DISTRIBUATABLE: **(5)**

RITA MARQUE MBATHA
v
(1) CONFEDERATION OF ZIMBABWE INDUSTRIES (2) THE SHERIFF OF ZIMBABWE

CONSTITUTIONAL COURT OF ZIMBABWE
GARWE AJCC, GOWORA AJCC & PATEL AJCC
HARARE: 23 NOVEMBER 2020 & 13 JULY 2021

Applicant in person

T. Zhuwarara, for the first respondent

No appearance for the second respondent

GOWORA AJCC: This is an application for leave for direct access to the court made in terms of s 167(5) of the Constitution ("the Constitution"), as read with r 21(2) and (3) of the Constitutional Court Rules, 2016 ("the Rules"). The application is opposed.

FACTUAL BACKGROUND

The applicant and the respondent were involved in a labour dispute which ultimately found its way before the Supreme Court. The Supreme Court found in favour of the applicant and ordered the respondent to pay the applicant an amount of USD41 161.30 as damages for unlawful dismissal.

Pursuant to the order, the applicant caused a writ of execution to be issued out for the attachment of the movable property of the respondent in satisfaction of the judgment. She instructed the second respondent to execute the writ. Upon service of the writ, on 15 January 2020, the first respondent paid through RTGS the sum of 43 495.37. Notwithstanding such payment, the applicant caused the seizure of the respondent's movable property which prompted the latter to seek a provisional order to stay the execution of the writ.

The applicant was undeterred. On 7 July 2020, she caused the issuance of an additional writ, this time against the movable and immovable property of the respondent. On 28 July 2020, an immovable property of the first respondent was attached in execution pursuant to the second writ. The second respondent was instructed to sell the property. The sale was scheduled to take place on 2 October 2002.

The first respondent reacted. It filed an urgent court application seeking the setting aside of the second writ of execution and the consequential attachment of the immovable property. The applicant was given five days to respond to the application.

Due to an error, the matter was treated as an urgent chamber application instead of a court application and referred to a judge in chambers. The applicant had not, at that stage, filed any papers in response. There was also no proof on record that the first respondent had served the court application on the applicant as required by the rules of court. At the time, the *dies induciae* stated on the application had not expired and the matter was removed from the roll for urgent chamber applications.

After correspondence from the first respondent to the High Court pointing out the errors was received, the error was rectified and the parties filed their papers in accordance with the rules.

The applicant had grievances on how papers of the application were served on her. She filed several letters in the record raising issues on how the matter was being dealt with by the first respondent and the conduct of the matter by court officials. The first respondent also requested audience with the judge to whom the matter had been assigned. The learned judge acceded and set a date for the parties to appear before her. On 28 September 2020, the parties appeared before a judge of the High Court in chambers for a case management meeting to prepare a road map for the disposal of the matter.

During the meeting, the first respondent requested that the applicant agree to a postponement of the judicial sale of the immovable property. The applicant would not agree resulting in the former making an oral application for the suspension of the sale in execution. Pursuant to that meeting an order in the following terms was issued:

> "IT IS ORDERED THAT:
> 1. First respondent to be served with applicant's answering affidavit and heads of argument forthwith.
> 2. The first respondent shall if she so wishes file her heads of argument on or before 5 October 2020.
> 3. The matter HC 4380/20 be set down on 8 October 2020.
> 4. The writ of execution in SC 119/19 be suspended pending the decision of the court in HC 4380/20.
> 5. Costs of the stay in execution incurred by the second respondent pending the decision of the court in HC 4380/20 shall be borne by the applicant."

On 7 October 2020, the applicant filed this application for direct access to the Court. She attached a copy of the main application she wishes to file under s 85(1) of the

Constitution in which she alleges that her rights had been violated by the order granted by the court *a quo*.

THE LAW

The applicant intends to bring an application to the Court under s 85(1) of the Constitution alleging a violation of her fundamental rights as enshrined in s 56(1) of the Constitution. She alleges that her right to protection of the law under s 56(1) of the Constitution was infringed by a judgment of the High Court issued on 28 September 2020. Section 167(5) of the Constitution provides that rules of the court must allow a person, when it is in the interests of justice, with or without leave, to bring a constitutional matter to the Constitutional Court. In turn, r 21 makes provision for the manner of bringing such application to the court. Rule 21 (2) requires that such application be supported by an affidavit setting out the facts upon which the applicant seeks relief.

The founding affidavit by the applicant for direct access does not set out any facts as required by r 21(2). Instead, the applicant incorporates her founding affidavit in the main application and the pleadings filed under Case No HC 4380/20.

Direct access is an extraordinary remedy that should only be granted in exceptional cases. Rule 21(3) provides in relevant part 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.

(4) The applicant shall attach to the application a draft of the substantive application.

As is evident from subrule (3)(c) the applicant should state in the affidavit whether the matter can be dealt with by the court without the need to hear oral evidence or, if it cannot, how such evidence should be adduced and any conflict of facts resolved. The applicant has not complied with this additional requirement.

In *Zimbabwe Development Party v President of Zimbabwe* CCZ 3/18, the court said the following:

> "The Rules set out the objective factors a litigant has to state in a chamber application for direct access for consideration by the Court or Judge in the determination of the question whether it is in the interests of justice to grant direct access. There must be filed with the registrar, and served on all parties with direct or substantial interest in the relief claimed, an application setting out the grounds on which it is claimed it is in the interests of justice that direct access be granted."

The view I take is that notwithstanding the omissions in the affidavit, this is a matter in which the court can reach a determination on the substance. This is because the papers themselves, including the record from the High Court, clearly map out the events surrounding the order by the court *a quo*. In addition, the learned judge provided detailed reasons for the order made. For that reason, it is my view that the failure to set out the facts as required by r 21 (2) does not disable the court from determining this matter.

I consider each of the requirements as provided in the rule *ad seriatim*.

WHETHER IT IS IN THE INTERESTS OF JUSTICE THAT DIRECT ACCESS BE GRANTED.

The Constitutional Court is a specialised court and in terms of s 167(1), b) decides only constitutional matters and issues connected with decisions on constitutional matters. It thus exercises jurisdiction as a court of first instance and an appeal court. In view of the limited jurisdiction of this Court, direct access to the court for the exercise of its jurisdiction for the vindication of a fundamental right premised on s 85 of the Constitution as a court of first instance is granted to a litigant who is able to show that it is in the interests of justice for direct access to the court to be granted to such litigant.

The import of the principle for the requirement that an applicant for direct access show that it is in the interest of justice that the application be granted ought not to be minimized. The requirement was explained by I Currie and J de Waal in "The Bill of Rights Handbook", 6ed, at p 128 as follows:

> "Direct access is an extraordinary procedure that has been granted by the Constitutional Court in only a handful of cases.
> ……
>
> If constitutional matters could be brought directly to it as a matter of course, the Constitutional Court could be called upon to deal with disputed facts on which evidence might be necessary, to decide constitutional issues which are not decisive of the litigation and which might prove to be of purely academic interest and to hear cases without the benefit of the views of other courts having constitutional jurisdiction. Moreover …… it is not ordinarily in the interest of justice for a court to sit as a court of first instance, in which matters are decided without there being any possibility of appealing against the decision given."

A court that sits to decide whether or not it is in the interests of justice that direct access be granted may take into account a number of factors for consideration. Those factors are set out in r 21(8) as follows:

> (8) In determining whether or not it is in the interest of justice for a matter to be brought directly to the Court, the Court or Judge may, in addition to any other relevant consideration, take the following into account—
>
> (*a*) the prospects of success if direct access is granted;
>
> (*b*) whether the applicant has any other remedy available to him or her;
>
> (*c*) whether there are disputes of fact in the matter.

Within this jurisdiction, the requirement that an applicant shows prospects of success as regards the main application as provided for in r 21 (8) was settled in *Lytton Investments (Pvt) Ltd v Standard Chartered Bank Zimbabwe Ltd and Anor* CCZ 11/18, wherein the court made the following remarks:

> "The Court turns to determine the question whether the applicant has shown that direct access to it is in the interests of justice. Two factors have to be satisfied. The first is that the applicant must state facts or grounds in the founding affidavit, the consideration of which would lead to the finding that it is in the interests of justice to have the constitutional matter placed before the court directly, instead of it being heard and determined by a lower court with concurrent jurisdiction. <u>The second factor is that the applicant must set out in the founding affidavit facts or grounds that show that the main application has prospects of success should direct access be granted</u>." (emphasis is mine)

In casu, it is common cause that the decision that the applicant alleges to be in violation of her rights is an interlocutory one. It was the decision to suspend the sale of the first respondent's immovable property pending the determination of the matter on the substance. The suspension of the sale did not determine any rights of the respective parties. The decision served to preserve the rights of the parties until a decision on the merits had been made. The court reasoned thus:

> "This Court is required to decide, on 8 October 2020, whether the payment by the applicant,(first respondent herein), of $43, 495,37 to the Deputy Sheriff on

> 14 January 2020 sufficiently discharged its indebtedness to first respondent thus warranting a stay of execution and the setting aside of the writ issued on 7 July 2020. While first respondent is a self-actor she ought to understand that it is improper to insist on a sale in execution and thus render the decision of the court a *brutum fulmen*, particularly where the date of disposal of the matter has been agreed. In any event, she suffers no prejudice as the property remains under attachment with costs for the suspension of the sale being to the charge of the applicant. If she succeeds in opposing the application for stay of execution, she can continue with the execution which is merely being suspended, and not set aside. However, if execution is allowed to continue and it transpires that the applicant had indeed settled the judgment debt in full, then the harm to it would be irreparable as its property would have been sold to an innocent third party. While it is understandable that the first respondent is frustrated at the delay in obtaining just satisfaction for the applicant, it cannot be reasonable to insist on the sale in execution as that makes the whole process an exercise in futility. Therefore the balance of convenience favours the applicant."

A consideration of the reasons by the learned judge in the lower court shows that the real dispute between the parties has not even been heard. Thus, the rationale for the applicant to insist on execution of the writ of 7 July 2020 has not yet been ventilated. There are issues of fact and law that have yet to be determined.

Indeed, if the applicant had not mounted these proceedings the main dispute which was scheduled for hearing on 8 October 2020 would have been decided by the High Court by now.

This means that there is not even an issue of the applicant not having exhausted her domestic remedies as there were no domestic remedies to resort to. As explained by her ladyship in the judgment, the suspension of the sale was a reasonable intervention that would serve to achieve justice between the parties. The court had to decide whether or not the first respondent had satisfied the judgment debt and, in the interim, to ensure that the judgment would not be a *brutum fulmen* the sale had to be suspended. No prejudice ensued against either party as the applicant, would if successful, be able to have the sale continue and recover from the sale whatever the court would have decided was still owed.

As a consequence, the court is disabled from considering the first factor mentioned in the rules, that of prospects of success. There is nothing to consider and determine due to the fact that the real dispute between the parties is pending before the court *a quo*.

The correct position is that proceedings between the parties are still pending in the High Court. This, therefore, means that the application is ill-conceived and this court has in several cases pronounced on the imprudence of an applicant adopting this course of action. The dicta in *Chihava v Provincial Magistrate Mapfumo N.O & Anor* 2015(2) ZLR 31, at 38G-H, are apposite. GWAUNZA JCC (as she then was) remarked:

> "I, therefore, entertain no doubt that the certainty referred to above would be completely eroded were the courts to operate based on a literal and grammatical interpretation of s 85(1). This circumstance is not only highly undesirable, but it would also constitute an affront to the time-honoured common law principle that a superior court should be slow to intervene in ongoing proceedings in an inferior court, except in exceptional circumstances. This principle is persuasively articulated as follows in the case of *Wahlhaus v Additional Magistrate, Johannesburg* 1959 (3) SA 113 (A);
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> > " … a superior court would be slow to exercise any power upon the unterminated course of criminal proceedings in a court below, but would do so in rare cases where grave injustice might otherwise result or where justice might not by other means be attained." See also *Mushapaidze v St Anne's Hospital & Ors CCZ 18/17*

The above remarks are apposite in this case. The High Court is seized with a very critical issue between the parties, viz, whether or not the first respondent has met its obligations in terms of the judgment obtained by the applicant. The court *a quo* is not aware of these proceedings or the fact that its directive is being impugned by the applicant. A perusal of the founding affidavit to the main application will tend to show that the applicant is aggrieved by the grant of the stay of execution concerning the sale scheduled for 2 October 2020. I do not read from the substance of the affidavit an allegation that the court *a quo* conducted itself in a manner that could be considered a violation of the applicant's rights to a fair hearing. The

complaints emanating from the affidavit focus on procedural and substantive issues regarding the order suspending the sale in execution.

In *Bruce v Fleecytex Johannesburg CC* 1998 (2) SA 1143(CC) [4], the Constitutional Court of South Africa, in considering an application for direct access made the following remarks:

> "……..If Bruce is entitled to any relief she can obtain it from the High Court. In effect what she is now seeking to do through the application for direct access is to appeal against the decision of Wunsh J on an issue that was not raised in the proceedings before him, and to avoid the normal appeal procedure by launching proceedings for direct access to this Court.
> [22] KENTRIDGE AJ made it clear in his judgment in *S v Zuma and Others* [26] that applications for direct access are to be entertained in exceptional circumstances and not merely to avoid the consequences of incorrect procedures that have been followed. If, notwithstanding the pending appeal, Bruce is entitled to raise the constitutionality of s 180(3) of the Insolvency Act in separate proceedings, she can initiate such proceedings in the High Court; but if she is not entitled to do so, she cannot avoid the consequences of her earlier omission by applying to this court for relief.
> [23] I am satisfied that grounds for direct access have not been established and that this is not a proper case for the granting of such relief."

There is a suggestion that the learned judge had indicated that the matter was not urgent. This does not appear to be supported by the learned judge's reasons for its removal from the roll. In any event, it is of no moment as the matter was filed as an urgent court application and not an urgent chamber application. There is a difference in the manner of treatment of the two by the registrar and the court itself.

An urgent chamber application must be placed before the judge in chambers upon its filing, whereas an urgent court application must comply with the *dies induciae* as stated on the face of the application. It must be placed on the roll after the respondent or respondents, as the case may be, have been availed an opportunity to file papers in opposition.

DISPOSITION

I do not find it necessary to consider whether or not the applicant has established whether or not there is no other remedy available or if the matter cannot be dealt with without the calling of evidence. The application seeks to challenge interlocutory proceedings and this is not permissible in the light of the authorities referred to above.

From the aforegoing, the applicant has not established that it is in the interests of justice that the application be granted. The application must fail.

The first respondent has prayed that the applicant be mulcted with an order for costs. In constitutional matters, it is not the norm that costs be awarded against the unsuccessful litigant. The first respondent has not suggested that the applicant is guilty of vexatious conduct or an abuse of court process. Nor has it been suggested that the application is frivolous. In the premises, it is my view that an order for costs is not warranted.

Accordingly, it is ordered that the application be and is hereby is dismissed with no order as to costs.

GARWE AJCC : I agree

PATEL AJCC : I agree

Gill, Godlonton & Gerrans, legal practitioners for the first respondent