REPORTABLE (73)

Judgment No. SC. 84/05
Const. Application 208/05

MORGAN TSVANGIRAI v

(1) ROBERT GABRIEL MUGABE
(2) THE ELECTORAL SUPVERVISORY COMMISSION

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, SANDURA JA, CHEDA JA, ZIYAMBI JA & MALABA JA
HARARE, NOVEMBER 17, 2005 & FEBRUARY 14, 2006

J J Gauntlett SC, with him *A P de Bourbon SC* and *E T Matinenga*, for the applicant

T Hussein, for the first respondent

G C Chikumbirike, for the second respondent

MALABA JA: On 9, 10 and 11 March 2002 an election to the office of President was held in Zimbabwe. The applicant, who is the leader of the opposition political party, the Movement for Democratic Change ("the MDC"), stood for that party as a candidate for election as President. The first respondent, who is the leader of the ruling political party, the Zimbabwe African National Union – Patriotic Front ("ZANU-PF"), also stood for his party as candidate for election as President.

On 13 March 2002 the first respondent was declared the winner of the election and is the President of Zimbabwe.

The second respondent is a body established in terms of s 61 of the Constitution of Zimbabwe ("the Constitution"). Its functions, at the time, included the supervision of the registration of voters and the conduct of the election.

On 12 April 2002 the applicant presented to the High Court, in terms of the procedure prescribed in s 102(1) of the Electoral Act [*Chapter 2:01*] ("the Act"), an election petition complaining of undue election of the first respondent to the office of President by reason of a number of alleged causes. Amongst the grounds on which the petition was based was the allegation that s 158 of the Act and statutory instruments enacted thereunder, particularly the Electoral Act (Modification) Notice 2002, SI 41D of 2002, in terms of which the election was conducted, were constitutionally invalid. The election petition prayed the High Court to make an order in terms of s 102(2)(b) of the Act declaring that the President was not duly elected.

Section 136(1) of the Act required the High Court to determine the question of the alleged undue election of the first respondent as President on a trial of the election petition in open court. Section 18(9) of the Constitution guaranteed to the applicant as the petitioner the right to a fair hearing and determination of the election petition within a reasonable time.

After the presentation of the election petition to the High Court, there was no indication as to when the trial would commence. Letters were written by the applicant's legal practitioners to the registrar of the High Court ("the registrar") enquiring as to when the hearing of the election petition would take place.

On 18 November and 2 December 2002 the parties, represented by their legal practitioners, held a pre-trial conference before the JUDGE PRESIDENT. The pre-trial conference minute issued in Chambers on 2 December 2002, shows that the parties agreed that the trial of the election petition would deal first with submissions and argument on the constitutional validity of s 158 of the Act and the statutory instruments and orders made under its authority. The applicant believed that these grounds of the alleged undue election of the first respondent as President were so weighty that a favourable ruling on them would be dispositive of the election petition.

Notwithstanding the fact that the pre-trial conference minute directed the registrar to set down the election petition for trial as soon as possible, the applicant had to apply to the High Court on 9 May 2003 for a *mandamus* compelling the registrar to set down the election petition for trial.

The trial commenced in the High Court before HLATSHWAYO J on 3 November 2003. The learned judge heard submissions and argument on the validity of s 158 of the Act and the statutory instruments and orders made under its authority. He then reserved judgment on these preliminary issues.

A long time passed without the judgment being delivered. The applicant's legal practitioners wrote letters to the judge's clerk, enquiring as to when judgment would be handed down. No satisfactory answer was forthcoming. The matter was brought to the attention of the JUDGE PRESIDENT. It appears from the

papers that the JUDGE PRESIDENT discussed the issue of the delayed delivery of the judgment with the learned Judge, who indicated that the delay was due to the fact that the issues raised for determination were complex, requiring more time for research and reflection on his part.

On 10 June 2004, that is to say, about seven months after judgment was reserved, the learned Judge issued an unspeaking order. Its effect was that the contentions advanced on behalf of the applicant on the alleged constitutional invalidity of s 158 of the Act and the statutory instruments and orders made under it were dismissed. The terms of the order were stated as follows:

> "I hereby order as follows –
>
> 1. Dismiss with costs the Fourth Respondent's objection that it was not properly cited as a party to these proceedings.
>
> 2. Dismiss with costs the relief sought by the Petitioner as to the constitutional validity of s 158 of the Electoral Act (Modification) Notice 2002, Statutory Instrument 41D of 2002, and the declaration that all orders made and directions given and acts done in terms of the Electoral Act (Modification) Notice 2002, SI 41D, are void.
>
> 3. Dismiss with costs the preliminary points raised by the Petitioner in that none of them on its own nor all of them collectively suffice at this stage to invalidate the election."

The learned Judge intimated that reasons for the order would be given in two weeks' time. He failed to keep the promise. There was no appeal noted by the applicant against the order within fifteen days of the date it was given, as required by rule 30 of the Rules of the Supreme Court 1964.

On 16 July 2004, with the consent of all the parties to the proceedings, the continuance of the trial of the election petition was set down on a date in September 2004.

On 3 August 2004 the applicant wrote to the learned Judge's clerk, indicating that he was not ready to proceed with the trial until after the inspection of ballot papers and other election material ordered by the High Court, in terms of s 78(5) of the Act. He requested that the resumption of the trial be postponed to a date after the inspection. The reason given for the postponement was that the information expected to be gathered from the inspection of ballot papers had a direct and material bearing on the establishment of the grounds of the relief sought in the election petition.

The letter reads as follows:

> "Because of the great importance of the election material, we respectfully submit that it is essential that we are given an adequate opportunity to inspect and analyse it prior to the commencement of Phase 2 of the Election Petition, Case No. HC 3616/2002. …
>
> The election material has a fundamental bearing on many of the General Issues contained in the Pre-Trial Conference minute and we consider that it is essential that it is inspected and analysed before proceeding further with (the) Election Petition." (the underlining is mine for emphasis)

Not only is the letter couched in the language of a formal application for a postponement of the continuation of the trial of the election petition, it also makes clear to the learned Judge that the deferment of the hearing of the matter to a date after the inspection of the ballot papers and other election material was so necessary that refusal to grant it would amount to injustice to the applicant.

The trial of the election petition was not continued with in September 2004.

Meanwhile letters were written to the learned Judge's clerk on behalf of the applicant by his legal practitioners on 5 July, 13 August and 14 September 2004, enquiring as to when reasons for the order issued on 10 June 2004 would be given. In these letters the applicant did not indicate that he needed the reasons for purposes of appealing the order. It was in the letter written on 2 February 2005, seven months after the order was issued, that the applicant complained that he was unable to decide whether or not to appeal the order without the reasons for the decision.

The JUDGE PRESIDENT discussed with the learned Judge the need to give reasons for the order. It appears from the letter dated 11 February 2005 that the learned Judge once again told the JUDGE PRESIDENT that the matter involved complicated legal issues. He promised to give the reasons during the Easter vacation. He once again failed to keep his promise.

On 11 July 2005 the applicant made the application to the Supreme Court for redress in terms of s 24(1) of the Constitution, alleging that the rights to protection of the law and to a fair hearing within a reasonable time, guaranteed to him and protected against infringement under ss 18(1) and 18(9) of the Constitution respectively, had been contravened by the High Court. The allegation was that the length of the delay in hearing and determining the election petition by the High Court

in the exercise of the judicial functions of the State had exceeded the bounds of reasonable time within which the matter ought to have been disposed of. He cited as the causes of the cumulative delay, the failure to set down the case for hearing before 3 November 2003, inability by the learned Judge to give judgment on the preliminary issues, and his failure to give reasons for the order issued on 10 June 2004.

The relief sought by the applicant for the alleged contravention of the Declaration of Rights was an order declaring that:

> "1. The delay of the High Court of Zimbabwe in failing to adjudicate upon and finalise the Election Petition in case No. HC 3616/2002 constitutes a breach of the right of the applicant in terms of ss 18(1) and 18(9) of the Constitution of Zimbabwe.
>
> ACCORDINGLY IT IS ORDERED THAT:
>
> 2. The order of the High Court issued in the Election Petition in case No. HC 3616/2002 given on 10 June 2004 be and is hereby set aside.
>
> 3. The preliminary issues raised in the Election Petition in case No. HC 3616/2002 and argued before the High Court in November 2003 be heard and argued before this Honourable Court as presently constituted.
>
> 4. The first respondent shall pay the costs of this application."

The day the application was made to the Supreme Court was also the day when the inspection of ballot papers and other election material commenced at the High Court.

The respondents opposed the application. Their contention was that the delay in the hearing and determination of the election petition was caused by the applicant when he had the continuation of the trial postponed to a date after the inspection of the ballot papers. They said that the failure by the learned Judge, in the

circumstances, to give reasons for the order issued on 10 June 2004 was not a factor at all in the causation of the delay on which the alleged infringement of the Declaration of Rights was based.

More importantly, the first respondent took a point *in limine*. It was to the effect that the application could not lie to the Supreme Court in view of the provisions of s 24(3) of the Constitution. The argument advanced on behalf of the first respondent was that the question as to the contravention of the Declaration of Rights, on which the application to the Supreme Court was based in terms of s 24(1), arose in the proceedings on the election petition in the High Court and as such the applicant was obliged to comply with the procedure prescribed in terms of s 24(2) of the Constitution if he wanted the question determined by the Supreme Court.

Section 24(3) of the Constitution provides that where a question as to the contravention of the Declaration of Rights has arisen in any proceedings in the High Court and the Judge presiding in that court has not been requested to refer it to the Supreme Court for determination no application shall lie to the Supreme Court in terms of s 24(1) of the Constitution.

The gist of the response on the point *in limine* was that the question as to the contravention of the Declaration of Rights forming the subject-matter of the application did not arise on the election petition. The contention was that there were no proceedings in the High Court at the time the question arose, which was when the application to the Supreme Court was made. It was said that the only proceedings took place on 3 November 2003 and came to an end on that day. There were no

further proceedings thereafter up to the time the application was made to the Supreme Court in terms of s 24(1) of the Constitution. It was submitted that the applicant was not obliged to request the learned Judge in the court *a quo* to refer the question as to the contravention of the Declaration of Rights to the Supreme Court in terms of s 24(2) of the Constitution.

Mr *Gauntlett* also argued on behalf of the applicant that the learned Judge was being accused of being the principal cause of the delay in the hearing and determination of the election petition by failing to give reasons for the order issued on 10 June 2004. It was submitted that he would have become a judge in his own cause (*iudex in causa sua*) in breach of the rule of natural justice had the application been made to him to refer the question as to the contravention of the Declaration of Rights to the Supreme Court for determination.

It was also submitted that the learned Judge had become *functus officio*.

Before determining the question whether this application is in contravention of s 24(3) of the Constitution, I set out the relevant provisions of s 24. They read 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.

> (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.
>
> (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)." (the underlining is mine for emphasis)

Section 24 is to be found in *Chapter III* of the Constitution, which contains the declaration and entrenchment of the fundamental human rights and freedoms. In subs (4) it confers upon the Supreme Court original jurisdiction to hear and determine applications alleging violation of the Declaration of Rights unless in its opinion they are merely frivolous or vexatious and to determine the questions as to the contravention of the Declaration of Rights referred to it in terms of s 24(2). It is clear that s 24 guarantees to a person in relation to whom a fundamental right has been infringed, the right of access to the Supreme Court to seek redress of the contravention and *ipso facto* enforcement of the right.

There are, however, two separate procedures prescribed in ss 24(1) and 24(2) of the Constitution by which redress of a contravention of the Declaration of Rights may be sought from the Supreme Court. In this case the question is whether the applicant ought to have used the procedure prescribed in terms of s 24(2) for the enforcement of the protection of the rights he claimed were contravened in relation to him.

In *Mandirwhe v Minister of State* 1986 (1) ZLR 1 BARON JA said that compliance with the procedure prescribed in s 24(2) of the Constitution was mandatory where there was litigation in progress and the determination of the question as to the contravention of the Declaration of Rights by the Supreme Court had a bearing on the decision by the High Court or the court subordinate to it on the matter in dispute in the proceedings in that court.

The learned JUDGE OF APPEAL said at 7F-8D:

> "The purpose of s 24 is to provide, in a proper case, speedy access to the final court in the land. The issue will always be whether there has been an infringement of an individual's fundamental rights or freedoms, and frequently will involve the liberty of the individual; constitutional issues of this kind usually find their way to this Court, but a favourable judgment obtained at the conclusion of the normal, and sometimes very lengthy judicial process, could well be of little value. And even where speed is not of the essence there are obvious advantages to the litigants and to the public to have an important constitutional issue decided directly by the Appellate Division [now the Supreme Court] without protracted litigation.
>
> Subsection (1) contemplates the situation in which it is clear from the outset that the existence of a remedy depends on whether there has been (or is likely to be) a contravention of the Declaration of Rights, when the person alleging to be aggrieved is given the right to go direct to the Appellate Division.
>
> Subsection (2) deals with a different situation; it contemplates that proceedings have been commenced in the General Division [now the High Court] or in a subordinate court in circumstances in which it was not anticipated that the question of a contravention of the Declaration of Rights would necessarily arise, since otherwise one expects subs (1) to be invoked. The question having arisen, the subsection provides a speedy procedure for the determination by the Appellate Division of, in effect, a constitutional point of law without the necessity first to conclude the trial in the court of first instance and to come to this Court by way of appeal. When the question is referred to this Court, the proceedings are merely interrupted; this Court answers the question but the matter must be concluded in the court *a quo*. The subsection does not authorise the proceedings to be transferred to this Court."

Section 24(2) of the Constitution only applies when there is a question arising in the proceedings in the High Court or in the court subordinate to the High Court. We are concerned here with proceedings in the High Court. There is no doubt that the question as to whether the delay in hearing and determining the election petition by the High Court contravened the Declaration of Rights guaranteed to the applicant in ss 18(1) and 18(9) of the Constitution arose in his mind when he had already commenced litigation. The application made to the Supreme Court on 11 July 2005 is evidence of the fact that the question as to the contravention of the Declaration of Rights arose in his mind. The question had a bearing on the matter in dispute, in that it alleged failure on the part of the High Court to discharge the judicial functions of the State in determining that matter within a reasonable time.

The question is whether there were proceedings in the High Court at the time that question as to a contravention of the Declaration of Rights arose. My view of the facts is that I must answer the question in the affirmative. The words "in any proceedings in the High Court" mean proceedings that have come to or have been instituted in the High Court. They are proceedings that have found existence in the High Court, in the sense that that court has been called upon, through a method prescribed by law, to exercise the judicial functions of the State over the matter in dispute between the parties and it is in control of the conduct and progress of the proceedings.

The word "proceedings" has a wider meaning in s 24(2) of the Constitution than "goings-on" in court. There are no proceedings without an action or case. Proceedings ordinarily progress in steps. The word is, therefore, 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. See *Re Appleton French & Scrafton Ltd* [1905] 1 Ch.D 749 at 753; *Mundy v The Butterley Co Ltd* [1932] 2 Ch.D 227 at 233; *Muzuva v United Bottlers (Pvt) Ltd* 1994 (1) ZLR 217 at 219.

There is, therefore, no need to limit the very general words of s 24(2) of the Constitution and say that the question as to the contravention of the Declaration of Rights arises only when the court is actually sitting. The words "if in any proceedings in the High Court any question arises as to the contravention of the Declaration of Rights" imply that proceedings may take place in the High Court without any such question arising.

In this case, the proceedings commenced in the High Court on 12 April 2002 when the election petition was presented. The election petition, as the special procedure required by the statute to be used, defined the stages of the proceedings in the High Court in that it set out the relief sought and the grounds for it. Until the question whether the President was duly elected or not duly elected was determined, the proceedings were pending in the High Court.

It is also clear that the trial was the procedure by which the proceedings were advanced. When it began on 3 November 2003 before

HLATSHWAYO J the whole election petition was at issue and not parts of the grounds on which it was based. The proceedings were not terminated on that day because the trial was not concluded. They were continued by the order of the High Court issued on 10 June 2004. The learned Judge remained seized with the matter and under the duty to determine the matter in dispute, which was whether the President was duly elected or not duly elected.

The parties accepted the fact that the effect of the order was that the proceedings in the High Court were pending. The trial had been set down for continuation in September 2004. The letter written on 3 August 2004 on behalf of the applicant seeking postponement of the continuation of the trial of the election petition to a date after the inspection of the ballot papers was a formal and significant step in the proceedings. The applicant, having taken such a step, cannot probate and reprobate it. The letter of 3 August 2004 shows that there were active proceedings that had not been allowed to go to sleep.

For these reasons I find as a fact that there were proceedings in the High Court at the time the question as to the contravention of the Declaration of Rights arose and that the question arose in those proceedings. See *J B Brooks & Co Ltd v Lycett's Saddle and Motor Accessory Co Ltd* [1904] 1 Ch.D 512 at 516-517; *Cheney v Spooner* (1929) 41 CLR 532 at 536-537; *Barclay Davit Co Ltd v Samuel Taylor and Sons Ltd* [1946] 2 All ER 41 at 45.

Once the question as to the contravention of the Declaration of Rights has arisen in the proceedings in the High Court, there is a further condition to be

satisfied. It is that the party wishing to have the question determined by the Supreme Court must request the Judge presiding in that court to refer it to the Supreme Court for determination. The making of the request for reference to the Supreme Court is a mandatory step to be taken in order to obtain the determination of the question as to the contravention of the Declaration of Rights by the Supreme Court. As it is a necessary act required to be done by a party to the proceedings, the request must be made to the Judge in court.

It is clear from the provisions of s 24(2) that, whilst the request for the reference of the question to the Supreme Court for determination must be made to the Judge whilst he or she is actually sitting in court, the question itself does not have to arise when the court is sitting. It may arise on the pleadings (see *Granger v Minister of State* 1984 (1) ZLR 194 at 199H), or from the circumstances of the case, as happened in *Mandirwhe's* case *supra*, and *Zinyemba v Minister of Public Service and Anor* 1989 (3) ZLR 351 (S) provided that the existence of the remedy sought in the proceedings depends on the determination of the question as to the contravention of the Declaration of Rights by the Supreme Court. Raising a question the determination of which has no bearing on the relief sought in the proceedings amounts to an abuse of the process of the Supreme Court.

The Supreme Court is able to prevent abuse of its own process when the application for the determination of the alleged contravention of the Declaration of Rights is properly made directly to it in terms of s 24(1) of the Constitution by ensuring that it is not merely frivolous or vexatious. Section 24(2) places the duty to ensure that the process of the Supreme Court is not abused on the Judge presiding in

the High Court, who is enjoined to refuse a request for a reference of the question as to the contravention of the Declaration of Rights to the Supreme Court for determination if in his opinion the raising of the question is merely frivolous or vexatious.

It is clear that once the question as to the contravention of the Declaration of Rights in relation to him arose in the proceedings as demonstrated, the applicant was obliged to ensure that he made an application in open court to the learned Judge who was seized with the matter for the question to be referred to the Supreme Court for determination.

I do not accept as valid the suggestion that as the question arose when the court was not actually sitting he could avoid the procedure prescribed in terms of s 24(2) of the Constitution and approach the Supreme Court directly on an application in terms of s 24(1). By a notice in writing, served on the other parties to the proceedings, the applicant should have had the application for reference of the question as to the contravention of the Declaration of Rights set down for hearing by the learned Judge.

Mr *Hussein*, for the first respondent, relied on the case of *Jesse v Attorney-General* 1991 (1) ZLR 121 (S) for the authority that the applicant could not approach the Supreme Court directly on an application in terms of s 24(1) of the Constitution. The applicant in that case was on trial in the regional court on charges of (1) kidnapping, (2) contravening s 7(1) of the Children's Protection and Adoption Act [*Chapter 5:06*], and (3) contravening s 4(4)(a) of the Firearms Act

[*Chapter 10:09*]. He made an application to the Supreme Court in terms of s 24(1) of the Constitution, alleging that the provisions of both s 7(1) of *Chapter 5:06* and s 4(4)(a) of *Chapter 10:09* fell foul of the presumption of innocence guaranteed by s 18(3)(a) of the Declaration of Rights in the Constitution and therefore should be declared invalid.

At the time the application was made, the trial before the regional magistrate had reached the closure of the prosecution case. The applicant did not apply to the trial court under s 24(2) of the Constitution for the referral of the question as to the contravention of the Declaration of Rights to the Supreme Court for determination.

Dismissing the application with costs for contravening s 24(3) of the Constitution GUBBAY CJ said at 122 C-D:

> "At the inception of this hearing, a preliminary procedural point was raised by the Court. It was whether the applicant was entitled to have recourse to s 24(1) of the Constitution since he had omitted to request the regional magistrate to refer the alleged constitutional questions to the Supreme Court in terms of s 24(1). Put differently, whether an applicant may, during the course of proceedings in the High Court, or in any court subordinate to it, simply ignore the provisions of s 24(2) and utilise the procedure laid down in s 24(1). I entertain not the slightest doubt that the resort by the applicant to s 24(1) of the Constitution was impermissible."

It is the duty of the party who wants a question as to the contravention of the Declaration of Rights arising in the proceedings in the High Court or in a court subordinate to it referred to the Supreme Court for determination to ensure compliance with the provisions of s 24(2). The requirement to comply with the procedure prescribed thereunder is made mandatory by the provisions of s 24(3).

Mr *Gauntlett*, for the applicant, sought to distinguish *Jesse's* case *supra* from the present one. He argued that in *Jesse's* case *supra* the applicant made the application to the Supreme Court in terms of s 24(1) in the middle of proceedings in the regional court. *Jesse's* case *supra* is, in my view, not distinguishable from the present case.

In both cases the application in terms of s 24(1) of the Constitution was made to the Supreme Court after the commencement of the proceedings and when the trial of the matter was continuing. In *Jesse's* case *supra* the application was made soon after the question as to the contravention of the Declaration of Rights arose in the mind of the applicant. So was the application in this case. There is no evidence that in *Jesse's* case *supra* the court was actually sitting when the question arose in the proceedings. It is clear that it did not really matter to the applicant in that case whether the court was sitting or not. There was, however, a regional magistrate who was seized with the matter. Similarly, the application in this case was made to the Supreme Court in terms of s 24(1) of the Constitution when there was a Judge who was seized with the duty of deciding whether the President was duly elected or not duly elected. He was not given the opportunity to decide whether the determination of the question as to the contravention of the Declaration of Rights was relevant to the determination by him of the matter in dispute in the proceedings or whether the raising of the question by the applicant was merely frivolous or vexatious.

The argument that the learned Judge would have become a Judge in his own cause in breach of the rule of natural justice that no-one shall be a judge in his

own cause (*nemo iudex in causa sua*) had the request been made of him to refer the question as to the contravention of the Declaration of Rights to the Supreme Court for determination ignores the fact that compliance with the procedure prescribed in s 24(2) of the Constitution is mandatory.

If the learned Judge had, purely out of selfish interest and in bad faith, held that the raising of the question as to the contravention of the Declaration of Rights 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) of the Constitution. On the authority of *Martin v Attorney-General and Anor* 1993 (1) ZLR 153 (S) at 157G-158A, the applicant would have been entitled to apply to the Supreme Court for redress in terms of s 24(1) of the Constitution. He would in that event have discharged his duty to comply with the procedure prescribed in s 24(2) of the Constitution.

I do not therefore find merit in the argument advanced on behalf of the applicant.

It was also argued that the learned Judge had become *functus officio*. In my view, this argument also has no merit. The question the learned Judge was called upon to decide in the proceedings was whether the President was duly elected or not duly elected. He had not made a decision on that matter. In any event, the learned Judge would have been called upon to decide whether the raising of the question as to the contravention of the Declaration of Rights was merely frivolous or

vexatious. I fail to understand how he could be said to have become *functus officio* over a matter that had not been placed before him for decision.

In my opinion, the application should be dismissed for contravening s 24(3) of the Constitution.

On the question of costs, I have taken the view that the answer to the question raised by the application, as to whether a party in litigation when the question as to the contravention of the Declaration of Rights arises when the court is not actually sitting is nonetheless obliged to comply with the procedure prescribed by s 24(2) of the Constitution, was not self-evident. Despite the failure of the application, I propose to apply the principle set out in *Bull v Minister of Home Affairs* 1986 (1) ZLR 202 (S) at 203 G-H and not penalise the applicant in costs.

Accordingly, the application is dismissed. There is to be no order as to costs.

CHIDYAUSIKU CJ: I agree.

SANDURA JA: I agree.

CHEDA JA: I agree.

ZIYAMBI JA: I agree.

Coghlan, Welsh & Guest, applicant's legal practitioners

Hussein, Ranchhod & Co, first respondent's legal practitioners

Chikumbirike & Partners, second respondent's legal practitioners