REPORTABLE (39)

Judgment No. SC 45/07
Civil Application No. 276/06

CHARLES MUCHEMWA NHERERA v

(1) LILIAN KUDYA N.O. (2) THE ATTORNEY-GENERAL N.O.

SUPREME COURT OF ZIMBABWE
HARARE, OCTOBER 18, 2007

J Mandizha, for the applicant

No appearance for the first respondent

G Butau-Mocho, for the second respondent

An application in terms of section 25 of the Supreme Court of Zimbabwe Act [*Cap. 7:13*]

Before CHIDYAUSIKU CJ, In Chambers, in terms of s 25 of the Supreme Court of Zimbabwe Act

After hearing submissions by both counsel in this matter, I dismissed the application and indicated that reasons for judgment would follow. The following are my reasons for judgment –

The notice of application for review reads in part as follows:

"**NOTICE OF AN APPLICATION FOR REVIEW TO A JUDGE OF THE SUPREME COURT IN TERMS OF THE SUPREME COURT ACT, AS READ WITH PARTS II AND III OF THE SUPREME COURT RULES**

TAKE NOTICE THAT the applicant hereby applies for the review of the proceedings of the Regional Court, sitting at Harare, via CRB R404/2006, on the grounds, *inter alia*, that - …".

Thereafter the notice proceeds to set out in some detail the grounds for review upon which the application is based.

In support of the notice, the applicant deposed to a lengthy affidavit in which he sets out, again in some detail, his criticisms of the judgment of the regional magistrate.

The applicant was charged with contravening s 3(1)(a)(i) of the Prevention of Corruption Act [*Cap. 9:16*] in the regional magistrate's court. The applicant pleaded not guilty but was found guilty after a long trial.

Upon his conviction, the applicant applied to a Judge of the High Court for bail pending appeal. The application for bail was dismissed on the grounds that the appeal had no prospects of success.

Following the refusal to admit him to bail, the applicant launched this application for review.

The second respondent opposed the application and filed a document headed "**RESPONDENTS' RESPONSE TO APPLICATION FOR REVIEW**", which reads as follows:

> "1. It is respectfully submitted that the application is not properly before this Honourable Court.
>
> 2. The Supreme Court Rules cited by the applicant do not provide for the making of an application for review of a magistrate's decision by this Honourable Court whilst bypassing the High Court.
>
> 3. The High Court has the same review powers as this Honourable Court. The fact that the High Court heard the applicant's application for bail pending appeal does not necessarily mean that it cannot exercise its review powers on the same matter. The provisions which apply in applications for bail pending appeal are quite different from those for review proceedings.
>
> 4. It is further submitted that section 25 of the Supreme Court Act [*Chapter 7:13*] does not give any right to any accused person to institute any review in the first instance before the Supreme Court.
>
> 5. In the premises the respondents (*sic*) pray that the application be struck off the roll.
>
> **DATED AT HARARE THIS 9th DAY OF OCTOBER 2006**".

I pause here to make the following observation –

Where a party, the respondent, wishes to oppose an application, he/she/it should file a notice of opposition, supported by an opposing affidavit. To simply file a document headed "The respondent's response" reveals an appalling lack of appreciation of Court procedure and the Rules of this Court. I would urge counsel for the second respondent to familiarise himself with the Rules and procedure of this Court.

Be that as it may, it is quite clear that the second respondent is raising a point *in limine*, namely that it is not competent for the applicant to make an application for review of the proceedings of the regional magistrate's court directly to a Judge of the Supreme Court.

It appears *ex facie* that the application was made in terms of s 25 of the Supreme Court Act [*Cap. 7:13*] (hereinafter referred to as "the Act"), as read with Parts II and III of the Supreme Court Rules.

A perusal of Parts II and III of the Supreme Court Rules reveals that they do not provide for an application for review by this Court. The notice does not cite the specific rule in terms of which it is made. I do not believe there is such a rule.

The application also purports to be made in terms of s 25 of the Act.

Section 25 of the Act provides as follows:

"**25 Review powers**

(1) Subject to this section, the Supreme Court and every judge of the Supreme Court shall have the same power, jurisdiction and authority as are vested in the High Court and judges of the High Court, respectively, to review the proceedings and decisions of inferior courts of justice, tribunals and administrative authorities.

(2) The power, jurisdiction and authority conferred by subsection (1) may be exercised whenever it comes to the notice of the Supreme Court or a judge of the Supreme Court that an irregularity has occurred in any proceedings or in the making of any decision notwithstanding that such proceedings are, or such decision is, not the subject of an appeal or application to the Supreme Court.

(3) Nothing in this section shall be construed as conferring upon any person any right to institute any review in the first instance before the Supreme Court or a judge of the Supreme Court, and provision may be made in rules of court, and a judge of the Supreme Court may give directions, specifying that any class of review or any particular review shall be instituted before or shall be referred or remitted to the High Court for determination."

A proper reading of the above section reveals that the section provides for the following –

(a) it confers review jurisdiction on the Supreme Court and every Judge of the Supreme Court;

(b) the review jurisdiction conferred on the Supreme Court and every Judge of the Supreme Court is of the same level as the High Court or a Judge of the High Court and is over inferior courts, tribunals and administrative authorities;

(c) the review jurisdiction is exercisable by the Supreme Court and/or every Judge of the Supreme Court *mero motu* when an irregularity comes to its/his/her attention;

(d) in terms of s 25 of the Act, no person has a right to institute review proceedings in the first instance in the Supreme Court; and

(e) the section provides for the making of rules for review by the High Court and also for the Supreme Court or any Judge of the Supreme Court to remit a matter for review to the High Court.

It is quite clear that s 25 of the Act does not confer on an applicant the right to apply to the Supreme Court or a Judge of the Supreme Court for the review of proceedings of a regional magistrate's court in the first instance. Section 25(3) of the Act is very explicit in this regard.

However, the Supreme Court or a Judge of the Supreme Court can review such proceedings *mero motu* in terms of s 25(2) of the Act. Indeed this Court had occasion to deal with this point in the case of *The Chairman Zimbabwe Electoral Commission and Anor v Roy Leslie Bennet and Anor* SC 48/05, where ZIYAMBI JA had this to say at pp 5-6 of the cyclostyled judgment:

> "It appears to me that the effect of subsections (2) and (3) of s 25 of the Supreme Court Act is that although the Supreme Court may correct an irregularity in proceedings or in the making of a decision which comes to its attention, not necessarily by way of appeal or application, no person has the right to institute any review in the first instance before this Court. Thus it is not open to a party aggrieved by proceedings in a lower court to apply directly to the Supreme Court on review for redress. This much is clear from the wording of s 25(3) of the Supreme Court Act.
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> The Supreme Court is an appellate court. It has no original jurisdiction except when it sits as a Constitutional Court by virtue of s 24 of the Constitution of Zimbabwe ('the Constitution'). The powers conferred on the Supreme Court by s 25(1) of the Supreme Court Act are, therefore, to be exercised as part of its appellate jurisdiction. This view is, in my judgment, emphasised by the fact that the legislature has made the provisions of subsection (1) 'subject to' the rest of the section, that is, subsections (2) and (3).
>
> Section 25(2) confers additional jurisdiction which may be exercised when it comes to the notice of the Supreme Court or a Judge of that Court that an irregularity has occurred in proceedings not before it on appeal or application. Thus s 25(2) deals with irregularities in respect of which no appeal or application is before the Supreme Court and the review is undertaken at the instance of the Supreme Court and not of any litigant. Reviews of such irregularities would, but for the provisions of s 25(2), fall outside the jurisdiction of the Supreme Court acting in terms of its appellate jurisdiction or sitting in terms of s 24 of the

> Constitution. This view is emphasised by s 25(3) which states that s(ubss) 25 (1) and (2) must not be construed as giving a right of review at first instance."

The learned JUDGE OF APPEAL further concluded at p 7 of the cyclostyled judgment:

> "However, lest it should be thought that litigants have, because of the provisions of s 25(2), the right to approach the Supreme Court directly in order to obtain redress for perceived irregularities, s 25(3) was enacted to correct any misconception that a litigant may approach this Court directly for review. Thus the Act expressly prohibits any attempt to approach the Supreme Court as a court of first instance in an application for review.
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> It is clear from the above that the intention of the legislature was to ensure that the Supreme Court remains the final Court of Appeal. The application before us is one for review at first instance – the very thing which is prohibited by s 25(3). In the premises, I agree with the submission advanced on behalf of the first respondent, namely, that this application was contrary to statute."

I agree with the learned Judge's conclusion or interpretation of s 25 of the Act.

Accordingly, this application could not succeed.

Before concluding I wish to make the following observations –

I find it rather unusual that this Court or a Judge of this Court is conferred with jurisdiction to adjudicate on an irregularity that has come to its/his/her attention, but is barred from adjudicating on the same irregularity if attention to that irregularity is brought to the Court or the Judge by one of the affected parties through an application for review. It would also appear to me that in terms of s 25 of the Act the Supreme Court

has no review jurisdiction in respect of any irregularity in High Court proceedings except in the process of hearing an appeal. In my view, this is unsatisfactory and needs redress.

*Mandizha & C*o, applicant's legal practitioners

Civil Division of the Attorney-General's Office, second respondent's legal practitioners