REPORTABLE (7)

FEATHERS MUKONDO

v

THE STATE

CONSTITUTIONAL COURT OF ZIMBABWE
HARARE, JULY 19 2019 & JULY 02, 2020

The applicant in person

E Makoto, for the respondent

Before: MALABA CJ, In Chambers

AN APPLICATION FOR AN ORDER FOR LEAVE FOR DIRECT ACCESS TO THE CONSTITUTIONAL COURT

This is a chamber application for an order for direct access to the Constitutional Court ("the Court") in terms of r 21(2) of the Constitutional Court Rules, SI 61 of 2016 ("the Rules"). The applicant intends to file the substantive application with the Court in terms of s 85(1)(a) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013 ("the Constitution").

The substantive application the applicant intends to make in terms of s 85(1)(a) of the Constitution, should leave for direct access be granted, alleges that the decision of the Supreme Court dismissing an appeal against a decision of the High Court upholding his conviction and sentence of imprisonment for bribery violated his right to a fair trial, enshrined in s 69(1) of

the Constitution. The applicant had to show that it is in the interests of justice for an order for direct access to be granted.

FACTUAL BACKGROUND

The applicant was employed by the Zimbabwe Republic Police as the Officer-In-Charge of Guruve Criminal Investigation Department. On 24 October 2014 he was arraigned before the magistrate's court facing a charge of bribery, as defined in s 170(1)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] ("the Criminal Law Code").

It was the respondent's case that on 03 April 2014 the applicant unlawfully and intentionally received $200.00 from one Biggie Chipfunde in order to influence investigations in a criminal case involving the latter as an accused. The criminal case was pending before the magistrate's court. The applicant denied the charge of bribery. He said that he received the money from Biggie Chipfunde, genuinely believing that it was a donation to a fundraising campaign. After a full trial, the applicant was convicted of bribery. He was sentenced to twelve months' imprisonment, of which four months were suspended for a period of five years on conditions of good behaviour.

The applicant noted an appeal to the High Court against the conviction and sentence. The grounds of appeal against conviction were that the trial magistrate ignored glaring inconsistences in the evidence of the respondent's witnesses; that the respondent failed to prove its case beyond a reasonable doubt; and that the authority to organise entrapment had not been properly obtained. The ground of appeal against sentence was that a non-custodial sentence was more appropriate given the circumstances of the case. The High Court upheld the conviction. The appeal against sentence was also dismissed by the High Court.

The applicant noted an appeal to the court *a quo* against the judgment of the High Court. The court *a quo* found that the appellant's grounds of appeal against conviction did not emanate from the High Court's *ratio decidendi*. It held that no proper grounds of appeal had been placed before it. The court *a quo* also upheld the sentence, after finding no misdirection on the part of the High Court. The appeal was dismissed in its entirety.

It is against this background that the applicant filed the application for leave for direct access to the Court. He alleged that the court *a quo* breached his fundamental right to a fair trial. The contention was that the proceedings in the magistrate's court were tainted with gross irregularities, which resulted in a substantial miscarriage of justice. He alleged that the trial magistrate "deliberately ignored analysing and evaluating the defence case and its documentary exhibits which rebutted all essential averments in the State case".

The applicant further alleged that the subsequent upholding of the trial magistrate's decision by the High Court was irregular, as that court relied on s 170(2) of the Criminal Law Code as the basis for dismissing the appeal when the trial magistrate did not rely on the provision in question to convict him. He alleged that s 170(2) of the Criminal Law Code is invalid. He argued that the section is an unconstitutional provision which casts a reverse *onus* on the applicant to prove his innocence, thereby breaching s 70(1)(a) of the Constitution which guarantees an accused person the right to be presumed innocent until proven guilty.

Lastly, the applicant averred that the court *a quo* omitted to exercise its review powers provided for under s 25(2) of the Supreme Court Act [*Chapter 7:13*]. He contended that failure to exercise the powers provided for by law was an infringement of his right to have the case reviewed by a higher court, guaranteed under s 70(5)(a) of the Constitution. The applicant averred that granting leave for direct access to the Court would be in the interests of justice as it would vindicate his right to a fair trial guaranteed under s 69(1) of the Constitution.

The application was opposed by the respondent. *Mr Makoto* submitted that the court *a quo* properly evaluated the evidence adduced by the State and concluded that the High Court had reached the correct decision in dismissing the appeal against conviction and sentence. The applicant was not happy with the manner in which the evidence was assessed by the court *a quo*. That does not mean that the decision of the court *a quo* is in violation of the applicant's fundamental rights.

DETERMINATION OF THE ISSUES

WHETHER IT IS IN THE INTERESTS OF JUSTICE THAT LEAVE FOR DIRECT ACCESS TO THE COURT BE GRANTED

The jurisdiction of the Court is provided for under s 167(1) of the Constitution. The Court is the highest court in all constitutional matters. It decides only constitutional matters and issues connected with decisions on constitutional matters. The Court has the power to make the final decision on the question whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.

Direct access is an extraordinary procedure, which is granted only in deserving cases and has been sparingly granted. Before a party can be granted leave to approach the Court directly in terms of s 85(1)(a) of the Constitution, he or she or it has to satisfy all the requirements set out in r 21(3) of the Rules. The requirements are as follows:

> "(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 —
>
> (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."

It is peremptory for an applicant to set out facts or grounds in the founding affidavit, the consideration of which would lead to the conclusion that it is in the interests of justice to have the matter placed before the Court directly.

In *Lytton Investments (Pvt) Ltd* v *Standard Chartered Bank Ltd and Anor* CCZ 11/18, the Court had occasion to deal with the requirements to be satisfied in an application of this nature. It held as follows at p 19 of the cyclostyled judgment:

> "The Court turns to determine the question whether the applicant has shown that direct access to it is in the interests of justice. Two factors have to be satisfied. The first is that the applicant must state facts or grounds in the founding affidavit, the consideration of which would lead to the finding that it is in the interests of justice to have the constitutional matter placed before the Court directly, instead of it being heard and determined by a lower court with concurrent jurisdiction. The second factor is that the applicant must set out in the founding affidavit facts or grounds that show that the main application has prospects of success should direct access be granted."

Where the jurisdiction of the Court is sought to be invoked on the allegation that the decision of a subordinate court on a non-constitutional matter violated a fundamental human right, the applicant must show that the violation was a result of failure by the subordinate court to act in accordance with the law governing the proceedings concerned leading to an arbitrary decision.

In the *Lytton Investments* case *supra,* the Court held as follows at pp 19-20 of the cyclostyled judgment:

> "The theory of constitutional review of a decision of the Supreme Court in a case involving a non-constitutional matter is based on the principle of loss of rights in such proceedings because of the court's failure to act in terms of the law, thereby producing an irrational decision. There must, therefore, be proof of the failure to comply with the law. The failure must be shown to have produced an arbitrary decision."

What amounts to a constitutional matter is defined in s 332 of the Constitution as meaning a matter in which there is an issue involving the interpretation, protection or enforcement of the Constitution.

In *Moyo v Sergeant Chacha and Ors* CCZ 19/17, the Court explained the import of s 332 of the Constitution in the following words at p 15 of the cyclostyled judgment:

> "The import of the definition of '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." (the underlining is for emphasis)

The mere allegation that a fundamental human right enshrined in Chapter 4 of the Constitution has been infringed does not mean that a constitutional issue has arisen from a decision of a subordinate court. A decision of a subordinate court on any matter within the ambit of its jurisdiction would not be found to have given rise to a constitutional matter on the basis of a founding affidavit complaining about an alleged incorrectness of the decision of the subordinate court.

The question of whether or not the court *a quo* correctly assessed and evaluated the evidence before it is a factual matter that does not involve the interpretation, protection or enforcement of the Constitution. A contention that the court *a quo* did not take some evidence into account in reaching its decision cannot be used as a ground to allege that the applicant's right to a fair trial, enshrined in s 69(1) of the Constitution, was violated.

In *General Council for the Bar of South Africa* v *Jiba and Others* [2019] ZACC 23 it was held as follows at para 49:

> "The apparently incorrect determination of facts by the majority in the Supreme Court of Appeal and the erroneous application of the three-stage test to those facts also do not raise a constitutional issue. This is because the standard is well established and the determination of facts, whether right or wrong, does not amount to a constitutional issue."

Du Plessis, Penfold and Brickhill "*Constitutional Litigation*" (1 edn, Juta & Co Ltd, Cape Town, 2013) state as follows at pp 23-24:

> "While the ambit of the phrase 'constitutional matter' is clearly very wide, it is not unlimited. Most significantly, the Constitutional Court has indicated that a purely factual matter does not amount to a constitutional matter. For example, in *S* v *Boesak* 2001 (1) SA 912 (CC) the appellant contended that the decision of the Supreme Court of Appeal upholding his conviction for fraud and theft contravened his right to a fair trial (and particularly the right to be presumed innocent) and to freedom and security of the person. The basis for this contention was the allegation that the Supreme Court of Appeal erred in its evaluation of the evidence and in finding that Boesak's guilt had been proved beyond reasonable doubt. The Constitutional Court rejected this argument, holding that 'the question whether evidence is sufficient to justify a finding of guilt beyond reasonable doubt cannot itself be a constitutional matter' or, put differently, disagreement with the Supreme Court of Appeal's assessment of facts is not a breach of the right to a fair trial. The court thus held that '[u]nless there is some separate constitutional issue raised … no constitutional right is engaged when the appellant merely disputes the findings of fact made by the [Supreme Court of Appeal].'" (the underlining is for emphasis)

No constitutional issue can arise from a contention that evidence was incorrectly assessed by the subordinate court. The Court does not assume jurisdiction when it is being called upon to reverse factual findings of the court *a quo* on non-constitutional issues.

The remedy of an appeal is available to a litigant who is dissatisfied with an outcome of a matter on the merits. A litigant defines the boundaries of the appeal through the grounds of appeal. This is a clear remedy which was available to the applicant.

In defining his appeal before the court *a quo*, the applicant raised five grounds against the conviction and one ground against the sentence. The judgment of the court *a quo* shows that three of the grounds of appeal against conviction were abandoned. The abandoned grounds attacked the correctness of the High Court's decision on the allegation that proof beyond a reasonable doubt had not been led by the respondent. The abandoned grounds of appeal also raised the issue regarding the lawfulness of the entrapment authority.

At the hearing of the application, the applicant sought to argue that the court *a quo* should have detailed the reasons why he abandoned some of the grounds of appeal. The allegation was that the grounds were not voluntarily abandoned by his legal practitioner. The legal practitioner acted in the interests of his client.

Having abandoned some of the grounds of appeal, the applicant could not seek to revive those grounds of appeal in an application to the Court, alleging that there are irregularities which amounted to a substantial miscarriage of justice. Once a party abandons some of the grounds of appeal, he or she or it cannot seek to attack the appeal court for accepting the abandonment.

On the basis of the grounds of appeal that remained, the court *a quo* made a finding that the applicant was properly convicted on the basis of the evidence that was led in the magistrate's court. The court *a quo* held that the High Court upheld the conviction of the applicant for the offence charged on the basis of the assessment of the evidence which was adduced in the magistrate's court. This is contrary to the applicant's averment that the High Court relied on s 170(2) of the Criminal Law Code as a yardstick to validate his conviction.

In *Mukondo* v *The State* HH 277/17 at p 3 of the cyclostyled judgment the High Court said:

> "The evidence shows that it was the appellant who solicited the bribe. The learned magistrate demonstrated the length to which the appellant went in order to make sure that he personally received the money from the complainant. See *S* v *Fisher* 1971 (1) SA 745 (RA); *S* v *Kamtande* 1983 (1) ZLR 302. There is in my view no basis to interfere with the conviction by the magistrate as it is proper. The appellant in any event failed to discharge the reverse *onus* set out in section 170(2) above."

It is apparent that the *ratio decidendi* applied by the High Court in dismissing the appeal was that there was sufficient direct evidence adduced by the prosecution to prove the guilt of the applicant beyond reasonable doubt. Reference to s 170(2) of the Criminal Law Code is not evidence of the factors which the court took into account and which influenced its mind in making the determination it made. Reference to s 170(2) of the Criminal Law Code was made after the court had reached the conclusion, based on the analysis of the evidence adduced by the State, that the applicant had been properly convicted of the offence of bribery, as the evidence had proved his guilt beyond reasonable doubt.

The court *a quo* was also alive to the issue of the effect of the reference by the High Court to s 170(2) of the Criminal Law Code. The court *a quo* noted that the High Court commented on s 170(2) of the Criminal Law Code. The court *a quo* found that the issue regarding the section in question was a red herring because the conviction was not predicated on that provision. At p 5 of the cyclostyled judgment in *Mukondo* v *The State* SC 44/19 the court *a quo* said:

> "It is clear from a reading of the record that the remarks by the court *a quo* were made *mero motu* and were not based on any submissions that had been made for and on behalf of the respondent before that court. Secondly, the remarks were incorrect as far as they purported to confirm a position that the trial court had taken on the matter. The trial court did not make any finding on the reverse *onus* that is created by s 170(2).
>
> Finally, and more importantly, the remarks by the court *a quo* on s 170(2) were made after the court had concluded that the conviction of the appellant was proper on the basis of the weight of the evidence that the State had led against him. Thus, the *ratio decidendi* of the court *a quo* was its finding that it could not interfere with the factual findings of the trial court, which findings were that the State had led overwhelming evidence against the appellant.

> It is our finding that the remarks constitute an *obiter dictum* and had no effect on the court's *ratio decidendi*. Being such, the remarks cannot form the basis of an appeal. This is the trite position at law."

The Court does not interfere with non-constitutional findings of the lower courts, which findings are arrived at after a careful assessment of the evidence as a whole.

Even if it is assumed that the court *a quo* erred in the assessment of the evidence before it, that would not amount to a violation of the right to a fair trial. The Constitution could not possibly have sought to protect litigants against "wrong decisions".

In *Lane and Fey NNO* v *Dabelstein and Ors* 2001 (2) SA 1187 (CC) the Constitutional Court of South Africa held at p 1190B-C:

> "Even if the [Supreme Court of Appeal] erred in its assessment of the facts, that would not constitute the denial of the ['right to a fair trial and to fair justice']. The Constitution does not and could hardly ensure that litigants are protected against wrong decisions. On the assumption that section 34 of the Constitution does indeed embrace that right, it would be the fairness and not the correctness of the court proceedings to which litigants would be entitled."

In *Williams and Anor* v *Msipha N.O. and Ors* 2010 (2) ZLR 552 (S) at 567B-E the Supreme Court, sitting as a constitutional court, said:

> "The Constitution guarantees to any person the fundamental right to the protection under a legal system that is fair but not infallible. Judicial officers, like all human beings, can commit errors of judgment. It is not against the wrongfulness of a judicial decision that the Constitution guarantees protection. A wrong judicial decision does not violate the fundamental right to the protection of the law guaranteed to a litigant because an appeal procedure is usually available as a remedy for the correction of the decision. Where there is no appeal procedure there cannot be said to be a wrong judicial decision because only an appeal court has the right to say that a judicial decision is wrong. See *Maharaj v A G of Trinidad & Tobago* (No. 2) (PC) [1979] AC 385 at 399 D–H; *Boordman v Attorney General* [1996] 2 LRC 196 at 205i– 206b."

A reading of the judgment of the court *a quo* shows that it did not make any determination on a constitutional issue. The court *a quo* held that the constitutional question which the applicant purportedly intended to raise in his grounds of appeal had no basis. The reason was that the High Court had not confirmed the applicant's conviction on the basis of s 170(2) of the Criminal Law Code. The court *a quo* also noted that the constitutionality of s 170(2) of the Criminal Law Code was not an issue before the trial court. Neither had the presumption of a contravention of s 170(2) of the Criminal Law Code, upon proof by the State of the fact of obtaining, accepting or soliciting a gift or consideration, been relied upon in convicting the applicant. Counsel for the applicant conceded in the court *a quo* that the provision had not been relied on.

The court *a quo* correctly held that there was no basis for seeking to raise as a question of any relevance in the hearing and determination of the appeal against the decision of the High Court the applicability of the provisions of s 170(2) of the Criminal Law Code.

A perusal of the papers before the Court shows that the applicant is basically dissatisfied with the manner in which the evidence was assessed and evaluated by the trial court. He is further dissatisfied by the fact that the court *a quo* did not set aside the conviction and sentence on account of alleged irregularities.

The Court finds the application for an order for direct access to be a disguised appeal against the decision of the court *a quo* which upheld the conviction and the sentence. This can be gleaned from the applicant's founding affidavit, where he states that:

> "… if leave for direct access is granted, I seek for a relief to set aside the proceedings conducted under case number B 1361/14, and the subsequent upholding of the foregoing proceedings under case numbers HH 935/14 and SC 820/17 as being inconsistent with the right to a fair trial guaranteed under section 69(1) of the Constitution of Zimbabwe. I further pray for remittal of the case for trial *de novo* to Guruve Magistrate Court before a different magistrate."

The relief sought is the same as the relief that was sought on appeal to the Supreme Court.

In *Prosecutor General* v *Telecel Zimbabwe* 2016 (2) ZLR 422 (CC) at 428D the Court said:

> "… while the applicant did not specifically state so in his application, in reality the matter was an appeal brought to this Court under the guise of an application. This is abundantly evident from the relief that is outlined in his draft order. It is even more evident from his summary of the background to the intended application, as already indicated. He indicated that he wished to approach this Court 'for an order setting aside the Supreme Court judgment …'."

The applicant is seeking to appeal against the dismissal of the appeal by the Supreme Court.

DISPOSITION

The application is hereby dismissed with no order as to costs.

GWAUNZA, DJC: I agree

GARWE, AJCC: I agree

National Prosecuting Authority, respondent's legal practitioners