

REPORTABLE (3)

LOVERAGE MAKOTO

v

(1) T.K. MAHWE N.O.
(2) THE PROSECUTOR GENERAL

**CONSTITUTIONAL COURT OF ZIMBABWE
HARARE, OCTOBER 19, 2019 & JANUARY 08, 2020**

L Uriri, for the applicant

No appearance for the first respondent

E Mavuto, for the second respondent

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”).

The applicant intends to approach the Court in terms of s 85(1) of the Constitution, alleging that a decision by the first respondent refusing his request to refer “constitutional questions” to the Court for determination as frivolous and vexatious violates his fundamental rights to equal protection of the law. Should leave for direct access be granted, the applicant intends to place before the Court the question whether s 8(6) of the Money Laundering and Proceeds of Crime Act [*Chapter 9:24*] (“the Act”) infringes his fundamental rights to equal protection of the law, personal liberty, fair trial, and to be presumed innocent until proven guilty, enshrined in ss 56(1), 49(1), 69(1) and 70(1)(a) of the Constitution respectively.

The Court holds that the applicant failed to show that it is in the interests of justice that he be granted leave for direct access to the Court. The application is without merit and ought to be dismissed. The reasons for the decision now follow.

FACTUAL BACKGROUND

The applicant was employed by the Zimbabwe Consolidated Diamond Company (“ZCDC”) as an Acting Supervisor. In December 2018 he was arraigned before the magistrate’s court (“the court *a quo*”) on a charge of contravening s 8(1)(a), as read with s 8(6), of the Act. It was alleged that between July 2018 and December 2018 the applicant stole diamonds and sold them to unknown dealers. He deposited the proceeds of the sale into his “Ecocash account”.

In May 2019 the applicant raised questions on the constitutionality of s 8(6) of the Act. He requested the trial magistrate to refer the questions to the Court for determination in terms of s 175(4) of the Constitution. The applicant alleged that s 8(6) of the Act did not define the term “some kind of criminal activity”. He said the section “relieved the State of the obligation to establish what the offence is, how it was committed and by whom”. It was the applicant’s contention that s 8(6) of the Act infringes on his fundamental rights and was therefore invalid.

The questions the applicant requested the trial magistrate to refer to the Court for determination were these:

- “i. Whether s 8(6) of the Act is *ultra vires* ss 56(1), 69(1), 70(1)(a) and 49(1) of the Constitution and as such unconstitutional and thus void.
- ii. If so, and whether the accused person’s prosecution thereunder is not a breach of his constitutional rights to the protection of the law enshrined under s 56(1) and the right to liberty enshrined in s 49(1) of the Constitution.”

The application was opposed by the State. It submitted that the request was frivolous and vexatious. The contention was that the facts were clear that the applicant was involved in the theft. It was argued that the request for referral of the questions to the Court was meant to delay the criminal proceedings.

The court *a quo* held that the facts of the case did not give rise to a constitutional question. The request for referral of the constitutional questions framed by the applicant was refused on the ground that it was frivolous and vexatious. It was held that the application lacked seriousness and was only meant to delay proceedings.

The applicant was dissatisfied with the decision of the court *a quo* and filed the application for an order of leave for direct access on 08 August 2019. He asserted that the first respondent’s ruling did not show that he applied his mind to the purpose, context and spirit of the provisions of s 175(4) of the Constitution. The applicant submitted that it was in the interests of justice that direct access be granted because the object of s 175(4) of the Constitution is to afford speedy access to the Court, especially where access to the Court is impeded in circumstances that breach provisions of the Constitution which protect fundamental human rights and freedoms. Lastly, he contended that the questions he raised were at the heart of the right to a fair trial. He submitted that proceeding with the trial and raising the questions on a possible appeal would be contrary to the right to the protection of the law.

The application was opposed by the second respondent. It was submitted that the applicant had adopted a wrong procedure and that he ought to have appealed against the decision of the court *a quo*. It was also submitted that, having adopted the referral procedure under s 175(4) of the Constitution, the applicant could not ditch this procedure and seek to file a direct application in terms of s 85(1) of the Constitution.

THE LAW AND THE FACTS

Direct access is a remedy which is granted only in exceptional cases and where compelling reasons are given.

The requirements of an application of this nature are set out in r 21(3) of the Rules and are as follows:

“(3) An application in terms of subrule (2) shall be filed with the Registrar and served on all parties with a direct or substantial interest in the relief claimed and shall set out -

- (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.”

The success or failure of the application rests on the consideration of the question whether or not it is in the interests of justice that direct access be granted.

The issue that arises is whether the refusal of the request for referral was not within the confines of s 175(4) of the Constitution, to an extent that it violated the applicant’s right to equal protection of the law. Section 175(4) of the Constitution, which provides for referrals to the Court, states that:

“(4) If a constitutional matter arises in any proceedings before a court, the person presiding over that court may, and if so requested by any party to the proceedings must, refer the matter to the Constitutional Court unless he or she considers the request is merely frivolous or vexatious.” (the underlining is for emphasis)

This provision must be read with r 24 of the Rules, which gives practical effect to s 175(4) of the Constitution. The rule is to the effect that a judicial officer, upon satisfying himself or herself that a request is not frivolous or vexatious, shall refer the constitutional matter to the Court.

The Supreme Court, sitting as a Constitutional Court, had occasion to deal with the question whether or not the refusal to refer a matter by a magistrate violated the fundamental right to equal protection of the law in *Williams and Anor v Msipha N.O. and Ors* 2010 (2) ZLR 552 (S) at 566B-567A. It said:

“The answer lies in the examination of what the magistrate was required by s 24(2) of the Constitution to do and what he actually did as the basis of the refusal. The right to an effective judicial protection of a fundamental human right or freedom requires that the judicial officer should act in accordance with the requirements prescribed by the Constitution for the protection of the particular right or freedom.

...

The procedural and substantial requirements with which the person presiding in a lower court is required ... to comply under s 24(2) of the Constitution are integral parts of the protection for the right of access to the Supreme Court given to any person who has raised, in the proceedings in that court, a question as to the contravention of a fundamental right or freedom and requested the judicial officer to refer the question to the Supreme Court. The only restriction of the obligation imposed on the judicial officer is the discretion given to him or her to refuse a request for a referral when in his or her opinion the raising of the question is ‘merely frivolous or vexatious’.

...

A refusal of a request for a referral, based on an opinion formed in accordance with the procedural and substantive requirements prescribed under s 24(2) of the Constitution, constitutes a permissible denial of access to the Supreme Court. What all this means is that under the system governing the exercise of judicial power, the legal basis of an opinion does not follow from the choice of factors by the person presiding in the lower court alone but must rest upon objective factors prescribed by the law.” (the underlining is for emphasis)

Regarding the procedure under s 175(4) of the Constitution, the Court in *Nyagura v Ncube N.O. and Ors* CCZ 7/19, at pp 9-10 of the cyclostyled judgment, stated that there must be a moment when the presiding person must address his or her mind to the factors that answer a number of questions, including whether the request to refer the matter to the Court is frivolous or vexatious, and whether the determination by the Court is necessary for the purposes of the proceedings before him or her.

The purpose of the exercise of the jurisdiction of a subordinate court under s 175(4) of the Constitution is to protect the process of the Court against frivolous or vexatious litigation. The standard by which the facts on which the raising of a question is based must be measured is put so high so as to enable the person presiding in the lower court to stop legal proceedings that should not have been launched at all.

In *Nyathi v The State* CCZ 16/19, the Court also explained the importance of the procedure under s 175(4) of the Constitution at p 10 of the cyclostyled judgment:

“The importance of guarding the Court against the abuse of its process through the adjudication of matters that ought not to have passed the frivolity or vexatiousness test cannot be overemphasised. The Court must protect its integrity and ensure that it only adjudicates that which it is constitutionally mandated to hear and determine. Consequently, where the procedures of the Court are used to achieve purposes for which they are not intended that would amount to an abuse of process. It is in this context that presiding persons ought to exercise their minds when seized with a request for a referral to the Court.”

The meaning of the phrase “frivolous or vexatious” was explained in the *Williams* case *supra* at 568C-F:

“In *S v Cooper and Ors* 1977 (3) SA 475 at 476D, BOSHOFF J said that the word ‘frivolous’ in its ordinary and natural meaning connotes an action or legal proceeding characterised by lack of seriousness as in the case of one which is manifestly insufficient. The raising of the question for referral to the Supreme Court under s 24(2) of the Constitution would have to be found on the facts to have been obviously lacking in seriousness, unsustainable, manifestly groundless or utterly hopeless and without foundation in the facts on which it was purportedly based.

In *Martin v Attorney General and Anor* 1993 (1) ZLR 153 (S) it was held that the ordinary and natural meaning of the words ‘frivolous or vexatious’ in the context of s 24(2) of the Constitution had to be borne in mind and applied to the facts by the person presiding in the lower court to form the requisite opinion. GUBBAY CJ at 157 said:

‘In the context of s 24(2) the word “frivolous” connotes, in its ordinary and natural meaning, the raising of a question marked by a lack of seriousness; one inconsistent with logic and good sense, and clearly so groundless and devoid of merit that a prudent person could not possibly expect to obtain relief from it. The word “vexatious”, in contra–distinction, is used in the sense of the question being put forward for the purpose of causing annoyance to the opposing party in the full appreciation that it cannot succeed; it is not raised *bona fide* and a referral would be to permit the opponent to be vexed under a form of legal process that was baseless’

In dismissing the application, the court *a quo* stated as follows:

“The accused cannot at this stage before the trial has produced evidence say that there is no evidence that he committed theft so he must be presumed innocent of theft of the diamonds.

The application can only be granted where it is not frivolous or vexatious.

...

The defence is clearly not serious when he says that his right to the presumption of innocence will be infringed yet he elects not to testify on why he makes such allegation.

The court therefore makes a finding that the application lacks seriousness and is meant only to delay proceedings.” (the underlining is for emphasis)

Section 8 of the Act provides as follows:

“8 Money laundering offences

- (1) Any person who converts or transfers property —
 - (a) that he or she has acquired through unlawful activity or knowing, believing or suspecting that it is the proceeds of crime; and
 - (b) for the purpose of concealing or disguising the illicit origin of such property, or of assisting any person who is involved in the commission of a serious offence to evade the legal consequences of his or her acts or omission;

commits an offence.

...

(6) In order to prove that property is the proceeds of crime, it is not necessary for there to be a conviction for the offence that has generated the proceeds,

or for there to be a showing of a specific offence rather than some kind of criminal activity, or that a particular person committed the offence.”

The particulars of the applicant’s charge were articulated as follows in the charge sheet:

“Contravening section 8(1)(a) as read with section 8 Part 6 of the Money Laundering and Proceeds of Crime Act CHAPTER 9:24

In that during the period extending from July 2018 to 14 December 2018 and at Zimbabwe Consolidated Diamond Company, Lovorage Makoto, was employed by Zimbabwe Consolidated Diamond Company, ***he stole diamonds and sold them to unknown dealers and obtained \$34 246-00 of which he deposited into his Ecocash Account number***” (the bold italics is for emphasis)

Implicit from a reading of the charge sheet is that the applicant was charged under s 8(1) of the Act. Section 8(1) is the charge section. It is very specific and the crime alleged has both *actus reus* and *mens rea*.

Section 8(1) of the Act reveals that the State cannot charge a person under it unless it is convinced that an unlawful activity was committed. The State has the duty to show the *actus reus*. The State identified the *actus reus* in the case as “theft of diamonds”.

Section 8(6) of the Act, on the other hand, deals with the evidential burden imposed upon the State to prove the offence under s 8(1) and lessens the burden of proof on the State. It relates to proof of the crime and not the charge itself. It can only be resorted to if such necessity arises, that is, where the State will have failed to establish proof beyond a reasonable doubt under s 8(1) of the Act. The alleged vagueness does not relate to the crime but, instead, it relates to the burden of proof.

Sight must not be lost of the fact that in this case the State did not use s 8(6) of the Act in relation to the applicant. Hence, it is imperative that, when deciding whether or not a provision is unconstitutional, regard must be had, not only to the mere question itself, but also to the context or circumstances in which the question is being raised.

There being a possibility that the alleged theft of diamonds can be proved without resort to s 8(6) of the Act, the determination of the question becomes irrelevant. Whether or not the State proves the case is of no importance to the Court.

The question regarding the constitutionality of s 8(6) of the Act should be predicated on facts. As aforementioned, the articulation of the charge and particulars thereof leave no room for ambiguity or uncertainty in interpretation. The State identified the proceeds (money) to have been obtained as a result of an unlawful activity, in particular theft of diamonds. The argument that s 8(6) is unconstitutional loses sight of the fact that the provision may be inapplicable, as the unlawful act has been identified with precision. The applicant's case can be disposed of on factual findings and evidence to be led by the State under s 8(1) of the Act without the need to resort to the constitutionality of s 8(6) of the Act.

The applicant would have been in a stronger position had he been arguing his case after being convicted without direct evidence to prove the unlawful activity. He would also have been in a stronger position had he been arguing his case after the State secured a conviction following resort to s 8(6) of the Act. That not being the case, the applicant is simply trying to put the cart before the horse.

Under s 85(1) of the Constitution, which provides for direct access to the Court, for the Court to determine the constitutional question a party has to show that he, she or it has an interest to protect and that the interest has been, is being, or is likely to be, violated. The applicant's interest is not being or has not been violated, as he was properly charged under s 8(1) of the Act. The Court noted that the applicant did not challenge s 8(1). By this conduct, he accepted that he was properly charged in terms of s 8(1) of the Act and implicitly accepted its constitutionality. Consequently, it is not in the interests of justice that direct access be granted.

There is no need to resort to s 8(6) of the Act to secure the applicant's conviction. The questions as to the constitutionality of s 8(6) should not have been taken in the abstract. In a referral, the questions should be premised on facts. Unless the State resorts to s 8(6) of the Act, no constitutional issue can arise in the matter.

More importantly, the determination of a question must be of benefit to a party. It would be absurd for the Court to pronounce on the constitutionality of s 8(6) of the Act and then state that, in the circumstances of the case, the finding is unnecessary. This approach would render the whole determination an advisory opinion or a mere academic opinion. The Court is loathe to offer opinions which at the end of the day do not assist in the resolution of disputes in the lower courts.

If a remedy is available to a party, whether it is a factual or a legal remedy, courts will not normally consider a constitutional question unless the existence of a remedy depends on it.

The determination of the constitutional question before evidence has been led is not necessary for the disposal of the proceedings in the court *a quo*, where the allegation is that the applicant stole and sold diamonds and converted the proceeds therefrom. The court *a quo* was therefore correct in holding that "the accused cannot at this stage before the trial has produced evidence say that there is no evidence that he committed theft so he must be presumed innocent of theft of diamonds".

From the foregoing, the Court finds that the ruling by the first respondent was made within the confines of the law. The right to equal protection of the law was not infringed. The applicant failed to demonstrate that his prosecution under s 8(1), read together with s 8(6), of the Act is unconstitutional. The alleged vagueness of s 8(6) of the Act does not relate to the unlawful activity or the crime, it relates to the burden of proof imposed on the State.

A reading of the first respondent's ruling shows that he was alive to the need to answer the question of whether or not the request was frivolous or vexatious. The ruling demonstrates that the first respondent applied his mind to the spirit and purpose of s 175(4) of the Constitution. This emerges from the fact that the first respondent stated that "the application can only be granted where it is not frivolous or vexatious".

The applicant was aggrieved by the refusal of the request for referral. The law provides for the remedy of an appeal where one is aggrieved by a determination of a court. The appeal procedure is generally available only at the conclusion of the trial, as an appellate court should be slow to intervene in ongoing proceedings.

DISPOSITION

In the result, it is ordered as follows -

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

GOWORA JA: I agree

HLATSHWAYO JA: I agree

Makombe and Associates, applicant's legal practitioners

National Prosecuting Authority, second respondent's legal practitioners