, it may be in the interests of justice that a constitutional matter be heard at first and final instance by this Court if it is urgent or if it is sufficiently important in the national interest that this Court pronounces itself on the matter in the first and final instance.

In *casu*, even if this Court were to take the most benevolent approach to the “facts” of this application, and were to hold that there is the slightest possibility that the respondent somehow violated the applicant’s rights as alleged, still, the dispute between the parties would not have merited that this court determines it in both the first and final instances. Whilst the applicant subjectively feels and understandably so, that the matter should be resolved, the matter does not command the urgency envisioned by the rules of court in assessing the interests of justice. Being a dispute *intra partes*, it hardly has an impact on the public interest.

Apart from establishing his own interests, the applicant has not shown the importance of the matter, objectively assessed, that would warrant the rare consideration that this court determines the matter directly.

On the basis of the foregoing, the application cannot succeed and must be dismissed.

Regarding costs, the respondent has prayed that we award him costs on the legal practitioner and client scale.

The applicant is a self-acting litigant who would have benefitted from legal counsel before he filed this application. His application was devoid of any merit and ought not to have been filed. However, in view of his status as a self-acting litigant, the Court will bend over backwards and save him from an order of costs.

In the result I make the following order:

1. The application is dismissed.
2. There shall be no order as to costs.

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GOWORA JCC : **I agree**

MAVANGIRA AJCC : **I agree**

Gill, Godlonton & Gerrans, respondent's legal practitioners.