REPORTABLE (9)

TUNGAMIRAI NYENGERA

v

THE STATE

CONSTITUTIONAL COURT OF ZIMBABWE
HARARE, NOVEMBER 5, 2019 & JULY 02, 2020

The applicant in person

T Mapfuwa, for the respondent

Before: MALABA CJ, In Chambers

AN APPLICATION FOR AN ORDER FOR LEAVE TO APPEAL TO THE CONSTITUTIONAL COURT

This is a chamber application for leave to appeal to the Constitutional Court ("the Court") against a decision of the Supreme Court ("the court *a quo*") in terms of r 32(2) of the Constitutional Court Rules S.I. 61/2016 ("the Rules"), as read with s 167(5)(b) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013 ("the Constitution").

The Court holds that it is not in the interests of justice that the applicant be granted leave to appeal against the decision of the court *a quo* because no constitutional matter arose or was raised in the decision of the court *a quo*. Consequently, the application has no merit and cannot succeed. The reasons for the decision are set out below.

FACTUAL BACKGROUND

In February 2015 the applicant was charged in the magistrates' court at Bulawayo with fraud as defined in s 136 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] ("the Criminal Law Code"). The background to the charge is that the applicant was the legal practitioner representing one Lungisani Sibanda ("Lungisani"), who was serving a seven-year prison sentence at Khami Maximum Prison for the offence of car theft.

After a failed attempt was made to obtain liberty for Lungisani, it was alleged that the applicant obtained a fake warrant of liberation misrepresenting that Lungisani had been granted bail pending appeal. It was alleged that the fake warrant of liberation was given to Lungisani's sister Lilian. She was the one to present the fake warrant of liberation of her brother from prison to the relevant authorities. In the statement she gave to the police, Lilian implicated the applicant.

After a full trial, the applicant was convicted of the offence and sentenced to forty-eight months' imprisonment, of which twelve months were suspended for five years on conditions of good behaviour.

Dissatisfied with the decision of the trial court, the applicant noted an appeal against both conviction and sentence to the High Court on the following grounds:

"Ad conviction

1. The learned magistrate in the court *a quo* erred, at law, in holding that Absolom Hlupo's evidence was admissible as against his co-accused who, in this case, was the appellant.

2. The learned magistrate erred in holding that the Warrant of Liberation was fake when no evidence was led from the Clerk of Criminal Court's office in the Provincial Magistrates Court, that no record existed thereat where such bail had been granted warranting the Clerk of Criminal Court's stamp to be used.

3. The learned magistrate erred, at law, in holding that the call history regarding the cellphone was admissible as evidence against the appellant without considering, at all, the veracity, authenticity and reliability of such evidence.

   A fortiori, the learned magistrate erred at law in holding that such evidence was admissible when it also clearly infringed on the appellant's constitutional rights and was obtained using a secondary legislation that is not supreme to the Constitution of Zimbabwe. Such evidence, in any event, had not been tendered in terms of the law.

4. The learned magistrate erred in accepting and considering Lilian Tapera's evidence admissible when she testified without being cautioned in terms of the law.

5. The learned magistrate further erred in seeking to have Lilian Tapera's evidence corroborated when, in the first place, it had been taken outside the purview of the law, had clear contradictions, prevarications (*sic*) and could not be relied upon. Despite this, the learned magistrate held that she had acquitted herself very well totally ignoring the aforesaid.

6. The learned magistrate erred in holding that Lilian Tapera's evidence was adequately corroborated by Joyce Sibanda and Richard Bhebhe's evidence totally ignoring, in the process, the glaring inconsistencies in her evidence and also between her evidence and that of these two witnesses.

7. The learned magistrate erred in holding that the envelope which Lilian Tapera saw at the appellant's office was one and the same envelope which was then delivered at Khami Prison and from which a Warrant of Liberation was discovered and on 23 December 2014, not on 24 December 2014 as appeared in the charge.

8. The learned magistrate further erred in holding that appellant's visit to Lilian Tapera's house was the reason why the said witness then gave a different statement at CID Frauds totally ignoring many factors that proved that such a finding was inconsistent with Lilian's own behaviour, her own evidence and that of her mother Joyce Sibanda and the appellant.

9. The learned magistrate erred, at law, in totally disregarding the appellant's evidence which was most probable and accusing him of taking his legal role to the witness stand and, in the process, ignoring the fact that he stood firmly and gave his evidence clearly.

Ad sentence

The learned magistrate's sentence was excessive and harsh to the extent that it induced a sense of shock in light of:

a) The grounds of appeal highlighted above.

b) Its inconsistency with the factors highlighted in mitigation i.e. the appellant's personal circumstances and that no prejudice was suffered.

c) The fact that it basically amounted to paying lip service to the mitigating factors."

The High Court found no merit in the appeal against conviction. It was dismissed.

The appeal against sentence succeeded. The High Court held that the sentence was unduly harsh and excessive. It noted that the applicant was a young lawyer who was at the inception of his career. It was of the view that in passing sentence his immaturity as a lawyer had to be considered.

As a result, the applicant's sentence was reduced from forty-eight months to thirty-six months' imprisonment, twelve months of which were suspended for five years on condition that the applicant did not within that period commit an offence involving dishonesty for which upon conviction he was sentenced to imprisonment without the option of a fine.

Still aggrieved, the applicant noted an appeal against the confirmation of his conviction to the court *a quo*. In his grounds of appeal, he argued that the High Court erred in accepting the evidence of the two witnesses who testified that the warrant of liberation was fake, as such evidence was not in conformity with the law regulating the authenticity of public documents. He further argued that the High Court erred in failing to regard Lilian as an accomplice witness. The argument was also made that the High Court erred in dismissing the applicant's challenge against the admissibility of the call history of his cellphone. Lastly, it was argued that the High Court erred by failing to rule against the admissibility of the confession by the appellant's co-accused in convicting the applicant.

The court *a quo* was of the view that the warrant of liberation was fake beyond a reasonable doubt and that the evidence adduced put this fact beyond any doubt.

As regards the issue whether Lilian was an accomplice witness or not, the court *a quo* held that the High Court was correct in finding that she was not an accomplice, as there was no

evidence that she participated in the generation and presentation of the fake warrant of liberation.

Further, the court *a quo* found that the call history from the applicant's cellphone could be used as evidence against him because his objections to its use in the trial court were not substantiated, and that, in any event, he had consented to it being adduced as evidence.

It was the court *a quo's* finding that, in terms of s 259 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (the "CPEA"), the confession of one Hlupo could not be used against the applicant. As such, it was held that the trial court erred in admitting the confession into evidence against the applicant. However, the court a *quo* found that, even excluding the confession, there was sufficient evidence against the applicant to prove beyond a reasonable doubt that he had committed fraud in contravention of s 136 of Act. The appeal was accordingly dismissed.

On 19 February 2019 the applicant filed the present application for leave to appeal in terms of r 32(2) of the Rules, as read with s 167(5)(b) of the Constitution. He alleged that his right to equal protection and benefit of the law in terms of s 56(1) of the Constitution was violated by the court *a quo* when it upheld the authenticity of the call records.

The applicant further alleged that his right to a fair trial, as enshrined in s 69(1) of the Constitution, was violated by the court *a quo*. The allegation was that the applicant's right to challenge evidence was violated because he was not given the opportunity to "cross-examine the person who informed Lungile Moyo that the warrant was fake". The applicant also averred that his right under s 70(1)(k) of the Constitution not to be convicted of an act that was not an offence when it took place was violated. He alleged that if investigations were still to be completed, the delivery of the warrant of liberation was not an offence at the time of the trial.

It was also the applicant's allegation that his right to be presumed innocent in terms of s 70(1)(a) of the Constitution was infringed upon by the court *a quo*. The applicant challenged the finding by the court *a quo* to the effect that "that the provincial court had issued a warrant was not only remote but fanciful". He also contended that the court *a quo'*s finding on the authenticity of the warrant of liberation infringed his right to be presumed innocent until proven guilty. This finding by the court *a quo* was also alleged to be a violation of s 165(1) of the Constitution, which guarantees that justice must be done to all irrespective of status.

The application was opposed by the respondent. Its argument was that the findings of the court *a quo* were correct, because the evidence proved beyond a reasonable doubt that the warrant of liberation was fake. It was further denied that there were any infringements of the applicant's constitutional rights. Therefore, no constitutional issues arose for determination. It was prayed that the application be dismissed.

APPLICATION OF THE LAW TO THE FACTS

In terms of s 167(5)(b) of the Constitution, the Rules must allow a person, when it is in the interests of justice and with or without leave of the Court, to appeal directly to the Court from any other court. Rule 32 of the Rules gives effect to s 167(5)(b) of the Constitution. It provides in relevant part as follows:

> "***32. Leave to appeal***
>
> (1) …
>
> (2) A litigant who is aggrieved by the decision of a subordinate court on a constitutional matter only, and wishes to appeal against it to the Court, shall within fifteen days of the decision, file with the Registrar an application for leave to appeal and shall serve a copy of the application on the other parties to the case in question, citing them as respondents." (the underlining is for emphasis)

Section 167(1)(b) of the Constitution makes it clear that the jurisdiction of the Court is limited to deciding only constitutional matters and issues connected with decisions on constitutional matters. It is the highest court in all constitutional matters.

The case of *Lytton Investments (Pvt) Ltd v Standard Chartered Bank Zimbabwe Ltd and Anor* CCZ 11/18 is instructive with regards to the specialised jurisdiction of the Court. At p 9 of the cyclostyled judgment the Court said:

> "The Court is a specialised institution, specifically constituted as a constitutional court with the narrow jurisdiction of hearing and determining constitutional matters only. It is the supreme guardian of the Constitution and uses the text of the Constitution as its yardstick to assure its true narrative force. It uses constitutional review predominantly, albeit not exclusively, in the exercise of its jurisdiction."

In *Muza* v *Saruchera and Ors* CCZ 5/19 the Court noted that the purpose of the right of appeal granted to a person under r 32(2) of the Rules, the procedure of an application for leave to appeal provided therein, and the contents of the application required under r 32(3)(c) of the Rules, are premised on the existence of a decision by a subordinate court on a constitutional matter.

The purpose of the Rules is to ensure proper exercise of jurisdiction by the Court. The matter that gives rise to the need for the Court to exercise its jurisdiction must be a constitutional matter decided by the subordinate court.

In *Sadziwani* v *Natpak and Ors* CCZ 15/19 the Court emphasised the need for protecting its jurisdiction and process from abuse. It stated the following at pp 18-19 of the cyclostyled judgment:

> "Jurisdiction is the power or competence of a court to adjudicate on, determine and dispose of a matter. In this regard, the Court is a creature of the Constitution. The principle of constitutional supremacy, as enshrined in s 2 of the Constitution, guarantees that the Court only exercises jurisdiction over matters which are specifically set out in

terms of s 167, as read with s 332, of the Constitution. The principle also ensures that the jurisdiction of the Court, as the highest court on constitutional matters and connected issues, cannot be ousted by legislation.

The Court's power to adjudicate on constitutional matters ought to be construed as a means by which life can be given to the objectives set out in s 3 of the Constitution. The Court, as the highest and most authoritative tribunal in constitutional matters, is tasked with the responsibility of safeguarding the values and objectives of the Constitution. It is charged with the duty of ensuring that these objectives are realised and given effect to.

Thus, it is imperative that the Court is not unduly saddled with cases that have no bearing on the interpretation, enforcement or protection of the Constitution. It is incumbent upon the Court to guard its jurisdiction jealously and eliminate the abuse of its powers. The integrity of the Court is of utmost importance and it ought to be protected.

The deliberately narrow jurisdiction of the Court is meant to shield it from abuse and ensure that it only adjudicates upon that which it is constitutionally mandated to adjudicate on."

The object of the exercise of jurisdiction by the Court is always the protection, promotion and enforcement of the supremacy of the Constitution. Where there is no decision by a subordinate court to justify the allegation of actual or threatened violation of a constitutional provision, the Court will have no cause for the exercise of its jurisdiction.

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 this Constitution".

It is the applicant's case that the decision of the court *a quo* violated his right to equal protection and benefit of the law, enshrined in s 56(1) of the Constitution, when it upheld the authenticity of the call records and upheld the reliance of the trial court upon them. With regards to the admissibility of the call history as evidence against the applicant, the court *a quo* held the following at paras 46-49 of the cyclostyled judgment in *Tungamirai Nyengera* v *The State* SC-67/18:

"The record indicates that the issue that was before the court *a quo* is whether or not the call histories were admissible. The appellant contended that they were not as the evidence '*clearly infringed on the appellant's constitutional rights, and were*

obtained using secondary legislation that is not supreme to the Constitution of Zimbabwe.'

Clearly there is no merit in this ground.

The right to privacy given in the Constitution is derogable and the law under which the call history was ordered by the magistrates' court is an example of one such derogation.

The rules governing the admissibility of documentary evidence in criminal trials are aimed at ensuring a fair trial through the elimination of any potential prejudice to an accused person, who is clearly the weaker of the two adversaries involved in a criminal trial. All these rules, however, yield and fall by the wayside when an accused person consents to the production of documents tendered by the State. Before the trial court, the appellant consented to the production of the call histories without any demur. There was therefore no issue before that court regarding the admissibility of the call histories."

The court *a quo* dismissed the applicant's argument regarding the call history because the applicant had consented to the production of the records at his trial. The finding by the court *a quo* was a finding of fact, which was made after an assessment of the laws of evidence. Where an accused person consents to the adduction of incriminating evidence, he cannot turn around and challenge a conviction which was secured based on that evidence. In coming to this conclusion, the court *a quo* did not decide a constitutional matter because there was no need to interpret, enforce or protect the Constitution in order to come to the conclusion that the call history was admissible as evidence against the applicant. As such, the applicant's argument in this regard ought to fail.

The applicant also argued that his right to a fair trial, as enshrined in s 69(1) of the Constitution, was violated. In this regard he asserted that his right to challenge evidence was impinged upon because the evidence of one Lungile Moyo was at odds with s 253 of the CPEA, in that he was not given the opportunity to "cross-examine the person who informed Lungile Moyo that the warrant was fake".

The position of the law is that a purely factual matter does not amount to a constitutional issue. In *S* v *Boesak* 2001 (1) SA 912 (CC), LANGA DP put this position beyond doubt when he stated the following at para 15(a):

> "A challenge to a decision of the SCA on the basis only that it is wrong on the facts is not a constitutional matter. In the context of section 167(3) of the Constitution the question whether evidence is sufficient to justify a finding of guilt beyond reasonable doubt cannot in itself be a constitutional matter. Otherwise, all criminal cases would be constitutional matters, and the distinction drawn in the Constitution between the jurisdiction of this Court and that of the SCA would be illusory. There is a need for finality in criminal matters. The structure of the Constitution suggests clearly that finality should be achieved by the SCA unless a constitutional matter arises. Disagreement with the SCA's assessment of the facts is not sufficient to constitute a breach of the right to a fair trial. An applicant for leave to appeal against the decision of the SCA must necessarily have had an appeal or review as contemplated by section 35(3)(o) of the Constitution. Unless there is some separate constitutional issue raised therefore, no constitutional right is engaged when an appellant merely disputes the findings of fact made by the SCA."

As a result, the question whether evidence is sufficient to justify a finding of guilt beyond reasonable doubt is not, for the reasons given above, a constitutional matter.

The applicant also averred that his right under s 70(1)(k) of the Constitution not to be convicted of an act that was not an offence when it took place was violated. He alleged that if investigations were still to be completed, the delivery of the warrant of liberation was not an offence at the time of the trial. It is common cause that the applicant was charged with and convicted of fraud as defined in s 136 of the Code. It is also common cause that the Code was in force at the time the applicant's trial commenced. The allegation that the conduct for which the applicant was convicted was not an offence at the time of his trial was not made in seriousness and must be dismissed.

The applicant further advanced the argument that the finding by the court *a quo* that the warrant of liberation was fake infringed his right to be presumed innocent until proven guilty, as enshrined in s 70(1)(a) of the Constitution. This finding by the court *a quo* is also alleged to

be a violation of s 165(1)(a) of the Constitution, which guarantees that justice must be done to all irrespective of status. The applicant further argued that s 70(1)(a) of the Constitution must be read together with s 18(1) of the Criminal Law Code. Section 18(1) provides:

> "**18 Degree and burden of proof in criminal cases**
>
> (1) Subject to subsection (2), no person shall be held to be guilty of a crime in terms of this Code or any other enactment unless each essential element of the crime is proved beyond a reasonable doubt."

As already found, the findings of the court *a quo* regarding the authenticity of the warrant of liberation are within the realm of the law of evidence, particularly the assessment thereof, and do not give rise to a constitutional issue. A decision as to the sufficiency of evidence that is required to sustain a conviction in a criminal prosecution does not ordinarily involve the interpretation or application of any provision of the Constitution. Neither does it involve the application of a law inconsistent with the Constitution, or have any other connection with the Constitution that would make that decision a constitutional matter. The Constitution must be involved in some way before such a finding can be said to raise a constitutional issue within the jurisdiction of the Court.

The fact that there was no constitutional matter that was raised before and determined by the court *a quo* cannot be meaningfully disputed. The applicant was merely aggrieved by the non-constitutional findings of the court *a quo* and this means that the jurisdiction of the Court is not triggered in the circumstances.

In *De Lacy and Anor v South African Post Office* [2011] ZACC 17 at paras 27-28, the Constitutional Court of South Africa held as follows regarding an applicant's dissatisfaction with the factual findings of a lower court:

> "Then, the essence of their contention was that the Supreme Court of Appeal should have held that indirect intent was sufficient to render an organ of state vicariously liable

for the wrongs of its employees and that on the evidence they had established that the Post Office's employees had acted with indirect intent to defraud.

That was the applicants' constitutional focus. And yet the bulk of its papers were devoted to an exhaustive critique of the factual findings of the Supreme Court of Appeal. Their grievance had all the hallmarks of a mere dissatisfaction with factual findings. The Post Office opposed the application. On 9 July 2009, this Court dismissed it for lack of prospects of success." (the underlining is for emphasis)

See also *Chiite and Ors* v *The Trustees of the Leonard Cheshire Homes Zimbabwe Central Trust* CCZ 10/17.

Consequent to the above, the issue relating to the hierarchy of courts in non-constitutional matters arises. In this regard, s 169(1) of the Constitution is paramount. It provides as follows:

"**169 Jurisdiction of Supreme Court**

(1) The Supreme Court is the final court of appeal for Zimbabwe, except in matters over which the Constitutional Court has jurisdiction."

In *Rushesha and Ors* v *Dera and Ors* CCZ 24/17 GWAUNZA JCC (as she then was), at p 10 of the cyclostyled judgment, interpreted this provision in the following manner:

"The import of this provision needs no elaboration. Only where the Supreme Court determines a constitutional issue, may one appeal to this Court for a final determination. Because the Supreme Court in this matter did not determine any constitutional issue, the decision it rendered was final and not appealable."

Section 26(1) of the Supreme Court Act [*Chapter 7:13*] reaffirms the above position. It states:

"**26 Finality of decisions of Supreme Court**

(1) There shall be no appeal from any judgment or order of the Supreme Court."

In the *Lytton Investments (Pvt) Ltd* case *supra*, the Court held that the principles that emerge from s 169(1) of the Constitution, as read with s 26 of the Supreme Court Act, are clear. At p 22 of the cyclostyled judgment, the Court said:

> "A decision of the Supreme Court on any non-constitutional matter in an appeal is final and binding on the parties and all courts except the Supreme Court itself. No court has power to alter the decision of the Supreme Court on a non-constitutional matter. Only the Supreme Court can depart from or overrule its previous decision, ruling or opinion on a non-constitutional matter. The *onus* is on the applicant to allege and prove that the decision in question is not a decision on the non-constitutional matter."

There was no constitutional issue raised before and determined by the court *a quo*. The dismissal of the appeal by the court *a quo* remains final. It cannot be appealed against. As such, the application has no merit and it ought to be dismissed.

DISPOSITION

The application is dismissed with no order as to costs.

GARWE, AJCC: I agree

HLATSHWAYO, AJCC: I agree

National Prosecuting Authority, respondent's legal practitioners