

REPORTABLE (2)

JOSEPH CHANI

v

(1) JUSTICE HLEKANI MWAYERA

(2) MICHAEL MUGABE

(3) MUSUTAMI CHIFAMUNA

(4) NATIONAL PROSECUTING AUTHORITY

**CONSTITUTIONAL COURT OF ZIMBABWE
HARARE, JULY 26, 2019 & JANUARY 08, 2020**

The applicant in person

No appearance for the first and the third respondents

F I Nyahunzvi, for the second and the fourth respondents

Before: MALABA CJ, In Chambers

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

This is a chamber 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”).

FACTUAL BACKGROUND

At the conclusion of his trial in the High Court, the applicant was convicted of murder, as defined in s 47(1) of the Criminal Law (Codification and Reform Act) [*Chapter 9:23*] (“the Criminal Law Code”). The first respondent presided over the trial. The applicant was sentenced to eighteen years’ imprisonment. He is dissatisfied with the manner in which his case was investigated prior to the trial. The facts of the case are as follows.

The applicant was the second-in-command of the security forces tasked with the duty of protecting Chiadzwa Diamond Mine. It is averred that on 23 September 2011 four brothers were arrested in one of the “diamond fields”. They were detained in an open wire enclosure under police and army guard while awaiting transportation to the court in Mutare.

At 22:00 hours of the same day one of the brothers (hereinafter referred to as “the deceased”) was found dead, lying face down in the enclosure. As a result, the Zimbabwe Republic Police Marange Criminal Investigations Department attended the sudden death scene. Investigations were carried out by the third respondent. The applicant said that the third respondent transported the body of the deceased to the Mutare Hospital Mortuary for a post-mortem to be carried out to establish the cause of death.

It is the applicant’s case that the Zimbabwe Republic Police sent the “sudden death docket” to the second respondent, who was the prosecutor in the criminal trial, instead of transmitting the same to the resident magistrate for assessment, purportedly in terms of the Inquests Act [*Chapter 7:07*] (“the Inquests Act”). It is contended that the second respondent, not being authorised to process a sudden death docket, violated the applicant’s right to a fair trial. The applicant submits that his prosecution before the High Court was instituted on a defective charge because the inquest proceedings had not been conducted in a manner that complied with the Inquests Act.

The applicant further avers that during the trial the State was afforded the opportunity to lead evidence from thirteen witnesses, yet he was allowed to call only one witness. It is against this background that the applicant alleges that ss 68(1) and 69(1) of the Constitution were violated.

Section 68(1) of the Constitution provides as follows:

“68 Right to administrative justice

(1) Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair.”

Section 69(1) of the Constitution guarantees the right to a fair trial. The section provides:

“69 Right to a fair hearing

(1) Every person accused of an offence has the right to a fair and public trial within a reasonable time before an independent and impartial court.”

It is on the basis of the alleged failures by the second, the third and the fourth respondents to observe pre-trial procedures that the applicant is of the view that the aforementioned constitutional provisions were violated.

The application for an order for direct access was opposed by the second and the fourth respondents (“the respondents”). The respondents raised a preliminary point, in their opposing affidavit, to the effect that the application was not properly before the Court, as the applicant’s affidavit reveals only a narration of a myriad of administrative actions he is aggrieved with. It was further contended that the applicant does not demonstrate how his rights have been infringed.

On the merits, it was contended by the respondents that inquests are held only to establish the identity of the deceased and whether he or she died of natural causes or death was

a result of an unlawful act perpetrated by another person. It was argued that the provisions of the Inquests Act were not relevant to the proceedings before the trial court. They averred that the alleged irregularities should have been raised with the Supreme Court when the appeal was heard. Consequently, the respondents prayed that the application be dismissed.

DETERMINATION OF THE ISSUES

WHETHER OR NOT THE APPLICATION IS PROPERLY BEFORE THE COURT

The applicant intends to bring the substantive application directly to the Court in terms of s 85(1)(a) of the Constitution alleging an infringement of his fundamental rights. The relevant provision reads as follows:

“85 Enforcement of fundamental human rights and freedoms

- (1) Any of the following persons, namely —
- (a) any person acting in their own interests; ...

is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this Chapter has been, is being or is likely to be, infringed, and the court may grant appropriate relief, including a declaration of rights and an award of compensation.”

The above provision does not require the applicant to prove an actual violation of his rights. It will suffice for the applicant to merely allege an infringement of his fundamental rights for an application to be properly before the Court.

In *Meda v Sibanda and Ors* 2016 (2) ZLR 232 (CC) at 236B-D the Court held as follows in this regard:

“It is clear from a reading of s 85(1) of the Constitution that a person approaching the Court in terms of the section only has to allege an infringement of a fundamental human right for the Court to be seized with the matter. The purpose of the section is to allow litigants as much freedom of access to courts on questions of violation of fundamental human rights and freedoms with minimal technicalities. The facts on which the allegation is based must, of course, appear in the founding affidavit.

Whether or not the allegation is subsequently established as true is a question which does not arise in an enquiry as to whether the matter is properly before the Court

in terms of s 85(1). In this case, the applicant alleged in the founding affidavit that her right to property had been infringed. Whether her allegation is true or not is not the issue. What matters is that she alleged a violation of a fundamental human right and as such the Court was properly seized with the matter. The question of the veracity of the allegation would have been tested on the basis of evidence placed before the Court.” (the underlining is for emphasis)

The determination was reinforced by the Court in *Denhere v Denhere (nee Marange)* and *Anor CCZ 9/19* at p 10 of the cyclostyled judgment, where the Court held as follows:

“The provision entitles any person to approach the courts and seek relief where he or she or it alleges that a fundamental right has been violated. It raises three important factors.

The first factor is that the provisions of s 85(1) of the Constitution do not limit the right of approach to vindicate a fundamental right or freedom to a specific court. The present application is based on an allegation of violation of fundamental rights. The applicant correctly approached the Court for appropriate relief.

The second point is that s 85(1) of the Constitution requires that a person with the stated interests in the protection and enforcement of a fundamental right or freedom enshrined in Chapter 4 only has to allege infringement of the right or freedom to have the right of access to a court to seek appropriate relief.” (the underlining is for emphasis)

The mere fact that the applicant has alleged an infringement of his fundamental rights is enough for the purposes of finding in the affirmative that the application is properly before the Court.

IS IT IN THE INTERESTS OF JUSTICE TO GRANT DIRECT ACCESS?

The requirements of applications for direct access to the Court are prescribed by r 21 of the Rules. Subrule (3) of r 21 sets out requirements which have to be complied with where an application for direct access is made to the Court. The rule provides that, for the purpose of meeting the test, the application should set out the following:

- “(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.”

In an application of this nature, it is of utmost importance that the applicant illustrates clearly in his or her or its founding affidavit that it is in the interests of justice that an order for direct access be granted.

In *Liberal Democrats and Ors v President of the Republic of Zimbabwe E D Mnangagwa NO and Ors CCZ 7/18* at p 11 of the cyclostyled judgment the Court noted that:

“It is imperative for an applicant for an order for leave for direct access to indicate that it is in the interests of justice that an order for direct access be granted. Where the affidavit does not satisfy the requirement, the application has no basis. Rule 21(3)(a) requires that the founding affidavit should have regard to the matters that show why the interests of justice would be served if an order for direct access is granted.”

The applicant has not stated in his founding affidavit that it would be in the interests of justice for direct access to the Court to be granted. He merely states numerous issues he desires the Court to determine. For instance, he states that he wishes the Court to establish whether the second respondent’s conduct was inconsistent with the Inquests Act. The applicant consequently failed to establish a basis for the application.

In *Sadziwani v Natpak (Pvt) Ltd and Ors CCZ 15/19* at p 6 of the cyclostyled judgment, the Court found as follows in this regard:

“The applicant’s founding affidavit does not state the basis upon which the Court should consider that it is in the interests of justice to grant the application. Such omission is fatal to the application because the application is not compliant with the Rules. The application has no basis. An application stands or falls on its founding affidavit.”

The Court can only entertain a direct application in terms of s 85(1) of the Constitution if the application raises a constitutional question or matter to be determined by the Court.

In *Moyo v Sergeant Chacha and Ors* CCZ 19/17 at p 24 of the cyclostyled judgment the Court said:

“The making of an application alleging infringement of a fundamental human right or freedom does not necessarily mean that the issue for determination is violation of a fundamental human right or freedom enshrined in the Constitution. The Constitutional Court still has to satisfy itself that the issue for determination is a constitutional matter or an issue connected with a decision on a constitutional matter involving the interpretation, protection or enforcement of the constitutional guarantee of the fundamental human right or freedom.” (the underlining is for emphasis)

A matter does not become a constitutional matter and fall within the jurisdiction of the Constitutional Court merely because it is brought in terms of s 85(1) of the Constitution. The mere reference to constitutional provisions or alleged infringement of constitutional rights does not mean that a constitutional issue has been raised. See *Magurure and Ors v Cargo Carriers International Hauliers (Pvt) Ltd t/a Sabot* CCZ 15/16.

The applicant’s first allegation is that his right to a fair trial as envisaged in s 69(1) of the Constitution was violated on the basis “that most procedures for a trial to commence were not followed”. This is premised on the allegation that the inquest procedures were not followed.

Fair trial rights will accrue when the object of the proceedings is to determine the guilt or innocence of the accused. A person becomes an accused when he is charged with committing an offence. In *National Director of Public Prosecutions v Phillips* 2002 (1) BCLR 41 (W) at paras [40] and [41], the court held that “an accused person is someone called to answer a charge” in proceedings that culminate in a conviction. Therefore, for rights in terms of s 69(1) of the Constitution to accrue to the applicant, he must have been charged. In *Du Preez v Attorney-General, Eastern Cape* 1997 (2) SACR 375 (E) at 382j-383a, ZIETSMAN JP held that “a person is not ‘charged’ with an offence” until he or she “is advised by a competent authority that a decision has been taken to prosecute” him or her.

When the inquest proceedings were conducted, the applicant had not been charged and hence was not an accused person. The right to a fair trial, as contemplated in s 69(1) of the Constitution, had not accrued to him and thus the manner in which the inquest proceedings were conducted cannot render the consequent trial unfair. This is even more so in the absence of any allegation stating that evidence from the inquest proceedings was adduced at the trial.

The question whether or not the inquest proceedings were conducted in a procedural manner does not involve the interpretation, protection and enforcement of the Constitution in respect of the right to a fair trial. The question does not raise a constitutional matter and thus the Court cannot assume jurisdiction on the basis of these allegations. In any event, it should be noted that the reason for the prosecutor assessing the docket was merely to establish that in the light of the cause of death an inquest had to be done. It had more to do with the deceased than the applicant.

The applicant in the intended application further seeks to impugn the admission of evidence by the trial court, particularly with regard to evidence given by witnesses and the fact that there was no murder weapon or a conclusive post-mortem result.

Du Plessis, Penfold and Brickhill in "*Constitutional Litigation*" (1 edn Juta & Co (Pty) Ltd, Cape Town 2013) remarked 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)

The findings by the trial Judge, whether correct or not, do not result in the infringement of any constitutional rights of the applicant. The Court in *Williams and Another v Msipha N.O. and Others* 2010 (2) ZLR 552 (S) put the matter beyond any doubt. It held at 567B-C that:

“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.” (the underlining is for emphasis)

If the applicant was aggrieved by the admission of, or refusal to admit, any evidence as reflected by his founding affidavit, he ought to have articulated his grievances through the appeal procedure. It has not been disputed by the applicant that the irregularities complained of were neither raised in nor dealt with by the Supreme Court. Strangely, the applicant did not even make mention of the fact that the matter went on appeal to the Supreme Court (*Joseph Chani v S* SC 43/17). It is only through the respondents’ opposing papers that the Court was made aware of the fact that the matter was dismissed on appeal. The fact that the applicant lost the non-constitutional case in the Supreme Court is fatal to the application. The Court cannot inquire into the final decision of the Supreme Court.

In *Lytton Investments (Pvt) Ltd v Standard Chartered Bank Zimbabwe Ltd and Anor* CCZ 11/18, 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.”

The law provides a clear remedy of an appeal where an applicant is not content with a decision of a lower court. An appeal procedure is a protection in itself. Competent relief on the irregularities alleged could have been granted by the Supreme Court. See *Everjoy Meda v Maxwell Matsvimbo* 2016 (2) ZLR 232 (CC) at p 236E.

The protection of the right enshrined in s 68(1) of the Constitution has been given effect to, through the enactment of the Administrative Justice Act [*Chapter 10:28*] (“the AJA”), in accordance with s 68(3) of the Constitution. The applicant ought to have resorted to the remedy prescribed by the AJA for the protection and enforcement of the right he claims was infringed by the administrative conduct of the second respondent.

In *Zinyemba v Minister of Land and Rural Resettlement and Anor* 2016 (1) ZLR 23 (CC) at 26D-F the Court said:

“Once an Act of Parliament which gives effect to all the rights to just administrative conduct set out in subss (1), (2) and (3) is enacted, s 68 of the Constitution takes a back seat. The question whether any administrative conduct meets the requirements of administrative justice must be determined in accordance with the provisions of the Administrative Justice Act. Unless there is no Administrative Justice Act or the complaint is that the provisions of the Act do not give effect to the fundamental rights guaranteed under s 68(1) of the Constitution in the terms required by subs (3), s 68 cannot found a complaint of its violation in terms of s 85 of the Constitution.

Where there is an Administrative Justice Act which gives full effect to all the substantive and procedural requirements for effective protection of the fundamental rights guaranteed under s 68, the Act must surely govern the process for the determination of the question whether a specific administrative conduct is in accordance with the standards of administrative justice. There cannot be an allegation in terms of s 85(1) of the Constitution of administrative conduct violating the fundamental right to administrative justice enshrined in s 68 of the Constitution when there is an Act of Parliament which validly gives full effect to the requirements for the protection of the fundamental right against the provision of which the legality of the administrative conduct must be tested.”

In *South African National Defence Union v Minister of Defence and Others* 2007

ZACC 10 (CC) the Constitutional Court of South Africa said:

“Where legislation is enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard.”

See also *MEC for Education, Kwa-Zulu Natal and Others v Pillay* 2008 (1) SA 474.

DISPOSITION

In the result, it is ordered that -

“The application be and is hereby dismissed with costs.”

MAKONI JCC: I agree

BERE: JCC: I agree

National Prosecuting Authority, second and fourth respondents’ legal practitioners