REPORTABLE (1)

Judgment No. SC 1/08
Const. Application No. 09/08

SIMON FRANCIS MANN v

THE REPUBLIC OF EQUATORIAL GUINEA

SUPREME COURT OF ZIMBABWE
HARARE, JANUARY 30, 2008

J Samukange, for the applicant

Ms F Ziyambi, for the respondent

Before: CHIDYAUSIKU CJ, In Chambers

This is an urgent Chamber application in which the applicant is seeking the relief set out in the draft order. The draft order reads in part as follows:

"**It is hereby ordered that:**

1. Judgment in the appeal by the applicant in case No. HC CA 507/07 shall not be delivered pending the determination of the appeal against the judgment in case No. HC 462/08.

2. The appeal against the judgment in case No. HC 462/08 shall be set down as a matter of urgency by the Registrar of this Honourable Court.

3. The parties to the said appeal shall file heads of argument in accordance with directions of the said Registrar.

4. Costs shall be costs in the cause of the appeal."

After hearing submissions from counsel, I dismissed the application with no order as to costs.

The facts giving rise to the urgent Chamber application are briefly that the JUDGE PRESIDENT and MR JUSTICE PATEL heard an appeal from the magistrate's court some time in July 2007. In that appeal the applicant was the appellant. It was an appeal against a judgment of the magistrate's court. After hearing submissions from counsel, the learned Judges reserved judgment. Some time in December 2007 MR JUSTICE PATEL was appointed Acting Attorney-General. Subsequent to MR JUSTICE PATEL'S appointment as Acting Attorney-General, the High Court set down the appeal for the handing down of judgment. Judgment was not handed down on the set down date following representations made to the Judge President by the applicant. The matter was reset down for the handing down of judgment on 30 January 2008. The day before the judgment was due to be handed down, the applicant made an urgent application to the High Court seeking an order to interdict the High Court from handing down the judgment. HLATSWAYO J dismissed the application. I am advised that the reason for dismissal was that the learned Judge was of the view that the applicant should have applied to MR JUSTICE PATEL for him to recuse himself.

Following the dismissal of the application by HLATSWAYO J, the applicant launched two applications to this Court. The one was a Court application made in terms of s 24(1) of the Constitution of Zimbabwe ("the Constitution"). The other was

this Chamber application. I have already set out the relief sought in the Chamber application. The relief sought in the Court application is:

"**It is hereby ordered that:**

1. The hearing on the 26th of July 2007 before the Judge President, Mrs Justice Makarau, and Mr Justice Patel is hereby set aside.

2. That Mr Justice Patel is recused from hearing or handing down judgment in the appeal under case number HC CA 507/07 between Simon Francis Mann and the Republic of Equatorial Guinea.

3. That a declaration that the High Court has no jurisdiction to determine the applicant's appeal as presently constituted and that the appeal should accordingly be reheard by a freshly constituted Court of at least two Judges.

4. That the respondent pays costs."

When I dismissed the urgent Chamber application with no order as to costs, I indicated that reasons for judgment would follow and these are they.

The Chamber application does not state in terms of which rule of the Supreme Court Rules it is being made. It would appear the Chamber application is being made on the basis that the Chamber application relates to the appeal against the judgment of HLATSWAYO J; alternatively, the Chamber application relates to the Court application filed at the same time as this Chamber application. The latter basis was merely argued and has no factual basis in the founding affidavit. On that basis alone it can be safely dismissed, but I will deal with its merits. I will deal with this contention first.

The Court application was made in terms of s 24(1) of the Constitution, which provides as follows:

> Section 24(1) of the Constitution provides as follows:
>
> "**24 Enforcement of protective provisions**
>
> (1) If any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may, subject to the provisions of subsection (3), apply to the Supreme Court for redress."

The applicant contends that his entitlement to due process, guaranteed in terms of s 18 of the Constitution, will be violated if judgment in the matter is handed down. On the applicant's version of events, the alleged violation of the Declaration of Rights has arisen in proceedings of the High Court. Where any question arises as to a contravention of the Declaration of Rights in any proceedings in the High Court or in any court subordinate to the High Court, the person presiding in that court may, and if so requested by any party to the proceedings shall, refer the question to the Supreme Court unless, in his opinion, the raising of the question is merely frivolous or vexatious.

The submission by *Mr Samukange*, for the applicant, that the proceedings in the High Court were not proceedings because the court was not properly constituted is simply not tenable. What constitutes proceedings in the High Court was defined by this

Court in the case of *M Tsvangarai v R Mugabe and Ano* S-84-05, where the Court held that:

> "(1) The word 'proceedings' in s 24(2) is a general term, referring to the action or application itself and the formal and significant steps taken by the parties in compliance with procedures laid down by the law for the purpose of arriving at a final judgment on the matter in dispute. There are proceedings in being in the High Court from the moment an action is commenced or an application made until termination of the matter in dispute or withdrawal of the action or application. There was no need to limit the very general words of s 24(2) by saying that the question as to the contravention of the Declaration of Rights arises only when the court is actually sitting. The proceedings in the High Court were still pending. Whilst the request for the reference of the question to the Supreme Court must be made to the judge whilst he is actually sitting in court, the question itself does not have to arise when the court is sitting. It may arise on the pleadings or from the circumstances of the case. The applicant should have had the application for reference of the question set down for hearing by the judge. (2) The argument that the judge would have become a judge in his own cause had the request been made of him to refer the question to the Supreme Court for determination ignores the fact that compliance with the procedure prescribed in s 24(2) is mandatory. If the judge had, out of selfish interest and in bad faith held that the raising of the question by the applicant was merely frivolous or vexatious, he would have infringed the applicant's right to the protection of the law guaranteed under s 18(1). The applicant would then have been entitled to apply to the Supreme Court for redress in terms of s 24(1) of the Constitution. He would have discharged his duty to comply with the procedure prescribed in s 24(2)."

On this definition, there can be no doubt that the alleged violation of the applicant's rights arose during proceedings in the High Court. The applicant should then have applied for a referral in terms of s 24(2) of the Constitution.

Subsection (2) of s 24 of the Constitution sets out the procedure to be followed when any question arises as to the contravention of the Declaration of Rights in any proceedings in the High Court. It provides as follows:

> "**24 Enforcement of protective provisions**

> (2) If in any proceedings in the High Court or in any court subordinate to the High Court any question arises as to the contravention of the Declaration of Rights, the person presiding in that court may, and if so requested by any party to the proceedings shall, refer the question to the Supreme Court unless, in his opinion, the raising of the question is merely frivolous or vexatious.",

It is not open to a party in proceedings in the High Court or a subordinate court to apply to this Court in terms of s 24(1) of the Constitution except in the circumstances alluded to in *Tsvangarai's* case *supra*. Subsection (3) of s 24 of the Constitution specifically prohibits such a procedure. It provides as follows:

> "**24 Enforcement of protective provisions**
>
> (3) Where in any proceedings such as are mentioned in subsection (2) any such question as is therein mentioned is not referred to the Supreme Court, then, without prejudice to the right to raise that question on any appeal from the determination of the court in those proceedings, no application for the determination of that question shall lie to the Supreme Court under subsection (1)."

Apart from the explicit language of subss (2) and (3) of s 24 prohibiting the use of s 24(1) of the Constitution for approaching this Court directly in respect of violations of the Declaration of Rights arising during proceedings of the High Court and subordinate courts, the cases of *M Tsvangarai v R Mugabe and Ano supra*, *Mandadirwe v Minister of* State 1986 (1) ZLR 1 and *Jesse v Attorney*-General 1991 (1) ZLR 121 make it very clear that such a procedure is not permissible except where the presiding officer violates the applicant's right in the process of considering the application for referral.

In the light of the above authorities, the inescapable conclusion is that the applicant' Court application filed with this Court is a nullity and this Chamber application cannot be predicated on that nullity.

The other basis for bringing this Chamber application is that an appeal against the judgment of HLATSWAYO J is pending in the Supreme Court. This Chamber application is in relation to that appeal.

The respondent, in response to this contention, averred that the judgment of HLATSWAYO J was an interlocutory order. Leave to appeal against an interlocutory order is required in terms of s 44(5) of the High Court Act [*Chapter 7:06*]. The applicant has not obtained such leave. Accordingly, the purported appeal is also a nullity. The applicant has not disputed this contention. On this basis, there is no appeal pending in this Court against the judgment of HLATSWAYO J. This Court cannot therefore assume jurisdiction to hear this Chamber application on the basis of a pending appeal. That ground also falls away.

Finally, I wish to make the following observations -

The High Court is seized with this matter. It heard submissions and reserved judgment and was about to deliver judgment when applications to stop the handing down of judgment were launched. I have serious doubts as to whether the High

Court has the jurisdiction to set aside its own proceedings and order the hearing of the appeal *de novo*. I do no more than express serious doubts in this regard because the matter has not been fully argued before me. That issue is therefore left open.

It also is apparent to me that the best way forward in the interests of finalising this matter expeditiously is to allow the proceedings in the High Court to proceed to finality. That is, to allow the High Court to give its judgment in this matter. Once judgment is given, whichever party is aggrieved by that judgment can take that judgment on appeal. In the event of the judgment going against the applicant, it is open to him to raise on appeal all the issues he has raised relating to the constitutionality or otherwise of the judgment. The applicant is not being left without a remedy. The dismissal of the Chamber application does not in any way prejudice the applicant. All that the applicant is being required to do is to follow the correct procedure in approaching this Court.

It was for the above reasons that the Chamber application was dismissed with no order as to costs.

Byron Venturas & Partners, applicant's legal practitioners

Office of the Attorney-General, respondent's legal practitioners