

MARTIN DINHA
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 25 November 2015

Criminal Trial

T. Mpofu, with him *T. Dzvetero*, for the accused
C. Chimbara, with him *T. Kasema*, for the State

ZHOU J: On 3 November 2015 this court gave a judgment, HH 867-15 in which it dismissed an application by the applicant for his trial to be postponed until he obtains certain documents which, according to him, are protected by the provisions of the Official Secrets Act [*Chapter 11:09*]. The applicant, who is the accused before this court, contends that until the documents are declassified he cannot use them in his defence. When the court dismissed the request for postponement it postponed the matter to 23 November 2015 for trial. On 17 November 2015 the applicant filed an application in terms of s 175(4) of the Constitution for referral to the Constitutional Court of the issue of the effect on the right to a fair trial of the judgment of this court in Case No. HH 867-15. That application is opposed by the State.

Section 175 (4) of the Constitution provides as follows:

“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 effect of the above provision is that where a request for referral is made the court is enjoined to grant it unless it holds that such a request is merely frivolous or vexatious. The expression “frivolous or vexatious” has been the subject of judicial interpretation in the celebrated case of *Martin v A-G & Anor* 1993 (1) ZLR 153 (S). At p 157 C-E, GUBBAY CJ 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. See *Young v Holloway & Anor* [1895] P 87 at 90-91; *Dyson v Attorney-General* [1911] 1 KB 410 (CA) at 418; *Norman v Mathews* (1916) 85 LJKB 857 at 859; *S v Cooper & Ors* 1977 (3) SA 475 (T) at 476 D-G; *Fisheries Development Corporation of SA Ltd v Jorgensen & Anor* 1979 (3) SA 1331 (W) at 1339E-F.

To my mind, the purpose of the descriptive phrase is to reserve to subordinate courts the power to prevent a referral of a question which would amount to an abuse of the process of the Supreme Court.”

Put in other words, it is only where the request for referral to the Constitutional Court is so manifestly lacking in seriousness as to constitute an abuse of the constitutional provision that this court would be entitled to dismiss the request. The applicant, made a request for the documents in question on the first day that the trial was due to commence. He has provided a list of those documents and in some instances the dates thereof. Mr *Chimbari* for the State has submitted that the applicant has done very little, if anything, to ensure that he secures the declassification of those documents. The court accepts the validity of that submission. However, the applicant’s tardiness in seeking to enforce his rights is a separate matter from the genuineness or *bona fides* of his request to have the constitutional implications of proceeding with the trial determined by the Constitutional Court. This court is of the view that the request for referral to the Constitutional Court cannot be characterised as frivolous or vexatious within the meaning of s 175 (4) of the Constitution. The very comprehensive and expansive bill of rights contained in the current Constitution calls for a generous interpretation of its provisions in a manner that gives full effect to the normative value system which underpins the Constitution. It is the right of every person, to have his or rights determined by the highest court in constitutional matters in this jurisdiction. In order to give efficacy to the above principles, this court comes to the conclusion that the request by the applicant for the matters raised to be referred to the Constitutional Court is neither frivolous nor vexatious.

In the result, the relief sought is granted. The following questions are referred for determination by the Constitutional Court:

1. Whether the judgment of the High Court, HH 867-15, refusing to postpone the trial to enable the applicant to seek declassification of certain documents in the custody of the state is a violation of the applicant’s right to a fair trial as provided for in s 69 (1) of the Constitution of Zimbabwe.
2. Whether, if the applicant’s rights as enshrined in s 69(1) of the Constitution of Zimbabwe have been or would be violated, the trial proceedings should be stayed pending proceedings to have the documents in question declassified.

Antonio & Dzvetero, applicant's legal practitioners' for the accused
National Prosecuting Authority, respondent's legal practitioners' for the State