EDWIN MUSHORIWA
versus
AUDITOR GENERAL OF ZIMBABWE

HIGH COURT OF ZIMBABWE
DEMBURE J
HARARE: 19 November 2024 & 14 February 2025

Opposed Application

T. Biti for the applicant
B. Maunze with *V. Mugumba* for the respondent.

[1] DEMBURE J: This is a constitutional court application filed in terms of rule 107(1) of the High Court Rules, 2021. The matter was heard on 19 November 2024. After hearing submissions from the parties' legal practitioners, the court issued an *ex tempore* judgment the operative part of which was that the application was dismissed with no order as to costs. A letter from the respondent's legal practitioners dated 31 January 2025 was placed before me wherein a request for written reasons for this court's decision of 19 November 2024 were sought. What follows are the full written reasons thereof.

FACTUAL BACKGROUND

[2] The applicant is Edwin Mushoriwa, a male adult Zimbabwean who is also a Member of Parliament for Dzivarasekwa Constituency in Harare. The respondent is the Auditor General of Zimbabwe whose office is set up in terms of s 309 of the Constitution of Zimbabwe, 2013 *("the Constitution")*.

[3] On 19 August 2024, the applicant filed this constitutional application seeking a *declaratur* and consequential relief that:

> "1. The respondent failed to comply with section 309(1) and (2) of the Constitution of Zimbabwe read together with Section 32(2) and Section 35(6) and (7) of the Public Finance Management Act and sections (6), (7), (8) and 16 of the Audit office Act (Chapter 22:18) of the Finance and Revenue Statements and Funds accounts for the years ended 31 December 2021, 31 December 2022and 31 December 2023.
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> 2. That the respondent, within sixty (60) days of this order, shall file with the Registrar of the High Court full audit reports on appropriation accounts finance and revenue statement and fund accounts for the year ended 31 December 2021, 31 December 2022 and 31 De 2023 in full compliance with the law.

3. The respondent shall pay cost of suit."

[4] The applicant averred that in terms of s 309(2) of the Constitution of Zimbabwe, the respondent is obliged to audit every Ministry's Appropriation Account of every government account and every state vote. This constitutional obligation is then amplified in the Public Finance Management Act [*Chapter 22:19*] *("PFMA")* which in s 32(2) and 35(6) obliges the respondent to audit the annual financial statements of every Ministry within sixty days of receipt thereof.

[5] It was further averred that the respondent in her annual audit reports on Appropriation Accounts for the years ending 2021, 2022 and 2023 failed to comply with the provisions of s 309(2) of the Constitution as further amplified in s 35(6) and (7) of the PFMA in that the said reports omitted the Ministries or votes which included *inter alia* from the Office of the President and Cabinet, the Ministry of Finance and Economic Development and the Zimbabwe Electoral Commission.

[6] It was also the applicant's position that the Audit Office Act [*Chapter 22:18*] also placed certain obligations on the respondent ensuring that there has been due diligence in financial probity with regard to the handling of public funds. The applicant further outlined that the appropriation accounts of Ministries or votes missing from the Auditor General's reports for the years ending 2021, 2022 and 2023 and, therefore, sought a *declaratur* that the respondent failed to audit and publish the mentioned Appropriation Accounts in breach of s 309(2) of the Constitution as read together with ss 32(2) and s 35(6) and (7) of the PFMA and ss 6, 7, 8 and 16 of the Audit Office Act [*Chapter 28:18*]. The consequential relief was that the respondent be compelled to comply with the law by providing the full audit reports for the said period.

[7] The application was opposed by the respondent. The respondent raised a point in *limine* that the applicant failed to exhaust the available local remedies. It was contended that the applicant is a Member of Parliament's Public Accounts Committee wherein the respondent is also an *ex-officio* member. The issues arising from the audit reports should be raised through that committee. It was argued, therefore, that the remedy to the applicant is available internally within Parliament. On the merits, the respondent denied that she failed in her statutory duties as the Auditor-General. She contended that the outstanding votes

alleged by the applicant were presented to Parliament by the respondent. The votes which were not initially included either those appropriation accounts from Ministries or public entities which were yet to be audited or were being audited at the time the initial reports were being compiled. Supplementary reports were later produced and submitted as required by the law. She contended that she cannot be ordered to audit and publish appropriation accounts which she audited and published.

PRELIMINARY ISSUE FOR DETERMINATION

[8] When the parties' legal practitioners appeared before me, I raised a legal point about whether or not there was a ripe constitutional issue for determination. This issue arose given that the twin concepts of constitutional avoidance and the principle of subsidiarity are part of our law. In other words, was there a ripe constitutional issue for determination before me? This question is one which the court could raise *mero motu* even though it was not raised in the pleadings. It is trite that where a legal point has not been raised by the parties in the pleadings the court is at liberty to put the question to the parties and ask them to make submissions on the matter. What constitutes a misdirection is for the court to deliver a judgment on the legal point never canvassed by the parties without hearing them on the issue. This position was enunciated in *Nzara & Ors v Kashumba & Ors* SC 18/18 where UCHENA JA had this to say:

> "The function of a court is to determine disputes placed before it by the parties. It cannot go on a frolic of its own. Where a point of law or a factual issue exercises the court's mind but has not been raised by the parties or addressed by them either in their pleadings in evidence or in submissions from the bar, the court is at liberty to put the question to the parties and ask them to make submissions on the matter."

I, therefore, invited the parties' legal counsels for their submissions on the issue.

APPLICANT'S SUBMISSIONS

[9] Mr *Biti* submitted that the doctrine of constitutional ripeness simply means that a constitutional court will not entertain a matter if there is no constitutional issue that arise. The leading case is the case of *Majome v Zimbabwe Broadcasting Corporation and Ors* 2016 (2) ZLR 27 (CC). It was further submitted that the application has two reliefs covered by the draft order. The first order is a declaration to the fact that the respondent's actions in failing to audit all the accounts of the State as required by s 309 of the Constitution was

a breach of s 309(2). That section is ready because it is not in dispute that the respondent failed to audit all the accounts in the year 2021. That is why in 2023 she produced a supplementary arrear report. The court is being asked to make a determination as to whether that was a breach of the law. In 2023 she failed to audit some missing votes. She accepts some missing reports. The missing reports are then smuggled in the 2023 audit report (Annexure C) produced in Parliament in July 2024. Two years later she produced arrear reports in 2024. The cycle for the audits is one year. For 2023, she had twenty appropriation accounts that were missing. This time she produced Annexure E.

[10] Counsel further argued that the court is being asked to issue a *declaratur*. The respondent said she has complied for 2021. She said Annexure C, the arrear report in 2023, is sufficient. There is a missing report. There is no appropriation vote for the Zimbabwe Electoral Commission *("ZEC")*. It was also submitted that all the facts for the court to determine the matter were there. The second part of the relief is that once a *declaratur* is issued the court is asked to exercise its discretion to issue a consequential relief. One vote for the ZEC appropriation account is not there for 2021 and 2022. The vote of the Office of the President is not there in the 2021 and 2023 reports. These matters are ripe and can be determined.

[11] Mr *Biti* also submitted that the court is only being asked to determine if the respondent's actions are *ultra vires* the constitution. See *Combined Harare Residents' Association & Ors v The Minister of Local Government, Public Works and National Housing* CCZ 03/24. It was further argued that the matter could not be pleaded with reference to the subsidiary legislation. The case of the Auditor General unlike the *Majome* case is an office created in terms of the Constitution. The office is *sui generis*. The functions and the office are created in terms of the Constitution. Her obligations are in terms of the Constitution. That is why she wrote to say that she filed the report in terms of s 309(2) of the Constitution. The applicant is saying she has failed to comply with s 309(2). If you look at s 32(2) of the PFMA, they do not create an obligation. The obligation to audit is not in the PFMA. The duty is created and obligated in terms of the Constitution. The PFMA describes how the process is done. It was argued that the Act does not create an obligation of the Auditor General. The PFMA is a procedural law dealing with the obligation created

in the Constitution. The same applies to the Human Rights Commission. Subsidiarity does not arise.

RESPONDENT'S SUBMISSIONS

[12] *Per contra*, Mr *Maunze* submitted that the first thing is to understand the constitutional obligation of the respondent. In terms of s 309 of the Constitution, it is to audit the state. The obligation is only to deal with the audit. There are no timelines imposed by the Constitution. Secondly, there is no constitutional obligation to publish audited accounts in the constitution. What the applicant takes issue with is the publication of those accounts and the alleged failure to comply with timelines. Those complaints cannot reside in s 309(2)(a). The applicant's true gripe is in terms of s 35 of the PFMA as read with s 10 of the Audit Office Act as further read with s 55(1) and 58(2)(b) of the Audit Office Regulations, SI 85/2019. Therefore, his Lordship asked a crucial question with regard to the deference to these subsidiary pieces of legislation.

[13] Counsel further submitted that in the draft order at p 28 the applicant seeks a *declaratur* for non-compliance with the PFMA and the Audit Office Act. Therefore, the applicant is aware of the primary legislation which can address the complaints. If the applicant is aggrieved in the manner the audit was done, he has recourse in terms of these Acts or recourse to approach the court on a non-constitutional manner in terms of s 27 of the High Court Act or the Administrative Justice Act. The Constitutional Court has already decided on the same principle in *Vela v Auditor General of Zimbabwe & Anor* CCZ 10/24 at pp 26-27 where the court held that resorting to s 309 of the Constitution to resolve the dispute between the parties is unnecessary once there is an Act of Parliament which give rights to the parties. Section 309 is taken at the exit. Therefore, it is improper for the applicant to approach this court on a cursory application of s 309 when there are non-constitutional remedies at its disposal.

APPLICANT'S SUBMISSIONS IN REPLY

[14] In his response, Mr *Biti* submitted that the respondent seeks to create a new cause of action for the applicant. The applicant's case is that in terms of s 309(2), the respondent is supposed to audit every account of state institutions. The respondent has breached that if she fails to do so. Counsel also argued that there is a timeframe in s 309. The financial

year is a year. An account is defined within a twelve-month cycle. The budget is annual and the appropriation account is annual. The respondent produced a report for 2021. That audited report has twenty missing appropriation accounts (Annexure B). It was produced in 2023. The cause is not that the audit report must be produced within a year but whether her production of the audit with missing accounts is in compliance with the constitution. She published the supplementary report. In Annexures B, C, D and E there is one account that is missing, the account of the ZEC. Her failure to account for the accounts of the ZEC is a breach of her constitutional duty under s 309.

[15] It was further argued that the cause of action would have been different to say she failed to produce the accounts for a particular period. Annexure B was published in 2023. The 2023 audit was published in 2024 in breach of the PFMA. When you fail to audit all the accounts the breach is that of the constitution. There is no issue of subsidiarity. The case of *Vela* is not an authority for the principle of subsidiarity. The two cases of *Majome v Zimbabwe Broadcasting Corporation* & Ors 2016 (2) ZLR 27 and Zinyemba v Minister of Lands and Rural Resettlement & Anor 2016 (1) ZLR 23 (CC) are the authority. See also the *South African National Defence Union v Minister of Defence & Ors* 2007 (5) SA 400 (CC).

[16] Mr *Biti* also went on to argue that the emphasis is that the right of access to the court is sacrosanct and cannot be defeated on any principle or basis unless there is a sound basis for doing so. It was counsel's position that the cause of action demands an enquiry on the Constitution. It starts and ends with s 309. The reference to the PFMA simply extended the Constitution. It was finally submitted that without the audit process, pirates would be in the corridors of the Consolidated Revenue Fund.

THE LAW

[17] It is a settled principle of the law that where there is a statute or law designed to provide effective redress, litigants must find redress in that law rather than approaching the court pleading a constitutional issue. See *Stone & Anor v Central African Building Society & Ors* CCZ 05/24. The court therein also cited the following cases as setting out the same principle: *Zinyemba v Minister of Land and Rural Resettlement and Anor* 2016 (1) ZLR 23 (CC) at 26D-F, *South African National Defence Union v Minister of Defence and Others*

2007 ZACC 10 (CC), *MEC for Education, Kwa-Zulu Natal and Others v Pillay* 2008 (1) SA 474 and *Chani v Mwayera & Ors* CCZ 2/20.

[18] In *Stone & Anor v Central African Building Society & Ors supra* at p 17 para 49 GOWORA JCC restated the law on the principles of constitutional avoidance and subsidiarity which are part of our law as follows:

> "The twin concepts of constitutional avoidance and the principle of subsidiarity are part of our law. In terms thereof where redress can be afforded in subsidiary legislation and without pleading constitutional issues, such remedies must be exhausted before approaching the court on a constitutional premise. See *Magurure and 63 Ors v Cargo Carriers International Hauliers (Pvt) Ltd* CCZ 15/2016, *Majome v Zimbabwe Broadcasting Corporation and Ors* 2016 (2) ZLR 27 (CC). In *Moyo v Sergeant Chacha & Ors* (supra), the Court held that:
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> > "Where the question for determination is whether conduct the legality of which is impugned is consistent with the provisions of a statute, the principle of subsidiarity forbids reliance on the Constitution, the provisions of which would have been given full effect by the statute. The principle of subsidiarity has been explained in the cases of *Majome v Zimbabwe Broadcasting Corporation and Ors* CCZ 14/2016 and *Boniface Magurure and 63 Ors v Cargo Carriers International Hauliers (Pvt) Ltd* CCZ 15/2016. It states that a litigant who avers that his or her constitutional right has been infringed must rely on legislation enacted to protect that right and may not rely on the underlying constitutional provision directly when bringing action to protect the right, unless he or she wants to attack the constitutional validity or efficacy of the legislation itself. Norms of greater specificity should be relied upon before resorting to norms of greater abstraction."

EXAMINATION

[19] Applying the above principles, the question that arises is whether or not there was a ripe constitutional issue for determination by this court. It was the applicant's position that the respondent in failing to audit all the accounts of the state as required by s 309(2)(a) of the Constitution breached the Constitution. The crux of the applicant's case from the founding affidavit is that the respondent failed to audit and publish the appropriation accounts for the mentioned Ministries or votes. He averred that the Auditor General in her reports on Appropriation Accounts for the years ending 2021, 2022 and 2023 failed to comply with s 309(2) of the Constitution as further amplified in ss 32(2) and 35(6) and (7) of the PFMA by omitting the appropriation accounts for some ministries such as the Ministry of Finance and Economic Development, ZEC and the Office of the President and Cabinet. He then sought a *declaratur* that the respondent failed to comply with s 309(2) of the Constitution read together with s 32(2) and ss 35(6) and (7) of the PFMA, ss 6, 7, 8 and

16 of the Audit Office Act in respect of the finance and revenue statements and fund accounts for the years ended 31 December 2021, 31 December 2022 and 31 December 2023. The second part of the relief sought is a consequential relief for a compelling order that the respondent within sixty days of the order file with the Registrar of the court full audit reports on the appropriation accounts, finance and revenue statements and fund accounts for the same period in compliance with the law.

[20] It is pertinent that I first restate what s 309 of the Constitution which establishes the office of the Auditor General provides. It reads:

> **"309 Auditor-General and his or her functions**
> (1) **There must be an Auditor-General**, whose office is a public office but does not form part of the Public Service. [Subsection amended by s. 25 of Act No. 2 of 2021]
> **(2) The functions of the Auditor-General are—**
> **(a) to audit the accounts, financial systems and financial management of all departments, institutions and agencies of government, all provincial and metropolitan councils and all local authorities;**
> (b) at the request of the Government, to carry out special audits of the accounts of any statutory body or government-controlled entity;
> (c) to order the taking of measures to rectify any defects in the management and safeguarding of public funds and public property; and
> (d) to exercise any other functions that may be conferred or imposed on him or her by or under an Act of Parliament." [My emphasis]

[21] While the office of the Auditor General is founded on the above provisions of the Constitution the provisions only provide some of the functions of the Auditor General and state nothing concerning how these functions should be carried out. The exercise of the respondent's functions is fully regulated by the PFMA and the Audit Office Act and the regulations made in terms of those pieces of primary legislation. The said s 309 does not define any parameters of how the audit must be carried out and within what period. There is also no reference to any timelines and periods within which the audit must be carried out including what a proper audit should entail. The conduct of annual audits, their publication and submissions are then fully set out in the PFMA and the Audit Office Act and the regulations thereto. The Audit Office Act provides further functions of the Auditor General in line with para (d) of s 309(2) of the Constitution.

[22] The relevant sections of the PFMA are as correctly highlighted in the applicant's founding affidavit and these include s 32 which read as follows:

“32 Preparation and reporting of annual financial statements by Ministries

(1) Every director of finance shall prepare or cause to be prepared the annual financial statements of the Ministry concerned and shall submit such statements to the accounting officer in that Ministry and to the Accountant-General within thirty days of the year concerned.

(2) **The Comptroller and Auditor-General or any independent auditor shall audit the annual financial statements and return the audited statements to the accounting officer within sixty days of receipt thereof.**

(3) **The annual report and audited financial statements shall—**

(a) contain a report on the activities, outputs and outcomes of the Ministry;

(b) fairly present the state of affairs of the Ministry, reporting unit, constitutional entity or public entity for which the Ministry is responsible;

(c) include, where appropriate—

(i) particulars relating to losses arising through criminal activities, and criminal and disciplinary action taken;

(ii) instances of unauthorised expenditure;

(iii) instances of irregular expenditure;

(iv) instances of fruitless and wasteful expenditure;

(v) recoveries and write-offs of public resources;

(vi) any other matters as may be prescribed.” [My emphasis]

It is clear that in terms of s 32(2) of the PFMA, as correctly captured by the applicant in para 46 of his founding affidavit, the respondent shall audit the annual financial statements and return the audited statements to the accounting officer within sixty days. Section 32(3) then provides what the annual audit report should contain. Subsection (6) of s 35 of the PFMA further provides for every accounting officer of a ministry to keep or cause to be kept proper accounting records and submit financial statements within sixty days of the end of the financial year to the Auditor General for audit. In terms of s 35(7), every accounting officer of a constitutional entity or public entity shall submit to the appropriate Minister and the Auditor General an annual report on the entity's activities, audited financial statements and audit report on those statements within the specified period.

[23] It is not in doubt that the appropriation account of every ministry or public entity is audited by the Auditor General in terms of s 32(2) of the PFMA. The obligations of the Auditor General are further spelt out in the Audit Office Act. Section 10 of the said Act further outlines what the respondent should do after examining the accounts transmitted to her in terms of s 35(6) and (7) of the PFMA and the accounts of any public entity, designated corporate body or statutory fund. The timelines of what she is required to do and submit are also provided including under subsection (2) of what the Auditor General shall set out in her annual report. The applicant’s gripe is that the respondent omitted to

include in her annual audit reports some appropriation accounts for the ministries and entities he listed for the financial year ending 31 December 2021, 31 December 2022 and 31 December 2023 in breach of her statutory duty. Consequently, he sought a compelling order for the respondent to submit the audit report for those missing ministries or votes within sixty days. Clearly, what he complains about or his cause of action and the relief he is seeking could not have been pleaded as a constitutional issue given the applicable subsidiary legislation.

[24] The statutory provisions on how the audit should be carried out, the timelines, contents and submissions of annual audit reports are issues regulated extensively by the existing legislation namely the PFMA and the Audit Office Act and the relevant regulations thereof. The respondent's statutory duties are, therefore, fully provided for in those pieces of legislation. The rights the applicant seeks to enforce can be found within the same statutes or law. The applicant's cause and the relief he sought can, therefore, be viewed and the matter determined without seeking to rely on s 309 of the Constitution. I agree with Mr *Maunze*'s arguments in this regard. It was unnecessary for the applicant to plead a constitutional matter when the matter could have been pleaded and resolved in terms of the available relevant specific legislation. The twin principles of constitutional avoidance and subsidiarity are applicable to this matter. There can be no direct reliance on the constitutional provision in the face of specific legislation which can adequately address the issue at hand.

[25] The rationale for the doctrine of subsidiarity was well outlined in *Stone & Anor v Central African Building Society & Ors supra* at p 18 para 51 where the Constitutional Court had this to say:

> "…It is a trite principle that the doctrine of subsidiarity serves as a gate keeping function to guard against the hearing of constitutional matters on an ad hoc basis. It ensures that the courts apply a general principle to all cases and that in that manner the courts are protected from criticism with regard to their decisions on which matters they consider as appropriate to determine. The principle thus ensures that there is certainty in the law and that the principle of constitutional consistency and validity required by the Constitution in the law is upheld. See *Magurure & Ors v Cargo Carriers International (Pvt) Ltd (supra)* and *Berry (nee Ncube) & Anor v Chief Immigration Officer & Anor* 2016 (1) ZLR 38 (CC)."

The principle was also explained in *Vela v Auditor General of Zimbabwe & Anor* CCZ 10/24 where the court held:

"In *Everjoy Meda v Maxwell Matsvimbo Sibanda* and *Three others* CCZ 10/16 this Court cited with approval remarks by the U.S Supreme Court in *Spector Motor Services, Inc.* v *McLaughlin, Tax Commissioner*, 323 U.S. 101, 103 (1944) that:

> "… if there is a doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not pass on questions of constitutionality … unless such adjudication is unavoidable."

And further remarks by the same Court in *Ashwander* v *Tenessee Valley Authority (TVA)* 297 U.S. 288, 345-48, (1936) that:

> "the last resort rule states that a court should 'not pass upon a constitutional question … if there is also present some other ground upon which the case may be disposed of.

[64] The doctrine of avoidance also encompasses the doctrines of ripeness and subsidiarity. In the present matter, it was unnecessary on the part of the Court *a quo* to resort to s 309 of the Constitution as the matter was clearly resolvable on the basis of the Administrative Justice Act. In the circumstances, the determination by the Court *a quo* fell foul of these principles. The court *a quo* should have resisted the invitation by the applicant's legal practitioner for it to determine the dispute after taking into account the provisions of s 309 of the Constitution. Its decision to do so was therefore irregular."

[26] In the case of *Vela v Auditor General of Zimbabwe & Anor supra,* the Constitutional Court found it unnecessary and also irregular for the lower court to have determined the dispute by directly resorting to the provisions of s 309 of the Constitution when the matter could have easily been resolvable on the basis of the subsidiary law, the Administrative Justice Act. The reasoning therein equally applies to this case. In *casu*, the applicant's cause does not seek to challenge or impugn the provisions of any of the applicable statutes on the basis of constitutional validity. Rather the case alleges breaches of a statutory duty which is fully covered and provided for by the existing statutes, being subsidiary legislation to the Constitution. The matter can be clearly resolvable on the basis of those statutes without seeking to rely directly on the provisions of s 309 of the Constitution.

[27] Mr *Biti* argued that the right of access to courts is sacrosanct and cannot be defeated on any principle or basis unless there is a sound basis for doing so. I do not, however, believe that the principle of subsidiarity defeats or takes away the right of litigants of access to the courts which is a fundamental right. The principle does not bar the applicant or any litigant from approaching the courts for relief. What the court simply does is decline to determine the constitutional issue on the basis that it is not ripe. The applicant still has the right to approach the court by pleading a non-constitutional issue on the basis of the statute

or law that provides adequate remedies to his cause without unnecessarily bringing into the picture a constitutional question.

DISPOSITION

[28] The fact that the applicant in his founding affidavit recognises that the provisions of ss 32 and 35 of the PFMA and ss 5, 7 and 10 of the Audit Office Act which amplified the provisions of s 309(2) of the Constitution provide the legal framework for the performance of the respondent's statutory duties relating *inter alia,* to the examination of accounts, preparation and submission of annual audit reports within the set statutory limit is evidence that there was no constitutional question. It was unnecessary for the applicant to plead a constitutional issue or resort to the constitutional provision directly. The law is settled that where there is a statute or law designed to provide effective redress litigants must find redress in that law rather than pleading a constitutional issue. See *Stone & Anor v Central African Building Society supra.* Consequently, this court avoided the constitutional question raised as it was not ripe and dismissed the constitutional application.

[29] On the issue of costs, the court considered that since the matter was resolved on the point of law which the court itself had raised, it would not be justified to award the respondent the costs of this application. The court, therefore, departed from the general rule that costs follow the cause. An order that there be no order as to costs would meet the justices of this matter.

[30] In the light of these reasons, the court entered the judgment as stated above.

DEMBURE J: ………………………………………………

Tendai Biti Law, applicant's legal practitioners
Makuwaza & Gwamanda Attorneys, respondent's legal practitioners