

REPORTABLE (14)

(1) JENNIFER WILLIAMS (2) SIKHANGEZILE NDLOVU (3)
SITSHIYIWE NZIMA (4) WENDY MOYO (5) NOTHANDO
TSEMBE (6) PRISCILLA NCUBE (7) THABITHA NDLOVU (8)
SITHINGIWE NGWENYA (9) KHOLWANI NDLOVU (10) FAINA
MAPOSA
v
THE STATE

CONSTITUTIONAL COURT OF ZIMBABWE
CHIDYAUSIKU CJ, MALABA DCJ, ZIYAMBI JCC,
GWAUNZA JCC, GARWE JCC, GOWORA JCC,
HLATSHWAYO JCC, GUVAVA JCC & MAVANGIRA AJCC
HARARE, OCTOBER 1, 2014 & JULY 12, 2017

T Mpfu, for the applicants

E Nyazamba, for the respondent

MAVANGIRA AJCC: This matter was referred to this court by a magistrate in terms of s 24 (2) of the former Constitution of Zimbabwe. After hearing the parties, judgment was reserved.

BACKGROUND

The applicants were arraigned before the magistrate at Bulawayo, on a charge initially, of criminal nuisance as defined in s 46 as read with para 2 (v) of the 3rd Schedule to the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. It was alleged that the applicants unlawfully and with intent to cause public disorder, displayed placards and distributed fliers along Leopold Takawira/9th Avenue in Bulawayo, thereby disturbing the free flow of both human and vehicular traffic.

Before pleading to the charge, the applicants made an application in terms of s 24 (2) of the former Constitution for their matter to be referred to the Supreme Court (then sitting as the Constitutional Court). The question for determination by the Supreme Court was formulated in para 13 of their written application in the following terms:

“Whether section 2 (f) of the 3rd Schedule of the Criminal Law (Codification and Reform) Act [Chapter 9:23], with the contravention of which the Applicants are charged, is in violation of the following fundamental human rights contained in the Declaration of Rights of the Constitution of Zimbabwe: right to liberty (Section 13 [1]), right to protection of the law (Section 18 [1]), right to freedom of expression (Section 20 (1)), and right to freedom of association and assembly (Section 21 (1)).

Alternatively, whether the prosecution of the Applicants on the present charge, based on the facts in the State Outline, constitutes a violation of the applicants’ following fundamental human rights contained in the Declaration of Rights of the Constitution of Zimbabwe: right to liberty (Section 13 (1)), right to protection of the law (Section 18 (1)), right to freedom of expression (Section 20 (1)), and right to freedom of association and assembly (Section 21 (1)).”

The record of proceedings in the Magistrate’s Court reveals that at an early stage in the proceedings the prosecutor invoked s 202 of the Criminal Procedure and Evidence Act, [Chapter 9:07] and applied to amend the charge by deleting “2 (v)” and substituting it with “2 (f)” such that the charge would then be “Criminal nuisance as defined in s 46 as read with para 2 (f) of the Third Schedule of the Criminal Law (Codification and Reform) Act, [Chapter 9:23], (the Codification Act). No amendment was sought to the wording of the charge or to the facts outlined in the State Outline.

The applicants’ legal practitioner submitted before the magistrate that the defence had no objection to the amendment of the charge. Although there is no ruling by the magistrate on the unopposed application, the probability and likelihood seem to be that the amendment was granted. This is so because in the written application presented to the magistrate in terms of s 24(2) of the Constitution for referral of the matter to this court, the

applicants' legal practitioner referred to the charge that the applicants were facing as a contravention of s 46 as read with para 2 (f), and not para 2 (v), of the Third Schedule of the Codification Act. Furthermore, as already captured above, in para 13 of the written application the question for referral to this court was stated in the following terms:

“The applicants request that the following question be referred to the Supreme Court in terms of section 24 (2) of the Constitution: -

Whether Section 2 (f) of the Third Schedule of the Criminal Law (Codification and Reform) Act [Chapter 9:23], with the contravention of which the applicants are charged, is in violation of the following fundamental rights contained in the Declaration of Rights of the Constitution of Zimbabwe: ...” (emphasis added)

THE MAGISTRATE’S RULING ON THE APPLICATION FOR REFERRAL TO THIS COURT

It is necessary to quote the relevant portion of the magistrate’s ruling. It reads:

“The ten accused persons represented by Mr Lizwe Jamela are facing a charge of C/S 46 of the C.L.C.R. Act chapter 9:23 arw 2 (v) of the third schedule. (sic)

However, in their submissions the applicants referred to c/s 46 arw section 2 (f) of the third schedule. The state responded very shortly by saying the application should be dismissed as it is frivolous and vexatious.

A reading of section 2 (v) of the third schedule under which the applicants are charged is very wide and general. It is couched in the following terms:

employs by means whatsoever (sic) which are likely materially to interfere with the ordinary comfort, convenience, peace or quiet of the public or any section of the public, or does any act which is likely to create a nuisance or obstruction shall be guilty of criminal nuisance. (sic)

.....”

What is evident, despite the typographical and grammatical errors, is that the magistrate stated in the first sentence of her ruling that the applicants are facing a charge of contravening s 46 as read with para 2 (v) of the Third Schedule. In the next sentence she acknowledged that in their submissions, the applicants referred to a charge of contravening

s 46 as read with para 2 (f) of the Third Schedule. She then reverted, in the third sentence, to dealing with the application as one relating to a charge under para 2 (v), and she proceeded to determine it on that basis. She did not explain how the differences in the charge that the applicants were said to be facing was resolved but went on to quote the wording of para 2 (v).

APPLICANTS' SUBMISSIONS BEFORE THIS COURT

At the hearing of this application Mr *Mpofu* for the applicants, submitted at the outset, that he was no longer challenging the constitutional validity of s 46 of the Criminal Code. This stance was also evident in his written submissions wherein it is categorically stated that “the constitutional question which arises is whether the allegations made against applicants establish the existence of a reasonable suspicion such as would entitle the State to interfere with their right to liberty. ... It is submitted that the placement of applicants on remand is unlawful, unconstitutional and stands to be set aside with a consequential order decreeing a permanent stay of prosecution.” (emphasis added.) This submission meant that the main constitutional issue as stated in para 13 of the application placed before the magistrate fell away, thus leaving only the alternative issue live.

Although Mr *Mpofu* made the above submission in the heads of argument, it was at a very late stage in the proceedings and after he had made his oral submissions in reply to the respondent’s counsel’s submissions, that he, in response to questions posed to him by the court, turned around and stated that he had made an error by not raising the constitutionality of the pertinent provisions. He however conceded that no meaningful submissions had been made in the lower court and in this court as to how s 46 as read with para 2 (f) of the Third Schedule of the Criminal Code, in terms of which the applicants were charged, was said to be unconstitutional. He indicated that he accepted his “role” in the fact that the issue was not

argued. Despite this concession, he, at this very late stage, insisted that the constitutionality of the relevant provision was a live issue for determination by this court and suggested that the court could call for further submissions and argument by the parties.

It was also Mr *Mpofu*'s submission that the facts alleged by the State as having been committed by the applicants do not constitute an offence, whether in terms of sub para (v) or sub para (f) of para 2 of the Third Schedule, and that the said allegations are not consistent with sense. He submitted that this was so as it is not possible for ten people to simultaneously wave placards, distribute fliers, walk along a street and disturb vehicular and human traffic as each applicant would need more than two arms to achieve such a feat. He further submitted that the allegations against the applicants are so senseless that it should not be necessary for this court to inquire into whether the correct charge ought to be paragraph (f) or para (v). He referred to this court's decision in *Jennifer Williams & Anor v Phathekile Msipa N.O. & Ors*, SC 22/10 and submitted that by the same reasoning that was applied in that case, the alleged actions of the applicants *in casu* must be found to be a legitimate exercise of the applicants' constitutional rights. He further submitted that the court therefore ought to declare the applicants' prosecution unlawful and order a permanent stay of proceedings against them.

RESPONDENT'S SUBMISSIONS BEFORE THIS COURT

Mr *Nyazamba*, for the respondent, contended in response that the matter is not properly before this court for the following reasons. Firstly, the magistrate looked at the wrong factors by dealing with it as if it involved a charge based on para 2 (v) despite submissions by both sides having been made on the basis of, and with reference to, a charge premised on para 2 (f). The magistrate further fell into error citing and relying on the case of *Jennifer Williams*

& *Anor v Phathekile Msipa & Ors* SC 22/10, (the Williams 2010 case) thereby misdirecting herself and erroneously stating, in the process, that the allegations in the cited case were similar to the allegations *in casu*.

It was Mr *Nyazamba's* submission that in addition, the magistrate did not make a finding, as was incumbent upon her, whether or not the application for referral to this court was frivolous or vexatious. He urged the court to dismiss the application for that reason as well.

Mr *Nyazamba* also submitted that should the court be of the view that the matter was properly referred and is therefore properly before it, then it is pertinent to note that the charge against the applicants was amended during the proceedings before the magistrate by the deletion of para 2 (v) and the substitution thereof with para 2 (f). He submitted that the constitutionality of para 2 (f) is however not a live issue before this Court as no argument was advanced in the court *a quo* on it. He described para 13 of the applicants' written application before the magistrate as being merely a preamble to the arguments purportedly meant to be made before the magistrate but which arguments were never made. He submitted that the rest of the submissions following after para 13 do not show how the provisions of para 2 (f) infringe the various rights listed therein.

It was Mr *Nyazamba's* further submission that the only question that could, in the circumstances, possibly be properly before this court is whether the allegations levelled against the applicants establish the existence of reasonable suspicion of them having committed the offence with which they were charged, such as would entitle the State to interfere with their right to liberty. It was also his submission that in the respondent's view, the allegations levelled

against the applicants would, if proved, lead to their conviction on the offence charged. He submitted that in the result, the application that this Court declare the applicants' prosecution unlawful and order a permanent stay of proceedings against them ought to be dismissed.

THE ISSUES FOR DETERMINATION BY THIS COURT

The following appear to be the pertinent issues for this court to decide, *viz* whether this court is properly seized with this matter and if so whether the applicants are entitled to a permanent stay of the proceedings against them in the magistrate's court.

WHETHER THIS COURT IS PROPERLY SEIZED WITH THIS MATTER

The issue relates to whether this matter was properly brought before this court in terms of s 24 (2) of the former Constitution. Section 24 (2) of the former Constitution provides:

“(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 in dispute that on a reading of para 13 of the application that was made before the magistrate, a constitutional issue was raised by the applicant. In terms of s 24 (2) (*supra*), the magistrate was obliged to refer the question to the Supreme Court unless in her opinion the raising of the question was merely frivolous or vexatious. This position is well settled. See *Martin v Attorney-General* 1993 (1) ZLR 153 (S) at 156 H

The essence of the magistrate's ruling is captured in the last para of the ruling.

It reads:

“In view of what the Supreme Court said in *Jennifer Williams & Another v Phatekile Msipa NO & 2 Ors*, SC 22/10 where the alleged (sic) by the applicants were similar to the case on hand the court has decided to grant the application. In that case the Supreme Court stated that the prosecution and remand of appellants amounted to deprivation of their person (sic) liberty and protection of the law. Accordingly, the application for the referral of this case to the Supreme Court is granted.”

Despite the magistrate’s reference to the *Williams* case (*supra*), it appears she did not read the judgment in that matter for if she had done so she would no doubt have been guided as to what was expected of her in such an application. Although the *Williams* case dealt with the refusal by a magistrate to accede to a request for referral to the Constitutional Court, the following excerpt from pp 17 -18 of the cyclostyled judgment provides guidance to lower courts faced with applications of this nature:

“In this case the magistrate was required to form an opinion that the raising of the constitutional questions ... was not merely ‘frivolous or vexatious’. The formation of the opinion is made the pre-condition for the refusal of the referral. The framers of the Constitution confided the power to form the opinion in the person presiding over the proceedings in which the question is raised. It must be his or her judgment and not that of the Supreme Court.

Although the formation of the opinion denotes a subjective state of mind it presupposes compliance with a process in which objective procedural and substantive standards are observed and met. The opinion which the person presiding in the lower court is required to form is a particular opinion in the sense that he or she is expected to form it by reference to specific criteria. The raising of a question in a court of law is an action or legal proceeding which includes all material facts required to be proved by the party raising the question to entitle him or her to relief. ...

The judicial officer is required to have knowledge of the ordinary and natural meaning of the words ‘frivolous or vexatious’, which constitutes the standard which he or she must conscientiously and objectively apply to the facts on which the question as to the contravention of the fundamental human right or freedom is raised.”

In *casu* the magistrate’s ruling is confusing as to what charge the applicants were facing between 2(f) and 2 (v) as both are interchangeably referred to. Clearly the magistrate did not address her mind to this aspect. She did not carry out an analysis of the facts and the constitutional provisions that may be violated. She did not apply her mind to the

principles for referral.¹ It is thus not surprising that she did not, in her ruling, formulate or state the constitutional question requiring determination by this court, let alone her opinion as to whether the raising of that question is merely frivolous or vexatious.

In *Douglas Togarasei Mwonzora & 31 Ors v The State* CCZ 9/2015 the following was stated at para (11):

“The magistrate at Nyanga did not, as he should have, ask himself whether the issues raised were not frivolous and vexatious. Indeed, it appears the magistrate was not sure as to what was required of him. He made no finding that the application was not frivolous or vexatious”

These comments that were made in the *Mwonzora* case (*supra*) apply equally in this matter. A reading of the magistrate’s ruling shows that the magistrate was not alive to the duty that befell her when the application was placed before her. She did not ask herself whether the issues raised were frivolous or vexatious. There is a conspicuous absence of a specific pronouncement by the magistrate as to whether or not in her opinion the raising of the question by the appellants was merely frivolous or vexatious. *Cadit quaestio*. It goes without saying that this matter was not properly referred. This court is therefore not properly seized with this matter.

It thus becomes unnecessary to deal with the second issue stated earlier.

It is not only necessary but very important, before the final disposition of this matter, to highlight that this is not an isolated case where a magistrate has failed to properly deal with an application for referral to the Constitutional Court. The frequency with which this court has been confronted with this shortcoming is a cause for great concern particularly as this

¹ Jabulani Sibanda v The State CCZ4/17

court has, in a number of judgments, pointed magistrates to the correct procedure that must be adopted.

The intended guidance or correction in the pronouncements by this court do not seem to be taken heed of. It would appear that there might be need for remedial intervention by both the Judicial Service Commission and the National Prosecuting Authority in their respective capacities and domains, for the conscientisation of magistrates and prosecutors.

Accordingly, this matter is struck off the roll with no order as to costs.

CHIDYAUSIKU CJ: I agree

MALABA DCJ: I agree

ZIYAMBI JCC: I agree

GWAUNZA JCC: I agree

GARWE JCC: I agree

GOWORA JCC: I agree

HLATSHWAYO JCC: I agree

GUVAVA JCC: I agree

Zimbabwe Lawyers for Human Rights, applicant's legal practitioners

National Prosecuting Authority, respondent's legal practitioners