TENDAI BONDE

v

(1) NATIONAL FOODS LIMITED

(2) REGISTRAR OF THE SUPREME COURT – MS. ANITAH TSHUMA

CONSTITUTIONAL COURT OF ZIMBABWE
MAKARAU JCC, GOWORA JCC, HLATSHWAYO JCC
HARARE: July 25, 2023 & FEBRUARY 12, 2024

Applicant in person

Mr. S. Chamunorwa, for the 1st respondent

No appearance for the 2nd respondent

GOWORA JCC:

1. This is an application for leave for direct access to the Constitutional Court filed in terms of s 167 (5) of the Constitution of Zimbabwe, 2013 as read with r 21 (2) of the Constitutional Court Rules, 2016. The Supreme Court allowed an appeal by the respondent against a judgment issued in favour of the applicant by the Labour Court. If granted leave, the applicant intends to bring an application in the main alleging that the Supreme Court had acted unlawfully in setting down the appeal in the manner it did and thus violated the Constitution.

FACTUAL BACKGROUND

2. The applicant was, in happier times, formerly employed by the first respondent. The second respondent was the Registrar of the Supreme Court ("the Registrar") at the time that these proceedings ensued in the Supreme Court.

3. In June 2018, the first respondent noted an appeal under case number SC 454/18, against a decision of the Labour Court. The effect of the judgment of the Labour Court was to find that the applicant's omission from getting a pay rise that was given to all other technical staff constituted a breach of s 5 (2a) of the Labour Act [*Chapter 28:01*]. In noting the appeal, the first respondent had failed to furnish proof of payment of the Sheriff's costs of service in terms of r 12 (3) of the Supreme Court Rules, 2018. For that reason, the appeal was deemed as having been abandoned and, consequently was dismissed in terms of rule 12(6) of the Supreme Court Rules.

4. Subsequently, the first respondent applied under case number SC 738/18 for the reinstatement of its appeal. By order dated 20 March 2019, the appeal under case number SC 454/18 was reinstated. Paragraph two of the order obliged the first respondent to file with the registry the receipts issued by the Sheriff for the security for his costs within five days of the grant of the order.

5. Thereafter, the applicant approached the Registrar alleging that the first respondent had not complied with the Supreme Court order in that it had failed to file the receipts within the prescribed period. The Registrar sought directions from PATEL JA (as he then was),

who had issued the order reinstating the appeal. The learned judge directed the first respondent to respond to the applicant's allegation that it had not complied with the order by no later than 4 p.m. on 8 November 2019.

6. The first respondent duly filed a response in accordance with the directions of the learned Judge of Appeal. The applicant responded by complaining to the Registrar that the response had been filed out of time. He was, however, advised that PATEL JA had directed that the appeal should be set down for hearing and that all issues raised by the parties would need to be addressed at the hearing. The appeal was subsequently set down for hearing by notice dated 15 March 2020. At the hearing of the appeal, the parties agreed to abandon the preliminary points they had raised against each other on the basis that since the appeal was an issue of labour, the law required that such matters be determined on the merits as opposed to technicalities. As a result, the Supreme Court proceeded to determine the appeal on the merits.

7. In light of the above, the applicant alleged that by issuing a notice of set down the Registrar's office had terminated proceedings that were before PATEL JA and in that vein, had referred the chamber application under SC 738/18 for resolution before the Supreme Court. Resulting from the same, the applicant proceeded to file this application seeking direct access to this Court.

THE PRESENT APPLICATION

8. In his founding affidavit, the applicant averred that the Registrar failed to enforce compliance with the court order issued by PATEL JA under case number SC 738/18 and contended that her failure to ensure compliance was not in the interests of justice. He alleged that the Registrar had neglected her duty as provided in s 33 of the Supreme Court Act [*Chapter 7:13*] as read with s 169 (4) of the Constitution of Zimbabwe.

9. Further to the above, the applicant alleged that it was not in the interests of justice for a three-member bench to preside over a matter that should have been heard by a single judge in chambers. He argued that the Supreme Court could not assume appellate jurisdiction over the chamber application under SC 738/18 as that matter was still pending before PATEL JA. He contended that the Supreme Court had, as a consequence, erred by dealing with the appeal under SC 454/18 following upon its dismissal in terms of the rules of court. He also argued that the order made by the court *a quo* under SC 65/20 was vague and unenforceable. He was of the view that the said order could also not be amended by the court *a quo* due to the absence of an application under SC 250/20 praying for the same.

10. In addition, the applicant claimed that his right to equal protection and benefit of the law as provided by s 56 of the Constitution had been violated by the Registrar's enrolment of a dismissed notice of appeal in the absence of an order reinstating such appeal. He also contended that his right to a fair hearing as guaranteed by s 69 of the Constitution was violated by the court *a quo* when it presided over a dismissed appeal and handed down an ambiguous and unenforceable order.

11. The application was opposed by the first respondent. The first respondent argued that the application was an indirect appeal against the decision of the court *a quo* under SC 65/20. Further to this, the first respondent submitted that there were no constitutional issues arising from the application and that the applicant was not entitled to any relief as a result.

12. In opposing the grant of the application, the first respondent submitted that the court *a quo* did not preside over and determine a previously dismissed appeal. It further submitted that although the appeal was deemed abandoned on 19 September 2018 by the Registrar, it had been reinstated on 20 March 2019 under SC 738/18. The first respondent further contended that the court *a quo* had not presided over grounds of appeal that were merely academic. It averred that it was within the applicant's rights to raise the issue of the validity of the grounds of appeal before the court *a quo* so that it could determine whether or not the grounds of appeal were academic. He did not do so.

13. Further to the above, the first respondent contended that the judgment under SC 65/20 had been amended pursuant to an on application it had filed seeking a correction as the judgment contained a patent typographical error. It denied that the judgment of the Supreme Court had been corrected in a manner contrary law. It maintained that the provisions of Order 49 r 449(2) of the old High Court Rules, 1971 permitted the court to amend vary or correct a judgment or order which had a patent error. Thus, the first respondent maintained, the law provided for the processes by which the order had been corrected. The first respondent suggested that the applicant was seeking to revisit the judgment of the court *a quo* where no constitutional issues arose.

14. Regarding the validity of the appeal under SC 454/18, the first respondent submitted that the applicant could not persist with the contention that the appeal had been dismissed as he had abandoned this preliminary point before the court *a quo*. It was further argued that the applicant had another remedy, if he was so inclined, by making a direct application to the court *a quo* for a correction of its judgment. It was, as a consequence, the view of the first respondent that there had been no infringement of any of the applicant's constitutional rights as alleged.

15. The Registrar, as she was duty-bound, filed a report in response to the application. In that report, the Registrar stated that the first respondent's appeal under SC 454/18 which had been deemed abandoned and dismissed for failure to pay the sheriff's costs was subsequently reinstated under SC 738/18 on 20 March 2019. The Registrar submitted that her office had lawfully set down the appeal under SC 454/18 in accordance with directions given by PATEL JA. The Registrar denied that her office had failed to ensure compliance with the order granted by PATEL JA as alleged.

APPLICANT'S SUBMISSIONS BEFORE THIS COURT

16. At the hearing of the application, the applicant made an application to amend his address of service and alternative email address. He also sought an amendment of the draft order by seeking that the Court order a remittal of the matter to the Labour Court for that court to undertake a quantification of damages in his favour. In addition, he also sought to amend his prayer for costs and abandoned the order for costs against the second

respondent, the Registrar. Finally, he sought an amendment to include a paragraph in his application reflecting the constitutional infringement of his right to administrative justice. Mr. *Chamunorwa*, for the first respondent, was not opposed to these amendments.

17. The applicant also raised preliminary points against the first respondent. Firstly, he averred that the deponent to the first respondent's founding affidavit had no authority to do as there was no valid board resolution authorising the deponent. Secondly, he submitted that principally the first respondent's affidavit was vague and embarrassing and further that it did not set out a clear or concise defence to the application.

18. Regarding the merits of the application, the applicant submitted that he was seeking direct access to approach this Court in order to address the infringement of his constitutional rights. He averred that his right to administrative justice had been infringed. He further submitted that the court *a quo*, once it realised that it had no jurisdiction to determine the matter, ought to have stopped at that stage of the proceedings.

RESPONDENT'S SUBMISSIONS BEFORE THIS COURT

19. In response to the preliminary points raised against it, counsel for the first respondent argued that the deponent to the notice of opposition had the requisite authority to depose thereto as is evident from the board resolution attached to the notice of opposition. There can be no dispute that the resolution was issued by the board of directors of the first respondent. In relation to the second preliminary point, counsel submitted that the

opposing affidavit was sufficient as it satisfactorily captured the first respondent's defence.

20. Mr. *Chamunorwa* for the first respondent went on to raise a point *in limine* to the effect that the matter before the Court had prescribed. He averred that the applicant's cause of action arose 3 years ago when the proceedings before the court *a quo* were instituted.

21. On the merits, counsel contended that the application was without merit. He submitted that during the hearing of the appeal before the court *a quo*, both parties consented to the matter proceeding on the merits which effectively meant that the preliminary points had been abandoned. To buttress this point, counsel submitted that the applicant could not then approach this Court to argue that the court *a quo* had no jurisdiction when the point had been abandoned by consent.

22. Counsel further submitted that there were no constitutional issues arising from the application. He suggested that the application was a disguised appeal against the decision of the court *a quo*. He further submitted that the contention by the applicant that the notice of appeal before the court *a quo* was fatally defective was without merit as the order for reinstatement by PATEL JA was on the basis of a valid notice of appeal. He thus prayed for the application to be dismissed with costs.

THE LAW

23. It is a settled practice of this Court of law that direct access to the Constitutional Court is not readily granted. This is an exceptional remedy that is only granted in cases where the requirements of this Court's rules are satisfied. The relevant rule that provides the requirements to be met in an application of this nature is rule 21(3) which states that:

> "(3) An application in terms of sub-rule (2) shall be filed with the Registrar and served on all parties with a direct or substantial interest in the relief claimed and shall set out —
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> (a) the grounds on which it is contended that it is in the interests of justice that an order for direct access be granted; and
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> (b) the nature of the relief sought and the grounds upon which such relief is based; and
>
> (c) whether the matter can be dealt with by the Court without the hearing of oral evidence or, if it cannot, how such evidence should be adduced and any conflict of facts resolved."

24. What constitutes the "interests of justice" is spelt out in rule 21(8) which provides that:

> "(8) In determining whether or not it is in the interest of justice for a matter to be brought directly to the Court, the Court or Judge may, in addition to any other relevant consideration, take the following into account—
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> (a) the prospects of success if direct access is granted;
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> (b) whether the applicant has any other remedy available to him or her;
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> (c) whether there are disputes of fact in the matter."

25. In the case of *Liberal Democrats & Ors* v *President of the Republic of Zimbabwe E.D. Mnangagwa N.O. & Ors* CCZ-7-18 at pg. 11, MALABA CJ held that:

> "It is imperative for an applicant for an order for leave for direct access to indicate that it is in the interests of justice that an order for direct access be granted. Where the affidavit does not satisfy the requirement, the application has no basis**.** Rule 21 (3) (a) requires that the founding affidavit should have regard to the matters that show why

the interests of justice would be served if an order for direct access is granted." (Emphasis added)

See also *Zimbabwe Development Party & Anor* v *President of the Republic of Zimbabwe & Ors* CCZ-3-18 at pg. 9.

WHETHER IT IS IN THE INTERESTS OF JUSTICE THAT THE APPLICANT BE GRANTED LEAVE FOR DIRECT ACCESS TO THE COURT

26. The applicant filed an application in the proper form and to that extent complied with the requirements set out in the rules of the Court. He duly set out the relief he was seeking on the face of the application and it was couched in the following manner:

"**TAKE NOTICE** the applicant seeks leave for direct access to the Constitutional Court of Zimbabwe in terms of section 167(5) of the Constitution of Zimbabwe read with rule 21(2) of the Constitutional Court Rules 2016 for:

a) An order declaring that the legality of setting down of a dismissed notice of appeal SC 458/18 to a three- judge panel calls for interpretation of s 33 of Supreme Court Act [*Chapter 7:13*] read with s 169 of Constitution of Zimbabwe with respect to powers of registrar under that section.

b) An order declaring that Supreme Court of Zimbabwe failed to act in accordance with the law governing proceedings or prescribing the rights and obligations subject to determination by sitting and determining a dismissed notice of appeal under SC 454/18.

c) An order declaring that Supreme Court of Zimbabwe constituted in terms of s 3 as read with s 22 of Supreme Court Act [*Chapter 7:13*] has no jurisdiction to sit and determine a dismissed notice of appeal even by consent of parties thereby raising a question of constitutional nature with respect to interpretation of Supreme Court Act [*Chapter 7:13*] as read with s 169 of Constitution of Zimbabwe.

d) An order declaring that Supreme Court of Zimbabwe was incapacitated by handing down ambiguous and unenforceable orders [SC 65/20] warranting interference by Constitutional Court of Zimbabwe.

e) An order declaring that applicant has a *prima facie* case for appropriate relief and compensation against the respondents."

27. Thus, on the face of it, he was seeking an order for the enforcement of his constitutional rights. He did not, however, adhere to the statements made on the cover in the body of the application. The relief sought in the draft differs materially from the above and has no relationship with what is described above.

28. The draft order is couched in two different parts, with the first part relating to a declaratory order in the following manner:

"**IT IS DECLARED THAT**

a) The proceedings in the Supreme Court of Zimbabwe in respect of the dismissed notice of appeal SC 454/18 are unconstitutional and invalid as they are *ultra vires* s 22 of the Supreme Court Act [*Chapter 7:13*] and s 169 of the Constitution of Zimbabwe for want of jurisdiction.

b) The legality of proceedings in the Supreme Court of Zimbabwe under SC 454/18 violated TENDAI BONDE's fundamental rights is contemplated under s 56, s 65 and s 69 of Constitution of Zimbabwe.

c) The applicant warrants appropriate relief and compensation sounding in money."

29. The second part of the applicant's draft relief stems from the first part. Clearly, it is a claim for damages against both respondents. It reads:

"**IT IS ORDERED THAT**

1. Application be and is here by allowed.
2. 1st respondent to pay applicant US$57 600 [or the ZWL equivalence at prevailing RBZ interbank rate] plus interest at prescribed rate between date of judgment and date of full and final payment as appropriate relief for deferred salaries.
3. 2nd respondent to pay applicant appropriate relief US$970-00 [or the ZWL equivalence at prevailing RBZ interbank rate] plus interest at prescribed rate between date of judgment and date of full and final payment as appropriate relief for wasted costs.
4. There is no order to costs in respect of this application."

30. A close scrutiny of the applicant's averments and submissions would tend to show that his main grievance is his conviction that the Supreme Court acted in an irregular manner when it corrected the order issued pursuant to the determination of the appeal. Therefore, the applicant contends, it is in the interests of justice that the he be granted leave for direct access in order for the alleged illegality of issuing court orders in the absence of corresponding applications seeking such relief be ventilated. Added to that, the applicant seeks to challenge the exercise of its administrative functions under the law by the registrar's office on the allegation that the setting down of the appeal infringed his constitutional rights both under s 69 and s 56 of the Constitution.

31. It is settled that the law makes provision for litigants to approach this Court on a non-constitutional decision of the Supreme Court on the allegation that a constitutional right has been infringed, but there are requirements that such litigants must satisfy in order for direct access to be granted. This principle was underscored in *Lytton Investments (Pvt) Ltd v Standard Chartered Bank Limited & Anor* CCZ-11-18 at pg. 19 as follows:

> "The facts must show that there is a real likelihood of the Court finding that the Supreme Court infringed the applicant's right to judicial protection. *The Supreme Court must have failed to act in accordance with the requirements of the law governing the proceedings or prescribing the rights and obligations subject to determination. The failure to act lawfully would have to be shown to have disabled the court from making a decision on the non-constitutional issue*." (Emphasis added)

32. It is clear from his averments that the applicant seeks to impugn the processes of the Supreme Court in the determination of the appeal noted by the first respondent against

the Labour Court judgment that found in the applicant's favour. It is apparent that he not only seeks a reversal of the decision on the merits, but he is inviting the Court to review the very exercise of jurisdiction by the Supreme Court on the appeal. The basis of the application is not founded on any legal principle that the applicant has advanced. The Supreme Court is the final court of appeal on all matters except those that are constitutional in nature. The appeal in *casu* was not concerned with the determination of any constitutional matter. It is therefore final.

THE NEED FOR FINALITY IN LITIGATION

33. It is not in dispute that the applicant himself has stated that the determination by the court *a quo* as to whether or not the appeal was valid was a determination on a non-constitutional matter. The application before the Court, therefore, seeks to challenge the alleged unconstitutionality of the manner in which the appeal was set down and the correction of the court order subsequent to the determination of the appeal itself. In terms of s 169(1) of the Constitution as read with s 26(1) of the Supreme Court Act, the judgment of the Supreme Court in a non-constitutional matter is final. In *Denhere* v *Denhere* CCZ–9–19 at p. 15, it was held that:

> "A finding that the decision of the Supreme Court is on a non-constitutional matter should bring the inquiry to an end. The rationale for this proposition of the law is set out by the *Lytton Investments* case *supra* at p 23 of the cyclostyled judgment. The Court said:
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> 'The law of finality of decisions of the Supreme Court on non-constitutional matters applies to all litigants equally, whether they become winners or losers in the litigation process. The declaration of finality of a decision of the Supreme Court on a non-constitutional matter is itself a protection of the law. Once a decision is as a matter of fact a decision of the Supreme Court on a non-constitutional matter, no inquiry into its legal effect can arise. There would be no

> proof of infringement of a fundamental right or freedom as a juristic fact. It is enough for the purposes of the protection of finality and therefore correctness that the decision is on a non-constitutional matter.'"

34. Moreover, a final decision of the Supreme Court cannot be wrong. The remarks in *Mwoyounotsva* v *Zimbabwe National Water Authority* CCZ-17-20 at pg. 15 are apposite:

> "As a corollary to the above, in the absence of a higher court saying so, the decision of the Supreme Court on a non-constitutional matter cannot be said to be wrong. This point was underscored in *Williams and Anor v Msipha NO and Ors* supra at 567C where the Supreme Court said:
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> "A wrong judicial decision does not violate the fundamental right to the protection of the law guaranteed to a litigant because an appeal procedure is usually available as a remedy for the correction of the decision. *Where there is no appeal procedure there cannot be said to be a wrong judicial decision because only an appeal court has the right to say that a judicial decision is wrong.* See Maharaj v A G of Trinidad & Tobago (No. 2) (PC) [1979] AC 385 at 399 D–H; Boordman v Attorney General [1996] 2 LRC 196 at 205i–206b." (Emphasis added)

35. Thus, as the decision of the court *a quo* was on the merits in a non-constitutional matter, the decision is final and binding. There is no further recourse to this Court. The intended application has no prospects of success and must fail.

THE APPLICANT'S PROSPECTS OF SUCCESS

36. The applicant submitted that his application had prospects of success because the court *a quo,* as constituted in terms of s 3 as read with s 22 of the Supreme Court Act [*Chapter 7:13*], had no jurisdiction to sit and determine a notice of appeal that, by operation of the rules as read with the practice directions, no longer existed on the court roll even by consent. The applicant further argued that the parties could not consent to

establish jurisdictional facts for the Supreme Court. He contended that due to failure by the first respondent to file proof of payment of the Sheriff's security for fees the reinstated appeal had been nullified and it should not have set down.

37. In assessing the prospects of success, this Court has to be satisfied that an applicant has an arguable case should direct access be granted. In *Mvududu* v *Agricultural and Rural Development Authority (ARDA) & Anor* CCZ 10/21, the court highlighted the importance of assessing the prospects of success as follows:

> "One of the factors for consideration by the court is whether or not the application has prospects of success. In *Lytton Investments (Pvt) Ltd* v *Standard Chartered Bank Limited and Another* CCZ 11/18, the court stated:
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> > "The court turns to determine the question whether the applicant has shown that direct access to it is in the interests of justice. Two factors have to be satisfied. *The first is that the applicant must state facts or grounds in the founding affidavit, the consideration of which would lead to the finding that it is in the interests of justice to have the constitutional matter placed before the court directly, instead of it being heard and determined by a lower court with concurrent jurisdiction. The second factor is that the applicant must set out in the founding affidavit facts or grounds that show that the main application has prospects of success should direct access be granted*." (Emphasis added)

See also *Chiangwa* v *Apostolic Faith Mission in Zimbabwe* CCZ-6-23 at pg. 12.

38. The authorities above accentuate the fact that the applicant has to set out in the founding affidavit, those facts or grounds that show that the substantive application has prospects of success should an order for direct access be granted. In *casu*, the applicant needed to establish that the Supreme Court acted contrary to the law in a manner that caused him grievous prejudice which can only be redressed through the enforcement of an entrenched right under Chapter 4 of the Constitution. He has not placed any facts before

the Court justifying his contention that the Supreme Court violated his rights, either in having the appeal set down for hearing or correcting a patently wrong order of the court.

WHETHER OR NOT THE APPLICANT DEMONSTRATED THAT THE SUPREME COURT FAILED TO ACT IN TERMS OF THE LAW GOVERNING ITS PROCEEDINGS.

39. In my view, the applicant's bald assertion that there are prospects of success in the substantive application cannot, on its own, be a sufficient basis for this Court to grant him direct access. In order to approach this Court in terms of s 85 of the Constitution, a litigant has to establish that the Supreme Court acted in a manner that is contrary to the law. That is the only basis upon which the judgment of the court *a quo* can be set aside at this stage. However, the applicant did not do so. He did not show how the court *a quo* violated his rights by allegedly failing to comply with the law regulating its proceedings.

40. Instead of setting out the facts and basis upon which he claims that the Supreme Court violated the law, the applicant merely alleged that the decision of the court *a quo* to hear the appeal under SC 454/18 infringed his constitutional rights to administrative justice and equal protection and benefit of the law. He failed to lay out any material facts to buttress the allegation that the court *a quo* infringed his constitutional rights. To make matters worse, he fully participated in the said hearing in which the appeal was heard and adjudicated upon. He was not only allowed full access to the court he was heard in all material aspects of the dispute between himself and the first respondent. Subsequent

to the judgment being issued with an erroneous order, he happily approached the Labour Court seeking damages on the basis of the order in question. He only reacted to the judgment after it had been corrected to reflect the correct determination by the court *a quo.* The first respondent has described this application as a disguised appeal and, in my view, this is an apt description. I would go as far as saying that it is an abuse of court process.

41. The court *a quo* clearly acted in terms of the requirements of the law. Its decision to preside over the appeal under SC 454/18 was neither irrational nor arbitrary because the appeal had been duly reinstated under SC 738/18 in terms of r 70 of the Supreme Court Rules, 2018. It thus cannot be said that the court *a quo* failed to act in accordance with the law and that such alleged failure violated the applicant's rights to administrative justice and equal protection and benefit of the law. There was, therefore, no infringement of the applicant's constitutional rights for this Court to determine.

42. Moreover, it is clear that the court *a quo* reached a decision on the merits of the matter. It is trite that the decision of the Supreme Court is final. Thus, because the applicant's cause of action is an attack on a final decision of the court *a quo*, there is no constitutional issue for this Court to determine.

43. His attack upon the integrity of the registrar is not warranted. Not only is it baseless it is premised on a misconception of the role of court officials. Once there was an order reinstating the appeal, the registrar was duty bound to set it down for hearing. There is

no suggestion from the applicant that he ever sought clarification from the registry on the status of the appeal before it was set down. He never sought to challenge the first respondent on the alleged failure to adhere to the time limits set by PATEL JA. In any event, the order of reinstatement was not conditional upon the filing of any document on the part of the respondent.

44. With regard to the allegation that the court issued a court order that was not supported by a corresponding application, the applicant has again failed to substantiate the allegation. The record shows that the court *a quo* allowed the appeal in favour of the first respondent. The order that was issued pursuant to the conclusion of the court stated that the appeal had been dismissed. The order was clearly out of sync with the reasoning of the court and was an obvious error. The error was brought to the attention of the registrar and a correction was duly made to reflect the reasoning of the court. The applicant has not established that the correction of the order was outside the law.

WHETHER OR NOT THERE IS A CONSTITUTIONAL MATTER BEFORE THE COURT.

45. The existence of a constitutional matter must be established in order for the jurisdiction of this Court to be triggered. The Court has limited jurisdiction under the Constitution and only assumes jurisdiction over those matters that the law permits. Section 332 of the Constitution defines a constitutional matter as "*a matter in which there is an issue involving the interpretation, protection or enforcement of the Constitution*." In *Moyo* v S*ergeant Chacha and Ors* CCZ-19-17 at pg. 24, the Court said:

> "The making of an application alleging infringement of a fundamental human right or freedom does not necessarily mean that the issue for determination is violation of a fundamental human right or freedom enshrined in the Constitution. *The Constitutional Court still has to satisfy itself that the issue for determination is a constitutional matter or an issue connected with a decision on a constitutional matter involving the interpretation, protection or enforcement of the constitutional guarantee of the fundamental human right or freedom*." (Emphasis added)

46. Again, in *Chani* v *Justice Hlekani Mwayera & Ors* CCZ -2-20 at pg. 7, it was held that:

> "A matter does not become a constitutional matter and fall within the jurisdiction of the Constitutional Court merely because it is brought in terms of s 85(1) of the Constitution. The mere reference to constitutional provisions or alleged infringement of constitutional rights does not mean that a constitutional issue has been raised. See *Magurure and Ors* v *Cargo Carriers International Hauliers (Pvt) Ltd t/a Sabot* CCZ 15/16."

47. In view of the above, it is apparent that the applicant is an aggrieved litigant attempting to get recourse from this Court on a non-existent constitutional issue. The application before the Court is a disguised appeal in terms of which the applicant is seeking a chance to have the decision of the court *a quo* set aside. The applicant has failed to establish a *prima facie* case for constitutional review of the court *a quo*'s decision. The application should thus fail on that basis.

DISPOSITION

48. The applicant has failed to show that the Supreme Court did not act in terms of the provisions of the applicable law. There are no prospects of success in the intended application as there is no constitutional issue arising for determination. It is, therefore, not in the interests of justice that he be granted direct access to the Court.

49. The applicant and the first respondent both sought costs against each other in their papers, with the first respondent seeking costs on the legal practitioner and client scale in its papers. However, the first respondent later abandoned its claim for punitive costs at the hearing of the application.

50. Nevertheless, I see no reason to deviate from the general approach in constitutional matters, that is, that no party should be penalized with an order of costs, save in exceptional circumstances. No such special circumstances as would justify an order of costs even on the ordinary scale are evident in this matter.

51. In the result, the Court makes the following order:

"The application be and is hereby dismissed with no order as to costs."

MAKARAU JCC: **I agree**

HLATSHWAYO JCC: I agree

Calderwood, Bryce Hendrie & Partners, first respondent's legal practitioners