REPORTABLE (11)

RITA MARQUE MBATHA
v
(1) ANITAH TSHUMA
(2) VINCENT NCUBE
(3) MESSENGER OF COURT, HARARE

CONSTITUTIONAL COURT OF ZIMBABWE
GARWE JCC, GOWORA JCC & HLATSHWAYO JCC
HARARE, SEPTEMBER 12, 2023 & July 23, 2024.

The applicant in default,

Mr *ABC Chinake* for the first respondent,

Ms *A Sunday* for the second respondent,

HLATSHWAYO JCC:

[1] This is a court application for an order for direct access to the Constitutional Court ("the Court"), brought in terms of r 21(2) of the Constitutional Court Rules, 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, 2013 ("the Constitution") wherein she intends to move the court to make a finding that the first respondent interfered with proceedings and violated her fundamental rights. Consequently, she seeks an order allowing her to file her application under CCZ 05/22 which had been struck off for the reason that the applicant had not served it on the second respondent.

BACKGROUND

[2] The applicant is Rita Mbatha. She has filed this application for direct access against the first respondent who is the Registrar of this Court as well as the Chief Registrar of the Superior Courts of Zimbabwe. The second respondent is one Vincent Ncube, a male adult, who has been involved in litigation with the applicant. The third respondent is a Messenger of Court in Harare.

[3] The facts founding this application are as follows. The applicant alleges that the first respondent unduly interfered in proceedings involving the applicant and the second respondent. According to the applicant, the first respondent abused her position as Registrar of the Constitutional Court by influencing the second respondent to lie that he was not served with the application under case no. CCZ 55/22. She makes reference to the second respondent's pleadings under case no. CCZ 55/22, wherein he stated the following:

> "I was not served with the application by 1st respondent. I got to know of the existence of a constitutional court application through a telephone call by the Registrar of this Court on 2nd of November that I was supposed to file a response to 1st Respondent's application when I was in Gwanda."

[4] It is the above-mentioned conduct that is impugned for creating an unfair advantage for the second respondent in the proceedings under case no. CCZ 55/22. In addition, the applicant submits that the second respondent was allowed to file his papers out of time. She further avers that the second respondent was out of time by five months. It is

contended that this act was done without an order for condonation being granted by this Court.

[5] The applicant further makes the allegation that the first respondent took a lot of time to go through the applicant's pleadings filed on the Integrated Electronic Case Management System, (hereinafter "IECMS") and that such conduct is intentional and designed to frustrate the applicant. The applicant further contends that the first respondent interferes with matters involving her even in the High Court. In that same vein, she avers that the first respondent has failed to appreciate her role as a senior employee of the Constitutional Court because she accepted the second respondent's pleadings which were filed five months out of time.

[6] To this end, the applicant intimates that her right to a fair trial under s 69 of the Constitution has been infringed by the first respondent in a manner that is inconsistent with the Constitution. It is contended that the right to a fair hearing is also covered by the rules of Natural Justice. She cites, *inter alia*, sections 56(1) and (3), 69(2), 175(6) 164(1), (2), (3) as having a bearing on the present matter.

[7] In her founding papers, the applicant submits that the prospective application enjoys prospects of success. She asserts that the rule of law subjects every person to the same standard. As such her unfair and unequal treatment amounted to a violation of this principle. She submits that there was considerable harm occasioned by the first respondent's conduct. The applicant insists that there are no alternative remedies save for

the present application to request the full bench of this Court to preside over the matter. It is also contended that there are no disputes of fact that preclude the determination of the matter based on the papers filed of record.

[8] The application is opposed by the both respondents. The first respondent's preliminary objections relate to the manner of citation, where the applicant has cited her in her personal capacity whilst making allegations based on her professional conduct as Chief Registrar and Registrar of the Constitutional Court. She also highlights the absence of a cause of action and the defective nature of the relief sought by the applicant.

[9] On the merits, the first respondent argues that the applicant failed to provide factual details regarding the purported violation of her constitutional rights. The first respondent submits that the extent of her involvement with the matter under case no. CCZ 55/22 was in the execution of her duties as Registrar of the Constitutional Court. She avers that the "Registrar" who communicated with the second respondent was not herself but an Assistant Registrar seized with the matter in that Assistant Registrar's official capacity. The first respondent alleges that the Assistant Registrar simply notified the second respondent of the set down date for case no. CCZ 55/22 instead of advising him to file any documents.

[10] In addition, the first respondent submits that the applicant failed to effect proper service on the second respondent under case no. CCZ 55/22.For that reason, this Court granted an order confirming the improper service which resulted in the matter being struck off the

Roll. The first respondent also argues that the principle of subsidiarity is relevant in the matter as the impugned conduct could have been dealt with in terms of the Constitutional Court Rules, 2016.

[11] In opposing the application, the second respondent takes the preliminary point that the application is an abuse of court process. He submits that the applicant has filed six applications in this Court alone since the dismissal of her appeal in the Supreme Court under case no. SC 443/21 in a bid to frustrate the second respondent. He also argues that the applicant is in contempt of court due to her failure to comply with an extant eviction order under case no. MC 39520/16.

[12] The second respondent further submits that the applicant is misleading the Court as he denies ever receiving a personal call from the first respondent. He asserts that he received a call from an Assistant Registrar in response to his letters to the Judicial Service Commission regarding the applicant's conduct. It was at this point that he became aware of the proceedings under case no. CCZ 55/22.

[13] The second respondent maintains that he has no personal relationship with the first respondent and that the allegations of collusion made by the applicant are only meant to frustrate the execution of the aforesaid court order under case no. SC 39520/16.

[14] Both respondents seek an order of costs against the applicant on a higher scale. In addition the second respondent seeks an order for perpetual silence against the applicant.

[15] In response, the applicant clarifies that the first respondent is being sued in her personal capacity. She maintains that the first respondent unduly interfered in the proceedings by notifying the second respondent of proceedings under case no. CCZ 55/22. It is this conduct that is taken to violate the applicant's right to a fair trial as legal advice is deemed to have been rendered to the second respondent. Regarding the second respondent's opposing affidavit, it is contended that the second respondent has no basis for opposing the relief sought. As such, costs *de bonis propiis* are sought against the second respondent's legal l practitioner for filing purportedly frivolous opposing papers.

[16] After considering the papers filed of record and submissions made, the Court has concluded that direct access is not merited in this case for the reasons which follow below.

SUBMISSIONS BEFORE THIS COURT

[17] At the hearing of the matter the applicant was found to be in default despite proper service of the notice of set down on her through the Integrated Electronic Case Management System. Accordingly, the application could be dismissed on that score. However, Mr *Chinake* submitted that the Court ought to determine the matter on the merits due to the applicant's alleged penchant for avoiding finalisation of disputes through non-appearances and also taking into account the severity of the allegations levelled against the first respondent.

[18] On the merits, Mr *Chinake* submitted that the applicant's cause of action merely impugned the first respondent for acting within the scope of her duties as the Registrar of this Court. He referenced r 12(13) of the Rules as providing an avenue for review if the applicant was dissatisfied with the first respondent's conduct. He asserted that the Court ought to determine the matter on the merits. In order to prevent gratuitous future attacks against officers of the Court. Mr *Chinake* moved for an order of costs on a higher scale due to alleged *mala fides* of the applicant. When probed on the issue of mootness, he maintained that a determination on the merits was important due to the nature of the allegations made against the first respondent.

[19] The court was satisfied that the merits of the matter need to be considered not just for the convenience of the first respondent but also for the benefit of the applicant, who is not legally represented and appears genuinely befuddled by what transpired in the prosecution of her cases.

[20] Ms *Sunday* for the second respondent submitted that the first respondent did not render any undue assistance to the second respondent. She asserted that there was no evidence that the applicant's right to a fair trial was infringed, and that, therefore, the application had no merit. *Ms Sunday* further prayed for costs on a higher scale against the applicant, but did not persist with the order for perpetual silence, which, anyway, would have required a separate application.

PRELIMINARY POINTS

[21] Two preliminary points relating to improper citation and mootness were raised but found not to be determinative of the matter.

[22] The first respondent cited in the matter is the Chief Registrar and Registrar of the Constitutional Court. However, the applicant has sued her in her personal capacity. Depending on the nature of the allegations, this may amount to improper citation. The allegations contained herein relate to the first respondent's role as the Registrar of the Constitutional Court. As indicated above and taking a robust view of the pleadings on the papers, there appears to have been improper citation by the applicant. This, however, does not preclude the possibility that the first respondent, acting in the scope of office, may so abuse her position that she becomes liable to be sued in her personal capacity.

In the case of *Marange Resources (Pvt) Ltd* v *Core Mining & Minerals (Pvt) Ltd (In Liquidation) & Ors* SC 37/16, it was held:

> "The need for the proper citation of parties is highlighted in, Cilliers, A.C. et al in *Herbstein & van Winsen's The Civil Practice of the High Courts of South Africa, 5th ed, vol.1 page 143* as follows:
> "Before one cites a party in a summons or in application proceedings, it is important to consider whether the party has locus standi to sue or be sued *(legitima persona standi in judicio)* and to ascertain what the correct citation of the party is." (emphasis added)"

[23] *In casu*, the objection of wrongful citation cannot stand as it was merely submitted that the applicant cannot cite the first respondent in her personal capacity on the basis of conduct related to her administrative functions as the Registrar. However, the applicant is not prevented from citing the respondent where she alleges that the acts complained of

exceeded the general performance of duty and amounted to abuse of office, as she seems to do here.

[24] On the issue of mootness, the crux of the applicant's case relates to the purported maladministration of the first respondent in handling her matter under CCZ 55/22. However, this has since been overtaken by events since the dismissal of her chamber application for condonation and extension of time to purge her non – compliance with r 9(7) of the Rules. There is a judgment to that effect under case no. CZZ 7/22. This case also highlights that there is no tangible gain for the applicant in respect of any order that can be granted by this Court in connection with the proceedings under case no. CCZ 55/22.

[25] In the referenced case of *Mbatha v Ncube & Anor* CCZ 7/23, PATEL JCC posited the following on pages 8 and 9:

> "The applicant's eviction from the first respondent's property before the set down of this hearing has a direct bearing on the present proceedings. The matter has now become a classically academic dispute with no practical impact or effect flowing from any order that may be handed down by this Court in favour of the applicant's instant or prospective applications, viz. for direct access and for substantive relief in the main matter. Her lawful eviction granted in terms of the order under Case No. MC 39520/16 means that any declaratory and other relief granted by this Court upsetting the judgments of the Supreme Court become abstract and meaningless – nothing more than *bruta fulmina* – by reason of the hard fact that she is no longer in occupation of the first respondent's property… The sole reason for entertaining the applicant's case thus far is to ensure finality to the present and intended proceedings before this Court. In declining the instant application for condonation, I am fortified by the case of *Khupe & Anor* v *Parliament of Zimbabwe & Ors* CCZ 20/19, wherein MALABA CJ emphasised the following regarding mootness:
>
> > 'The question of mootness is an important issue that the Court must take into account when faced with a dispute between parties. It is incumbent upon the Court to determine whether an application before it still presents a live dispute as

> between the parties. The question of mootness of a dispute has featured repeatedly in this and other jurisdictions. The position of the law is that a court hearing a matter will not readily accept an invitation to adjudicate on issues which are of 'such a nature that the decision sought will have no practical effect or result.'

See also *Movement for Democratic Change & Ors* v *Mashavira & Ors* SC 56/20.

[27] However, considering the nature of the allegations which the first respondent is facing, the Court may exercise its discretion to hear the matter notwithstanding it being moot. In this regard, when determining the case of Kupe *& Anor* v *Parliament of Zimbabwe & Ors* CCZ 20/19 MALABA CJ, at pp. 7-8 had this to say:

> "The mere fact the matter is moot does not constitute an absolute bar to a court to hear a matter. Whilst a matter may be moot as between the parties, that not without more render it [unjusticiable]. The court retains a discretion to hear a moot case where it is in the interests of justice to do so. **JT Publishing (Pty) Ltd v Minister of Safety and Security** 1997 (3) SACC at 525A-B."

ISSUE FOR DETERMINATION

[28] The sole issue for determination is whether direct access should be granted to the applicant in this matter, i.e., whether the applicant has managed to establish that indeed her constitutional right to a fair hearing were violated and as such direct access should be granted.

[29] Applications of this nature are regulated by the Constitution as elucidated in rules of this Court. Section 167(5) (a) of the Constitution states that direct access must be granted whenever it is in the interests of justice to do so and r 21(3) details what should be contained in such an application and r 23(8) sets out the key but non-exhaustive factors that may be taken into account in determining whether it is in the interests of justice to

grant direct access, viz., prospects of success, availability of other remedies and presence of disputes of fact. See, for example, *Liberal Democrats & Ors* v *The President of the Republic of Zimbabwe E.D. Mngangagwa N.O & Ors* CCZ 7/18, *Lytton Investments (Pvt) Ltd* v *Standard Chartered Bank Zimbabwe Ltd and Anor* CCZ 11/18, *Mbatha* v *Confederation of Zimbabwe Industries & Anor* CCZ 05/21

APPLICATION OF THE LAW TO FACTS

[30] Generally despite the clear requirements set out above of what should be contained in an application for direct access, *in casu*, the applicant's founding papers are beset by vague and contradictory averments that undermine her case. Critically, the applicant's cause of action is unclear from a reading of the founding affidavit. In the case of *Sibangani* v *Bindura University of Science and Technology* CCZ 7/22, this Court held the following:

> "An applicant must set out either the facts or the law that would form the basis of the jurisdiction of the Court in his or her cause. It is insufficient for an applicant, without more, to merely cite a provision of the Constitution and assume that the Court's jurisdiction is triggered. The existence of jurisdiction is an objective fact derived from the founding affidavit. It must also find expression in a draft order which speaks to the relief concerned with a constitutional matter for adjudication by the Court. On the contrary, it cannot be derived from a litigant's belief that the application it has filed involves a constitutional issue."

[31] In the present proceedings, the objective facts supporting the applicant's constitutional cause of action are not highlighted. The basis of the complaint is simply put as that the first respondent influenced the second respondent to allege non–service of the application under case no. CCZ 55/22. The applicant avers that the Registrar of the Constitutional Court unlawfully and improperly influenced the second respondent to lie under oath and allege that he was not served with the application under CCZ 55/22. However, the

applicant has not provided this Court with any tangible evidence to prove her assertions. The only evidence she produced to prove before this Court is the second respondent's pleadings under CCZ 55/22, where he testified that he became aware of the applicant's application when he was called by the office of first respondent advising him of the same. It seems from this alone, the first respondent was simply carrying out her duties.

[32] The insufficiency of her pleadings is further highlighted by the draft order specifying the relief sought. The draft relief is ambiguous. The true nature of her complaint cannot be gleaned from a reading of the aforesaid draft order. Paragraphs 1 and 2 are worded as follows:

> "1. The first respondent who is tasked with ensuring the protection, fulfilment and realisation of the right to a fair trial limited the applicant's fundamental rights through her conduct.
> 2. That the applicant's right to a fair trial and to the protection of the law enshrined in section 69(1) and 69(2) of the Constitution of Zimbabwe was infringed by the first respondent in case no. CCZ 55/22 in the matter of *Rita Marque Mbatha* v *Vincent Ncube* and *the Messenger of Court*, Harare, in that the first respondent unlawfully interfered with the court proceedings."

[33] The relief sought is long winded and the reference to constitutional provisions appears only to be an afterthought. The connection between the allegation and the existence of a constitutional issue is implausible.

[34] The applicant in her papers also accused the first respondent of being biased after having purportedly allowed the second respondent to file his court papers when he was out of time under CCZ 55/22. The first respondent as the Registrar of this Court confirmed the position that the application had not been properly served on the second respondent. This

Court further went on to make a determination that the same application had not been properly served on the second respondent. In such circumstances, the applicant has failed to establish that her constitutional rights were violated through the conduct of the first respondent.

DISPUTES OF FACT

[35] Although the applicant maintains that there are no disputes of fact that cannot be resolved on the papers, the parties appear to differ as to whether it was the first respondent in person who contacted the second respondent as the applicant alleges or that it was the office of the Registrar, and, specifically, an assistant registrar who did so, as asserted by the respondents. There is also the generalized allegation by the applicant, which is denied by the first respondent, that the first respondent has been interfering in the applicant's matters at the High Court. As far as the latter is concerned, it can be dismissed as unsubstantiated. However, the former dispute of fact has relevance for both the current and intended future proceedings.

[36] As a general rule, where there are disputes of fact which the applicant should have foreseen, in proceedings requiring that there be no such disputed facts, the court either dismisses the application on that score or takes a robust view of the facts and proceeds accordingly, with the aim of ensuring a just and speedy resolution of the dispute. *See* Herbstein & van Vinsen, *The Civil Practice of the High Courts of South Africa,* 5th ed. Vol.1 p.459 In this case, the Court would be disinclined to grant access and refer to the

full bench a matter bristling with disputes of fact, where, as in this case, no indication has been made as to how the disputed facts would be resolved.

[37] In the meantime, the Court may, in resolving the disputed facts, take the robust view, strongly supported by the submissions of the respondents, that the impugned communication was made by the office, and not the person, of the Registrar, and related to the legitimate duties of that office.

RIPENESS

[39] As spelt out in the rules noted already, an applicant for direct access must show that there are no other remedies available. Where, as in this case, a registrar has allegedly accepted process out of time, an aggrieved party is perfectly entitled to apply for the striking out of such irregularities in the normal cause of litigation or, in other instances of alleged malfeasance in the discharge of duty, to challenge the actions of the registrar in terms of the provisions of the rules r 12 (13), which states as follows:

> "Any party aggrieved by any decision of the Registrar in terms of these rules may apply to a Judge in chambers for a review of such decision within five days of the party having been notified of the decision."

[40] So, therein lie the ready double remedy available to the applicant. Accordingly, the involvement of this Court is not triggered, the matter is not ripe for this Court's involvement in the manner proposed. In other words, direct access may not be granted in the light of the alternative remedies available to the applicant.

PROSPECTS OF SUCCESS

[41] In the light of the above findings, it is unnecessary to inquire into the prospects of success. At any rate, the conclusion already noted favoring the respondents on the disputed facts would shift the merits inexorably against the applicants.

CONCLUSION

[42] The Court despite noting that the matter had become moot decided to deal with the merits of the matter for reasons stated above. The outcome is that, because the applicant has alternative remedies she has not exhausted, the matter is not ripe for consideration by this Court, and, therefore, ought to be dismissed.

COSTS

[43] As far as costs are concerned, the general position of this Court is that costs are not awarded in constitutional matters. See *Liberal Democrats & Ors* v *President of the Republic of Zimbabwe E.D. Mnangagwa N.O. & Ors CCZ 7/18*, wherein MALABA CJ had this to say in this regard:

> ”The general principle by which the Court is guided on the question of costs is that generally no costs are awarded in constitutional matters. The circumstances that may influence a court to exercise its discretion and order an unsuccessful private party to pay costs in a constitutional case include institution of frivolous or vexatious proceedings. Conduct in the proceedings is a factor a court is entitled to take into account in deciding whether to award costs against an unsuccessful litigant. The test is that the award of costs should be just when regard is had to the facts and circumstances of the case. It would not be in the interests of the administration of justice to encourage litigants to believe that they are free to institute constitutional proceedings challenging the constitutionality of State action on spurious grounds. Awards of costs against unsuccessful litigants, in appropriate constitutional litigation cases, are a necessary means for the protection of the integrity of the judicial process and maintenance of public confidence in it.”(my emphasis added)

[44] This is a borderline case. While the allegations against the respondents, particularly the first respondent, are spurious and unsubstantiated and should rightly have attracted an adverse order of costs, sight should not be lost to the fact that the applicant is an unrepresented self-actor who may have been genuinely perplexed about the official communications relating to her matters and hastily jumped into wrong conclusions. The remedy, in the absence of proven stiff-necked obstinence, obdurate mulishness or *mala fides*, should not be to mulct her in costs, but to point her to the correct and proper remedies available to her as this judgment has sought to do. It is to be hoped that the applicant will be guided accordingly.

DISPOSITION

[45] In the result it is ordered as follows:

"The application is dismissed with no order as to costs"

GARWE JCC : I agree

GOWORA JCC : I agree

Kantor & Immerman, first respondent's legal practitioners

Legal Aid Directorate, second respondent's legal practitioners

Scanlen and Holderness, third respondent's legal practitioners