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The People v The Patents and Companies Registration Agency Ex-Partes Finsbury Investment Limited and Zambezi Portland Cement Limited 2017/CCZ/R003 Selected Judgment No. 28 of 2018

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The People v The Patents and Companies Registration Agency Ex-Partes Finsbury Investment Limited and Zambezi Portland Cement Limited 2017/CCZ/R003 Selected Judgment No. 28 of 2018

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Facts

The matter came to the Constitutional Court by referral from the High Court. The Applicant applied for leave to issue judicial review process and leave was granted by the High Court. While the main application for judicial review was still pending, the Respondent filed an application to discharge the leave granted to the Applicant. The Applicant opposed this motion and then applied to have the matter referred to the Constitutional Court for the determination of the following questions:

1. Whether in light of the provisions of Article 118 of the Constitution, judicial review proceedings are still subject to grant of leave; and
2. Whether in light of Article 118 of the Constitution, leave to commence judicial review proceedings granted prior to 5 January 2016 can be discharged.

Holding

1. The requirement to first obtain leave before one can institute judicial review proceedings is an important tool by which the court is able to prevent the impediment of the smooth running of government institutions as well as the halting unnecessarily of government policies and decisions that can result from having to hear and determine frivolous and vexatious cases. The leave stage enables the court to stop the influx into the court system of unmeritorious cases that would assume the courts resources only to be dismissed later on the ground that they are frivolous or vexatious.
2. The phrase 'undue regard to technicalities' means placing reliance on or giving heed to a minor detail or point of law which is part of a broader set of rules that govern the manner in which court proceedings are to be conducted which does not go to the core of the whole court process.
3. Article 118(2)(e) of the Constitution does not proscribe adherence to procedural rules or technicalities as what it proscribes is paying undue regard to procedural technicalities that result in a manifest injustice. Article 118(2)(e) does not proscribe the requirement for leave before issuing judicial review process in judicial review matters. The requirement to first obtain leave of the court before issuing judicial review process still subsists and it does not violate the provisions of Articles 118(2)(e) and 134 of the Constitution.

Significance

For ease of reference, Article 118(2)(e) requires the Courts, in the exercise of judicial authority, to be guided by the principle that 'justice shall be administered without undue regard to procedural technicalities.' The decision of the Constitutional Court is problematic on many fronts. The Court took the view that the requirement for obtaining leave prior to issuing judicial review process is both a procedural and substantive rule. According to the Court, this is because the leave requirement can be dispositive of a judicial review matter. In the words of the Court:

For the foregoing, it is clear that the requirement to first obtain leave before one can institute judicial review proceedings is an important tool by which the court is able to prevent the impediment of the smooth functioning of government institutions as well as the halting unnecessarily of government policies and decisions that can result from having to hear and determine frivolous and vexatious cases. The leave stage also enables the Court to stop the influx into the Court system of unmeritorious cases that would consume the Court's resources only to be dismissed later on grounds that they are frivolous or vexatious.

The import of this holding is that if a technical rule or procedure is capable of disposing a matter then it does not offend Article 118(2)(e) of the Constitution. However, to hold this way is a misdirection on the part of the Court. It is a position that shows very little appreciation of the historical roots of Article 118(2)(e) and an example of constitutional adjudication that is ‘outcomes-based decision-making’¹ as opposed to principled adjudication. Article 118(2)(e) of the Zambian Constitution was transplanted verbatim from Article 159(2)(d) of the Kenyan Constitution of 2010. Its inclusion in the Kenyan Constitution was actuated largely by the fact that prior to 2010, no single presidential election petition was ever heard on merits in Kenya. They were all systematically killed off by the courts on procedural technicalities. A few case examples could illustrate this problem. *Mwai Kibaki vs. Daniel Toroitichi Arap Moi Court of Appeal Civil Application No. 172 [Election Petition No.1 of 1998]* was a presidential election petition brought by then main opposition candidate Mwai Kibaki against the election of President Daniel Arap Moi, following Kenya’s 1997 elections. Mwai brought an action to void the election for several electoral malpractices violating electoral rules. The petition, however, was thrown out on procedural technicalities to do with the service of the petition.

The petitioner had served the petition by way of publication in the government Gazette, since the respondent had not furnished details of his advocates as provided for in the rule. The petitioner did not effect personal or direct service as required by the relevant rules because the respondent, as president ‘is surrounded by a massive ring of security which is not possible to penetrate.’² The court held that the rule did not compel the respondent to provide contact details of his advocates. According to the court, service through publication in Gazette would only apply if the option of personal service, service through advocates and/or registered mail had been attempted and failed. Only then could a petition be presented by way of publication in the Gazette, and because this was not done, then the petition failed and the court dismissed it for improper service.³

In the Kenyan context, this was not an isolated incident but was a systematic way the judiciary took to killing off presidential election petitions without hearing the merits. For example, following the 1992 presidential elections, losing opposition candidate, Kenneth Matiba brought a petition challenging the election of Daniel Arap Moi.⁴ However, before the election, Matiba became physically incapacitated and unable even to write, and, therefore, unable to personally sign the election petition as required by the rules of service. The petition was signed by his wife, who he had given power of attorney. The court, however, struck the petition for failure to sign the petition personally by the petitioner.⁵

What is clear from these cases is that adherence to existing procedures were dispositive of the cases. Yet that was problematic, as the merits of the cases were never weighed. The 2010 Constitution, therefore, deliberately included Article 159(2)(d) to overcome that. It is not about how useful or dispositive a procedural rule is. To hold, as did the Constitutional Court, that a procedure that is dispositive of a case is consistent with Article 118(2)(e) is to miss the substance of the provision. As already noted, the decision is outcome based as opposed to principled adjudication. Under outcome based adjudication, the court thinks of the possible consequences of its decision and if it does not like the consequences, it decides the case before it in a manner consistent with an outcome it prefers.⁶ It is an approach that is based on ‘suppositions, conjecture or convenient assumptions.’⁷ In arriving at the decision to sustain the rule requiring leave, the Constitutional Court based its decision not on the articulation of the principles underlying Article 118 but on the filtering function of the rule and its

¹ Cora Hoexter, ‘South African Reserve Bank v Shuttleworth: A Constitutional Lawyer’s Nightmare’ (2016) VIII *Constitutional Court Review* 348

² Ibid p.18

³ Ibid p. 17-19

⁴ Kenneth Stanley Matiba vs. Daniel Toroitichi Arap Moi and others Civil Application No.NAI 241 (1993) [Election Petition No.27 of 1993]. See also Handbook on Election Dispute in Kenya: Context, Legal Framework, Institutions and Jurisprudence (2013)

⁵ Ibid

⁶ Michael Tsele, ‘Coercing Virtue in the Court: Neutral Principles, Rationality and the Nkandla Problem’ (2016) VIII *Constitutional Court Review* 196

⁷ Ibid, 216

capacity to dispose of unmeritorious claims in applications for judicial review. This outcome is not based on the reading or analysis of Article 118(2)(e) as this Article does not save a procedural rule merely on account of its supposed utilitarian value. It is hard to actually think of a procedural rule that would not meet the utility or dispositive value criteria set by the Constitutional Court in this case.

On the other hand, principled adjudication is grounded in the neutrality and generality of the reasons of the decision maker. Herbert Wechsler correctly described what constitutes principled adjudication:

A principled decision, in the sense I have in mind, is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved.⁸

In principled adjudication, it is not the role of the Court to worry about the likely consequences of their decision to government institutions, provided their decision is well reasoned and wells-up from correct interpretation of constitutional principles. In focusing on the supposed utility of the leave rule, the Constitutional Court failed to transcend the particularities of the case before it in order to articulate a broad framework that would inform litigants in advance when a particular rule of procedure would offend Article 118(2)(e) of the Constitution. Serving a procedural rule on account of its supposed utility value is to say nothing of value as every procedural rule was created for a purpose.

The Constitutional Court further held that the rule requiring leave before issuing judicial review process is both procedural and substantive, and is, therefore, 'part and parcel' of the application for judicial review. The Court seemed to think that judicial review is inconceivable without the rule requiring leave of Court. Shockingly, the Court went further to assert that because of the filtering function the leave rule plays, it is 'not tenable at law' to have it nullified (or perhaps even modified). This is incorrect and demonstrates limited appreciation of the plenitude of the practice of judicial review across the common law world. Judicial review is not dependent on the leave requirement. There is no necessary connection between the two. Several common law jurisdictions allow judicial review applications without requiring prior permission of the Court to proceed. For example, there is no leave requirement for judicial review proceedings in Canada, New Zealand, Australia, and Scotland.⁹ It is, therefore, completely misleading to hold that the requirement for leave is 'part and parcel' of judicial review. Even under English law, from which the rule was inherited, the rule around leave is more nuanced and does not apply, for example, to statutory judicial review which imposes six-week time limits.¹⁰

It would appear that the Constitutional Court believes it is the duty of the judiciary to limit scrutiny of the government by its own citizens through judicial review. To the Constitutional Court, the rule for obtaining leave is necessary in order to 'prevent the impediment of the smooth functioning of government institutions.' What about the doctrine of equality before the law? The authors Wade and Forsyth have stated that 'it seems wrong to impose this requirement in proceedings against public authorities, who ought not to be treated more favourably than other litigants.'¹¹ There is something fundamentally wrong about affording the government institutions this filter which is not available to every other litigant. As the Australian Administrative Review Council stated, 'it is difficult to justify a leave requirement in public law cases when no such requirement exists in other civil litigation.'¹² The Council took the view that the leave requirement adds to the expense and complexity of litigation to the disadvantage of applicants with legitimate causes of action.¹³

The decision of the Constitutional Court, in shielding the government institutions, elevates the government above the governed, an outcome that offends the concept of the rule of law, which at its

⁸ Herbert Wechsler, 'Toward Neutral Principles of Constitutional Law' (1959) 73 *Harvard Law Review* 19

⁹ HWR Wade and CF Forsyth, *Administrative Law* (11th edn, Oxford University Press 2014) 554

¹⁰ *Ibid*, 553

¹¹ *Ibid*, 553

¹² Administration Review Council, 'Review of the Administrative Decisions (Judicial Review) Act 1977: Stage One' (Report No 26, 1986) para 66

¹³ *Ibid*

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barest minimum, requires that the governors and the governed to be subject to the same rules.¹⁴ The Court should not have the duty to act as a gate keeper on behalf of government against its own citizens nor a supplicant on behalf of public authorities. The mandate of the judiciary in Article 118(1) of the constitution is simply to administer judicial authority in a just manner that promotes accountability. That is all.

The case demonstrates the inability of the Constitutional Court to transcend insular jurisprudence that promotes a culture of subservience to the executive. It demonstrates reluctance on the part of the Court to articulate ground breaking, innovative and progressive jurisprudence that does not see the government as elevated above its people but as a servant of the people and entirely answerable to the people, no matter how unwarranted the questions the people may ask. This has been a general problem affecting many judiciaries in Africa. Prempeh aptly described this problem when he stated:

The result, in the African context, is what I have called a 'jurisprudence of executive supremacy' - a jurisprudence that is unduly deferential to executive power, and, at best sceptical of 'novel' claims rooted in modern conceptions of constitutionalism.¹⁵

This case presented the Constitutional Court an opportunity to articulate clear principles underlying the adoption of Article 118 and enable litigants in advance how their claims will be settled in relation to the provision. It was an opportunity to break ground for a new jurisprudence that articulates the new Constitutional norms in the amended Constitution. Sadly, the opportunity was squandered.

¹⁴ Stu Woolman, 'Understanding South Africa's Aspirational Constitution as Scaffolding' (2015/2016) 60 *New York Law School Law Review* 286

¹⁵ H Kwasi Prempeh, 'Presidential Power in Comparative Perspective: The Puzzling Persistence of Imperial Presidency in Post-Authoritarian Africa' (2008) 35 *Hastings Constitutional Law Quarterly* 829