JUDICIAL SERVICE COMMISSION

"THE PROCEDURE OF REFERRAL OF CONSTITUTIONAL MATTERS FROM A SUBORDINATE COURT TO THE CONSTITUTIONAL COURT IN TERMS OF SECTION 175(4) OF THE CONSTITUTION OF ZIMBABWE"

A PRESENTATION BY THE HONOURABLE MR JUSTICE L MALABA, CHIEF JUSTICE,

AT THE END OF THE FIRST TERM 2019 JUDGES' SYMPOSIUM

TROUTBECK INN RESORT, NYANGA

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INTRODUCTION

Section 175(4) of the Constitution provides a framework for referral to the Constitutional Court of constitutional matters that arise in any proceedings before a subordinate court. It should be noted that s 175(4) is worded in almost the same way as its precursor in s 24(2) of the Lancaster House Constitution. The only difference is that s 24(2) was confined to the Declaration of Rights, whereas s 175(4) is wider and covers any constitutional matter which may arise.[1] In other words, s 175(4) endows the power of referral to a wider range of "constitutional matters" that might arise in any proceedings before a court. The provision is complemented and given practical effect by Rule 24 of the Constitutional Court Rules (hereinafter "the Rules"). That rule adds flesh to the referral concept as outlined in the Constitution. It stipulates the

[1] The minute difference is that in the old s 24 (2) and the new s 175 (4) is that in the old section, the referral necessarily had to be based on the alleged infringement of a provision of the declaration of rights, the new section does not limit the scope of the constitutional matter to declaration of rights but encompasses a wider spectrum of constitutional matters as defined under s 332 of the Constitution. As an example, during criminal proceedings being conducted by a police officer who is on secondment to the National Prosecuting Authority, a person may allege that the prosecution by the police officer is unconstitutional on the basis of s 208 (4) of the Constitution. That would be a constitutional issue which is not based on the Bill of Rights. The case of *Zimbabwe Law Officers Association and Anor* v *National Prosecuting Authority and Four Ors* CCZ 1/19 is an application challenging the constitutionality of having police prosecutors manning civilian courts. It came as a direct application in terms of s 85 of the Constitution but it could have arisen in proceedings in the lower court and could have been referred to the Constitutional Court.

procedures that must be followed in making a referral to the Constitutional Court. These and other matters incidental thereto are discussed below.

SECTION 175(4) OF THE CONSTITUTION

In order to interpret it properly and understand what the framers of the Constitution intended to achieve the provision must be broken down. The content and the scope of the provision must be fully understood.

Section 175(4) of the Constitution stipulates that:

> "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."

Clearly the provision envisages two instances where the court can refer to the Constitutional Court a constitutional matter that arises during proceedings:

i. The first is framed as a discretion to the court by the use of the word 'may.' It relates to instances where upon realisation that a constitutional issue has arisen and that its resolution has a bearing on the disposition of the issues at hand, the subordinate court *mero motu* decides to refer the constitutional question to the Constitutional Court;

ii. The second instance is mandatory to the person presiding over the lower court. It relates to where a party to the proceedings requests a referral of the constitutional matter. The presiding officer has no discretion in that case. He/she can only refuse to refer the issue if he/she considers the request to be merely frivolous or vexatious or both.

In determining the questions of frivolity and vexatiousness the presiding officer must understand that what can be frivolous or vexatious is the request and not the question. It is the human being who can be mischievous. It is for instance frivolous for a question to be referred to the Constitutional Court when that

question is not necessary for the determination of the guilt or innocence of the accused person before the court. It is failure to appreciate the distinction which has led to the rampant cavalier referral of questions to the Constitutional Court. Judicial officers must resist the temptation to be diverted from the real issues.

In every request, the court is enjoined to determine whether the request is frivolous or vexatious or both. The phrase "frivolous or vexatious" incorporates two distinct concepts which are disjunctive. A request may be frivolous but not vexatious or vexatious but not frivolous. It can also be both frivolous and vexatious. A finding that a request is either frivolous or vexatious suffices for the dismissal of the request.

As pointed out earlier the procedure to be adopted in referring matters is to a large extent similar to the procedure previously used in terms of s 24(2) of the old Constitution. The jurisprudence developed since that time equally applies in the current situation.

THE CONSTITUTIONAL COURT RULES

In addition to s 175 (4) of the Constitution which provides the framework, the Constitutional Court Rules provide the nuts and bolts of referrals. For that purpose, rule 24 is apposite and is reproduced below:

> **"24 REFERRAL OF CONSTITUTIONAL MATTER IN PROCEEDINGS BEFORE A COURT**
>
> ***(1) Where a person presiding over a subordinate court wishes to refer a matter to the Court mero motu in terms of subsection (4) of s 175 of the Constitution, he or she shall –***
>
> ***(a) request the parties to make submissions on the constitutional issue or question to be referred for determination; and***
>
> ***(b) state the specific constitutional issue or question he or she considers should be resolved by the Court.***

(2) Where the person presiding over a court of lesser jurisdiction is requested by a party to the proceedings to refer the matter to the Court and he or she is satisfied that the request is not frivolous or vexatious, he or she shall refer the matter to the Court.

(3) A referral under subrule (1) or (2) shall be in form CCZ 4 and be accompanied by a copy of the record of proceedings and affidavits or statements from the parties setting out the arguments the parties seek to make before the Court.

(4) Where there are factual issues involved, the court seized with the matter shall hear evidence from the parties and determine factual issues:

Provided that where there are no disputes of fact, the parties may prepare a statement of agreed facts.

(5) The record of proceedings referred to in subrule (3) shall contain the evidence led by both sides and where applicable, specific findings of fact by the person presiding over the court and the issue or question for determination by the Court.

(6) Where there is a statement of agreed facts in terms of the proviso to subrule (4), it shall suffice for the statement to be incorporated in the record in place of the evidence and specific findings of fact.

(7) The person presiding over the court shall direct the clerk or registrar as the case may be to prepare and transmit the record so prepared to the Court within 14 days of the date such direction:

Provided that, before transmission, the registrar or clerk of the referring court shall ensure and certify that the record is correct and accurate and in the case of a referral in terms of subrule (2), that it contains an appropriate draft order.

(8) Where the Registrar receives a referral in terms of this rule, he or she shall call upon the parties to file their heads of argument. After the filing of the heads of argument, or should either party fail to file heads of argument, the Registrar shall set the matter down for hearing."

Rule 24 mirrors the second part of s 175(4) of the Constitution which deals with a request for referral and mainly reinforces the idea that where a court is satisfied that the request is not frivolous or vexatious it has an obligation in terms of both the Constitution and the Rules to refer the matter to the Constitutional Court. **There must be a request** from a party for such an obligation to ensue. The request is a pre-requisite for a referral in terms of the rule and may be made orally or through a written application. A request is a clear statement of moving a decision by the court. The request must clearly specify the constitutional question. In addition, it must indicate how the question arises. In *Nyagura* v *Ncube N.O. and Ors CCZ* 7/19,

MALABA CJ at page 9 of the cyclostyled judgment succinctly held as follows in this regard:

> ***"If the presiding person is of the view that the determination of the constitutional matter by the Court is necessary for the purposes of the proceedings and that the request for a referral is not frivolous or vexatious, he or she is obliged to refer the matter to the Court for determination. If the presiding person is of the opinion that the request for a referral is frivolous or vexatious, he or she shall refuse the request. … There must be evidence that a request for a referral of a constitutional matter to the Court was made to the presiding person."***

THE PROCEDURE

A. REFERRAL AT THE INSTANCE OF A PARTY

The steps outlined below in their sequence must be followed in all cases where a request to refer is made in terms of s 175 (4). Section 175 (4) is clear that where a request is made "in any

proceedings before a court", the court must refer. It is therefore imperative to define that which is meant by proceedings.

WHAT ARE PROCEEDINGS?

"Proceedings" in relation to constitutional matters relates to legal process in any court that is subordinate to the Constitutional Court. In essence, proceedings relate to matters before a judicial officer of any court. In *Meda v Sibanda CCZ* 10/16, the court held that proceedings are those in which there is *lis* between the parties one of whom seeks redress or the enforcement of rights against the other.

The net in this regard has been cast much wider by the Constitution in terms of s175 (4). As indicated earlier on, its predecessor, s 24 (2) insisted upon basing a referral on a constitutional question alleging the infringement of a right protected in the Declaration of Rights. Section 175 (4) of the Constitution as read with s 322 removed that restriction. The

term proceedings from which a matter may or must be referred have also been widened.

ARE PLEADINGS PROCEEDINGS?

Whilst determining what proceedings are, it must also be considered whether pleadings are proceedings. In other words, can a constitutional matter be referred to the Constitutional Court if it arises in pleadings? In *Tsvangirai* v *Mugabe and Anor* 2006 (1) ZLR 148 (S) at 158E-F the Court defined proceedings in general as follows:

> "The word 'proceedings' has a wider meaning in s 24(2) of the Constitution than 'goings-on' in court. There are no proceedings without an action or case. Proceedings ordinarily progress in steps. The word is, therefore, a general term, referring to the action or application itself and the formal and significant steps taken by the parties in compliance with procedures laid down by the law for the purpose of arriving at a final judgment on the matter in dispute. There are proceedings in being in the High Court

from the moment an action is commenced or an application made until termination of the matter in dispute or withdrawal of the action or application." (emphasis added)

Resultantly, a pleading constitutes proceedings as described above. Once a constitutional matter is raised in pleadings before termination of the matter in dispute, then the normal procedure for referral must kick in.

It is also essential to consider the point at which during the proceedings a referral is envisaged. In a criminal matter, where a litigant feels that the process or preferred charge infringes a constitutional entitlement or raises a constitutional issue the question may be considered for referral. However, the proceedings need not have gone beyond responding to the charge. A litigant can make an application for referral on the basis that the charge itself is unconstitutional.

A referral made *during* proceedings means that the proceedings must have commenced and not yet terminated. This is so because a referral serves the purpose of answering a

constitutional question that is critical to the continuance and resolution of proceedings that are pending before the subordinate court.

Proceedings from which a referral can be requested or made at the instance of a court do not relate to all proceedings before any judicial officer but only those from a court of law.[2] As such, although arbitrators and legal officers constitute judicial officers the law does not contemplate referrals from such sort of proceedings.

NOTE:

(i) The Constitution compels the court to refer a matter to the Constitutional Court if requested by any party to do so and this means in criminal proceedings the court can be requested by either the State or the defence or by both to refer a matter. If requested, it SHALL so refer the case unless it considers and

[2] *Hove v Chairman, Health Professions Council Disciplinary Committee* 2000 (2) ZLR 422 (H); *In Re Gwekwerere* 2003 (1) ZLR 65 (S).

makes a finding that the request is frivolous or vexatious.

(ii) A party wishing to make the application must give the other side notice that such an application is going to be made.

(iii) The referral procedure is the same in both criminal and civil cases.

STEP 1: THE REQUEST

A request by a party to the proceedings is a pre-requisite. In most criminal cases in the Magistrates' Courts the accused are usually unsophisticated and unrepresented. The court must therefore bring to the attention of the accused the possible breach of his/her right. It must advise the accused person of the availability of the referral procedure and ask him if he wants the matter to be referred. To this end, in *S* v *Tau* 1997 (1) ZLR 93 (H) at 99F the High Court held that:

"The fact that he has not complained of the delays I cannot properly regard as constituting acquiescence in

the wrong or waiver of his rights. This man was unrepresented. He is uneducated. He was entitled to rely upon the court to protect his rights and to ensure fair treatment of him. It was his privilege to expect that the magistrate would advise him of his rights and would scrupulously scrutinize the applications by the State for remand after remand. He received no such advice or protection. He evidently knew of no rights."

What must trigger the request is the arising of a constitutional matter in the proceedings. As such, the request must indicate how the constitutional question arises. The person making the request must set out the basis upon which he believes the issue he intends to raise is a constitutional question. While they are at that, the person making the request must also set out the circumstances under which the constitutional question arises. The facts in which it arises must be made apparent. It must be indicated in the request whether the facts are agreed or disputed. The facts must be well grounded, capable of proof and relevant for the resolution of the case before the court.

At this stage the violation of the person requesting's constitutional rights is irrelevant. It is a matter for the Constitutional Court.

WHAT IS A CONSTITUTIONAL MATTER?

The Constitutional Court has no jurisdiction to determine any case which is not a constitutional matter. Judicial officers should know that the Constitutional Court is concerned with determination of matters raising questions of law, the resolution of which require the interpretation or protection or enforcement of the Constitution. What a constitutional matter is was defined in *Chiite & 7 Ors v The Trustees of The Leonard Cheshire Homes Zimbabwe Central Trust* CCZ 10/17 by Malaba DCJ (as he then was) at page 1-2 of the cyclostyled judgment as follows;

> ***"A constitutional matter is defined under s 332 of the Constitution to mean a matter in which there is an issue involving the interpretation, protection or enforcement of the Constitution. The issue raised before a court***

will be sufficient evidence of the existence of a constitutional matter to the extent that its determination requires the interpretation, protection or enforcement of the Constitution".

At pages 6 to 7 of the cyclostyled judgment in *Magurure and 63 Ors* v *Cargo Carriers International Hauliers (Pvt) Ltd* CCZ 15/16 the Court defined a constitutional matter thus:

"A constitutional matter arises when there is an alleged infringement of a constitutional provision. It does not arise where the conduct the legality of which is challenged is covered by a law of general application the validity of which is not impugned. The question whether an alleged conduct constitutes the conduct proscribed by a statute requires not only proof that the alleged conduct was committed, it also entails that the statutory provision against which the legality of the conduct is tested be interpreted to establish the content and scope of the conduct proscribed before it is applied to the conduct found proved."

In *Sister Berry (Nee Ncube) and Anor* v *The Chief Immigration Officer & Anor* 2016 (1) ZLR 38 (*CC*), the Court held as follows at page 46*A-C*:

> ***"… I find the following excerpt from the book 'Constitutional Litigation'[3] by the learned authors Max du Plessis, Glenn Penfold and Jason Brickhill, to be eminently apposite:***
>
> > ***'The quintessential example of a constitutional matter is one that involves the direct application of the Bill of Rights, that is, a constitutional challenge to law or conduct based on an unjustified infringement of a fundamental right. This includes challenges to the constitutionality of:***
> >
> > ***(i) An Act of Parliament, a local government by law or <u>conduct of a State functionary; and;</u>***
> >
> > ***ii) A rule of the common law or customary law.'" (my emphasis)***

In *Cold Chain (Pvt) Limited T/A Sea Harvest* v *Makoni* SC 8/17 MALABA DCJ (as he then was) defined a constitutional matter as follows at page 4 of the cyclostyled judgment:

[3] First Ed. at p 19

"Under s 332 of the Constitution a constitutional matter is one in which there is an issue involving the interpretation, protection or enforcement of the Constitution. Absence of an issue raised in the proceedings in the subordinate court requiring the interpretation, protection or enforcement of a provision of the Constitution in its hearing and determination would invariably be sufficient evidence of the fact that no constitutional matter arose in the subordinate court.

The principles to be applied in the determination of the question whether the Supreme Court determined a constitutional matter are clear. It is not one of those principles that the court against whose judgment leave to appeal is sought should have referred to a provision of the Constitution. There ought to have been a need for the subordinate court to interpret, protect or enforce the Constitution in the resolution of the issue or issues raised by the parties. The constitutional question must have been properly raised in the court

below. Thus, the issue must be presented before the court of first instance and raised again at or at least be passed upon by the Supreme Court, if one was taken."

In effect therefore, where a subordinate court does not take a view of the case that requires it to interpret and apply a constitutional provision to determine the issue raised, the matter does not pass for a constitutional matter. Section 332 must guide a presiding officer on whether the issue raised is one envisaged under s 175 (4) or not.

The constitutional question must have been properly raised in the court below. If the constitutional question is part of a defendant's defence in a criminal trial, then it should be raised in his defence outline. Should the question be part of a respondent's defence in a civil claim, it ought to be part of the respondent's plea or opposition. As the court held in *Cold Chain (Private) Limited t/a Sea Harvest* v *Makoni supra* at p 5, the issue must be presented before the court of first instance. The mere referring to a constitutional provision is not enough for

purposes of a referral of a constitutional matter in terms of s 175(4).

CONSTITUTIONAL ISSUES ARISING DURING PROCEEDINGS IN A LOWER COURT MUST BE BROUGHT BY WAY OF REFERRAL

In *Taylor-Freeme* v *The Senior Magistrate, Chinhoyi and Anor* 2014 (2) ZLR 498 (*CC*) at 505G, CHIDYAUSIKU CJ dealt with the procedure to be taken after a constitutional issue arises in a lower court as follows:

> ***"Once a constitutional issue arises in any proceedings in an inferior court, it should be referred to the Constitutional Court unless such an application is frivolous or vexatious…The court a quo was therefore required in terms of s 24(2) of the Constitution to refer this matter to the Constitutional Court."***

In *Chihava and Ors* v *Principal Magistrate and Anor* 2015 (2) ZLR 31 (*CC*) at 31F, it was held that:

> ***"… any constitutional issue that arises during proceedings in a lower court ought to and must be***

brought to this court only upon referral in terms of s 175 (4) of the Constitution ….”[4]

The same principle applies where the violation of a fundamental human right is alleged in proceedings pending before a judicial officer. In *Mushapaidze* v *St. Annes Hospital and Ors* CCZ 18/17 the Court held as follows at page 6 of the cyclostyled judgment:

> ***“… an application cannot be made directly to the Constitutional Court in terms of s 85(1) of the Constitution alleging a violation of a fundamental right in respect of conduct, the lawfulness of which is a subject of inquiry in proceedings pending before a subordinate court. If a question of violation of a fundamental right arises in proceedings before a subordinate court, the correct procedure for bringing the matter to the Constitutional Court is the one set out in s 175(4) of the Constitution.”***

[4] *See also Captain Ngonidzashe Mugadza v Minister of Defence & 3 Ors* CCZ 23/17

STEP 2: FORMAT OF REQUEST

As was held by the court in *Tomana and Anor v Judicial Service Commission and Anor* HH 281/16 at page 18, the request may be made ORALLY or as a WRITTEN application. The case of *Tomana and Anor* v *Judicial Service Commission and Anor supra* provides guidance as to circumstances in which a written or oral application can be made.

It must be borne in the mind of every judicial officer that irrespective of the format used to make a request, evidence must ultimately be led from the applicant, unless the case is such that there is no need for the leading of evidence.

In this regard, the court in *Tomana and Anor v Judicial Service Commission and Anor supra* stated that the request, whatever form it takes, either a written or an oral application, must not be made from the bar by an applicant's legal practitioner.

STEP 3: PROSECUTION OF REQUEST

Once satisfied that steps 1 and 2 have been complied with, the judicial officer must move on to hear oral evidence. This must

be the case even if the applicant has made a written application which contains a founding affidavit. In an oral application, the applicant or he who makes the request must lead evidence by calling witnesses who will testify on his behalf. That is particularly so where there are disputes of fact which need to be resolved. At this stage, it is important to note that the referring court ought not be concerned with the violation of the Constitution because this question of the violation of the Constitution is for the Constitutional Court to decide.

The point was made clear in *S* v *Banga* 1995 (2) ZLR 297 at page 301D-G where GUBBAY CJ held as follows;

> "… ***I trust that I have made it clear that it is essential for an accused, who requests a referral to this court of an alleged contravention of the Declaration of Rights, to ensure that evidence is placed before the lower court. It is on that evidence that the opinion has to be expressed as to whether the question raised is merely frivolous or vexatious. It is on that record that***

the Supreme Court hears argument and then decides if a fundamental right had been infringed."

In *Mwonzora and 31 Ors* v *The State CCZ* 9/15, the Court also held as follows at page 5 of the cyclostyled judgment:

"Further it is insufficient to make a statement from the bar, as the applicants' legal practitioners did in this case. The applicants should have been called to testify under oath in order to substantiate their complaints that their rights had been violated. Had that happened the prosecutor would then have had the opportunity to cross-examine the applicants and, thereafter, to adduce such evidence as he may have considered necessary to contradict the allegations made by the applicants. Only after hearing evidence from both sides would the magistrate have been in a position to make findings of fact, which findings he would have been bound to take into account in deciding whether or not to refer the issues raised to the Supreme Court. In short, it is the responsibility of the court referring a

matter to resolve any disputes of fact before making such a referral."

The Court went on to hold that it is on the basis of the resolved facts that the judicial officer makes the decision to refer the matter after making a finding as to whether the request is frivolous or vexatious.

The same point was taken in *S* v *Makaza and Anor* and *S* v *Gumbo and Anor CCZ* 16/17 where the Court held as follows at page 13 of the cyclostyled judgment:

"[12] The need for a court referring a matter to the Constitutional Court to resolve disputes of fact before making a referral has been emphasised in a long line of cases. It is on the basis of the findings of fact made that the court referring the matter formulates an opinion whether or not the question raised is frivolous or vexatious. It is also on the basis of those findings of fact that this court hears argument in order to

determine whether a fundamental right has been infringed."

What is clear from this jurisprudence is that leading of evidence is imperative before the referral of a case. It is the basis upon which the referring court decides whether or not the request is frivolous or vexatious. In addition, the Constitutional Court relies on the findings made from that evidence to determine the constitutional issues raised. The absence of oral evidence can be fatal to an application of this nature because it completely disables findings to be made on the complaints raised. It is also on the basis of those findings that the Supreme Court is called upon to deal with the allegations raised and, where necessary, afford appropriate relief.

In such cases it is a must that the applicant takes to the witness' stand to afford the other side opportunity to cross examine him/her if it so wishes. As usual, after cross-examination the witness can be re-examined by his legal practitioner.

After the leading of evidence by the applicant, the State must be afforded the same opportunity to lead its own witnesses and the same process of cross-examination and re-examination repeated. Thereafter, both parties may then make oral submissions to the court on the evidence led.

The entire process as outlined above is crucial in that it provides a basis upon which the court will make the necessary findings of fact. It is upon those findings of fact that the court will then decide whether or not the application is frivolous or vexatious.

NOTE:

Evidence led for the purpose of a referral must be aimed at establishing infringement of a right or interpretation, protection or enforcement of the Constitution. In a criminal matter, one must never be allowed to take the matter beyond the scope of the application and start giving evidence to establish his full defence or its case respectively.

STATEMENT OF AGREED FACTS

It must be noted that ordinarily the only time that evidence can be dispensed with is when there are no disputes of fact, in which case a statement of agreed facts must be drawn and signed by both parties who are subject to the proceedings where the request has been made, see rule 24 (4) of the Constitutional Court Rules, and *Sibanda v The State CCZ* 4/17.

STEP 4: DETERMINATION AND DISPOSITION

As already indicated, s 175 (4) compels a judicial officer to refer a matter to the Constitutional Court unless he is of the view that the request is frivolous or vexatious. In that regard, it is very important that every judicial officer understands what is meant by the words frivolous and vexatious in the context of an application for referral.

MEANING OF "FRIVOLOUS" AND "VEXATIOUS"

The phrase is descriptive in its meaning. It was defined in two seminal cases starting with *Martin* v *A-G and Anor* 1993 (1) ZLR 153 (S) p 157B-D where the court said:

"Frivolous connotes in its ordinary meaning, the raising of a question marked by lack of seriousness; one inconsistent with logic and good sense, and so clearly 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 purposes 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."

In *Rogers* v *Rogers and Anor* SC 64/07 the court per MALABA CJ (as he then was) at page 9 held:

"In S v Cooper & Ors 1977 (3) SA 475 at 476D BOSHOFF J said that the word 'frivolous' in its ordinary and natural meaning connotes an action characterised by lack of seriousness, as in the case of one which is

manifestly insufficient. An action is in a legal sense 'frivolous or vexatious' when it is obviously unsustainable, manifestly groundless or utterly hopeless and without foundation. See also Western Assurance Co v Caldwell's Trustee 1918 AD 262 at p 271; Corderoy v Union Government 1918 AD 512 at p 517; Wood NO v Edwards 1968 (2) RLR 212 at 213A-F; Fisheries Development Corporation v Jorgensen and Anor 1979 (3) SA 1331 at 1339 E-F; Martin v Attorney General and Anor 1993 (1) ZLR 153 (S)".

The characteristics of these phrases were then broken down in *Tomana and Anor v Judicial Service Commission supra* at page 24 of the cyclostyled judgment as follows:

"From the above I can summarise, regarding frivolity, into the following points:

(i) lack of seriousness;

(ii) manifestly groundless;

(iii) utterly hopeless and without foundation in the facts on which it is purportedly based;

(iv) inconsistent with logic and good sense;

(v) groundless and devoid of merit that a prudent person could not possibly expect to obtain relief from it.

In regard to vexatiousness:

(i) the question being put forward for the purpose of causing annoyance for the opposing party in the full appreciation that it cannot succeed.

(ii) It is not raised *bona fide*.

(iv) A referral would be to permit the opponent to be vexed under a form of legal process that was baseless."

See also *Williams and Anor* v *Msipha NO* 2010 (2) ZLR 552 (S) p 568.

From the above definitions, it must immediately occur to any judicial officer that for him/her to be able to determine whether the request is frivolous or vexatious, he/she must first know the content of the right he/she is dealing with or the constitutional provision that needs to be interpreted.

By content is meant what the right entails e.g. the content of the right to freedom of expression is that a person must be allowed to freely impart and receive information and ideas and that he must not be compelled to receive information and ideas that he does not want to receive, see *Retrofit Pvt Ltd* v *PTC and Anor* 1995 (2) ZLR 199 (SC).

Similarly, the content of the right to the protection of law entails that the law be expressed in clear and precise terms to enable individuals to conform their conduct to its dictates. A law may not be so widely expressed that its boundaries are a matter of conjecture nor may it be so vague that the people

affected by it must guess at its meaning. If it does it will fail to meet the test of validity. This has come to be known as the *Martin* v *Attorney-General supra* exception. Similar remarks were made in *Chihava and Anor v Provincial Magistrate Mapfumo N.O. and Anor supra.*

Any right one may think of may be the subject of a request for referral, e.g. a journalist charged with publishing a falsehood may claim his right to freedom of expression; an activist charged with public violence may claim freedom of association and expression, etc. Therefore, when confronted with a request the judicial officer must consider in light of the findings of fact made whether there is any basis that the right may have been infringed. It is such consideration that demonstrates that the magistrate has applied a conscientious and objective thought to the application.

In considering whether a request is frivolous or vexatious, a judicial officer is also guided by the principles of constitutional avoidance and subsidiarity. These will be discussed in turn as follows;

CONSTITUTIONAL AVOIDANCE

This doctrine entails that where there are proceedings pending in a lower court, wherein the applicant may obtain the relief which he intends to obtain in the Constitutional Court by raising a constitutional matter, the Constitutional Court will not interfere with the unterminated proceedings within the jurisdiction of the lower court. In terms of the doctrine, the court will only deal with a constitutional issue where the remedy sought by the applicant is solely dependent upon the determination of that constitutional issue. The doctrine of avoidance was fortified in *Sports and Recreation Commission* v *Sagittarius Wrestling Club and Anor* 2001 (2) ZLR 501 (S) in which EBRAHIM JA said the following at page 505F-G:

> ***"There is also merit in Mr Nherere's submission that this case should never have been considered as a constitutional one at all. Courts will not normally consider a constitutional question unless the existence of a remedy depends upon it; if a remedy is available to an applicant under some other legislative provision or***

on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of Rights. *(my emphasis)*

In *Chawira and Ors* v *Minister of Justice and Ors* CCZ 3/17 the Court explained the concept as follows at page 6:

> ***"Zimbabwe operates a self-correcting hierarchical judicial system where in the ordinary run of things cases start from the lower courts progressing to the highest court of the land. Generally speaking, higher courts are loathe to intervene in unterminated proceedings within the jurisdiction of the lower courts, tribunals or administrative authorities."***

Where, therefore, a party seeks to refer a constitutional matter to the Constitutional Court when there are proceedings pending in the lower court in terms of which he can obtain the same remedy which he intends to seek before the Constitutional Court, the judicial officer faced with the

request to refer must decline to grant such request on the basis that it is frivolous and vexatious in terms of the doctrine of avoidance.

THE PRINCIPLE OF SUBSIDIARITY

The principle of subsidiarity states that a litigant who avers that a right protected by the Constitution has been infringed must rely on legislation enacted to protect that right and may not rely on the underlying constitutional provision directly when bringing action to protect the right. He can only do that if he wishes to attack the constitutional validity or efficacy of the legislation itself. The principle of subsidiarity underlines the fact that there are many disputes of right or interest which do not give rise to constitutional matters. It directs as to the route to be taken for the protection of the rights allegedly violated. Where the question for determination is whether conduct the legality of which is impugned is consistent with the provisions of a statute, the principle of subsidiarity forbids reliance on the Constitution, the provisions of which would have been given full effect by the statute.

In *Magurure* v *Cargo Carriers International Hauliers (Pvt) Ltd* CCZ 15/16 the Court explained the principle as follows at page 9:

> ***"The principle of subsidiarity is based on the concept of one-system-of-law. Whilst the Constitution is the supreme law of the land it is not separate from the rest of the laws. The principles of constitutional consistency and validity underscore the fact that the Constitution sets the standard with which every other law authorised by it must conform. The Constitution lays out basic rights and it is up to legislation to give effect to them. This is the nature of the symbiotic relationship between the Constitution and legislation. The legal system is one, wholesome and indivisible."***

Where a litigant who avers that his right protected by the Constitution has been infringed and seeks to refer that matter to the Constitutional Court, the judicial officer faced with such request must decline to grant the same on the basis that the litigant must first rely on legislation enacted to protect that

right and not rely on the underlying constitutional provision directly when bringing action to protect the right. The request may only be granted where it is shown that the litigant intends to attack the constitutional validity or efficacy of the legislation itself.

THE COURT MUST MAKE A DETERMINATION OF WHETHER THE REQUEST IS FRIVOLOUS OR VEXATIOUS

Section 175(4) of the Constitution makes it clear that a determination of the frivolity or vexatiousness of a request is a pre-requisite to making a decision on whether or not to refer a matter to the Constitutional Court. Rule 24 (2) of the Constitutional Court underscores this requirement as follows:

> "Where the person presiding over a court of lesser jurisdiction is requested by a party to the proceedings to refer the matter to the Court and <u>he or she is satisfied that the request is not frivolous or vexatious, he or she shall refer the matter to the Court.</u>" (my emphasis)

This shows that this determination cannot be overlooked by a judicial officer as it is essential to every request for referral

by applicants. In *Mwonzora and 31 Ors* v *The State CCZ* 9/15 it was held as follows at pages 3-4:

> ***"The position is settled that a judicial officer faced with an application for referral has no option but to refer, unless, in the opinion of the Court, the raising of the question is frivolous and vexatious – Martin v Attorney-General 1993 (1) ZLR 153 (S) 156 H. The Magistrate at Nyanga did not, as he should have, ask himself whether the issues raised were not frivolous and vexatious. Indeed, it appears the magistrate was not sure as to what was required of him …".***

Further, in *Sibanda* v *The State CCZ* 4/17, it was held that a judicial officer must give reasons why he/she finds the application to be frivolous or vexatious or not.

A determination of whether or not the request is frivolous or vexatious is not a finding to be undertaken by the Constitutional Court. It is an exercise which must be carried by the presiding judicial officer in that particular matter. What

must be frivolous or vexatious is the request and not the question sought to be referred. A question cannot be frivolous or vexatious. In *Nyagura* v *Ncube N.O. and Ors* supra the following was stated at page 10 of the cyclostyled judgment:

> ***"It is not compliance with the requirements of the procedure of referral of a constitutional matter to the Court prescribed under s 175(4) of the Constitution to say the constitutional question was raised and the presiding person declined to refer it to the Court. <u>The reason is that it is the request to refer a constitutional question to the Court which must have been found to be frivolous or vexatious. It is not the constitutional matter itself that has to be found to be frivolous or vexatious</u>." (my emphasis)***

After making a finding that the request to refer the question is not frivolous or vexatious, the judicial officer must refer the question to the Constitutional Court. If the finding is made that the request to refer the question is merely frivolous or

vexatious, the judicial officer ought to decline the request and continue with the proceedings. Once he has made the decision to refer the judicial officer must state clearly which question must be determined by the Constitutional Court.

A COURT CANNOT REFER WHERE IT HAS ALREADY DETERMINED THE CONSTITUTIONAL ISSUE

Where a constitutional question has already been determined by the referring court, it becomes incompetent for that question to be referred to the Constitutional Court. This is so because once the question has been decided, the referral becomes tantamount to a review of the referring court's decision or an appeal of the referring court's decision. In *Nyagura v Ncube N.O. and Ors* supra the Court held as follows at pages 12-14 of the cyclostyled judgment:

> ***"If the subordinate court exercises its general power to determine the constitutional matter on the merits, it does so on the basis of some other law, not s 175(4) of the Constitution. The determination of a***

constitutional question by a subordinate court is of itself a judicial protection, unless the court has no jurisdiction over the matter. The remedy for the enforcement of the law prescribing the standard of jurisdiction is the appeal. … The subordinate court decides the question whether a request to refer the constitutional question to the Court is merely frivolous or vexatious. Once the subordinate court decides the constitutional question on the merits, s 175(4) of the Constitution ceases to be applicable. … <u>The court a quo could not have addressed its mind to the question whether a request for referral of the constitutional questions was merely frivolous or vexatious after determining the constitutional questions itself. … The Court can only exercise its jurisdiction to interpret, protect and enforce the Constitution in respect of matters that reach it from lower courts through the procedures prescribed by the Constitution and given effect to by the relevant provisions of the Rules. The</u>

substantive and procedural requirements of the relevant constitutional provisions must be complied with. It must be shown that the matter sought to be brought before the Court for determination falls within the ambit of matters for which the constitutional provisions invoked were designed. ***" (my emphasis)***

Therefore, it can be seen that once the lower court has decided the constitutional question on the merits, it cannot refer the same to the Court for determination, as section 175(4) of the Constitution ceases to be applicable in such circumstances. The correct route would be for the matter to be dealt with by way of appeal. In *Muchero and Anor* v *Attorney-General* 2000 (2) ZLR 286 (SC), the court held that it was incompetent for the court to make a determination when the magistrate had already rendered a decision. It was held that once he had made a decision, the matter could only be dealt with by way of appeal or review.

To refer a constitutional question when it has already been answered is to seek validation or endorsement of the referring court's decision. That is not the purpose of the Constitutional Court. This point is underscored in the case of *Dhlamini and Ors* v *The State* 2014 (1) ZLR 296 where the Court refused to determine the question of existence of reasonable suspicion of the applicants having committed the crime because to do so would amount to an inquiry of the correctness or otherwise of the referring court's decision. The rationale is that the Constitutional Court would not be exercising original jurisdiction in the matter, as it should.

JUDICIAL OFFICER TO FORMULATE A QUESTION FOR A REFERRAL

A referral in terms of s 175 (4) of the Constitution, although requested by the parties, is made by the judicial officer to whom the request is made. It essentially follows that the judicial officer as the one making the referral ought to formulate or state the question for referral. As was held by the court in the *Sibanda* v *The State* case *supra,* the judicial

officer ought to clearly state which question has been referred to the Constitutional Court. The necessity of formulating or stating the question to be referred was also underscored in S v *Williams and Ors* CCZ 14/17 at pages 8-9 where the Court held:

> ***"In casu the magistrate's ruling is confusing as to what charge the applicants were facing between 2(f) and 2(v) as both are interchangeably referred to. Clearly the magistrate did not address her mind to this aspect. She did not carry out an analysis of the facts and the constitutional provisions that may be violated. She did not apply her mind to the principles for referral. <u>It is thus not surprising that she did not, in her ruling, formulate or state the constitutional question requiring determination by this Court,</u> let alone her opinion as to whether the raising of that question is merely frivolous or vexatious.***
>
> ***An analysis by the judicial officer of the relevant facts and constitutional provisions is an antecedent to the***

formulation of the question/s to be referred. Once this has been done, it becomes easy for the judicial officer to, formulate and state the constitutional question which he or she considers not to be frivolous and vexatious for the purposes of referral to the Constitutional Court."

Failure to formulate a question is a serious omission on the part of the judicial officer. The Constitutional Court is guided by the constitutional question that is placed before it. The judicial officer knows the issue that has to be answered as it pertains to the proceedings before him or her. He or she must therefore formulate the question.

TYPE OF QUESTIONS

It is the obligation of the judicial officer to formulate a question for referral. Guidance ought to be taken from the couching of s 175(4) which requires that a constitutional matter must arise for it to be referred as already indicated. Again, it follows that a question to be referred ought to raise a

constitutional matter for determination by the Constitutional Court. Where the judicial officer fails to properly formulate a constitutional question for referral, the referral would be improperly before the court because there would be no constitutional question for the court to determine.

The questions stated in the *Tomana and Anor* v *Judicial Service Commission* case, referred to *supra*, are useful as guidance, as a starting point, on how to formulate constitutional questions. Some of them are as follows -

1. Whether the exercise by the first respondent of the legal right granted to it in terms of s 187(3) as read with s 259(7) of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013 ("the Constitution") in the circumstances of this case, violates the applicant's right under s 160 (1) of the Constitution?

2. Whether constitutionally, the office of the Prosecutor General is at par with the Chief Justice?

3. Whether the provisions of s 259 (7) of the Constitution relating to the removal of a Judge from office to apply to the removal of a Prosecutor General from office?

4. Whether under the Constitution of Zimbabwe, 2013, an inferior court can set aside a determination made by the Constitutional Court. In the alternative whether the decision of the Constitutional Court is binding on all Courts in Zimbabwe?

5. Whether the Constitutional Court has constitutional authority to review its own decisions either *mero motu* or at the instance of any applicant before the Constitutional Court.

6. Whether any proceedings or process instituted by the first respondent pursuant to s 259 (7) of the Constitution can be stayed pending the determination of any separate criminal or other administrative proceedings against the Prosecutor General?

7. Whether s 259 of the Constitution violates s 260 of the Constitution.

8. Whether the Constitutional Court is properly constituted in circumstances where the Chief Justice and the Deputy Chief Justice do not sit concurrently in hearing any matter?

9. Whether any order issued by the Constitutional Court in circumstances where the Chief Justice and the Deputy Chief Justice did not concurrently hear the matter together is a nullity.

10. Whether the provisions of s 259 (7), as read with s 187, of the Constitution are subservient to any other provisions of the Constitution?

11. Whether the Constitution allows the *ad hoc* appointment of a "foreign Judge" to determine any process instituted in terms of s 259(7), as read with s 187, of the Constitution.

12. Whether the fact that all Judges of the Constitutional Court and all other inferior courts in Zimbabwe are subordinate, constitutionally, to the Chief Justice of the Republic of Zimbabwe, raises a presumption of bias and prejudice on the facts or at law sufficient to require the wholesale recusal of all Zimbabwean judicial officers appointed under the Constitution from determining the urgent application filed by the applicant *in casu* and further whether the hearing of such matter by any judicial officer subordinate to the Chief Justice of Zimbabwe violates the applicant's constitutional rights.

13. Whether the Constitutional Court established in terms of the Constitution has the inherent jurisdiction to enforce compliance of court orders within Zimbabwe and whether such right includes the right to commit any offender to a term of imprisonment or order the payment of a fine.

The judgment in *In re Chinamasa* 2000 (2) ZLR 322 (S) also offers guidance on how to formulate questions for referral. They are as follows -

1. Whether the choice and assignment to deal with this matter by the Judge who passed the sentence, which was commented upon in the alleged contemptuous statement of the presiding Judge and the selection of counsel to appear *amicus curiae* by the assigned Judge, violates the Attorney-General's right to appear before an independent and impartial court established by law as provided in s 18 of the Constitution.

2. Whether the contempt proceedings, as particularised, violate the Attorney-General's freedom of expression, that is to say, his right to hold opinions and to express such opinions without interference as is provided for in s 20 of the Constitution.

A CONSTITUTIONAL QUESTION MUST BE ONE NECESSARY FOR THE RESOLUTION OF ISSUES BEFORE THE LOWER COURT

In any constitutional application, for an applicant to succeed he must show that the constitutional issue raised in the court *a quo* is one which is necessary to dispose of the dispute between the

parties. This was succinctly stated in *Director of Public Prosecutions, Transvaal* v *Minister of Justice and Constitutional Development and Others* 2009 (4) SA 222 at 244B-C as follows:

> ***"A court may not ordinarily raise and decide a constitutional issue, in abstract, which does not arise on the facts of the case in which the issue is sought to be raised. A court may therefore, of its own accord, raise and decide a constitutional issue where (a) the constitutional question arises on the facts; and (b) a decision on the constitutional question is necessary for a proper determination of the case before it; or it is in the interests of justice to do so."*** (my emphasis)

The same point was stated by MALABA DCJ (as he then was) in the case of *The Cold Chain (Private) Limited T/A Sea Harvest* v *Makoni supra* where he stated as follows at pages 5-6 of the cyclostyled judgment:

"In other words, the decision on the constitutional matter must have been so inextricably linked to the disposition of the controversy between the parties that the success or failure of the relief sought was dependent on it. A Karger, in his book, Powers of the New York Court of Appeals, 3 Ed, at p 245 states the principle thus:

> ***'The constitutional question must be both directly involved in the Appellate Division order and substantial. The appellant has the burden of establishing the direct involvement of the constitutional question.'"***

In *Moyo* v *Sgt Chacha and Ors CCZ* 19/17 at page 14, the Court held that for an issue to fall within the jurisdiction of the Constitutional Court, it must be a constitutional matter or connected with a decision on a constitutional matter. The Constitutional Court has no jurisdiction to determine a matter which is not a constitutional matter. In any case brought before the Constitutional Court, it has to ensure that the issue for

determination is a constitutional matter or an issue connected with a decision on a constitutional matter.

The case of Dhlamini *and Ors* v *The State supra* also discouraged the referral of a question that is no longer necessary for the resolution of the dispute before the lower court by holding thus at page 303B-C:

> ***"If that were to be permitted it would mean that the Supreme Court would not be rendering a decision on the question as a court of first instance in the exercise of original jurisdiction. It was no longer necessary for the High Court to place the applicants on remand and ipso facto to consider whether or not placing them on remand was likely to violate their right to personal liberty, the decision to place the applicants on remand having already been made by the Magistrates Court."***

The determination of the constitutional question has to have a bearing on the resolution of the dispute by the subordinate court in the matter before it. In this regard, BARON JA in

Mandirwhe v *Minister of State* 1986 (1) ZLR 1 (S) 5E-H reasoned:

> ***"The basis on which we declined to entertain this reference was that, since the determination of the question of an alleged contravention of the Declaration of rights was unnecessary for the purposes of the order the learned Judge had decided to make, it was not competent for him to refer that question to this court."***

If the question sought to be referred has no bearing on the resolution of the matter, the request to refer will be a frivolous or vexatious one.

STEP 5: REFERRAL TO THE CONSTITUTIONAL COURT

If after the thought processes referred to above, the judicial officer is convinced that the request is frivolous or vexatious, the aggrieved person has the *locus standi* to approach the Constitutional court for redress in terms of s 85 of the Constitution. In the *Martin's* case supra, it was held that when deciding whether the request is frivolous or vexatious, the magistrate must apply a conscientious and objective thought to the question raised in the proceedings before him. If the

magistrate meets these criteria in his ruling, then no appeal can succeed against that ruling. On the other hand, if he fails, this constitutes infringement of the accused's right to the protection of law; and the accused will be entitled to directly approach the Constitutional Court in terms of s 85(1) of the Constitution.

REFUSAL TO REFER IF THE REQUEST IS NOT FRIVOLOUS OR VEXATIOUS IS A VIOLATION OF A RIGHT TO PROTECTION OF THE LAW

In *Taylor-Freeme* v *The Senior Magistrate, Chinhoyi & Anor supra* at pages 505G-H to 506A, the Court dealt with the procedure to be taken after a constitutional issue arises in a lower court as follows:

> ***"This constitutional issue is neither frivolous nor vexatious. The court a quo was therefore required in terms of s 24(2) of the Constitution to refer this matter to the Constitutional Court. The court a quo's failure to refer the constitutional issue raised to the Constitutional Court constitutes a violation of the***

applicant's constitutional right to protection of the law guaranteed in terms of s 18(1) of the Constitution. Such violation entitles the applicant to approach the Constitutional Court in terms of s 24(1) of the Constitution."

In *Williams and Anor v Msipa N.O. and Ors supra, the court held that, in order to determine whether refusal to refer is a violation of the right to protection of the law, the Supreme Court (sitting to hear a constitutional matter) examines what the judicial officer is required to do by s 175(4) of the Constitution and what he/she actually did as the basis of the refusal. The headnote of the judgment reads at page 555C-D:*

"… the right to an effective judicial protection of a fundamental human right or freedom requires that the judicial officer should act in accordance with the requirements prescribed by the Constitution for the protection of the particular right or freedom."

The court stated at p 567D-E that:

"It is the failure by the judicial officer to comply with the requirements of the protection provided by the law of the fundamental human right or freedom which results in the violation or likelihood of violation of the right or freedom against which the Constitution guarantees to the litigant the right to the protection of the law. It is, therefore, important in every case of an alleged violation by a judicial officer of a fundamental human right or freedom to understand what it is that the judicial officer was required by the law to do and what he did, in order to decide whether there was failure of judicial protection which caused a violation of the fundamental human right or freedom concerned."

The court concluded at p 569G-H of the judgment that:

"There was, therefore, failure on the part of the magistrate to comply with the requirements of s 24(2) of the Constitution which resulted in the violation of

the applicants' fundamental right to the protection of the law."

In *Martin v Attorney-General & Anor supra* at page 157G the Court said that:

"I am in agreement with counsel that the magistrate's wrongful refusal to refer the question raised violated the applicant's entitlement, granted under s 18(1) of the Constitution, 'to the protection of the law' — 'law' being defined in s 113 as including 'any provision of this Constitution'. In other words, the magistrate breached the protective right afforded the applicant by s 24(2) to have access to the Supreme Court."

If there is a violation of the fundamental right by the judicial officer because of the failure to refer the constitutional question once an opinion that the request is not frivolous or vexatious, one is entitled to approach the Constitutional Court directly through section 85 alleging infringement of fundamental right. For this see *Matiashe* v *The Honourable*

Magistrate Mahwe N.O and Anor 2014 (2) ZLR 799 (S) at 805A-B where the court said the following -

> ***"In these circumstances the applicant was entitled to approach this Court directly – Martin v Attorney-General & Anor 1993 (1) ZLR 153 (S) at 158H; Mukoko v Commissioner-General of Police and Ors 2009 (1) ZLR 21 at 24B."***

What is important is that the judicial officer must state clearly which question must be determined by the Constitutional Court. One cannot and should not refer a CASE. This is the error that many judicial officers fall into. The following can be taken as a practical example:

> ***"Whether or not a delay of 10 years from date of first appearance in court to date of trial contravenes the accused person's right to a trial within a reasonable time in terms of section 69 (1) of the Constitution of Zimbabwe Amendment (No.20) Act 2013".***

The constitutional question, as drawn, must appear on Form CCZ 4 which must accompany the record to the Constitutional Court.

STEP 6: PREPARATION OF RECORD

In terms of Rule 4 as read with Rule 24 (5) – (7), the following are the requirements for the preparation and transmission of the record to the Constitutional Court -

1. The record must be typed/ transcribed.
2. It must contain the following:
    i. Record of proceedings (where there are no disputes of fact, a statement of agreed facts);
    ii. Statements by the parties setting out the arguments they wish to make before the court;
    iii. The constitutional question being referred;
    iv. A draft order; and
    v. Form CCZ 4.

3. Certification by the clerk that the record is correct and accurate and that it contains a draft order.

4. The record must be prepared and transmitted by the clerk to the Constitutional Court within 14 days of being directed to do so by the magistrate.

5. Upon receipt of the record, the registrar must notify the applicant to file heads of argument within 15 days of receipt of the notice.

6. If such heads are not received within the stipulated *dies induciae*, the referral shall be deemed abandoned and the registrar must notify the clerk of court of such fact.
