

REPORTABLE: (13)

ZIMBABWE WOMEN LAWYERS ASSOCIATION
v
**(1) THE MINISTER OF JUSTICE, LEGAL AND
PARLIAMENTARY AFFAIRS (2) MINISTER OF WOMEN
AFFAIRS, COMMUNITY SMALL AND MEDIUM
ENTERPRISES DEVELOPMENT (3) THE ZIMBABWE
GENDER COMMISSION (4) THE ZIMBABWE HUMAN
RIGHTS COMMISSION (5) NATIONAL COUNCIL OF
CHIEFS**

**CONSTITUTIONAL COURT OF ZIMBABWE
GARWE JCC, MAKARAU JCC & GOWORA JCC
HARARE: 13 JULY 2021 & 9 DECEMBER 2021**

C. Damiso with D. Atukwa, for the applicant

F. Chimbaru, for the first and second respondents

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

GARWE JCC

[1] This is an application for an order of leave for direct access to the Constitutional Court (“the Court”) in terms of s 167(5) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013 (“The Constitution”) as read with r 21 (2) of the Constitutional Court Rules S.I. 61/2016 (“the Rules”). In the event that such leave is granted, the applicant intends to bring an application before the Court in terms of s 85 of the Constitution seeking an order to the effect that the definition of a “marriage” provided in s 2 of the Matrimonial Causes Act

[Chapter 5:13] (“the Act”) is constitutionally invalid because it deliberately discriminates against unregistered customary unions.

[2] The applicant accepts that the first respondent introduced a Marriages Bill (HB 7, 2019) (“the Bill”) in Parliament and that according to its long title its objectives are, *inter alia*, to consolidate the law relating to marriages, to provide for the recognition and registration of customary law unions, to provide for the recognition of civil partnerships and to amend several statutes, including the Matrimonial Causes Act. At the hearing of this matter the Bill apparently had been transmitted to the Senate. A copy of the Bill was not made available to the Court. It was, however, common cause that the Bill was still to be debated in the Senate and that the processes provided for in Part 6 of Chapter 6 as read with the Fifth Schedule of the Constitution were still to be undertaken.

[3] In these circumstances, it is unknown at this stage what the final fate of the Bill will be. It would therefore be most inappropriate for this Court to make any definitive pronouncement on a matter that is still under debate by Parliament. As the matter is not ripe for consideration by this Court, it would not be in the interest of justice that leave be granted for the applicant to approach this Court directly.

FACTUAL BACKGROUND

[4] The applicant is a *universitas* whose objectives, *inter alia*, include dealing with all matters affecting the professional interests of women lawyers and promoting the legal status and rights of women and children. The application in respect of which direct access is sought is an application for a declaration of rights in terms of s 85 of the Constitution. The applicant contends that the definition of what constitutes a marriage under s 2 of the Act is

unconstitutional in three respects. First, it excludes unregistered customary law unions. Therefore the safeguards that ensure fairness and equity in the division of property amongst spouses upon divorce are not available to women married under this regime. This amounts to discrimination and violates s 56 (1) of the Constitution as the needs of the spouses and their indirect contributions during the subsistence of the union are not taken into account. Secondly, the failure to treat unregistered customary unions as valid also violates the rights of the spouses to language and culture (s 63) and, third, human dignity (s 51).

[5] The applicant accepts that the Bill has been transmitted to the Senate. Although it engaged Parliament in order to include a clause recognising the validity of unregistered customary unions, it alleges that its proposals were not taken up. If given leave it will seek a declaration that s 2 of the Act is constitutionally invalid. It will also seek an order that pending the process of remedying the defect, s 2 of the Act be read to include an unregistered customary law union.

SUBMISSIONS BEFORE THIS COURT

[6] Asked during oral submissions whether the matter was ripe for adjudication by the Court and whether this was not a matter for Parliament, counsel for the applicant, whilst acknowledging that no-one can tell at this point in time what the fate of the Bill in the Senate will be, as well as thereafter, argued that the matter is ripe for determination by this Court. She stated that there is nothing to stop this Court from determining whether s 2 of the Act, in its current form, is compliant with the Constitution. She accepted, however, that it was still possible for an amendment to be effected by Parliament in the current Bill.

[7] In her submissions, counsel for the first and second respondents, whilst conceding that s 2 of the Act excludes customary law unions in its definition of what constitutes a marriage, argued that the applicant is asking this Court to usurp Parliament’s law-making functions. She further argued that the applicant can continue to lobby Parliament to amend the Bill to include unregistered customary marriages. Further, there is no guarantee that the President will assent to the Bill in its current form. Counsel, therefore, submitted that the applicant has no prospects of success because what it is asking this Court to do is take over Parliament’s legislative function.

THE LAW ON DIRECT ACCESS

[8] Direct access to the Constitutional Court is an extraordinary procedure granted in deserving cases that meet the requirements prescribed by the relevant rules of the court. Rule 21 (3) of the Rules prescribes what must be contained in an application of this nature. It provides 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.”

[9] Rule 21 (8) of the Rules goes on to provide:

“(8) In determining whether or not it is in the interests of justice for a matter to be brought directly to the Court, the Court or Judge may, in addition to any other relevant consideration, take the following into account:

- (a) the prospects of success if direct access is granted;
- (b) whether the applicant has any other remedy available to him or her;
- (c) whether there are disputes of fact in the matter.” (Underlining is my own)

[10] It follows from sub-rule (8) above, that the three factors itemised therein are not the only factors that may be taken into account. The rule is clear that, in addition, there may be other relevant considerations that this Court may take into account in deciding whether or not direct access should be granted.

[11] Rule 21 (1) of the Rules provides for matters that fall within the exclusive jurisdiction of the court. In respect of those matters, no other court other than this Court has jurisdiction. The court, however, shares concurrent jurisdiction with lower courts in respect of the remaining constitutional matters that may require determination. It is in respect of those matters that leave to approach the court directly is required. An applicant seeking direct access must show that it is in the interests of justice that the matter be heard directly by this Court at first instance. This is because direct access is by its very nature an extraordinary remedy that is granted in very few cases. As I Currie and J de Waal in *The Bill of Rights Handbook*, 6ed, p 128 point out, constitutional matters cannot be brought directly to the court as a matter of course. If this were to be allowed, the court could get bogged down in cases in which there may be disputes of fact on which evidence might be necessary or may be called upon to decide constitutional issues which are not decisive of the litigation and which might prove to be of purely academic interest. It is also not ordinarily in the interests of justice for any court, including this Court, to sit as a court of first instance without there being the possibility of appealing against the decision taken.

[12] This Court, in various cases, has stressed that an applicant for direct access must satisfy two requirements. He must, firstly, show why it is in the interests of justice to have the matter determined directly by the court. Secondly, he must show that the main application has prospects of success.

DOCTRINE OF AVOIDANCE, RIPENESS

[13] It is not in dispute that, as the law currently stands, unregistered customary law unions have very limited recognition at law. In terms of s 3 of the Customary Marriages Act [Chapter 5:07] they are recognised as valid only for the purposes of legitimacy of the children born thereto and for the distribution of property upon the death of a spouse.

[14] The doctrine of constitutional avoidance dates back to the United States of America Supreme Court decision in *Ashwander v Tennessee Valley Authority*, 297 US 288 (1936). In that decision the court formulated the doctrine as consisting of seven rules, namely:-

1. The Court will not “pass upon” the constitutionality of legislation in a friendly, non-adversary, proceeding.
2. The Court will not anticipate a question of constitutional law in advance of the necessity of deciding it.
3. The Court will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.
4. The Court will not pass upon a constitutional question, although properly presented by the record, if there is also present some other ground upon which the case may be disposed.
5. The Court will not pass upon the constitutionality of a statute unless the plaintiff was injured by operation of the statute.
6. The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits.
7. Even if “serious doubt[s]” concerning the validity of an act of Congress are raised, the court will first ascertain “whether a construction of the statute is fairly possible by which the question may be avoided.”

[15] Rule 2 as formulated in the above cited case constitutes what has come to be referred to as ripeness. The rule in essence postulates that there can be no anticipation of a constitutional issue in advance. The principle of ripeness is therefore part of the doctrine of avoidance. The basic rationale of the ripeness principle is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies and to protect the agencies from judicial interference until an administrative decision

has been formalised and its effect felt in a concrete way by the litigating parties – *Abbot Laboratories v Gardner* 387 US 136 1967.

[16] *Hoexter, Administrative Law in South Africa*, 2nd ed 2012 at p 585 describes the doctrine in the following terms:

“The idea behind the requirement of ripeness is that the complainant should not go to court before the offending action or decision is final, or at least ripe for adjudication. It is the opposite of the doctrine of mootness, which prevents a court from deciding an issue when it is too late. The doctrine of ripeness holds that there is no point in wasting the courts’ time with half-formed decisions whose shape may yet change, or indeed decisions that have not yet been made.”

[17] In *Ferreira v Levin N.O. & Ors, Vryehoek v Powell N.O. & Others* 1996 (1) SA 984 CC, 199 KRIEGLER J pertinently remarked as follows:

“The essential flaw in the applicant’s cases is one of timing or, as the Americans and, occasionally the Canadians call it, “ripeness”. That term has a particular connotation in the constitutional jurisprudence of those countries which need not be analysed now. Suffice it to say that the doctrine of ripeness serves the useful purpose of highlighting that the business of a court is generally retrospective, it deals with situations or problems that have already ripened or crystallised, and not with prospective or hypothetical ones. Although, as Professor Sharpe points out and our Constitution acknowledges, the criteria for hearing a constitutional case are more generous than for ordinary suits, even cases for relief on constitutional grounds are not decided in the air. And the present cases seem to me, as I have tried to show in the parody above, to be pre-eminent examples of speculative cases. The time of this Court is too valuable to be frittered away on hypothetical fears of corporate skeletons.”

[18] Ripeness therefore entails consideration of the timing of a constitutional challenge. Where a constitutional issue can be dealt with more conveniently at a later stage and the applicant will get no tangible advantage from an earlier ruling, the doctrine of ripeness requires the applicant to wait until the court can ground its decision in a concrete relief. A court will not entertain a matter if it is premature in the sense that rights or interests have not been infringed or threatened. The term may also be used where alternative remedies have not been exhausted or an issue can be resolved without recourse to the Constitution. Whilst the concept is not

precisely defined, the position appears settled that, if it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course that should be taken – *Max du Plessis et al, Constitutional Litigation*, at p38.

[19] That avoidance and ripeness are part of the law of this country, there can be no doubt – see for example the decision of this Court in *Berry (Nee Ncube) & Anor v The Chief Immigration Officer & Anor* 2016 (1) ZLR 38 (CC), *Katsande & Anor v Infrastructure Development Bank of Zimbabwe* CCZ 9/17; *Chawira & Ors v Minister of Justice, Legal and Parliamentary Affairs & Ors* 2017 (1) ZLR 117 (CC).

THE FACTS OF THIS CASE

[20] It is common cause that one of the objectives of the Marriages Bill is to provide for the recognition and registration of customary law unions and to amend several statutes, including the Matrimonial Causes Act. During the hearing of this matter, this Court was advised by counsel for the applicant that the Bill had since been passed by the National Assembly and had now been transmitted to the Senate. That is all that is known about the Bill.

[21] It is not known whether the National Assembly made any amendments to the Bill. It is not known what its fate in the Senate will be. Even if the Bill is passed by both houses and presented to the President for his assent, he may refer it back to Parliament together with detailed reasons for his reservations. See s 131(5) of the Constitution. When that happens, the National Assembly must reconsider the Bill or pass it with or without amendments before it is once again referred to the President. If the President still has reservations, he must refer the Bill to the Constitutional Court for advice on its constitutionality. Further, in terms of Part 3 of the Fifth Schedule to the Constitution, neither the National Assembly nor the Senate may give a

Bill its final reading unless a report of the Parliament Legal Committee has been presented to the House. An application can also be made to the Constitutional Court by a Vice-President or a Minister for a declaration that the provision, if enacted, would be consistent with the Constitution.

[22] Regard being had to the above procedural requisites, it is unknown whether the Bill will be passed into law and, if so, whether this will be with or without amendments. Counsel for the applicant did concede during the hearing that an amendment to the Bill is still possible to include customary law unions in the definition of marriage.

MATTER NOT RIPE FOR ADJUDICATION

[23] Clearly therefore the matter is not ripe for adjudication by this Court. This is a matter that currently is the subject of consideration by Parliament and, perhaps thereafter, by the President. Indeed in *Doctors for Life International v The Speaker of the National Assembly* CCT 12/05 NCOBO J, whilst dealing with the competence of the court to interfere with the autonomy of Parliament to regulate its internal proceedings, made the following pertinent remarks:

“(68) Courts in other jurisdictions, notably in the Commonwealth jurisdictions, have confronted this question. Courts have traditionally resisted intrusions into the internal procedures of other branches of government. They have done this out of comity and, in particular, out of respect for the principle of separation of powers. But at the same time they have claimed the right as well as the duty to intervene in order to prevent the violation of the Constitution. To reconcile their judicial role to uphold the Constitution, on the one hand, and the need to respect the other branches of government, on the other hand, courts have developed a “settled practice” or general rule of jurisdiction that governs judicial intervention in the legislative process.

(69) The basic position appears to be that, as a general matter, where the flaw in the law-making process will result in the resulting law being invalid, courts take the view that the appropriate time to intervene is after the completion of the legislative process. The appropriate remedy is to have the resulting law declared invalid. However, there are exceptions to this judiciary developed rule or “settled practice”. Where immediate intervention is called for in order to prevent the violation of the Constitution and the

rule of law, courts will intervene and grant immediate relief. But intervention will occur in exceptional cases, such as where an aggrieved person cannot be afforded substantial relief once the process is completed because the underlying conduct would have achieved its object.”

DISPOSITION

[24] The conclusion is inescapable that the issue raised in this application is not ready for adjudication by this Court. Until the fate of the Bill is known, it would not only be inappropriate and unwise but also premature for this Court to make a determination on the constitutionality of the definition of marriage in s 2 of the Matrimonial Causes Act. I find therefore that it is not in the interest of justice that leave for direct access be granted to the applicant.

[25] On the question of costs, I find no reason to depart from the normal practice of this Court not to award costs in constitutional applications. In light of this conclusion, it becomes unnecessary to determine whether or not the applicant has an alternative remedy at its disposal.

[26] In the result, the following order is made:-

“The application is dismissed with no order as to costs.”

MAKARAU JCC : I agree

GOWORA JCC : I agree

Atukwa Attorneys, applicant’s legal practitioners

Civil Division of the Attorney General’s Office, 1st and 2nd respondent’s legal practitioners