SAIPAR Case Review

Volume 1
Issue 2 *May 2018*

Article 12

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O'Brien Kaaba
University of Zambia

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The Facts
Three Applicants stood charged before the Livingstone Subordinate Court with twenty-five counts relating to corrupt practices under the Zambian Anti-Corruption Act No. 3 of 2012. When the matter came up for trial, the prosecutor presented a *nolle prosequi* to discontinue the criminal proceedings. The defence objected to the discontinuance of the proceedings in such a manner, arguing that the entry of the *nolle prosequi* did not meet the conditions set out in Article 180(4)(c) and (7) of the Constitution as amended, since no reasons were given to the Court for the discontinuation of proceedings. Consequently, the defence requested an interpretation of the impugned provisions by the Constitutional Court.

The issue for determination was whether the Director of Public Prosecutions (DPP) still has unfettered powers to discontinue criminal proceedings pursuant to Articles 180(4)(c) and (7) of the Constitution, since the amendment of the Constitution by the Constitution of Zambia (Amendment) Act No. 2 of 2016.

The Holding
By a majority of four to one (Munalula JC dissenting), the Constitutional Court held that once the DPP informs the Court of his intention to discontinue proceedings pursuant to Article 180(4)(c), the Court cannot object to that exercise of power nor can it ask the DPP to furnish it with reasons for the discontinuation. Therefore, the DPP has unfettered discretion to discontinue criminal proceedings.

Significance
The judgment is significant in that it is the first application of Article 128 (2): "where a question relating to this Constitution arises in a court, the person presiding in that court shall refer the question to the Constitutional Court." That notwithstanding, the Constitutional Court's decision is unsatisfactory for its defiance of the basic approaches in constitutional adjudication, and for its dearth in legal analysis, leaving one with the sense that a critical opportunity to expand constitutional law was lost.

In determining how to interpret the Constitution, the Constitutional Court claimed to be restating the principles applicable in constitutional

interpretation in Zambia as well as in other jurisdictions. According to the Court, the correct approach is the literal rule of interpretation, which literal interpretation should only be vacated when it leads to an absurdity. This approach is, however, problematic. Judges are required to justify their decisions. As constitutional scholar Robert Post argues, "judges must be able to explain why they have decided to interpret the Constitution through one set of inquiries rather than another."[1] The reasons advanced by the Constitutional Court for choosing the literal rule have no merit and in fact, it is respectfully submitted, the use of the literal approach in constitutional adjudication is unconstitutional.

The Constitution was, save for the Bill of Rights, overhauled in the 2016 amendment. Article 1 of the Constitution declares the Constitution supreme. Therefore, any law or practice contradicting it is, to the extent of the inconsistency, invalid. Article 267(1) of the Constitution provides in mandatory terms how the Constitution shall be interpreted, stating that:
This Constitution shall be interpreted in accordance with the Bill of Rights and in a manner that:-

(a) Promotes its purpose, values and principles;

(b) Permits the development of the law; and

(c) Contributes to good governance.

Further, Article 8 of the Constitution provides for national values, which include democracy and constitutionalism, social justice, good governance and integrity. Article 9 makes it mandatory for a court to apply these values in interpreting the Constitution and other laws. It must be noted that these provisions were borrowed from the 2010 Kenyan Constitution, word for word. The significance of these provisions, as the then Kenyan Chief Justice Willy Mutunga stated, is that "the Constitution is complete with its mode of its interpretation."[2] The Constitution being self-contained with tools for its interpretation, and these provisions being mandatory, there was no legal basis for the Constitutional Court's reversion to the common law in order to circumvent the theory of interpretation required by the very Constitution. Surprisingly, the Constitutional Court seemed to be unaware of these

1 Robert Post, (1990) "Theories of Constitutional Interpretation." Yale Law Faculty Scholarship Series Paper 209.

2 In the Matter of the Principles of Gender Representation in the National Assembly and Senate Advisory Opinion No. 2 of 2012.

provisions as nowhere in the majority judgment does the Court make reference to them. South African Constitutional Court Judge, Kentridge J, rightly stated that when a court ignores the language of the law giver, what results "is not interpretation but divination."[3]

Articles 8, 9 and 267 of the Constitution, which provide for its construction are value laden, entailing that constitutional interpretation is teleological and not mechanical. It should be geared towards realization of those constitutional values, standards and collective aspirations of the people. Invariably, only a purposive interpretation is consistent with this standard the Constitution has set for its interpretation. Contrary to the assertion of the Constitutional Court that the literal rule is the approach to interpretation taken in many jurisdictions, the purposive approach is actually the standard in countries with written constitutions.[4] Former Judge of the South African Constitutional Court Mahomed J, considers a purposive and generous interpretation of the Constitution as an "international culture of constitutional jurisprudence."[5] This, as stated in a Namibian case, is the standard way of interpreting the constitution:

> A constitution is an organic document. Although it is enacted in the form of a statute it is *sui generis*. It must be broadly, liberally and purposively interpreted so as to avoid the austerity of tabulated legislation and so as to enable it to continue to play a creative and dynamic role in the expression and achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and disciplining its government.[6]

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3 Zuma and Two Others v The State, Case No. CCT/5/94.

4 See the following case examples: Affordable Medicines Trust and Others v The Minister of Health of the Republic of South Africa and Another, Case No. CCT/27/03; In the Matter of the Principle of Gender Representation in the National Assembly and Senate Advisory Opinion No. 2 of 2012; Democratic Alliance v Speaker of the National Assembly and Others (2016) ZACC 8; Economic Freedom Fighters v Speakers of the National Assembly and Others (2016) ZACC 11; State v Makwanyane and Mchunu, Case No. CCT/3/94; Mhlungu and Four Others v State , Case No. CCT/25/94; Republic of Namibia and Another v Cultura 2000 and Another 1994 (1) SA 407; Zuma and two others v The State, Case No. CCT/5/94.

5 Mhlungu and Four Others v State, Case No. CCT/25/94.

6 Government of the Republic of Namibia and Another v Cultura 2000 and Another 1994(1) SA 407.

In holding that the DPP enjoys absolute discretion in discontinuing criminal proceedings, the Court also relied on the legislative history of the provision. It noted that the first draft Constitution of 2012 had provisions that trammelled the discretion of the DPP, but that these provisions were removed in the final draft, and therefore, the framers of the Constitution never intended the DPP's discretion to be constrained. Again, this approach is by itself, an impoverished approach to the determination of a constitutional matter. While understanding the decisions and choice of words used by framers of the Constitution is important in order to understand the larger context and meaning of specific words, that in itself should not be determinative of a constitutional issue. This is because, logically, the Constitution is not the product of the few individuals who framed it, but is, in the words of Mahomed AJ, "a mirror reflecting the national soul, the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people."[7] A constitution, therefore, should not be interpreted simply to reflect its drafting history but to reflect the collective values and ideals of the people. Interpretation should be forward and not backwards looking. Chaskalson P, the former President of the South African Constitutional Court, once stated that a constitution should be interpreted as the product of a "multiplicity of persons" and therefore "caution is called for in respect of the comments of individual actors in the process, no matter how prominent a role they might have played."[8] The views of the Technical Committee that drafted the 2016 Constitution should, therefore, not have been determinative of the outcome of the Court's decision.

Taking a literal approach, the Court considered Article 180(4) (c) as giving the DPP unfettered discretion to discontinue criminal proceedings at any stage before judgment is delivered. In light of this approach, the Court has no oversight role to play in the manner in which the DPP exercises his/her discretion. In the view of the majority, this position is consistent with Article 180(7) which states that the DPP shall not be subject to the direction or control of a person or an authority in the discharge of his/her office.

However, a careful reading of the Constitution shows no merit in this position. First, Article 180(7) has a qualification to the effect that in the discharge of his/her duty, the DPP "shall have regard to the public interest, administration of justice, the integrity of the judicial system and the need to avoid abuse of the legal process." It is obvious that this qualification is a fetter

7 The State v Achesou 1991(2) SA 805 (NM).

8 The State v Makwanyane and Mchunu, Case No. CCT/3/94, para 18.

on the manner in which the DPP exercises discretion. If he/she contravenes these standards, he/she would be acting unconstitutionally. But not so for the Constitutional Court. The Constitutional Court simply considered this qualification as a mere guide to the Director of Public Prosecutions "in the performance of the functions of that office." The Court, however, gave no reasons for making that conclusion. The decision of the Constitutional Court is further contradicted by Article 267(4) which clearly states:

> A provision of this Constitution to the effect that a person, an authority or institution is not subject to the direction or control of a person or authority in the performance of a function, does not preclude a Court from exercising jurisdiction in relation to a question as to whether that person, authority or institution has performed the function in accordance with this Constitution or other laws.

The net effect of Article 267(4) is that as long as the DPP derives his/her authority from the Constitution, the manner in which he/she exercises that power cannot escape the scrutiny of the Court as the guardian of the Constitution and the rule of law. The exercise of any power that issues under the Constitution is subject to constitutional control and judicial oversight. This is the standard approach in a constitutional democracy. Power is never arbitrary. As the South African Constitutional Court stated, where power derives from the constitution, its exercise must be "rationally related to the purpose for which power was given."[9]

Recent jurisprudence from the South African Supreme Court of Appeal is squarely in line with this view. On the powers of the DPP, the South African Constitution has comparable provisions to the Zambian Constitution. The South African National Prosecution Authority had, in 2009, dropped charges against President Zuma, and it was argued by the prosecution that this was within its discretion. The court rejected this argument.

Finally, back to basics. The majority of the Constitutional Court held that the DPP has unfettered discretion to discontinue proceedings at any stage before judgment is delivered. But is "unfettered discretion" tenable in law? What exactly is discretion? Ronald Dworkin, addressed the concept of

[9] Affordable Medicines Trust and Others v The Minister of Health of the Republic of South Africa and Another, Case CCT/27/04.

discretion in his theory of adjudication.[10] The word discretion is appropriately used in one context only, that is, when a person is in general charged with making decisions which are subject to standards set by a particular authority. As Dworkin states, "discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction." Discretion therefore, at least in law, is always relative to the power under which it is given. Otherwise it does not exist. According to Dworkin, it is always legitimate to ask: "discretion under which standards?" or, "discretion as to which authority?" If, therefore, someone can do as they please, that is not discretion. It is simply lawlessness.

[10] Ronald Dworkin, *Taking Rights Seriously* (London: Gerald Duckworth and Co, 1986) 14-34.