REPORTABLE (106)

(1) FARAI MATSIKA (2) FAIRGOLD INVESTMENTS (PRIVATE) LIMITED
V
MOSES TONDERAI CHINGWENA AND 37 OTHERS

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, MUSAKWA JA & MWAYERA JA
MONDAY 17 OCTOBER 2022

L. Madhuku, for the applicant

T. Mpofu, for the first, third, fourth, fifth, sixth, seventh, eighth and ninth respondents.

D.Ochieng with T. Magwaliba, for the tenth, eleventh, thirteenth – thirtieth, thirty second and thirty seventh respondents

No appearance for the second, twelfth, thirty first, thirty third, thirty fourth and thirty fifth respondents

GWAUNZA DCJ

[1] This is a court application for the 'review' of a judgment by a single judge of this Court sitting in chambers. The applicants claim that the application has been filed in terms of s 176 of the Constitution of Zimbabwe 2013 as read with s 6 of the Supreme Court Act [*Chapter 7:13*] ("the Act"). At the commencement of the hearing in this matter, the applicants made an oral request in terms of s 175 of the Constitution, for referral to the Constitutional Court, of two questions that they submitted had arisen in the proceedings

before the court. After hearing submissions on this request, the court issued the following order and indicated that the full reasons for that order would be included in this judgment:-

> *"The application for referral in terms of s 175 (4) of the Constitution is dismissed with no order as to costs"*

[2] The court, two days later proceeded to hear arguments on the main application before it and subsequently issued the following order:-

> *"1 The preliminary point on jurisdiction raised by the respondents is hereby upheld with costs.*
>
> *2 The court declines jurisdiction in this matter*
>
> *3 Full reasons for this order will follow in due course"*

Contained in this composite judgment are the full reasons for the orders issued by the court in respect of the two matters.

FACTUAL BACKGROUND RELEVANT TO THIS APPLICATION

[3] The first applicant was an employee of *Croco Holdings Private Limited* (third respondent). In this protracted dispute, he and the second applicant, *Fairgold Investments (Pvt) Limited*, approached the High Court (the court *a quo*), in terms of s 196 (1) as read with s 198 of the Companies Act [*Chapter 24:03*] alleging that the affairs of the company were being conducted in a manner which was oppressive and prejudicial to its members, including the first applicant himself. It was also averred that he held 30 percent of the issued shares in the third respondent through the medium of the second applicant.

[4] The respondents opposed the application and raised several points *in limine*. These included the averments that-

i) the application was founded on material falsehoods,

ii) the shareholders' agreement relied on by the applicants was fraudulent, and

iii) the applicants did not have *locus standi in judicio* to mount the proceedings in question, and

[5] After upholding all the preliminary points raised by the respondents, the court *a quo* among others, made the finding that the first applicant was indeed not a shareholder in the third respondent and therefore, lacked the requisite *locus standi* to bring that application before the court. The court also found that the application was bad in law and that it did not meet the requirements of s 95 as read with s 196 of the Companies' Act. It ultimately dismissed the application with costs.

[6] Aggrieved by the decision of the court *a quo*, the applicants sought to appeal to this Court. However, realizing that they had not complied with Rule 37 (2) of the Supreme Court Rules 2018, in respect of service of the process on the Registrar of the High Court, they filed a chamber application before this Court for condonation and extension of time within which to appeal. The application was heard in chambers by a single judge of appeal who, in a fully reasoned judgment, found that the delay by the applicants in complying with the relevant procedural requirement was not inordinate. He further considered the explanation for the delay in question and found that the applicants had proffered a reasonable explanation thereof. The judge then considered the question of whether or not the matter

enjoyed reasonable prospects of success on appeal. He found that the evidence and documents that were before the court *a quo* did not help the applicant's case in any way. The judge also noted with concern that the first applicant had tendered a fraudulent document to deceive the court *a quo*. Having ultimately found that no prospects of success on appeal existed, the learned judge dismissed the application.

[7] It is this decision that the applicants wished to have 'reviewed' by this Court in terms of s 176 of the Constitution as read with s 6 of the Act.

[8] Based on their grounds of review, the applicants prayed for the success of the application, the setting aside of the decision of the single judge and, essentially, its substitution with an order granting the application for condonation and late noting of the appeal in question.

[9] **ISSUES FOR DETERMINATION**

i) Whether or not this Court has the jurisdiction to hear and determine the application for 'review' as presented, and if so;

ii) Whether or not the Judge of Appeal dismissed the application for condonation and extension of time without following due process; and

iii) Whether the application for the referral of the two constitutional matters to the constitutional court in terms of s 175 (4) of the constitution was properly made;

WHETHER THIS COURT HAS THE JURISDICTION TO HEAR AND DETERMINE THE APPLICATION FOR REVIEW AS PRESENTED

RESPONDENTS' SUBMISSIONS

[10] The respondents contended among other arguments, that this Court had no jurisdiction to determine the matter as presented. *Mr Mpofu* for 8 of the respondents, submitted that the application for review of the judgment of a single judge sitting in chambers was an abuse of court process and should be dismissed with costs on the higher scale. He argued that this Court did not have the jurisdiction to entertain the application at hand primarily because, in exercising his or her powers in chambers, a single judge did so in the capacity of a judge of the Supreme Court. Further, that the review powers of this Court could only be exercised in terms of s 25 (1) of the Act, which did not give the court jurisdiction to review decisions made by its judges in chambers. The court could only review decisions of an inferior court or tribunal, and further, not in the first instance. Thus, so the argument went, a judge of the Supreme Court could not be both an inferior and a superior court judge. *Mr Mpofu* argued that, to the extent that the applicants sought to directly approach this Court for the review of a single judge's decision, they acted contrary to s 25 (3) of the Act which specifically states in relevant part that:-

> **'Nothing in this section shall be construed as conferring upon any person any right to institute any review in the first instance before the Supreme Court or a judge of the Supreme Court…'**

This provision was, according to Counsel, particularly relevant since the applicants specifically stated in their founding affidavit that their application was one for a review.

[11] In so far as the relief sought by the applicants was concerned, counsel contended that the applicants' draft order showed that the relief they were seeking would be contrary to the law. This is because an applicant in an application for review did not *'end up obtaining relief that they contend ought to have been granted by the court.'* Further to this, it was

contended that in terms of the rules, condonation of the late noting of an appeal could only be granted by a judge of appeal in terms of r 43 (7).

[12] Counsel for 23 of the respondents, *Mr Ochieng* and *Mr Magwaliba* stressed the point that the application before the court both in terms of procedural dictates and on the merits, was 'an appeal in drag', that is an appeal disguised as a review. This was because an attack on the merits of a decision of a court should be launched in an appeal and not a review. They contended that by taking issue with the judge having 'cumulatively', rather than 'individually' considered the factors applicable to the grant of condonation of late noting of an appeal, the applicants' complaint related to substance and not the procedure followed by the single judge. Counsel submitted further that what was in effect being challenged was the correctness of the judge's reasoning, not its adequacy.

[13] Counsel further contended, on the basis of *Affretair (Pvt) Ltd & Anor v MK airlines (Pvt) Ltd*, 1996 (2) ZLR 15 (S) at 21F, that in order to establish the degree of irrationality that would constitute a basis for review, it must be shown that the decision *'could only have been arrived at by reference to improper considerations or by failure to refer to proper considerations*.' *In casu*, Counsel submitted that the applicants, while accepting that the judge applied the correct criteria, argued instead that he applied such criteria incorrectly. Since the applicants had filed an application in circumstances where no right of appeal existed, and also, where the basic requirements for a review as set out in the applicable rules of court, were not met (ie, *r 73 of the Supreme Court Rules, 2018 as read with r 62 (4) of the High Court Rules, 2021*), that really should be the end of the matter.

[14] Counsel further impugned the substantive relief sought by the applicants as being typically of the nature ordinarily sought in an appeal to a higher court, rather than the review that the applicants sought to portray the proceedings to be. They contended that the true remedy that the appellants craved lay in law reform rather than the application that they brought before the court. Specifically, counsel continued, the applicants should have challenged the validity on a constitutional or other legal basis, of the rule that vested in a single judge of the Supreme Court, the jurisdiction to hear an application for condonation of the late filing of an appeal. This was because the applicants' real grievance was that this provision in some way contravened the Constitution.

[15] Concerning s 176 of the Constitution, in terms of which the applicants assert the application had been filed, it was contended for the respondents that the provision did not vest in the Supreme Court the jurisdiction to review a decision to grant or withhold condonation and extension of time within which to appeal. Further, that the power 'to protect and regulate' its processes was exercised through the enactment of the Supreme Court Rules which provide for the full extent of the litigant's right to seek the condonation and extension of time to appeal, that the applicants craved. There was thus no question of the rules 'taking away' any of the Court's powers. It was also contended that the power to review was a matter of substance for which express provision would have to be made. Further, that the review powers of the Supreme Court were explicitly set out in s 25 (3) of the Act. As already indicated, the Act does not permit a litigant to institute a review.

Counsel for all the respondents accordingly submitted that the application was an abuse of court process and should be dismissed with costs on a punitive scale.

APPLICANTS' SUBMISSIONS

[16] The applicants, to the contrary, submitted that the application was properly one for a review of the decision of one judge of appeal, which was not final in nature. They contended further that on a proper reading of the provisions on which the application was premised, that is s 176 of the Constitution and s 6 of the Supreme Court Act, the court had the requisite jurisdiction to determine the matter as an application for review. On the basis of a number of authorities, the applicants further submitted that 'it was trite' that a single judge of this Court sitting in chambers did not exercise the full powers of the court. They therefore sought to persuade the court that the judgment of a single judge, even where it was rendered in proceedings sanctioned by the Act or the Rules of the court, did not have the same weight and standing as that of a full bench of the Supreme Court. That, as a result, such judgment was not final as envisaged by s 169 of the Constitution, and was therefore subject to review by the full bench of the Court in terms of s 176 of the Constitution.

[17] I pause here to observe that the authorities cited by the applicants in this respect, while reinforcing their assertion that a single judge does not exercise the full powers of the court, are nevertheless distinguishable from and not apposite to, the circumstances of the matter at hand. This is because all three authorities are concerned with the question of whether a single judge in chambers can properly strike off the roll, a matter that, in terms of the Supreme Court Act and the Rules, can only be determined by the full court. In other words,

can a single judge in chambers usurp the jurisdiction explicitly reposed in the full Court? As an example, the court in the *Blue Rangers Estates (Pvt) Ltd v Muduvuri* 2009 (1) ZLR 376 (S) held that a single judge of the Supreme Court sitting in chambers had no power derived from any provision of the relevant legislation, to issue an order striking off the roll, an appeal pending in the Supreme Court, and due to be heard by its full bench of at least three judges in terms of s 3 of the Supreme Court Act. Implicit in this finding was the fact that a judge sitting in chambers can only exercise such jurisdiction as is explicitly conferred on him/her by the requisite law (See in this respect *Stanley Nhari v Robert Mugabe and Ors*, SC 16/20 at para 33*).*

[18] *In casu* the applicants effectively contended that the demonstrated imbalance between the jurisdiction of the full Court and that of a single judge sitting in chambers, should be interpreted as vesting the former with review powers over decisions made by the latter. They however, did not cite any authorities to support this particular contention. In the absence of any such authorities, the appellants' case in the main rested on their interpretation of s 176 of the Constitution as read with a number of related provisions in the Act and the rules of the Supreme Court.

[19] The applicants submitted that there was no constitutional provision explicitly giving license for a single judge in chambers to exercise the jurisdiction and powers of the full court. They contended that single judges in chambers derived their jurisdiction and powers from an Act of Parliament, the Supreme Court Act, as contemplated in s 168 (3) of the Constitution. Further, that since s 3 of the Supreme Court Act provided for a composition of not less than

three judges for purposes of the court exercising its jurisdiction, the rules of the Supreme Court that afforded jurisdiction to a single judge in chambers should not and cannot, usurp the jurisdiction of the Supreme Court which is constitutionally granted.

ANALYSIS OF THE LAW AND APPLICATION THEREOF TO THE FACTS

[20] Section 169 (1) of the Constitution, reads as follows;

> '**169 Jurisdiction of the Supreme Court**
>
> The Supreme Court is the final court of appeal in Zimbabwe, except in matters over which the Constitutional Court has jurisdiction.
>
> (1) – (4)(not relevant)'

There seemed to be no dispute between the parties as to the meaning and import of this provision in so far as appeals in non-constitutional matters are concerned. Indeed, the applicants did not expressly state that their application was an appeal against a decision of this Court, even if it was the judgment of a single judge. The question that they raised rather, was whether the decision of a single judge of this Court was final as the respondents contended, or not final, as they argued. The latter circumstance would, in the applicants' view, render it susceptible to review by the full Court.

[21] The applicants correctly observed that the rules of the Supreme Court, in particular, r 43(7), afforded jurisdiction to a single judge in chambers to determine applications for condonation for the late noting of an appeal. However, in an apparent diversion from the main thrust of their application, the applicants questioned the validity of this rule,

effectively contending that it was *ultra vires* the enabling provision of the Supreme Court Act that is, s 3. They contended that this section provides for a composition of not less than three judges for purposes of the court exercising its jurisdiction.

[22] As this submission challenged the validity of r 43 (7) – and therefore the jurisdiction of a single judge to entertain an application in terms thereof - it constituted a cause of action different from the one on which this application was predicated. The applicants had neither properly motivated this cause of action in the papers before the court, nor sought any relief emanating thereof. It did not escape notice that despite the aspersions now being cast on the validity of the rule in question, the applicants were the ones who submitted themselves to the jurisdiction of a single judge by filing an application in terms of the same rule. This they did in the full knowledge that the matter would be heard and determined by a single judge. It would thus not be unreasonable in the court's view, to surmise that, had the decision of the single judge gone in their favour, the applicants would not have filed this application seeking a 'review' of such decision.

[23] This Court not being a court of first instance, and to the extent that the applicants may have entertained some hope that the impugned decision of the single judge may be set aside on that basis, they were clearly out of court. The respondents were therefore correct in their submission that the applicants should have considered seeking relief through law reform, that is, filed an application challenging the validity of the impugned rule rather than the purported review that is now before the court. Accordingly, r 43 (7) stood unchallenged

and what remained to be determined was whether or not a decision made in terms of that provision was reviewable as claimed by the applicants.

[24] It is evident from the foregoing that the respondents' contention that this Court lacked the jurisdiction to determine this matter was premised on two main grounds. These were firstly that s 169(1), cited above, did not create a right for an applicant to approach this Court directly seeking 'a review' of its own judgment. Secondly, that in any case, the purported application was a disguised appeal against a final therefore non-appealable, order of this Court.

[25] The Court found there was merit in the respondents' submissions and determined that one could not rely on s 176 of the Constitution as read with s 6 of the Act as a basis for seeking the review of an order of this Court. This is because review powers are substantive in nature, while s 176 of the Constitution, to the contrary, is clearly concerned with inherent powers of the court. It reads as follows:-

> 176. **Inherent powers of Constitutional Court, Supreme**
>
> **Court and High Court**
>
> The Constitutional Court, the Supreme Court and the High Court **have inherent power to protect and regulate their own process** and to develop the common law or the customary law, taking into account the interests of justice and the provisions of this Constitution (*my emphasis*).

[26] For its part, Section 6 of the Act provides as follows:

> **6 Practice and procedure**

> In any matter relating to records, practice and procedure for which no special provision is contained in this Act or in rules of court, the matter shall be dealt with by the Supreme Court or a judge thereof as nearly as may be in conformity with the law and practice for the time being observed in England by the Court of Appeal (*my emphasis*)

[27] The inherent jurisdiction that s 176 gives to the higher courts does not translate to a procedure or basis for a party to seek any relief against another person. It instead, relates to the functioning of the court to ensure a just procedure in proceedings before it. This position is aptly articulated thus in *Bheka v Disablement Benefits Board* 1994 (1) ZLR 353 (S); at 356-357 GUBBAY CJ had this to say;

> The nature of the inherent jurisdiction of a superior court was recently the subject of a scholarly exposition by Flemming J *in Chunguete v Minister Home Affairs & Ors* 1990 (2) SA 836 (W). After referring to a number of English and South African authorities, the learned judge came to the conclusion that such jurisdiction is limited to the procedural field. At 848G–H the court explained this as follows:
>
> > "What is appropriately called the 'inherent jurisdiction'- is related to the court's functioning towards securing a just and respected process of coming to a decision and is not a factor which determines what order the court may make after due process has been achieved. That is a function of the substantive law. **The Court — always — is charged with holding the scales of justice. It is not within its task to add weights to the scales by detracting from a right given by the substantive law or granting a right not given by the substantive law." (***my emphasis)*

[28] These principles were recently buttressed as follows in the case of *Cossam Chiyangwa* v *Apostolic Faith of Zimbabwe* CCZ 6/23*;*

> The applicant contends, rightly so in my view, that the Supreme Court has inherent jurisdiction and the power to control its processes. **It is a jurisdiction that the court exercises when it is seized with a process that is directly linked to matters that are pending before it**. The exercise of the inherent power to control its processes was clarified by the court in *Net One Cellular (Pvt) Ltd v Net One*

Employees & Anor 2005(1) ZLR 275(S). At 280-282, His Lordship *CHIDYAUSIKU* CJ stated:

> "The first issue to be resolved is whether I have jurisdiction to entertain this Chamber application. This application is not one that involves original jurisdiction. **It is ancillary to two appeals this Court is already seized with. Once this Court is seized with a matter, it has inherent jurisdiction to control its judgment.** See *South Cape Corporation v Engineering Management Services* 1977 (3) SA 534 and the cases referred to in that case. **The inherent jurisdiction to control the court's judgment includes, in my view, jurisdiction to control the court's process"** (*my emphasis)*

[29] *In casu,* the decision of the single judge was a judgment of this Court in a non-constitutional matter. On the basis of s 169 (1) of the Constitution, it was final in nature, which also meant that the Court became *functus officio*[1]. Based on the reasoning and authorities cited in the *Chiyangwa* case (*supra*) this Court was no longer seized with any matter relating to the decision in question. There was therefore no issue that the purported application for review could have been ancillary to. On that basis, the application was misconceived.

[30] The approach to what may or may not be done by the Constitutional, Supreme and High Courts in the exercise of their inherent powers may also be further and appositely guided by this *excerpt* in relation to the South African equivalent of s 176 of our Constitution[2];

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[1] 'The general principle, now well established in our law, is that once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it. The reason is that the court thereupon becomes *functus officio;* its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter ceases. The other equally important consideration is the public interest in bringing litigation to finality….' (see *Herbstein and Van Winsen's* 'The Civil Practice of the High Courts of South Africa' 5th ed at p3)

[2] S173 substituted by s 8 of the Constitution Seventeenth Amend Act of 2021 [see Erasmus' "SUPERIOR COURTS PRACTICE" 2nd Ed, at A1-40B]

> **General.** The Constitutional Court has emphasized that its power to regulate its own processes under this provision is to 'meet extraordinary procedural situations, and that it must be exercised with caution. Where the power is used, it should be 'done in a way which accords with the requirements of the Constitution and as far as possible with the procedure ordinarily followed by the Court in similar cases'. **The power may not be used to ignore or circumvent legislation that already provides for a certain procedural issue.** (*my emphasis*)

[31] Applying the principles set out in this and the other authorities cited above to the circumstances of this case, it becomes evident that the applicants *in casu* sought to persuade this court firstly, to ignore or circumvent s 25 of the Act, which substantively provides for the circumstances and manner *i*n which this Court may exercise review powers. Secondly and as stated in *Bheka's* case (*supra*) the applicants sought to persuade the court to improperly 'add weights to the scales' by granting them a right not given by the substantive law. This they could not do. The point has already been made that inherent jurisdiction is not a basis for creating a substantive right.

[32] Section 6 of the Act is concerned with 'records, practice and procedure' relating to any matter before the court. It surely cannot on this basis, be paired with s 176 of the Constitution in order to create and confer on this Court, substantive review powers whose effect would be to circumvent an extant provision of the law.

[33] In light of the foregoing, the court found that the purported application for the 'review' of a judgment of this Court in terms of the two provisions cited was one over which it lacked jurisdiction.

[34] In relation to their other ground for contending that the court lacked jurisdiction to entertain the application for review, the respondents contended that the application before the court was in reality, an appeal disguised as an application for review. They specifically drew attention to both the purported grounds for review, and the relief that the applicants sought, which they contended resonated with that typically sought in appeal proceedings.

[35] The learned authors *Herbstein and Van Winsen*[3] explained the distinction between an appeal and review as follows:-

> The reason for bringing proceedings under review or on appeal is usually the same, *viz* to have the judgment set aside. **Where the reason for wanting this is that the court came to a wrong conclusion on the facts or the law, the appropriate procedure is by way of appeal.** Where, however, the real grievance is against **the method of the trial, it is proper to bring the case on review. The first distinction depends**, therefore, on whether it is the result only or rather the method of trial which is to be attacked. Naturally, the method of trial will be attacked on review only when the result of the trial is regarded as unsatisfactory as well. The giving of a judgment not justified by the evidence would be a matter of appeal and not of review, upon this test. The essential question in review proceedings is not the correctness of the decision under review, but its validity (*my emphasis*)

[36] The applicants in their first ground of review, labeled 'Procedural Irregularity', alleged as follows:-

> "The learned judge dismissed the application for condonation and for extension of time within which to appeal without following the procedure that was binding on him, that procedure being that of considering all relevant factors cumulatively. **The learned judge followed his own procedure of considering factors individually and thereafter dismissing the application before him on the basis of a single factor the prospects of success on appeal**. (*my emphasis)*

[3] *The Civil Practice of the High Courts of South Africa,* 5th ed at page 1271

It has already been observed that the judge who heard the application for condonation issued a fully reasoned judgment. The respondents correctly argued that the applicants did not contend that the judge did not take into account the requisite legal requirements for proving a case for condonation of the late noting of an appeal. Their grievance was that, rather than consider the factors cumulatively, the judge dismissed the application on the basis of only one of those requirements. In the applicants' view, this constituted a procedural *faux pas* meriting a review by the full bench of the court. The applicants however did not explain how a proper consideration of all relevant factors individually and a decision that suggested that two of those were together outweighed by the remaining one factor, failed to pass their test of 'cumulative'.

[37] The court was in any case not persuaded by the applicants' arguments in this respect. Firstly, the court took the view that the impugned conduct of the judge did not amount to 'a method of trial' which, according to the learned authors *Herbstein and Van Winsen* (cited above), should properly be subjected to a review rather than an appeal. (See among other authorities, *Forestry Commission v Moyo* 1997 (1) ZLR 254 (S*), Kodzwa v Secretary for Health & Anor* 1999 (1) ZLR 313 (S) at 315 B-E). Secondly, once the applicants accepted as they did, that the judge did have regard to the correct legal principles for a determination on the merits, of the application before him, it became irrelevant for purposes of review, how and in the exercise of what discretion, he reached the decision that he did. Put in another way, the fact that the judge may have failed, in the applicants' view, to consider those principles 'cumulatively', did not convert his reasoning processes into a reviewable 'method of trial' or 'failure to follow due processes as the applicants put it. Nor was the

same result achieved by referring, as the applicants did, to the judge's reasoning and exercise of discretion in reaching the decision he reached, as a 'procedure.' It is trite that substance prevails over form. The decision remained one on the merits and based on the facts and/or the law applicable to the matter before the judge. In the ordinary course of events, such a decision would only be appealed against, not brought on review.

[38] Thirdly, it is trite that in weighing the requisite factors against each other in an application for condonation of the late noting of an appeal, a judge's discretion extends to a consideration of whether or not to determine the matter on the basis of a factor or factors that may in his/her view outweigh the other factors considered. (*Read v Gardner & Ors* SC 70/19*).* That he in the end dismissed the application for condonation based on the fact that he viewed the applicants as enjoying no prospects of success on appeal clearly goes to 'a decision on the facts or the law' rather than the 'method of trial' (*See Kodzwa's* case *(supra*). In such a circumstance should a losing party regard a judge's reasoning and exercise of discretion to be flawed or injudicious, respectively, the party's remedy would appropriately lie in an appeal and not a review.

[39] The respondents drew the court's attention to the applicants' draft relief as a further indication that their true intention was to have the order of the single judge set aside in proceedings that were in reality an appeal disguised as a review. Specifically, they charged that the relief sought resonated with that normally sought in an appeal. The court finds there is merit in the respondents' submissions. While labeling their application as one for a review, the applicants sought relief couched as follows:-

i) That the application for review succeeds.

ii) That the judgment rendered after a hearing in chambers be set aside.

iii) **That the application for condonation for non-compliance with Rule 37 (2) of the Supreme Court Rules, 2018 be and is hereby granted.**

iv) **That the application for extension of the time within which to file and serve a Notice of Appeal in terms of the rules be and is hereby granted.**

v) **That the Notice of Appeal shall be deemed to have been filed on the date an order is granted in this matter**, and

vi) That there shall be no order as to costs. (*my emphasis*)

[40] The relief sought by the applicants in paragraphs (iii), (iv) and (v) pre-supposes that this court, presented with an application dubbed 'a review' would have gone into and determined the merits of the single judge's decision, as is normally done in appeal proceedings. The incompetency of this draft relief is highlighted thus in *Davis v Chairman, Committee of the Johannesburg Stock Exchange*, 1991 (4) SA 43 (W) at 46F-48G;[4]

> The issue before the court on review is not the correctness or otherwise of the decision under review. **Unlike the position in an appeal, a court of review will not enter into, and has no jurisdiction to express an opinion on, the merits of an administrative finding of a tribunal or official, for a review does not as a rule import the idea of a reconsideration of the decision of the body under review……..**A court on review is concerned with irregularities or illegalities in the proceedings which may go to show that there has been 'a failure of justice……'(*my emphasis*)

[41] Albeit referring to administrative decisions of statutory tribunals, these sentiments are eminently apposite to the review of judicial proceedings by a superior court. Thus when all

[4] Herbstein and Van Winsen Fifth Ed, Vol 2 at page 1266

is told, little doubt remained that the applicants' 'application' was in substance and effect, an appeal against the decision of a single judge of this Court. The court so found.

It was in the light of this finding that the Court determined that it lacked the jurisdiction to hear the appeal, disguised as a review application that was before it. That the court would have no jurisdiction in such a case is aptly explained as follows by the authors *Herbstein and Van Winsen*[5]*;*

> A court of law will not entertain legal proceedings unless it is satisfied that it is competent (in other words, has jurisdiction) **to do so, that the proceedings have been instituted in the proper form, and that they are being conducted in the proper manner.** (*my emphasis*)

[42] The court found, further, that it lacked jurisdiction to hear the matter before it on yet another basis. This related to the purported review nature of the 'application'. In relation to the finality or otherwise of a single judge's decision, it has already been noted that the applicants did not dispute that non-constitutional decisions of this Court are final in nature and cannot be appealed against. In the absence of any provision suggesting that the decision of a single judge of this Court is any less final than that of the full bench of the court, there was no basis for holding that it was. As a decision that was final in nature it was therefore not reviewable in any form (See also *Zimbabwe Catering & Hotel Workers Union v Tangaat Hullet Zimbabwe t/a Hotel Workers Union* SC 84/14*)*. What this position said of the current situation under the law, is akin to what was stated in the case of *Crosland v Her Majesty's Attorney General UK* SC 58/2021, by *Lady Arden* of the Supreme Court of the United Kingdom (albeit in a dissenting view);

[5] *Herbstein and Van Winsen's 'The Civil Practice of the High Courts of South Africa'* 5th ed at p 926

> Fourthly, the Supreme Court is a single court, not a court composed of divisions or having unlimited jurisdiction. The justices are of equal standing, and it is not open to some of the Justices to review the acts of others by way of an appeal.

[43] It would in any case, be absurd as the respondents contended, for a judge of this Court to be both inferior and equal, to the rest of the judges of the court, depending on whether or not he/she sat alone or with other judges to reach a decision on any matter. Judges of appeal by law enjoy equal jurisdiction as well as the same rank and conditions of service. Thus this Court, sitting as a full bench, cannot hear an application for the review of an order it would have earlier granted through the medium of one of its own judges sitting in chambers.

[44] In the light of the foregoing, the court found that nothing turned on the applicants' citation of s 176 of the Constitution and s 6 of the Act, as the provisions upon which the ill-conceived 'application for review' was premised. Similarly, the court found that the attempt by the applicants to pass off the 'application' as one for a review and thereby entreating this Court to exercise review powers outside of the scope of s 25 of the Act, was an exercise in futility. It is appositely noted in this respect, that one of the stated objects of the Act is '*to confer powers of review on the Supreme Court of Zimbabwe.*' This the Act substantively did in its s 25 (3).

In the light of the decision of the court to decline jurisdiction to entertain the matter, it became unnecessary to consider the second issue listed for determination in this application.

WHETHER THE APPLICATION FOR THE REFERRAL OF TWO CONSTITUTIONAL MATTERS TO THE CONSTITUTIONAL COURT IN TERMS OF S 175 (4) OF THE CONSTITUTION WAS PROPERLY MADE

[45] As already indicated, the Court declined its jurisdiction to hear the purported application for 'review', after it had entertained submissions on and dismissed the applicants' request for the referral of two constitutional questions to the Constitutional Court in terms of s 175 (4) of the Constitution. That decision was influenced by the court having found the request for referral to have been frivolous and vexatious in a number of respects.

[46] Before addressing the issue of whether or not the application for the referral of two constitutional matters to the constitutional court in terms of s 175 (4) of the constitution was properly made, it is pertinent to record the following events that the court viewed as an abuse of its processes. After successfully seeking the recusal of one of the judges set to hear the matter, (who was then replaced by another judge who had already perused the record), the applicants made a request to be heard by a panel of five, rather than three, judges of this Court. It was the view of the applicants that the matter before the court involved an important question of law which could only be properly determined by a panel of five judges. The question of law to be determined, they submitted, was whether or not the decision of a single judge of this Court sitting in chambers was final in effect, in the sense that all access to the Supreme Court would thereby be blocked against the losing party. It was further submitted that there existed no precedence in terms of how the question could be answered.

[47] The request for a five member bench was opposed by the respondents and in any event, was turned down by the court in terms of s 3 (b) (ii) of the Supreme Court Act. This was primarily because no basis had been proved as to why a three-member panel of this Court could not sit to determine a matter in which the review of the decision of a single judge of the same court, was being sought.

[48] Following the issuance of the direction on the composition of the bench, *Mr Madhuku* for the applicants indicated in his third request, that he wished to file a written request for referral to the Constitutional Court in terms of s 175 (4) of the Constitution, of certain constitutional questions that he submitted had arisen in the proceedings hitherto before the court. To that end, *Mr Madhuku* sought a postponement of the hearing. In seeking to file the request for referral in writing rather than orally, *Mr Madhuku* relied on r 24 (2) whose import or implication, in his view, was that such request should be in writing.

[49] Counsel for the respondents were vehemently opposed both to the application to file a written request for a referral of the averred questions to the Constitutional Court, and the consequent postponement being sought. It was argued that there was nothing in the Constitutional Court rules mandating the filing of a written request (and precluding an oral one) for referral of questions to the Constitutional Court. *Mr Mpofu* expressed the view that the request for referral was *mala fide* given that the applicants could have approached the Constitutional Court directly for the relief they now craved. *Mr Ochieng* in his turn charged that the applicant in effect sought to manipulate the course of proceedings and

forestall progress thereof by improperly raising the issue of a referral to the Constitutional Court.

[50] Both counsel opined, and not unreasonably in the view of the court, that the applicants despite being d*omini litis,* strangely seemed to be averse to seeing a start to the hearing of the matter. Be that as it may, *Mr Madhuku* in the end relented and successfully sought a short adjournment to enable him to prepare argument in support of an oral request for the referral of two constitutional questions to the Constitutional Court.

APPLICANTS' SUBMISSIONS

[51] In motivating the applicants' request for referral, *Mr Madhuku* submitted that the two constitutional questions properly arose from the proceedings before the court. The two questions were:

i) *Whether or not section 25 (3) of the Supreme Court Act is constitutional and consistent with section 69 (2) of the Constitution to the extent to which it is interpreted as precluding a litigant dissatisfied with a judgment of a single judge in chambers from approaching the full Court for review and;*

ii) Whether or not section 176 of the Constitution gives jurisdiction to the full (Supreme) Court to review decisions of single judges in chambers.

The applicants thus would seek before the apex Court declarators based on their averments as contained in their request for referral.

[52] It is pertinent to note that the applicants raised the issue of referral at the commencement of the proceedings before the court. Their submission was that the matters arose from their founding papers as well as the arguments advanced by the respondents in their opposing

papers. The respondents took issue with the timing of the application for referral, which they regarded as suspect and indicative of the vexatious nature of the request given the events, outlined above, that had preceded the making of the request.

[53] The court found, on the basis of relevant authorities, that the matters sought to be referred to the Constitutional Court met the test of having arisen during the proceedings that were before the court. Special reference in this respect is made to the following *dictum* taken from the case of *Tsvangirayi v Mugabe and Anor* 2006 (1) ZLR 148 (S) at 158 E-F:-

> The word 'proceedings' has a wider meaning in s 24(2)[6]of the Constitution than the 'goings on' in court …. 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' (*see also Muhala & Others v Mukokera* CCZ 2/19*).*

These sentiments apply equally to a request made to this Court for the referral of a constitutional matter to the Constitutional Court.

[54] Counsel for the applicants submitted that the facts upon which the application was anchored, already outlined above, were legal in nature and therefore not in dispute. He further submitted that by bringing up s 25(3) of the Act in circumstances where the application for review was clearly filed in terms of s 176 of the Constitution, and by interpreting it the way they did, the respondents in their opposing papers effectively put that provision in issue. Further, that in relation to s 176 of the Constitution, this Court would be interpreting a provision of the Constitution, and the referral of the question in this respect would result in the Constitutional Court itself definitively interpreting s 176.

[66] Precursor to s175(4) of the current Constitution

Accordingly, Counsel added, the questions sought to be referred had 'substance', which rendered the request for their referral to the Constitutional Court both proper and far from being frivolous or vexatious. He added that he had not heard the respondents querying the substance in the questions themselves, rather what they took issue with was the manner in which the request was raised. In counsel's view a request for referral would be frivolous and vexatious if it had no relationship with the relief that was being sought in the main matter before the court, that is, something raised merely to annoy or vex the other party. Reliance for the submissions was placed on *Martin v Attorney General,* 1993 (1) ZLR 153 (S) at 157.

RESPONDENTS' SUBMISSIONS

[55] Conversely, *Mr Mpofu* for 8 of the respondents, submitted that the request for referral was both frivolous and vexatious because the applicants had no genuine intent of obtaining relief from the Constitutional Court. He maintained that the applicants ought to have applied directly to the aforementioned court if they felt that there was no other feasible avenue to challenge the judgment granted in chambers. *Mr Mpofu* insisted that the applicants had not provided any justification for filing the application for referral in light of their intent to petition the Constitutional Court seeking the same relief. He also urged the court to consider the timing of the application for referral, and expressed the view that it was peculiar at the very least that the application was made as soon as the applicants' quest for a five-member bench failed. *Mr Mpofu* further asserted that a genuine request for a referral ought to have preceded the application for the full bench of the Supreme Court to determine the purportedly important question of law that the applicant sought to raise.

[56] *Mr Mpofu* further submitted that the applicants appeared not to want the matter determined to finality. He added that they simply sought to craft another case before the Constitutional Court in a manner that amounted to an abuse of court process. He further observed that the applicants essentially sought to abandon the case they placed before the court since the referral being sought was anchored on the respondents' submissions rather than arguments stemming from their own case. Finally, it *was Mr Mpofu's* submission that the applicants had not advanced any cogent reasons for ousting the court's jurisdiction in the matter.

[57] For his part, *Mr Ochieng* for the rest of the respondents also opposed the applicants' request for a referral of the intended questions to the Constitutional Court. He submitted that the applicants sought to approach the Constitutional Court on a basis different and distinct from that which was pleaded in the matter before this Court. He added that the court ought not to be precluded from exercising its jurisdiction since a constitutional issue could be avoided by a determination of the simple issue of whether or not the ruling of a single Judge in chambers was a final judgment of the Supreme Court. In response, *Mr Madhuku* emphasised that the applicants merely sought to exercise their rights under s 175 (4) of the constitution.

ANALYSIS OF THE LAW AND APPLICATION THEREOF TO THE FACTS

[58] 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 vexatiou**s."(my emphasis)

It is evident from a simple reading of this provision that the court is compelled to refer a matter to the Constitutional Court at the request of a party unless it considers the request to be merely frivolous or vexatious.

[59] It is however, not just any question that is deserving of a referral to the apex Court. Counsel for the applicants, *Mr Madhuku,* correctly submitted that a request for referral would be frivolous and vexatious if it had no relationship with the relief that is being sought in the main matter before the court. This position was affirmed in a plethora of authorities among them *Muhala* & *Ors v Mukokera* CCZ 2/19 where the following was held:-

> A constitutional question worthy of referral is a question that is necessary **to be answered by the Constitutional Court in order that the referring court may dispose of the dispute before it.** In this regard, BARON JA in *Muhala vs 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." (***my emphasis***)**

[60] In the case of *Martin vs Attorney General & Anor* 1993 (1) ZLR 153 (SC), the phrase 'frivolous and vexatious' was defined in the following terms:

> "In the context of s 24(2)[7], **the word "frivolous" connotes, in its ordinary and natural meaning, the raising of a question marked by a lack of seriousness; one inconsistent with logic and good sense, and clearly so 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 purpose 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.** See *Young v Holloway & Anor* [1895] P 87 at 90-91; *Dyson v Attorney-General* [1911] 1 KB 410 (CA) at 418; *Norman v Mathews* (1916) 85 LJKB 857 at 859; *S v Cooper* & Ors 1977 (3) SA 475 (T) *at*

[7] *Precursor to s 175(4) of the current Constitution*

476D-G; *Fisheries Development Corporation of SA Ltd v Jorgensen & Anor* 1979 (3) SA 1331 (W) at 1339E-F.

To my mind, the purpose of the descriptive phrase is to reserve to subordinate courts the power to prevent a referral of a question which would amount to an abuse of the process of the Supreme Court." (*my emphasis)*

[61] It is against the yardstick set out in the *dicta* cited above that the purported constitutional questions sought to be referred, had to be measured. The request to refer the first of the two matters crafted by the applicants required the Constitutional Court to interpret s 25 (2) of the Act and determine whether or not it is ***'constitutional and consistent with section 69 (2) of the Constitution' to the extent to which it is interpreted as precluding a litigant dissatisfied with a judgment of a single judge in chambers from approaching the full Court for review'***. The respondents' reaction to the request to refer this matter to the Constitutional Court was essentially that:-

i) it constituted a whole different case from the one that was in the papers before the court, since it was premised on arguments advanced by the respondents in their opposing papers, a circumstance that rendered an answer to that question unnecessary and incapable of assisting the court to dispose of the dispute before it; and;
ii) it could have been taken directly to the Constitutional Court, since it basically alleged the violation of a fundamental human right.

The court found there was merit in the respondents' submissions.

[62] The applicants approached this Court seeking a 'review' of the decision of a single judge of appeal. The relief they sought from this Court, and emanating from their application for review in terms of s 176 of the Constitutions, was the setting aside of the judge's decision dismissing their application for condonation, and its substitution with an order granting the condonation of the late noting of their appeal. No amendment to this draft relief was sought.

On the basis of the authorities cited above, and by parity of reasoning, a determination of the question of the alleged violation of the Declaration of Rights, in this case s 69 (2) of the Constitution, was unnecessary for the resolution of the dispute before the court, much less the order that the applicants sought from this Court. To borrow from the submission made by Counsel for the applicants himself, the question sought to be referred had no relationship with the relief that was sought in the main matter before the court. On this particular basis, the court found that the request was frivolous and vexatious. It was calculated to vex the other party, if not the court as well. Counsel could not in one breath authoritatively assert one position of the law and then turn around to do its very opposite.

[63] The court further found the request to have been frivolous and vexatious to the extent that the applicants, as contended for the respondent, sought to thereby take to the Constitutional Court, a matter distinctly unrelated to the main matter before the court. In this respect the respondents contended that the applicants, who in their application sought a 'review' of the decision of a judge of appeal with no mention of s 25 of the Act, now sought to craft, through the referral sought, a whole new case focused on the constitutionality or otherwise of this provision *vis a vis* a fundamental right, the right to a fair hearing.

[64] The Court noted that the applicants in their papers, clearly distanced themselves from s 25 of the Act and in oral submissions, it was adamantly asserted on their behalf that the application before the court was not filed in terms of that section. It therefore came as somewhat of a surprise that Counsel for the applicants then assumed the attitude that the same provision did have some bearing on the nature of the application that was before the

court. Counsel now wished the matter concerning s 25 to be referred to the Constitutional Court, for a determination as to its constitutionality. It was difficult to envision how the constitutionality of s 25 of the Act could have properly arisen, as the applicants contended, within the context of an application for a purported review in terms of s 176 of the Constitution. That such referral would constitute a completely new case as different from the main matter as is chalk from cheese, was eminently evident. The court found that a decision of the Constitutional Court, be it a declaration of rights in favour of the applicants, an award of compensation or any other relief deemed appropriate, would clearly not have assisted this Court to dispose of the dispute before it, much less to grant the order sought. This was quite apart from the question of whether or not it would be competent for this Court to refer to the Constitutional Court, a matter that was fully capable of being taken directly to that Court in terms of s 85 (1) of the Constitution. More on this later.

[65] The applicants, in addition, did not reveal just how the applicants' rights in terms of s 69 of the Constitution were, or stood to be violated, or by whom. There was no indication that there was an intention to call or require the applicants to give evidence in any way on this circumstance. (See *S v Banga* 1995 (2) ZLR 297, *Douglas Togarasei Mwonzora &31 Ors v The State* CCZ 9/2015). Nor was it indicated that an agreed statement of facts would be tendered. However, what one could deduce from the formulation of the matter sought to be referred, was that the respondents' interpretation of s 25 in some manner had the potential to violate the applicants' fundamental right to a fair hearing. Given that it is the court which has the final say on how a disputed provision of the law is to be interpreted, it

was difficult to fathom just how the interpretation of such provision by the respondents would have had this type of effect on the applicants.

[66] The significance of findings of fact in respect of a request for referral was highlighted by the Constitutional Court in *Muhala's* case *(supra)* at para 20 thus:-

> In order to find that the question is one that is relevant for the resolution of the main dispute between the parties, the court has to be informed by findings of facts. It is from those findings that the court will consider whether the question raised is consistent with proven facts.

Thus *in casu,* in the absence of facts which would have enabled the court to make findings informing it as to the relevance of the question sought to be referred, a proper referral could not have been made. On this basis too, the court found the request for the referral of the first of the two matters, to have been frivolous and vexatious.

[67] The other argument advanced on behalf of the respondents was that the first matter sought to be referred could have been taken directly to the Constitutional Court, since it basically alleged the violation of a fundamental human right. Section 85 (1) of the Constitution reads as follows in relevant parts;

> Enforcement of fundamental human rights and freedoms
>
> Any of the following persons, namely-
> (a) Any person acting in their own interest
> (b) – (c)……(*not relevant*)
> **is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this Chapter has been, is being or is likely to be infringed**, and the court may grant appropriate relief, including a declaration of rights and award of compensation. (*my emphasis*)

[68] It is evident from a reading of this provision that a litigant in their own interests can approach a court, including the Constitutional Court, directly to seek the type or relief mentioned, on the basis that a fundamental right or freedom enshrined in the Constitution has been, is being or is likely to be infringed. The court was persuaded that the provision envisaged a stand-alone 'approach' to the court concerned, with the alleged or feared infringement of the fundamental right in question, constituting a separate and distinct cause of action. The alleged real or feared infringement would of necessity be fact based, derived from events on the ground. It surely cannot 'arise' from an interpretation that an opponent in court proceedings chooses to attach to a legislative provision not forming the basis of the application before it.

[69] Section 85 (1) of the Constitution effectively provides a straight path to a court for the vindication by an aggrieved party, of their fundamental rights. Against this background, a situation that purports to mix or combine other causes of action and grievances with claims in terms of s 85 (1), thereby 'muddying the waters' as it were, undermines the intent behind s 85 (1) and is therefore undesirable. The courts have in a number of authorities, frowned upon the conflation of different causes of action separately provided for under the Constitution. In the case of *Zimbabwe Human Rights Association v Parliament of Zimbabwe and Ors* CCZ6/22 at p 10 the court stated as follows:-

> In essence, what the applicant has purported to do is to proceed under two mutually exclusive provisions of the Constitution, viz s 85(1) and s 167(2) (d). This course of action was pointedly frowned upon in *Central African Building Society v Stone & Ors* SC 15/21 at page 17, para 38, where GWAUNZA DCJ observes that:
>
> > "An application under s 85 of the Constitution should not be raised as an alternative cause of action…….section 85(1) is a fundamental provision of

> the Constitution and, being *sui generis*, should ideally be made specifically and separately as such (my emphasis)"

[70] Even though the facts of those cases and those of the one at hand are not on all fours, the principle raised in the two authorities cited applies equally *in casu.* The principle being that one should not take a procedurally roundabout route in order to seek the vindication of any of the person's constitutionally guaranteed fundamental rights, when s 85 (1)of the Constitution provides a direct route to a court, including the apex Court itself, for such a purpose. On this further basis, the court found the request for referral of the first of the two matters sought to be referred, to be frivolous and vexatious.

[71] In respect of the second matter sought to be referred to the Constitutional Court, the respondents in the view of the court, were correct in taking exception to the request for its referral. The court was, for a number of reasons, not persuaded by the submission made by counsel for the applicants, *Mr Madhuku*, that as a matter calling for the interpretation of a constitutional provision, the referral requested would give the apex Court the opportunity to decisively and finally determine whether or not s 176 of the Constitution allowed for the review of the decision of a single judge of appeal, by a full bench of this Court. Section 175 (4) as discussed above, provides for the referral of ***'any constitutional matter arising in the proceedings'*** before a court, to the Constitutional Court. The intention is for the apex court to determine the referred matter so that the referring court is placed in a position to then resolve the dispute before it in the main matter.

[72] *In casu,* the applicants of their own accord, subjected themselves to the jurisdiction of this Court in their quest for a 'review' in terms of s 176 of the Constitution. The nub of their case was that s 176 as read with s6 of the Act provided a legal basis for the application that they filed. All pleadings in support of their case and those of the respondents opposing it were properly before the court. However, instead of letting this Court consider and determine that very matter on the basis of the papers before it, the applicants then, somewhat to the court's surprise, made a request to have the same matter referred to the Constitutional Court in terms of s 175 (4) of the Constitution.

[73] A number of factors militated against the granting of this request for referral. Firstly, this Court was capable of making a determination on the matter placed before it based on the papers and submissions made on behalf of the parties. The applicants' case was anchored on its interpretation of s 176 as a provision that allowed for the review by this Court of a decision made by a single judge of appeal. If the applicants' goal, as now seemed to be the case, was to have the apex Court make a final determination on this matter, they should have made an application directly to that court. By filing the matter before this Court, they of their own accord placed a bottleneck in the way of achieving their goal. They now had to circumvent that bottleneck first and thereafter in the case of an unfavourable decision by this Court, determine how best to take their case to the Constitutional Court. It surely was not open to them to attempt to achieve this goal under the guise of a request for referral of the matter to the higher court.

[74] Secondly in seeking a referral of the matter to the Constitutional Court, the applicants were obliged to observe the established requirements for doing so. The premise of the applicant's

case, fully backed by the parties' pleadings, was an interpretation of s 176 of the Constitution *vis a vis* the power of this Court (or lack thereof) to review a decision made by a single judge of appeal. In short, the applicants could not, as they did, file a case premised on their interpretation of s 176 before this court and then suddenly request that such matter be 'referred' to the Constitutional Court for a validation of their own interpretation. In the court's view, it stood to reason that by its nature, the very same matter could not be properly referred to the Constitutional Court when the applicants had by their actions, properly placed it before this Court for determination. It surely could not have been the intention behind s 175 (4) of the Constitution, that the entire cause of action in a dispute before a lower court may be regarded as a matter capable of referral to the apex Court.

[75] That this would offend against the principles of subsidiarity and ripeness, is undeniable, regard being had to the prominent authority on constitutional ripeness, *Chawira & Ors v Minister of Justice, Legal & Parliamentary Affairs & Ors* CCZ 3/17. The court in this case stated as follows:-

> "The doctrine of ripeness and constitutional avoidance gives credence to the concept that the Constitution does not operate in a vacuum or isolation. It has to be interpreted and applied in conjunction with applicable subsidiary legislation together with other available legal remedies. Where there are alternative remedies the preferred route is to apply such remedies before resorting to the Constitution. That conceptualisation of the law as previously stated finds recognition in the leading case of *Catholic Commission of Justice and Peace in Zimbabwe* (*supra*) heavily relied upon by the applicants. In that case the applicants waited until they had exhausted their alternative remedies before approaching the Constitutional Court for relief."

In the light of the foregoing, the court found that the request for referral in respect of the second matter sought to be referred, was frivolous and vexatious.

[76] The court found that in addition to the bases outlined above for its conclusion that the whole request for referral was frivolous and vexatious as anticipated by s 175 (4) of the Constitution, there was yet another basis for reaching the same conclusion. It is common cause that the request for a referral of the two matters to the Constitutional Court was made immediately after the court had turned down the applicants' request for a full bench of the Supreme Court. The respondents submitted that in the light of earlier delaying tactics resorted to by Counsel for the applicants, *Mr Madhuku*, the request for a referral of the two matters to the Constitutional Court was yet another demonstration of the frivolity and vexatiousness of the request in question. The court found this submission to have merit. The applicants justified their request for a five-member bench of this Court, on their argument that the application raised an 'important question of law' which could only be appropriately determined by the expanded bench. The question to be determined, they submitted, was whether or not the decision of a single judge of this Court sitting in chambers was reviewable in terms of s176 of the Constitution, on the basis that it was not final in nature. They further submitted that there existed no precedents to answer the question.

[77] Challenged on the timing of this request, *Mr Madhuku* attempted to salvage the applicants' position by maintaining that the request for a referral would still have been made before the five-member bench. It did not escape notice that both in substance and in respect of the relief sought, the matters sought to be referred to the Constitutional Court were similar to the 'important question of law' that the applicants had intended to be determined by a five member bench of the court. It therefore appeared to the court to be somewhat fanciful, that

the applicants would first seek a reconstitution of the bench so that it could determine 'an important point of law' when their true intention was to then request that very same bench to refer essentially the same question, to the Constitutional Court. Against this background, one could be forgiven for concluding that the applicants were for some reason, averse to the matter being determined by the three member bench constituted to hear the matter. This conduct in the court's view, bore the hallmarks of an exercise in 'forum shopping' by the applicants. It hardly needs emphasizing that the court frowns upon such conduct, especially coming as it did from such a senior Counsel of this Court.

On this basis, as much as on all the others articulated in the foregoing, the court found the totality of the request for referral of the two matters in question to the Constitutional Court in terms of s 175 (4) of the Constitution, to have been;

i) frivolous and vexatious, being in the court's view, calculated to annoy or vex the opposing parties to this dispute; and

ii) an abuse of court process.

Hence the order dismissing the request, granted as follows:-

> "The application for referral in terms of s 175 (4) of the Constitution is dismissed with no order as to costs"

[78] **DISPOSITION**

In their main 'application', the applicants sought to file an appeal against the final decision of a judge of this Court, which they had attempted to disguise as an application for review in terms of s 176 of the Constitution. In the same manner that a decision of this Court on non-constitutional matters is final and not appealable, it is not capable of being 'reviewed'

by the same court. In any case, the purported review was based on a provision of the Constitution that does not accord substantive review powers to this Court.

The applicants at the commencement of the proceedings, sought a referral to the Constitutional Court in terms of s 175 (4) of the Constitution, of two matters. The resolution of the first of these matters by the apex Court would not have assisted this Court to determine the dispute before it. The second question for which referral was sought, amounted to an improper attempt to transfer the matter, which this Court was properly seized with, to the Constitutional Court for a determination that would not have assisted the court in resolving the same matter.

Against this background, and having found the request for referral to be on the whole frivolous and vexatious, the court dismissed the request. Further, having found that the main matter before it was in reality an appeal disguised as a 'review' and an incompetent review at that, the court issued an order declining jurisdiction to entertain the matter.

MUSAKWA JA **:** **I agree**

MWAYERA JA **:** **I agree**

Lovemore Madhuku Lawyers, applicants' legal practitioners

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Bera Masamba, 10th -31st, and 33rd -37th respondents' legal practitioners