PATRICIA DENGEZI
versus
MUNYARADZI NYAMARURU
and
XOLISANI MOYO
and
CHAMPIONS INSURANCE COMPANY LIMITED
and
THE COMMISSIONER GENERAL OF POLICE
and
THE MINISTER OF HOME AFFAIRS

HIGH COURT OF ZIMBABWE
MAKOMO J
HARARE, 14 May & 10 October 2022

**Application for Referral to the Constitutional Court**

*T Biti*, for the applicant
*S Tembo*, for the 4th and 5th respondents

**MAKOMO J:**

[1] The law relating to requests for referral of a constitutional issue in terms of s 175 (4) of the Constitution of Zimbabwe is now well settled. The section makes it mandatory that a person presiding in any court subordinate to the Constitutional Court refers the question to the apex court when requested to do so by a party unless he/she finds that the request is frivolous or vexatious. It is a matter not in the discretion of the judge or magistrate whether or not to refer. The provision is mandatory. It is only a finding on the frivolity or vexatiousness of the request that the issue may not be referred (See *Tomana* v *Judicial Service Commission* HH 281/16)

[2] The facts of this case are largely common cause, hence the parties proceeded on the basis of a statement of agreed facts. There was therefore no need to lead any evidence as this was dispensed with in terms of r 108 (4) of the High Court Rules, 2021. In summary, these facts which are agreed, are that on 17 April 2017 the applicant who is a vendor was at her vending site along Chinhoyi Street. In her company was her one year old son. Without prior warning and when it was too late, she noticed a commuter omnibus veering off the road in her direction. The vehicle hit her with its bumper injuring and knocking her unconscious and injured, but more tragically, her son was instantly crushed to death on the spot. It is common

cause that the commuter omnibus which knocked her and killed her son and many others were driving off in high speeds and against one way traffic to evade police officers who were enforcing traffic regulations and laws.

[3] It is beyond question that the first defendant the driver of the omnibus drove the vehicle negligently. The vehicle was insured by the third defendant Champions Insurance Company Limited ("Champions Insurance") in terms of a 3rd party insurance cover. Finally, what is only disputed by the forth and fifth defendants is the allegation that police officers acted illegally which contributed to the accident. I am of the view it is not necessary at this juncture to make any factual finding on that aspect for it is not necessary for the purpose of the request before me, neither will it be of any assistance to the Constitutional Court to answer the constitutional questions in this matter.

[4] On 9 April 2018, almost a year later, plaintiff instituted the present proceedings against the defendants under case number HC3156/18 seeking damages in the combined amount of US$ 510 000 under different heads in respect of injuries to herself and loss of her son. The second and third defendants were sued vicariously as employer of the first defendant and insurer of the vehicle respectively. The fourth and fifth defendants were sued as nominal defendants being the employers of police officers who are accused of causing the accident by inappropriately threatening the commuter omnibuses at the nearby rank with spikes which caused the drivers to drive dangerously in different directions resulting in the accident.

[5] On filing her summons for damages and other claims as stated above, she was met with a plea of prescription by the fourth and fifth defendants in terms of s 70 of the Police Act [*Chapter 11:10*] and a tender for payment of ZWL$2000 by the 3rd defendant which is the amount provided for by s 23 (3) (b) and (c) of the Road Traffic Act ("the RTA") [*Chapter 13:11*]

[6] The applicant argues that the following constitutional questions have as a result arisen in these proceedings and requests that they be referred to the Constitutional Court for its determination:

1. Whether s 23 (3) (b) and (c) of the RTA which limits the statutory amount that can be paid by a third-party insurer (currently at USD2000 and at ZWL$2000 at time of application) for injury or death resulting from a road traffic accident infringes the applicant's right to equal protection and benefit of the law guaranteed in s 56 (1) of the

Constitution and right to life as provided for in section 48 (1) of the Constitution and, therefore unconstitutional?

2. Whether or not section 70 of the Police Act which sets the prescription period of eight (8) months for any person to institute civil proceedings against the Police is *ultra vires* ss 56 (1) and 69 (3) of the Constitution and therefore unconstitutional.

[7] The parties, in their agreed statement of facts have agreed that the requests in respect of both questions are not frivolous and vexatious. I am of the view however that I should not take their mere *ipse dixit* and proceed to refer the questions. It is the judicial officer who must consider the facts and the request and personally make a conclusion based on those facts whether the request is frivolous or vexatious. The duty cannot be abdicated to the parties.

[8] Being aware that I cannot render a decision on the questions whether the impugned provisions of the respective statutes are indeed unconstitutional and then seek to refer the matter (see *Nyika* v *Minister of Home Affairs & Ors* CCZ5/20; *Levy Nyagura* v *Ncube N.O. & Ors* CCZ 7/19) I will briefly advert to the facts and the question only for the purpose of formulating an opinion whether the raising of the questions is frivolous or vexatious.

**WHETHER OR NOT SECTION 23 (3) (b) AND (c) OF THE RTA IS UNCONSTITUTIONAL?**

[9] Section 23 (3) (b) and (c) of the RTA provides as follows:

> **"23 Requirements in respect of statutory policies of insurance**
>
> (1) ...
>
> (2) Subject to this section, a statutory policy shall insure such persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by them in respect of—
>
> (a) the death of, or bodily injury to, any person; and
>
> (b) the destruction of, or damage to, any property; caused by or arising out of the use of the motor vehicle or trailer concerned on a road.
>
> (3) Statutory policy shall not be required to cover—
>
> (a) any contractual liability; or
>
> (b) liability in respect of the death of, or bodily injury to, persons who were being carried in or on or entering or getting on to or alighting from the vehicle or trailer concerned when the event out of which the claims arise occurred, to an amount exceeding—
>
> (i) one thousand dollars (USD1000) in respect of any one such person killed or injured; or

(ii) five thousand dollars (USD5000) in respect of any one accident or series of accidents due to arising out of the occurrence of any one such event, where the vehicle concerned is a vehicle other than an omnibus or a commuter omnibus; or

(iii) ten thousand dollars (USD10000) in respect of any one accident or series of accidents due to or arising out of the occurrence of any one such event, where the motor vehicle concerned is an omnibus or a commuter omnibus; or

(c) liability in respect of the destruction of, or damage to, any property to an amount exceeding—

(i) two thousand dollars (USD2000) in respect of any one accident or series of accidents due to or arising out of the occurrence of any one event, where the vehicle concerned is a vehicle other than a passenger public service vehicle; or

(ii) two thousand dollars (USD2000) in respect of any one accident or series of accidents due to or arising out of the occurrence of any one event, where the motor vehicle concerned is a passenger public service vehicle." (underlining is for emphasis)

[10] It is apparent that the above provision applies strictly and does not take into account such other important factors as the extent of the injuries sustained, whether death(s) resulted, and the general considerations usually taken into account by a court when assessing damages, among others, pain and suffering, future earning capacity, loss of amenities e.t.c. In other words, the provision ousts the jurisdiction of courts to impose liability against the insurer beyond the statutory limit. It is an established rule that a statutory provision that seeks to oust the jurisdiction of a court must do so in clear and unambiguous terms. In case of the impugned provision, the figure is arbitrarily imposed by Parliament without setting out the above-listed factors being taken into account. In my view, this would ordinarily raise a serious question which is clearly not groundless or devoid of merit that an applicant who raises it does so with an expectation to get relief from it. It is a question that cannot be characterised as one raised merely for the purpose of vexing the other parties under a legal process. It is a serious question that has prospects of the apex court finding that the provision curtails the applicant's stated rights and, without any known cogent basis for its existence, may possibly not be saved as being reasonable in a democratic society. It is prima facie irrational.

[11] The enquiry does not end there however for one critical reason. The agreed facts are that the applicant and her son were not passengers in the omnibus involved in the accident. She was sitting on a pavement by the roadside where she was vending from. The vehicle veered off road and hit her and tragically crushed her child. These facts raise an important question whether the impugned section applies to applicant and her child. As quoted above s 23 (3) (b) and (c) of RTA provide that:

(3) Statutory policy shall not be required to cover—

(a) …

(b) liability in respect of the death of, or bodily injury to, persons who were being carried in or on or entering or getting on to or alighting from the vehicle or trailer concerned when the event out of which the claims arise occurred, to an amount exceeding—

(i) one thousand dollars (USD1000) in respect of any one such person killed or injured; or

(ii) five thousand dollars (USD5000) in respect of any one accident or series of accidents due to arising out of the occurrence of any one such event, where the vehicle concerned is a vehicle other than an omnibus or a commuter omnibus; or

(iii) ten thousand dollars (USD10000) in respect of any one accident or series of accidents due to or arising out of the occurrence of any one such event, where the motor vehicle concerned is an omnibus or a commuter omnibus." (underlining is for emphasis)

[12] To my mind, and I venture to say that the provision only applies to a person:

i. who was actually being conveyed in the omnibus or trailer;
ii. who was entering for the purpose of conveyance or alighting therefrom; and
iii. the accident which resulted in death, injury or loss of property must have occurred when the person was being so conveyed, entering or alighting from the vehicle.

[13] The insurer is therefore not obliged to pay, in terms of section 23 (3) of the RTA, in respect of a pedestrian or any other person who happened to be within the vicinity of the carriageway at the time of the accident resulting in him or her being injured or killed by the omnibus. To that end, it means applicant is not restricted in this case from claiming whatever amount she may find payable by any of the defendants including 3rd respondent. No right has been infringed in respect of what she can claim in respect of the accident by reason of the impugned provision. If I am correct in this interpretation, which I believe I am, it follows that the applicant seeks to have a hypothetical case referred to the Constitutional Court because the facts do not relate to the question before the court. In other words, the question does not arise from the facts before it. Section 23 (3) (c) does not arise either because no property of the applicant was damaged and she is not claiming in respect of any.

[14] When deciding whether a request is frivolous or vexatious, a judicial officer is peremptorily enjoined to consider the doctrines of constitutional avoidance and subsidiarity before referring a question to the Constitutional Court. Constitutional avoidance in simple terms mean that where an applicant is able to obtain the relief he is to seek in the Constitutional Court in any other lower court, the apex court will not normally exercise its jurisdiction in respect of it unless that remedy depends on the determination of the constitutional question. In this regard, the court remarked in *Sports and Recreation Commission v Sagittarius Wrestling Club & Anor* 2001 (2) ZLR 501 (S) at 505F-G:

> "Courts will not normally consider a constitutional question unless the existence of of a remedy depends upon it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of a Declaration of Rights."

[15] To the above, I add and venture to say that the proposition must apply too where the remedy is also available at common law or some other source of law. In the present instance, applicant has sued for damages under delict for negligence. It is an effective remedy at the disposal of the applicant as already found that it is not in any way rendered nugatory by the impugned legislative provision. On that basis, applicant may not expect to get any relief from the Constitutional Court based on the question sought to be referred. Put differently, the raising of the question is both frivolous and vexatious. It is accordingly found as such.

[16] For the sake of completely ventilating on this issue, I am of the further view that the first question may also not be referred on the basis of mootness. It is my view that the principles of frivolity and vexatiousness in the context of referral applications must be extended to mootness and ripeness of disputes. The Constitutional Court only decides live disputes between parties and not abstract or hypothetical questions based on non-existent facts. Prospective or past disputes which no longer have any bearing on the parties or which have not yet become justiciable have no place on the roll of the court. The first question herein is one such abstract question whose factual matrix is not applicable to the applicant. Applicant seeks a referral based on facts that do not relate to the provisions sought to be impugned. The provision does not apply to her in the circumstances stated above. On that basis it can properly be found to be frivolous and ought to fail.

**WHETHER SECTION 70 OF THE POLICE ACT IS *ULTRA VIRES* THE CONSTITUTION?**

[17] The agreed facts are that when applicant served her summons, she was met with the 4th respondent's plea of prescription having issued the summons about a year following the incident. She accepts the position taken by the 4th respondent to be correct but seeks to have the provision declared unconstitutional.

[18] The argument is that the provision unjustifiably favours the Police by limiting the period within which a claim against it to eight (8) months. That period, it is argued, is very short considering that accidents by their very nature often leave the victim seriously maimed and requiring long periods of medical attention such that by the time they fully recuperate the

claim would have already prescribed. Thus, the short period for prescription provided by the provision has curtailed applicant's right of access to courts enshrined in section 69 (2) of the Constitution as well as the right to equal protection and benefit of the law as provided for in section 56 (1) of the Constitution.

[19] Finally, it is argued that there is no rational basis upon which only the Police enjoys preferential treatment when section 15 of the Prescription Act [*THE* ] stipulates three (3) years as the prescription period for any debt for all others including other government departments, organisations and persons generally.

[20] Section 70 of the Police Act (Chapter 11:10) reads:

> "70. Limitation of actions
>
> Any civil proceedings instituted against the State or member in respect of anything done or omitted to be done under this Act shall be commenced within eight months after the cause of action has arisen, and notice in writing of any such civil proceedings and the grounds thereof and the grounds thereof shall be given in terms of the State Liabilities Act [*Chapter 8:15*]."

[21] The provision applies strictly and leaves no room for considerations such as ability of the applicant, who was seriously injured and spent a considerable time hospitalised due to those injuries sustained during the accident, to set in motion the legal process against the fourth defendant. By the time she fully recovered, the clock had already run its full course and the extinctive prescription brought in by the provision already established. In other words, by cloak of a statutory provision, she lost her right to access the courts for redress. What exacerbates the applicant's situation is the fact that the same provision requires that a two-month notice of intention to sue be first given in terms of the State Liabilities Act [*Chapter 8:15*] and that notice period is incorporated within the eight-month period within which to issue and serve summons.

[22] The right of access to court is important in that it provides the platform through which all the other rights are vindicated, for without access to courts all other rights guaranteed by the constitution become nugatory. It is held aloft by the courts in a democratic society based on fundamental rights, justice, openness, freedom and equality and must not be unjustifiably curtailed.

[23] I am aware of this court's judgment in *Nyika v Minister of Home Affairs* HH181/16 which extensively dealt with this same question. While the order of invalidity could not be confirmed by the Constitutional Court for issues raised by the apex court, it is my view that issues discussed therein are important in formulating an opinion whether the raising of this

same constitutional issue before me and seeking its request is frivolous or vexatious. I fall short of associating myself with and adopting those considerations because my jurisdiction ends with merely considering the frivolity or vexatiousness of the request. Suffice it to state that I hold that the facts of this case as agreed by the parties indeed raise a constitutional issue of whether s 70 of the Police Act is constitutional in light of applicant's right of access to the courts. It is a question that applicant may expect relief from and the determination of which will enable this court to in turn determine the matter before it.

In the final analysis, I hold that the request to refer the constitutional question on the constitutionality of section 70 of the Police Act [*Chapter 11: 10*] is not frivolous or vexatious.

**DISPOSITION**

In the result, **IT IS ORDERED THAT**:

1. The following question is therefore referred to the Constitutional Court in terms of s 175 (4) of the Constitution:

> **"Whether or not section 70 of the Police Act which sets the prescription period of eight (8) months for any person to institute civil proceedings against the Police is *ultra vires* section 56 (1) and 69 (3) of the Constitution and therefore unconstitutional."**

2. Pending the Constitutional Court's decision as in (1) above, the applicant's action is hereby stayed.

*Tendai Biti Law*, applicant's legal practitioners
*Civil Division of the Attorney-General's Office*, fourth and fifth respondents' legal practitioners