REPORTABLE (12)

CONSTRUCTION RESOURCES AFRICA (PRIVATE) LIMITED
v
CENTRAL AFRICAN BUILDING & CONSTRUCTION COMPANY LIMITED T/A CENTRAL AFRICAN BUILDING CONSTRUCTION

CONSTITUTIONAL COURT OF ZIMBABWE
GARWE JCC, HLATSHWAYO JCC & PATEL JCC
HARARE: 27 FEBRUARY 2023, and 23 JULY 2024

Mr *SM Hashiti* with Mr *L Uriri,* for the applicant.

No appearance for the respondent.

HLATSHWAYO JCC:

This is a court application for direct access in terms of s 167(5) of the Constitution of Zimbabwe, 2013 (“the Constitution”) as read with r 21(2) of the Constitutional Court Rules, 2016 (“the Rules”). The premise on which the application is based is that the decision of the Supreme Court of Zimbabwe in Construction Resources Africa (Private) Limited vs Central Africa Building & Construction Company Limited t/a Central African Building Construction SC–110–22 violated the applicant`s fundamental rights in terms of ss 56(1), 69(2) and 69(3) of the Constitution. It is further argued that third parties’ rights were violated in terms of s 74 of the Constitution.

BACKGROUND FACTS

The applicant is Construction Resources Africa (Private) Limited, a company incorporated in terms of the laws of Zimbabwe. The respondent is Central African Building & Construction Company Limited t/a Central African Building, a company also incorporated in terms of the laws of Zimbabwe.

On 29 November 2004, the respondent, in terms of a written agreement of sale, sold to the applicant assets listed on a schedule to an agreement which included office furniture, kitchen furniture, vehicles, etc. The purchase price for the above was US$ 219,000.00. On 29 November 2004, the parties entered into another agreement but this time in respect of three immovable properties, being Stand 272 Beverley East Township of Stand 261 Beverley East Township, Stand 195 Beverley East Township 3 of Stand 218 Beverley East Township and Stand 8 Comet Rise Township 2 of Comet Rise Estate A. The purchase price for the properties was recorded as US$296 000-00, US$97 00000, and US$88 000-00 respectively. The effective date of this agreement was the date of signature which was 29 November 2004.

This agreement, just like the first, made provision for payment of a portion of the purchase price in Zimbabwean dollars converted from United States dollars at the auction rate as at the date of payment. Clause 7 of the agreement provided that the transfer of the properties shall be effected within a reasonable period after the purchaser had fully paid the purchase price to the seller.

On 7 November 2006, the respondent, through its legal practitioners of record, addressed a letter by registered mail to the applicant cancelling the agreement of sale relating to the sale of the immovable properties. On 9 January 2007, the respondent instituted proceedings in the High

Court against the applicant. The respondent approached the High Court seeking the eviction of the applicant from all three immovable premises on the grounds that it remained the registered owner of the same. In disposing of the matter, the High Court ordered the eviction of the applicant from the premises. Aggrieved, the applicant lodged an appeal to the Supreme Court ("court *a quo*").

In the appeal, the applicant raised eighteen grounds of appeal which it later reduced to six. The applicant's argument was that the High Court had erred when it concluded that the agreement between the parties had been cancelled. It was the applicant's further argument that the High Court had erred in finding that the respondent had met the requirements for a claim for *rei vindicatio*. In disposing of the matter, the court *a quo* found that the notice of cancellation was valid as it complied with s 8 of the Contractual Penalties Act [*Chapter 8:04*]. As to the claim for the *rei vindicatio*, the court *a quo* found that the requirements had been established. The court found that, at the time of *litis contestatio*, the immovable properties were owned by the respondent and that was in possession of these properties.

Aggrieved by the decision of the court *a quo*, the applicant has filed the present application. It submits that two constitutional issues arise from the decision of the Supreme Court. The first being that it was denied the right to a fair hearing in terms of s 69(2) of the Constitution. The second is that it was denied the right to protection of the law in terms of s 56 of the Constitution. In the result, the applicant argues that a gross injustice occurred because it was denied the right to property and has been impoverished as a result of the gross misapplication of the law and that

parties not cited or joined in the proceedings have lost their right to a home notwithstanding their non-joinder and the provisions of s 74 of the Constitution.

The applicant has structured its founding affidavit in parts as follows:

THE RIGHT TO A FAIR HEARING

The applicant argues that the *causa* in the High Court was that the respondent allegedly owed a balance in respect of the purchase prices of the immovable properties. It is submitted that the payment of the sum of US$ 481 000.00 being the purchase price was to be paid through instalments over a period of 11 months. The applicant alleges that, notwithstanding the provisions of the deed of sale, the respondent was of the view that forty-five per cent of the purchase price would be paid in foreign currency at the auction rate at the time of payment and fifty-five per cent would be paid in local currency.

The applicant avers that the High Court had made a finding that both parties had failed to establish the amount outstanding and owing to the respondent. The applicant submits that that issue was motivated on appeal. Instead of remitting the matter to the High Court for ascertainment of the amount, the court *a quo* proceeded in the absence of argument by any parties to do a desk top computation which it was disabled from doing, it being a court of second instance and contrary to s 22 of the Supreme Court Act [*Chapter 7:13*]. The applicant therefore argues that the court *a quo* made erroneous findings, which the applicant cannot appeal against unless direct access is granted.

JUDGMENT SC 110/22: CRITICAL OBSERVATIONS

In this section the applicant has attacked the factual findings of the court *a quo* on four bases of the court *a quo's* factual findings. These impugned findings are that the purchase price was US$ 481 000.00, that the payment was to be in instalments, that payments were to be made on the dates as specified in the agreement of sale and lastly that payment was to be in the ratio forty-five per cent in USD and fifty-five per cent in ZWD. In that regard, the applicant argues that the court *a quo* erred in carrying out desktop research which thereby presented a serious conflict of facts. The applicant further argues that the determination of the court *a quo* was inconsistent with the facts that were before it, and the findings of the court *a quo*. It is lastly argued by the applicant that it is anomalous for a court to *mero motu* make calculations in the absence of contributions from the parties, which conduct constitutes an abrogation of the right to be heard.

DETRIMENTAL FACTUAL MISDIRECTIONS

Here the applicant argues that the court *a quo* made a finding that the applicant had made a concession in the High Court, which concession the court *a quo* used in support of its decision. The applicant argues that such finding is not supported by the pleadings, the evidence or any part of the record. In that regard, it is argued that since no such concession was made, the finding was erroneous and therefore constitutes a violation of the applicant's constitutional rights.

DEPRIVATION OF RIGHTS IN THE ABSENCE OF AFFECTED PARTIES

In this section, the applicant argues that there are parties that were not joined or served with court process despite their apparent and material interest in the subject matter. The applicant submits that making an order and enforcing it against the parties without them being cited or heard was tantamount to denying them the constitutional right to be heard and to administrative justice.

The applicant argues that the effect of the order of the court aquo was that it violated s 74 of the Constitution, which provides that no person may be evicted from their home without an order of court made after considering all the relevant circumstances. It submits that third-party occupiers now stand to be evicted, yet none of their circumstances was taken into account.

UNDUE AND UNJUSITIFIED ENRICHMENT

In this section, the applicant avers that the court *a quo*, after cancelling the agreement, ought to have restored the parties to their original positions prior to the agreements. The applicant avers that it had built a mansion on the property before selling it to the present beneficiary. It is argued that the court *a quo* simply ordered the return of the properties and eviction of the applicant without any mention of restitution.

The applicant contends that once the court *a quo* made a finding that transfer had been made to third parties, it could not simply have ordered eviction. It ought to have, firstly, set aside the juristic acts that had been created by the transfer. The applicant further contends that, as the dispute was a contractual dispute, the normal remedies for breach of contract would have been applicable and the court *a quo* did not even consider them. The applicant's last argument is that the court *a quo*, in not paying regard to the willingness of the applicant to make good any outstanding balances, created had a palpable inequity. It is therefore argued that the failure to consider the issue resulted in the deprivation of a right provided for under contract law and, consequently, the right to benefit from such.

SUBMISSIONS MADE IN THIS COURT

The respondent was in default at the hearing and consequently *Mr Hashiti* for the applicant made submissions in its absence. He submitted that an application before this Court, if unresisted or unopposed, ought to be related to as such. He added that this Court sits as a motion court and, because the matter is not opposed, the application must succeed in default.

As to the prospects of success, *Mr Hashiti* argued that it is settled that the full court can be approached on a complaint that the Supreme Court, in the exercise of its appellate jurisdiction, rendered a judgment which is at variance with the constitutional protection of the law. He further submitted that the Constitution provides that a person has the benefit of the protection of the law. He further argued that this Court is at large to enquire into an issue where it is argued that the Supreme Court, in exercising its jurisdiction, had abdicated the duty and the right to protect in terms of the law.

Mr *Hashiti* argued that the court *a quo* dealt with a portion of the dispute between the parties without according them an opportunity to address it on that aspect. He argued that the court *a quo* could not have undertaken a fresh calculation without the parties being called upon to make submissions on it. In that regard, it was contended that financial assessments are within the province of the court of first instance because it can call expert evidence in terms of s 17 (a) of the High Court Act [*Chapter 7:06*], which power the court *a quo* does not have. It was the applicant's further argument that the court *a quo* accepted that there were third parties with interests in the properties and that the law has accorded a court the power to *mero motu* order the joinder of such parties.

Regarding the draft order of the intended application, which relates to the right in terms of s 56 (1) of the Constitution, it was argued that a draft order is not a founding document nor a pleading, but it is, as it says, a draft. He argued that the draft order can be amended to suit what has been argued in the affidavit. The applicant thereafter moved for the amendment of the draft order in the intended application to include the reference to ss 69(1), 69(2) and s 74 of the Constitution.

ISSUE FOR DETERMINATION

The issue that arises in an application of this nature is whether it is in the interests of justice that the applicant be granted direct access to the Constitutional Court.

THE LAW

The success or failure of the application rests on the consideration of the question whether or not it is in the interests of justice that direct access be granted. The considerations in an application for direct access are set out in rule 21(3) of the Rules, which reads as follows:

> "(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—
>
> (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
>
> (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."

The "interests of justice" as they are connoted in rule 21(3) are amplified in r 21(8) as follows:

> "(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—
> (a) The prospects of success if direct access is granted;
>
> (b) Whether the applicant has any other remedy available to him or her;
>
> (c) Whether there are disputes of fact in the matter."

See *Mwoyounotsva* v *Zimbabwe National Water Authority* CCZ–17–20 at pp. 6 – 7, par. 19. In *Denhere* v *Denhere & Anor 2019 (1) ZLR 554* CCZ, this Court held that:

> "The underlying requirement is that the application ought to clearly illustrate that it is in the interests of justice that an order for direct access be granted. As was noted by the Court in the Lytton Investments (Private) Limited case *supra*, the filtering mechanism for leave for direct access effectively prevents abuse of the remedy."

It must also be mentioned that ordinarily direct access against judgments of the Supreme Court is sparingly granted. This is because the Supreme Court is the final court of appeal in all non-constitutional matters, hence the Constitutional Court must approach applications of this nature with caution. See the case of *Lytton Investments (Pvt) Ltd* v *Standard Chartered Bank Zimbabwe Ltd* and *Anor* 2018 (2) ZLR 743 (CC).

The present application will be assessed in light of the above considerations.

ANALYSIS

It is important to start by addressing the argument by the applicant that the application, being unopposed, the applicant is entitled to whatever it is seeking on the basis that its claim or prayer has not been defended. This cannot be a basis upon which this Court can ignore issues before it. This Court is obliged to evaluate the issues before it and determine whether indeed a

constitutional issue has been raised which warrants direct access to be granted. This is because the granting of direct access is a special remedy which the Court is obliged to carefully decide.

In the case of *Mbatha v Confederation of Zimbabwe Industries & Anor* CCZ 05/21, GOWORA AJCC (as she then was) eloquently laid down the following:

> "The Constitutional Court is a specialised court and in terms of s 167(1)(b) decides only constitutional matters and issues connected with decisions on constitutional matters. It thus exercises jurisdiction as a court of first instance and an appeal court. In view of the limited jurisdiction of this Court, direct access to the court for the exercise of its jurisdiction for the vindication of a fundamental right premised on s 85 of the Constitution as a court of first instance is granted to a litigant who is able to show that it is in the interests of justice for direct access to the court to be granted to such litigant. The import of the principle for the requirement that an applicant for direct access show that it is in the interest of justice that the application be granted ought not to be minimized. The requirement was explained by ***I Currie and J de Waal in "The Bill of Rights Handbook",*** **6ed, at p 128** as follows:
>
> > "Direct access is an extraordinary procedure that has been granted by the Constitutional Court in only a handful of cases. If constitutional matters could be brought directly to it as a matter of course, the Constitutional Court could be called upon to deal with disputed facts on which evidence might be necessary, to decide constitutional issues which are not decisive of the litigation and which might prove to be of purely academic interest and to hear cases without the benefit of the views of other courts having constitutional jurisdiction. Moreover …… it is not ordinarily in the interest of justice for a court to sit as a court of first instance, in which matters are decided without there being any possibility of appealing against the decision given."

Therefore, this Court will not simply grant the application on the ground that it was unopposed. However, there is need for this Court to comment on the manner in which the respondent has responded to the present application. Upon being served with the present application, the respondent adopted the stance that it would not be opposing the application for direct access but would oppose the main application if direct access is granted. Such an approach

is unprecedented as it is contrary to the purpose of direct access, which is to prevent unworthy cases from being heard by this Court.

An application for direct access is a filtering mechanism to prevent parties who intend to abuse the remedy of approaching the Constitutional Court. The fact that the respondent intends to oppose the main application should direct access be granted shows that the respondent believes that direct access should not be granted in the first instance. Given the foregoing, the Court is of the view that the respondent ought to have presented its considered view on the matter in responding to this application in order for the Court to make a fully informed decision. Having said this, I proceed to address the matter on the merits.

WHETHER IT IS IN THE INTERESTS OF JUSTICE THAT DIRECT ACCESS BE GRANTED

In assessing whether it is in the interests of justice to grant this application, it is apt that the Court deals with every right that is being alleged to have been violated in turn. The applicant describes the Supreme Court's decision as 'gross'. The question that arises is whether in reaching a decision, the Supreme Court failed to act in accordance with the law as stipulated in cases such as Lytton and Denhere, *supra*.

Whether there was a violation of ss 56 (1) and 69 of the Constitution

Section 56(1) of the Constitution guarantees the right to equality and equal protection in the following terms:

> "All persons are equal before the law and have the right to equal protection and benefit of the law."

What this provision entails is that all persons are equal before the law. They all have the same rights accorded by law and are to be protected by those laws and benefit from them in a similar manner. If a deviation from this norm occurs, there can be said to have been a derogation from the right and hence no equal protection and benefit of the law. In essence the right contemplated in s 56 (1) envisages a law which provides equal protection and benefit for the persons similarly affected by it. It includes the right not to be subjected to treatment to which others in a similar position are not subjected to. The test in assessing whether there has been an infringement of the right to equal protection of law as enshrined in s 56 (1) of the Constitution was aptly captured in *Nkomo* v *Minister of Local Government Rural and Urban Development & 2 Ors* 2016 (1) ZLR 113 (CC) as follows:

> "In order to found his reliance on this provision the applicant must show that by virtue of the application of a law he has been the recipient of unequal treatment or protection that is to say that certain persons have been afforded some protection or benefit by a law, which protection or benefit he has not been afforded; or that persons in the same (or similar) position as himself have been treated in a manner different from the treatment meted out to him and that he is entitled to the same or equal treatment as those persons."

Commenting on s 9 (1) of the South African Constitution, which is equivalent to s 56 (1) of the Zimbabwean Constitution the Constitutional Court of South Africa in *Van Der Walt* v *MetCash Trading Limited* [2002] ZACC 4 stated that the meaning of the right enshrined in s 9 (1):

> "… is that everyone has 'the right to equal protection and benefit of the law, 'cannot mean that where a final court of appeal exercises a discretion, such discretion may be subject to attack under s 9 (1). It is clear that the provision means that all persons in a similar position must be afforded the same right to access the courts and to the same fair and just procedures with regard to such access."

The import of the said provision as quoted in the *Van Der Walt* case, *supra*, is that it grants everyone the right to equal protection and benefit of the law. The concept of equal protection and benefit of the law entails that everyone in the same position must enjoy benefits available to them without any form of differentiation. See *Sarrhwitz* v *Martiz N.O & Anor* [2015] ZACC 14.

As aptly captured above, it is necessary that an applicant in an application such as the present, demonstrates how the court *a quo* infringed its right to equal protection and benefit of the law.

What was before the court *a quo* was an appeal against a decision of the High Court. Faced with six grounds of appeal the court *a quo* clearly captured the facts and the findings. To ascertain whether the court *a quo* violated the applicant's rights in s 56 of the Constitution, there is need to reconsider the findings of the court. As regards ground of appeal one, two and three concerning whether the respondents were properly before the court *a quo*, it was determined that the Vieira's were the directors of the respondent at the relevant time and could not have resigned before the applicant had paid the full purchase price.

As to whether the notice of cancellation was precise, the court *a quo* found that the notice of cancellation was valid as it complied with s 8 of the Contractual Penalties Act [*Chapter 8:04*]. The court *a quo* lastly dealt with issue whether a claim for the *rei vindicatio* had been established. The court correctly found that at the time of *litis*, the immovable properties were owned by the respondent and that the applicants were in the possession of these properties. It was also the court *a quo's* findings that the tendered cheque payment of ZW$2.5m was only equivalent to US$83

333.33 which was wholly inadequate to meet the purchase price. The applicant therefore failed to justify possession of the properties in question at the time pleadings closed.

The findings by the court *a quo* were based on a non-constitutional matter. The applicant is aggrieved by the findings of the court *a quo*. Clearly, the applicant had a preferred disposition that it hoped it would get after the hearing of the appeal. In the case of *The President of the Senate & Ors v Gonese & Ors CCZ* 01/21, the Court held that,

> "In s 167 (1), the Constitution provides that this Court is the apex court in all constitutional matters, while in s 169 (1) it provides that the Supreme Court is the final court of appeal save in matters over which the Constitutional Court has jurisdiction. I digress briefly and for comparative purposes to note that the provisions of 169 (1) in turn form the basis of s 26 of the Supreme Court Act which provides that:
>
> **"26 Finality of decisions of Supreme Court**
>
> (1) There shall be no appeal from any judgment or order of the Supreme Court.
>
> (2) The supreme court shall not be bound by any of its judgments, rulings or opinions nor by those of any of its predecessors."

Discussing the principles that emerge from the above provision, the Chief Justice in *Lyttton Investments (Private) Limited supra* had this to say at p 22 of the judgement:

> "A decision of the Supreme Court on any non-constitutional matter in an appeal is final. No court has power to alter the decision of the Supreme Court on a non-constitutional matter. Only the Supreme Court can depart from or overrule its previous decisions, ruling or opinion on a non- constitutional matter."

In casu, all the findings of the court *a quo* on non-constitutional matters were based on the record and cannot be impugned. No constitutional issue can arise from a contention that evidence was incorrectly assessed by the subordinate court. The Court does not assume jurisdiction when it is being called upon to reverse factual findings of the court *a quo* on non-constitutional

issues. In the case of *Feathers Mukondo* v *The State* CCZ 8/20 p 7, the Court quoted with approval the case of *General Council for the Bar of South Africa* v *Jiba and Others* [2019] ZACC 23 where it was held that:

> "The apparently incorrect determination of facts by the majority in the Supreme Court of Appeal and the erroneous application of the three-stage test to those facts also do not raise a constitutional issue. This is because the standard is well established and the determination of facts, whether right or wrong, does not amount to a constitutional issue."

The applicant has not shown that there has been unequal treatment or differentiation by the court *a quo*. It has been held in the case of *Machine v The Sherriff of Zimbabwe & Ors* CCZ 98/23 that:

> "However, the position of the law is that it is necessary that in all instances where the right is invoked, the equality before the law and the equal treatment under the law that the section envisages is specifically pleaded and ultimately proved even if, in some instances, the proof thereof will be common cause or easy to furnish."

The applicant has furthermore, not shown that it was denied protection of the law while others in its position have been offered such protection. As was stated in the *Mukondo* case, *supra* at p 7 that:

> "The mere allegation that a fundamental human right enshrined in Chapter 4 of the Constitution has been infringed does not mean that a constitutional issue has arisen from a decision of a subordinate court. A decision of a subordinate court on any matter within the ambit of its jurisdiction would not be found to have given rise to a constitutional matter on the basis of a founding affidavit complaining about an alleged incorrectness of the decision of the subordinate court."

The applicant, consequently, has failed to show how the court a quo infringed its right of equal protection of the law.

The remarks of MALABA DCJ (as he then was) in *Chiite* and *Ors* v *The Trustees of the Leonard Cheshire Homes Zimbabwe Central Trust* CCZ 10/17 are apposite. He stated the following at pp 5-6 of the cyclostyled judgment:

> "What the Court has before it are disgruntled litigants who have attempted to try and obtain redress under the guise of an appeal on a constitutional matter. Their criticism of the judgment of the Supreme Court set out in what purports to be grounds of appeal is no more than a raging discontent over the factual findings of the Supreme Court. The grievances of the losers in the Supreme Court have all the hallmarks of a mere dissatisfaction with the factual findings by that Court. See *De Lacy and Anor* v *South African Post Office* 2011(a) BCLR 905 (CC) paras 28 and 57."

It is the applicant's argument that the Supreme Court, in rendering its judgment under SC 110/22, abdicated its core function and completely acted as a trespasser of the law, both on key procedural and substantive issues, thereby denying it adequate and due protection of the law, the right to be heard and the right to a fair hearing before a competent and impartial judicial body.

The applicant has sought to rely on the case of *Denhere* v *Denhere, supra* in arguing that a party to proceedings before the Supreme Court which involve a non-constitutional matter may approach the Court in terms of s 85(1) of the Constitution alleging that the decision of the Supreme Court has violated his or her fundamental rights enshrined in Chapter 4 of the Constitution. It is its contention that the provisions of s 85(1) of the Constitution do not limit the right of approach to vindicate a fundamental right or freedom before a specific court.

From this argument, the inference is easily drawn that what the applicant is seeking is that this Court sits as an appellate court or a review court in a matter that did not raise a constitutional issue. The applicant is trying to camouflage this application in order to give the impression that it

is raising a constitutional issue. In these circumstances, it is clear that the there is no constitutional issue arising.

Whether or not the right under section 74 of the Constitution was violated.

The applicant further argued that the Supreme Court violated the law in failing to afford third-party purchasers of some of the properties, which are the subject of the dispute, an opportunity to defend their rights. It argues that their homes were expropriated in clear breach of their rights to a home in terms of s 74 of the Constitution. The applicant argues in its papers that:

> "The Supreme Court did not pay regard to the need to consider all such critical issues and adduce evidence from parties in order to render justice between men and men."

The applicant contends that the Supreme Court ought to have obtained further evidence from parties. Needless to reiterate that the Supreme Court is not a court of first instance and it only sits as an appellate court. This means that it is only limited to what is within the four corners of the appeal record. It is not for the Supreme Court to call in witnesses to adduce evidence as this should have been done in the High Court.

The applicant has argued that the property was properly sold to third parties who are now holders of the title thereto. The facts show that the property was subject to litigation as summons relating to the properties had been issued on 9 January 2007 and there were disputes pertaining to the full purchase price of those properties. The selling of the properties was in these circumstances therefore a nullity from the onset.

In *Zimbabwe Banking Corporation Ltd* and *Anor* v *Shiku Distributors (Pvt) Ltd and Ors* 2000 (2) ZLR 11 (H) at 18F, the court held that:

> "- - - a *res litigiosa* may not be sold after institution of action as there is no-one who can be enriched by the right as everyone has an equal right to prosecute it."

See also *Chenga* v *Chekadaya & Ors* S–7–13.

As already stated above, the applicant argued that the Supreme Court violated the law in failing to afford innocent purchasers of some of the properties, which are the subject of dispute, an opportunity to defend their rights. It must be noted that there was an opportunity for the applicant to move for the joinder of third parties whilst the matter was still in the High Court, which it failed to do. The applicant waited for the matter to be decided on appeal and now cries foul that the third parties were not joined on appeal and that they were not heard. The notice of appeal in the Supreme Court itself shows that the issue of the joinder of third parties was not an issue. Moreover, it is surprising that these third parties did not approach this Court to make the application for their joinder if we are to consider that their rights were indeed violated. I therefore find that the argument with respect to the argument that s 74 of the constitution was violated by the decision of the Supreme Court has no merit.

This is a disguised appeal against the decision of the court *a quo* on the basis that the applicant's rights to equal protection of the law and a fair hearing were violated. The constitutional Court is required to only deal with matters that involve constitutional issues. In the case of *Lytton, supra* it was stated, amongst other things, that:

> "The Court is a specialist court and not a court of general jurisdiction. The principle of constitutional supremacy ensures that the jurisdiction of the Court, as defined in s 167 of the Constitution, is narrowly defined and given constitutional protection. In addition, the very definition of a constitutional matter itself, in terms of s 332 of the Constitution,

> presupposes that not every matter is a constitutional matter. If the resolution of a matter does not require the protection, interpretation or enforcement of the Constitution, it is not a constitutional matter and the Court cannot assume jurisdiction over it."

This is one case where the Supreme Court was not dealing with a constitutional question but a question of whether the cancellation of a contract was valid and whether the full purchase price had been paid. No failure to act in accordance with the law has been demonstrated.

In the case of *Brink* v *Kitshoff NO* 1996 (4) SA 197 (CC), the South African Constitutional Court had the following to say at p 213E-F:

> **"28 The jurisdiction of this Court** is limited to the interpretation, protection, and enforcement of the provisions of the Constitution (in terms of s 98(2) of the Constitution) and any other matter over which it is expressly given jurisdiction. Neither the question of when an estate becomes entitled to the proceeds of a life insurance policy in terms of s 44 nor the question of when a *concursus creditorum* will be initiated, are constitutional questions. This Court accordingly does not have jurisdiction over such matters."

In the case of *Rita Mbatha* v *National Foods Private Limited* CCZ 06/21, this Court correctly held that:

> "Having found that no constitutional issue was placed before and determined by the court *a quo*, it follows that its decision was not on a constitutional matter. This means that the decision is final and non-appealable. Section 169(1) of the Constitution gives constitutional recognition to the principle of finality in litigation in non-constitutional matters and it provides the following:
>
> '**169 Jurisdiction of Supreme Court**
>
> (1) The Supreme Court is the final court of appeal for Zimbabwe, except in matters over which the Constitutional Court has jurisdiction.'"

The above constitutional provision must be read together with s 26(1) of the Supreme Court Act [*Chapter 7:13*] which states that:

> "**26 Finality of decisions of Supreme Court**
>
> (1) There shall be no appeal from any judgment or order of the Supreme Court."

The Court in the Mbatha matter concluded by saying that:

> "It is now settled that it is only a decision of a subordinate court on a constitutional matter that can be appealed to the Court. It is accepted that there was no constitutional issue that was raised before and determined by the court *a quo."*

The position of the law as regards the finality of non-constitutional decisions by the Supreme Court was put beyond dispute by MALABA CJ in *Lytton*, *supra* at p 22 of the cyclostyled judgment as stated above.

COSTS

Rule 55(1) of the Rules deals with the issue of costs. It provides that:

> "(1) Generally no costs are awarded in a constitutional matter:
> Provided that, in an appropriate case, the Court or the Judge, as the case may be, may make such order of costs as it or he or she deems fit."

There are no circumstances that exist or warrant the awarding of costs. There is no basis for this Court to depart from the norm in constitutional matters of not awarding costs.

DISPOSITION

The matter in the court *a quo* was a purely contractual one. What the applicant has simply done is to look at the judgment from a personal point of view and conclude that its constitutional rights were violated. The decision itself did not raise a constitutional matter. No right was violated in the determination of the matter by the court *a quo*.

In the result, it is ordered as follows:

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

GARWE JCC : I Agree

PATEL JCC : I Agree

Manase and Manase Legal Practitioners, Applicant's legal practitioners

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