REPORTABLE (10)

FRANCIS BERE
v
(1) JUDICIAL SERVICE COMMISSION (2) SIMBI VEKE MUBAKO (3) REKAYI MAPOSA (4) TAKAWIRA NZOMBE (5) VIRGINIA MABHIZA (6) THE PRESIDENT OF ZIMBABWE (7) MINISTER OF JUSTICE LEGAL AND PARLIAMENTARY AFFAIRS

CONSTITUTIONAL COURT OF ZIMBABWE
GARWE JCC, HLATSHWAYO JCC & PATEL JCC
HARARE, 24 MAY & 19 OCTOBER 2022

L. Madhuku and *L. Uriri*, for the applicant

A. B. C. Chinake, for the 1st respondent

T. Magwaliba, for the 6th and 7th respondents

No appearance for the 2nd, 3rd, 4th and 5th respondents

PATEL JCC: This is an application lodged in terms of r 32 of the Constitutional Court Rules, 2016, for leave to appeal against the whole judgment of the Supreme Court (the court *a quo*) handed down on 14 January 2022 as Judgment No. S-01-2022. The decision of the court *a quo* had dismissed the applicant's appeal against the judgment of the High Court in Case No. HC 2302/20.

The background

The applicant is a former judge of the Supreme Court. He has cited seven respondents in all. The first respondent is the Judicial Service Commission. The second, third and fourth respondents were the members of a Tribunal that was established to inquire into the question of the applicant's removal from judicial office. The fifth respondent was the Secretary of that Tribunal. The sixth respondent is the President of Zimbabwe, while the seventh respondent is the Minister of Justice, Legal and Parliamentary Affairs. Both the sixth and seventh respondents are cited in their official capacities.

On 3 March 2020, the applicant was suspended from judicial office following the appointment of the aforementioned Tribunal by the sixth respondent (hereinafter "the President"). The Tribunal was established to consider the applicant's suitability to hold the office of a judge. The suspension was pursuant to a resolution by the first respondent (hereinafter "the JSC") made on 13 December 2019 to refer the question of his removal from office to the President.

The applicant was dissatisfied with the manner in which his case had been referred to the President. Consequently, on 13 May 2020, he filed an application in terms of s 4 of the Administrative Justice Act [*Chapter 10:28*] alleging that the JSC had failed to comply with s 3(1)(a) of the Act by failing to act lawfully, reasonably and in a fair manner when it gave advice to the President in terms of s 187(3) of the Constitution. The High Court dismissed the application before it with costs in favour of the JSC. The court found

that the question of the applicant's alleged gross misconduct was a matter for the Tribunal to determine.

On appeal to the Supreme Court, the applicant raised five grounds of appeal, which are largely replicated in the intended grounds of appeal to this Court in the event that the instant application for leave to appeal is granted. The Supreme Court upheld the finding of the High Court that the deponent to the JSC's opposing affidavit was lawfully authorised to do so. The court *a quo* also upheld the finding of the High Court that the applicant had failed to prove that the JSC was inquorate and *functus officio* at its meeting held on 13 December 2019. Lastly, the court held that the applicant's right to be heard had not been violated. In the event, the court dismissed the applicant's appeal with no order as to costs.

The intended appeal before this Court is predicated on the assertion that the court *a quo* erred by avoiding an in-depth determination of various constitutional issues before it, despite having been alive to those issues. The applicant accordingly asserts that the question of whether or not there was a constitutional matter before the court *a quo* must be answered in the affirmative. He further avers that the intended appeal to this Court does enjoy prospects of success.

The intended grounds of appeal

As paraphrased, the intended five grounds of appeal asseverate that the court *a quo* erred and thereby misdirected itself in the following respects:

- In determining that the appeal was moot when the challenge to the referral by the JSC under s 187(3) of the Constitution was that it was unconstitutional.
- In not finding that any person who was not a member of the JSC was prohibited from representing it in any application pursuant to s 187(3) and, consequently, in not finding that the JSC was not properly before the High Court.
- In not finding that s 344 of the Constitution places the onus to prove that it had a quorum on the JSC and not on the appellant.
- In not finding that s 187(3) of the Constitution requires the JSC to grant a judge the full scope of the *audi alteram partem* rule before sending its advice to the President.
- In not finding that the JSC is required to determine the existence or otherwise of the jurisdictional facts under s 187(3) before sending its advice to the President.

The applicant avers that the foregoing grounds of appeal enjoy prospects of success for a number of reasons. As regards the first ground, he contends that mootness does not arise when a thing is void for being unconstitutional. On the second ground, he states that the Constitution does not permit the JSC to delegate to its Secretary the critically important duty of defending in court its advice to the President under s 187(3). With respect to the third ground, he argues that s 344 of the Constitution would be undermined if a constitutional body is not obliged to prove that it had a quorum and that the independence of the judiciary would be threatened by the possibility of an inquorate JSC proceeding in terms of s 187(3). In relation to the fourth and fifth grounds, he avers that a rigorous process preceding the tendering of advice in terms of s 187(3) requires the full scope of the *audi*

alteram partem rule and a finding by the JSC on the existence of the jurisdictional facts contemplated in s 187(1). Lastly, the applicant asserts that the intended appeal is of public importance because it is central to the independence of the judiciary. He contends that the position of this Court on the issues raised will clarify the law and protect the Constitution. In the premises, he prays for an order for leave to appeal to be granted.

The JSC, through an affidavit deposed to by its Secretary, firmly opposes the instant application. It denies that there are any constitutional issues or matters to be decided as contemplated by r 32(2) of the Rules. It also asserts that the issues that were before the court *a quo* were resolved on non-constitutional bases. It further disputes the argument that it is in the public interest to grant leave to appeal. It is contended that the application does not satisfy the requirements for leave to appeal under r 32.

The sixth and seventh respondents also oppose the application through an affidavit deposed to by the seventh respondent. In essence, it is averred that the court *a quo* did not decide any constitutional matter. Consequently, it is argued that the applicant has failed to show that his application has any prospects of success. Both respondents pray that the application be dismissed with costs.

Applications for leave to appeal

Applications for leave to appeal to this Court are governed by r 32 of the Rules. The requirements to be satisfied by an applicant seeking leave to appeal are now firmly established in the jurisprudence of the Court. They are as follows:

- The constitutional matter raised in the decision to be appealed against and any other connected issues must be clearly and concisely set out.
- The applicant must intend to apply for leave to appeal against the decision of the subordinate court on a constitutional matter.
- The applicant must demonstrate prospects of success on appeal.
- The intended appeal must be in the interests of justice which are a paramount consideration.

See *Cold Chain (Pvt) Ltd t/a Sea Harvest* v *Makoni* 2017 (1) ZLR 14 (CC) at 15G-16E; *Muza* v *Saruchera* CCZ 05-2019; *Bonnyview Estate (Pvt) Ltd* v *Zimbabwe Platinum Mine (Pvt) Ltd & Anor* CCZ 06-2019; *Ismail* v *St. Johns College & Ors* CCZ 19-2019; *TBIC Investments (Pvt) Ltd* v *Mangenje & Ors* CCZ 15-2020; *Rita Mbatha* v *National Foods* CCZ 06-2021; *Gift Konjana* v *Dexter Nduna* CCZ 09-2021.

I shall address each of the above requirements *ad seriatim* in their application to the facts and circumstances of the present matter.

Clear and concise exposition of constitutional matter

The application *in casu*, at its outset, relates to the requirements of r 32(3)(c) and proceeds to set out "the constitutional matters raised in the decision sought to be appealed against". These matters tally with the five grounds of appeal delineated in the draft notice of appeal. They are further elaborated in the applicant's founding affidavit.

There can be no doubt, and this appears to be common cause, that the applicant has satisfied and complied with the requirements of r 32 (3)(c).

Decision appealed against on constitutional matter

The more difficult question that arises herein is whether or not the decisions of the High Court and the Supreme Court, being the decisions impugned *in casu*, bear upon any constitutional issue or matter. Mr *Madhuku*, for the applicant, answers that question in the affirmative. He submits that the relevant constitutional matters were raised, both in the High Court and before the Supreme Court. In support of his position, he refers to several passages in the applicant's founding affidavit before the High Court and in his heads of argument before both of the subordinate courts. Mr *Madhuku* further submits that the fact that the Supreme Court wrote its judgment without reference to these points is irrelevant. He nevertheless accepts that the mere reference to a constitutional point, whether in the pleadings or in the judgment to be appealed against, is not sufficient to satisfy the requisite test. He is absolutely correct in that respect. See *Moyo* v *Sgt. Chacha & Ors* CCZ 19-2017; *Chani* v *Mwayera J & Ors* CCZ 02-2020. He also contends, much less persuasively so in my view, that a constitutional matter does not cease to be so simply because there is no reference to the Constitution itself.

It is necessary to pinpoint the relevant references adverted to by counsel. In the founding affidavit in Case No. HC 2302-20, at para. 12, the applicant avers that the President can only act under s 187(3) of the Constitution, if the advice given to him is lawful in compliance with s 3(1)(a) of the Administrative Justice Act. At paras. 55 and 56,

the applicant asserts that no jurisdictional circumstances exist that would have entitled the JSC to refer the matter to the President. In particular, he avers that the JSC does not appear to have addressed its mind at all to the grounds for removal from judicial office prescribed by s 187(1) of the Constitution. He then argues that, if the decision to refer the matter to the President was premised on facts incapable of sustaining any of the three grounds for the removal of a judge, "such a decision was grossly unreasonable and irrational".

At para. 57, the applicant attacks the decision of the JSC to revisit his case on the basis of new allegations without having been availed an opportunity to consider and respond to those allegations. This was in violation of the *audi alteram partem* rule and "the dictates of natural justice". At paras. 63, 65 and 66, the applicant avers that the JSC was both inquorate and improperly constituted when it took the decision to refer his matter to the President and the subsequent decision to suspend him. These decisions were made outside its constitutive instruments, in particular s 189 of the Constitution, and therefore "liable to be set aside as being unlawful and grossly irregular". At para. 68, the applicant assails the failure of the JSC to place before the High Court a record of its minutes and deliberations, in keeping with its mandate under s 191 of the Constitution to conduct its business in "a just, fair and transparent manner". At para. 70, the applicant observes that the office of a judge is sacrosanct and, at para. 77, he affirms the need for the JSC to protect its judges from unmeritorious attacks on their dignity and standing. He then concludes that the JSC's advice to the President "was contrary to section 3(1)(a) of [the Administrative Justice Act] and thus null and void". Accordingly, "the subsequent acts of [the President] are a nullity and must be set aside".

Turning to the applicant's heads of argument in the High Court, paras. 2 to 4 address the point that the JSC cannot delegate its constitutional duties, in particular, the defence of its conduct under s 187(3) of the Constitution, to its Secretary or Acting Secretary. The same point is addressed at paras. 2 to 7 of the applicant's heads of argument before the Supreme Court. The applicant reiterates the argument that the JSC was not properly before the High Court, as the deponent to its opposing affidavit was prohibited by the Constitution from representing it in an application brought by a judge pursuant to s 187(3). At paras. 11 to 17, the applicant sets out his attack on the quorum of the JSC at the meeting whereat it decided to refer his matter to the President under s 187(3). Reliance is placed upon s 341(1) and (2) of the Constitution pertaining to the quorum of any constitutional body. It is argued that the decision of the JSC "was unconstitutional, unlawful and null and void" and that, consequently, the onus to prove that it was quorate at the meeting in question shifted to and lay upon the JSC rather than the applicant.

At paras. 36 to 43, the applicant canvasses the alleged failure of the High Court to determine the existence or otherwise of the jurisdictional facts under s 187(1) of the Constitution warranting the referral of the applicant's case to the President in terms of s 187(3). It is argued that the actions of the JSC under s 187(3) are "clearly subject to review" and that "what was before the court *a quo* was a challenge to the prior administrative action of advising [the President] under section 187(3) of the Constitution". It is further argued that the failure of the JSC to "indicate the ground under section 187(1) that is being relied on" rendered "the action under section 187(3) unconstitutional, unlawful and null and void". Lastly, it is submitted that "section 187(1) requires [the JSC] to first

reach the conclusion that there is a *prima facie* case …….. before acting under section 187(3)" and that "to reach the *prima facie* verdict, [the JSC] must carry out an adjudicative process and set out reasons for its conclusions …….. before invoking section 187(3)".

Mr *Chinake*, for the first respondent, submits that the application before the High Court was clearly premised on the provisions of the Administrative Justice Act. The court was not seized with any specific constitutional challenge. In essence, so it is argued, the applicant did not file any constitutional matter before the High Court or the Supreme Court. Consequently, the doctrines of subsidiarity and avoidance come into play. Additionally, leave to appeal is a very limited right and, in the present case, there is no basis for appealing to this Court.

Mr *Magwaliba*, for the sixth and seventh respondents, adopts the same stance. He submits that the applicant did not directly impugn the conduct of the JSC on any constitutional ground. He filed what was essentially an administrative law matter and he cannot deviate from that position. Furthermore, the applicant attacks the Supreme Court for not making various findings. This shows that there was no proper basis for that court to adjudge any constitutional matter. It is further argued that references to the Constitution before the High Court and the Supreme Court were purely incidental and not directly relied upon. Such references were only ancillary and in support of s 3 of the Administrative Justice Act. Accordingly, both subordinate courts were correct in not dealing with the case as involving any constitutional matter.

In reply, Mr *Madhuku* argues that, where a constitutional issue arises in any litigation, the court may deal with it and, if it does address that issue, then a constitutional appeal must lie against its decision. Moreover, a point raising a constitutional issue may be taken at any time.

Mr *Uriri*, co-counsel for the applicant, submits that when one relates to the Administrative Justice Act then one is seeking to enforce the Constitution itself. As regards referrals to the President under s 187(3) of the Constitution, the JSC must apply its mind to that process and choose to apply the procedures available under the Judicial Code of Ethics as opposed to a referral to the President in terms of s 187(3).

Proceedings in the High Court

The application before the High Court, in its heading, declares categorically and unequivocally that it is a court application in terms of s 4 of the Administrative Justice Act. Again, in paras. 5 and 6 of the application, it is asserted that the JSC, being an administrative authority, failed to act in accordance with s 3(1)(a) of the Act and that its decision to refer the matter to the President was "unlawful, grossly irregular and therefore invalid". In similar vein, the founding affidavit in the High Court sets out the nature of the application in para. 11, as being made in terms of s 4 of the Act and on the premise that the JSC did not comply with s 3(1)(a) of the Act in that it failed "to act lawfully, reasonably and in a fair manner".

On the other hand, para. 7(5) of the application, relating to the alternative prayer sought, is framed on the basis that Proclamation No. 1 of 2020 does not set out the jurisdictional circumstances necessary to found a *prima facie* case for the dismissal of a judge as envisaged by s 187(3) of the Constitution. This is also mirrored in para. 5 of the draft order sought in the High Court. Additionally, the founding affidavit, in para. 56, refers to the failure of the JSC to apply its mind to the grounds for the removal of a judge in terms of s 187(1). However, very notably, the conclusion drawn in that regard is that the decision of the JSC to refer the matter to the President was "grossly unreasonable and irrational".

Turning to the record of proceedings before the High Court, counsel for the applicant, in addressing the propriety of the JSC's opposing affidavit, its allegedly inquorate status and the absence of jurisdictional circumstances warranting referral of the matter to the President, certainly appears to have relied upon various provisions of the Constitution in order to buttress his arguments. Nevertheless, it is abundantly clear that the judgment of the High Court, and its reasoning in arriving at its conclusions, are not in any way grounded upon any constitutional principle or requirement. On the contrary, the judgment and the reasons therefor are firmly anchored in the relevant provisions of the Administrative Justice Act.

Having regard to the pleadings and proceedings in the High Court, it appears to me that the applicant did not raise any specific constitutional issue for determination by that court. To the extent that he did allude to certain provisions of the Constitution, he did so purely incidentally in order to demonstrate the alleged failure of the JSC "to act lawfully,

reasonably and in a fair manner" in compliance with s 3(1)(a) of the Administrative Justice Act. The applicant's cause of action, as expounded throughout the application and his founding affidavit, was essentially predicated on the perceived unlawful, unreasonable and unprocedural conduct of the JSC, in alleged violation of its duties and obligations as an administrative authority, albeit as a creature of the Constitution.

Constitutional matter in the High Court

In s 322 of the Constitution, a constitutional matter is defined as "a matter in which there is an issue involving the interpretation, protection or enforcement of the Constitution". Accordingly, a constitutional matter arises where there is an issue in dispute raising questions of law, the resolution of which requires the interpretation, protection or enforcement of the Constitution.

In South Africa, it is settled law that a constitutional matter cannot arise for the first time on appeal when it was not available or in existence in the subordinate court. This rule was stated as follows in *Prince* v *President, Cape Law Society & Ors* 2001 (2) SA 388 (CC), at para. 22:

> "Parties who challenge the constitutionality of a provision in a statute must raise the constitutionality of the provisions sought to be challenged at the time they institute proceedings. In addition, a party must place before the court information relevant to the determination of the constitutionality of the impugned provisions. …….. I would emphasise that all this information must be placed before the court of first instance. …….. It is not sufficient for a party to raise the constitutionality of a statute only in the heads of argument, without laying a proper foundation for such challenge in the papers or in the pleadings. The other party must be left in no doubt as to the nature of the case it has to meet and the relief that is sought. Nor can parties hope to supplement and make their case on appeal." (my emphasis)

Similarly, the established practice of this Court is that in order to determine whether or not there was a constitutional matter before the court *a quo*, the dispute must be traced back to the court of origin, in this case, the High Court. See *Ismail's* case, *supra*, at p. 9.

I shall proceed to consider the relevant issues that arose for determination in the High Court. The first issue relates to the representation of the JSC by its Secretary. The court considered this to be justified on the basis of s 10 (2) of the Judicial Service Act [*Chapter 7:18*] as well as r 227 of the High Court Rules, both of which provisions bestow the Secretary with the competence to represent the JSC. It is trite that a constitutional matter cannot arise where the impugned conduct is predicated on an unchallenged and valid statute. See *Magurure & Ors* v *Cargo Carriers International Hauliers (Pvt) Ltd* CCZ 15/2016, at p. 6. *In casu*, the question of the legality of the JSC's representation by its Secretary was determined on the basis of extant statutory provisions, which provisions must be presumed to be constitutional. See *Mujuru* v *President of Zimbabwe & Ors* CCZ 08-2018. Thus, no constitutional matter could arise in respect of conduct based on the Judicial Service Act and the High Court Rules, unless the provisions in question were themselves impugned for being unconstitutional. Accordingly, in respect of the first issue, there was no constitutional issue involved.

The second issue concerns the quorum of the JSC at its meeting of 13 December 2019. Both the High Court and the Supreme Court dismissed the claim that the JSC was inquorate on the basis of the absence of pertinent evidence. The questions as

to the proof that was required to show that the JSC did not have the requisite quorum and the party upon whom the onus to prove the same rested are undoubtedly questions of evidence. *In casu*, there was no allegation by the applicant based on any provision of the Constitution to the effect that he was not required to prove that the JSC was inquorate at the relevant time. In the absence of any such averment, no constitutional matter could have arisen regarding the party upon whom the onus rested to prove that the JSC was quorate or inquorate.

The third issue revolves around the applicant's contention that s 187(3) of the Constitution enjoined the JSC to accord to him "the full scope of the *audi alteram partem* rule" before transmitting its advice to the President. Critically, the applicant's founding affidavit does not state that he based his entitlement to the full scope of the rule on s 187(3) or any other provision of the Constitution. Once again, in the absence of any such statement, the constitutional basis of the *audi alteram partem* rule could not have arisen as an issue for determination before the High Court. Rather, the issue seems to have been raised by way of inference from the Administrative Justice Act and the common law. Thus, it cannot be said that there was a constitutional issue in this regard.

The fourth issue pertains to the question whether or not the JSC was required to determine the existence or otherwise of jurisdictional grounds under s 187(1) of the Constitution before forwarding its advice to the President. Here too, although the applicant averred that any one of the three jurisdictional facts in s 187(1) had to be established before the question of his removal was referred to the President, he did not base such requirement

on the Constitution. Instead, he took the position that the advice given by the JSC "should have been reasonable and grounded in logic". He added that the JSC never informed him of the accusation against him that warranted a referral of his matter to the President. He therefore concluded that the decision of the JSC "was grossly unreasonable and irrational". It is evident that the applicant did not specifically regard the source of the requirement to establish the jurisdictional facts as being s 187(1) or s 187(3) or any other provision of the Constitution. Inasmuch as his application was premised on the Administrative Justice Act, it is plausible to assume that he considered that Act to be the legal basis of the supposed requirement to establish jurisdictional facts. Accordingly, no constitutional matter could have arisen in the absence of a properly pleaded basis that the requirement to establish the requisite jurisdictional facts arose from the Constitution.

Having regard to all of the foregoing, I am constrained to conclude that there was no clearly defined constitutional matter before the High Court and, consequently, on appeal from that court to the Supreme Court. This is so because the applicant's pleadings in the High Court are entirely unsupportive of the constitutional matters that he alleges to have been before the court. To put it differently, no constitutional matter could have arisen in that court in the absence of pleadings grounding the determination of the alleged constitutional issues. It therefore follows that the jurisdiction of this Court cannot be activated as s 167(1)(b) of the Constitution stipulates that the Constitutional Court only decides constitutional matters. As was held in the *Cold Chain* case, *supra*, at 15H-16E:

> "If the subordinate court had no constitutional matter before it to hear and determine, no grounds of appeal can lie to the Constitutional Court, as a litigant cannot allege that the subordinate court misdirected itself in respect of a matter it was never called

upon to decide for the purposes of resolution of the dispute between the parties." (my emphasis)

This Court has recently reinforced the position that the right of appeal to the Court is a limited right, strictly confined to an appeal against the decision of a subordinate court on a constitutional matter only. See *Mbatha's* case, *supra*, at p. 5.

Proceedings in the Supreme Court

Turning to the proceedings in the Supreme Court, the grounds of appeal before that court are tendentiously framed in a manner importing the supposed application of s 187 of the Constitution. The oblique references to that provision appear to have been inserted to cloak and circumvent the absence of any constitutional determination in the judgment of the High Court. Be that as it may, the Supreme Court dismissed all the grounds of appeal in their entirety without venturing into the constitutional domain. The *court a quo* predicated its findings and decision exclusively on the relevant statutory provisions and the applicable principles of the common law. It did not traverse or determine any constitutional question. In my view, the Supreme Court quite correctly proceeded on that basis given that the impugned decision of the High Court was devoid of any constitutional issue or determination. In short, neither of the subordinate courts can be impeached for any alleged constitutional aberration in its reasoning or judgment.

Subsidiarity and avoidance

For the sake of completeness, I must advert to the twin doctrines of subsidiarity and avoidance both of which are now firmly entrenched in our constitutional jurisprudence.

They constitute a further reason for declining leave to appeal in this case. Both doctrines are predicated on the seamless and holistic nature of our legal system and on the precept that all legislative enactments, both primary and subordinate, are ultimately grounded in and derive their legal force and authority from the Constitution itself.

The principles embedded in these doctrines, coupled with the concept of ripeness, enjoin the application and exhaustion of alternative remedies that are available outside the immediate parameters of the Constitution. Accordingly, where it is possible to decide any case without resort to any possible constitutional question or remedy, then that is the course and procedure that must ordinarily be followed. See *S* v *Mhlungu & Ors* 1995 (3) SA 867 (CC); *Chawira & Ors* v *Minister of Justice, Legal and Parliamentary Affairs & Ors* CCZ 03-2017; *Moyo* v *Sgt. Chacha & Ors* CCZ 19-2017.

In the present matter, as highlighted earlier, the applicant opted to proceed under the Administrative Justice Act. He did not rely on any provision of the Constitution directly in order to found his case, but only tangentially by way of reference so as to locate his cause of action in the supposed infringements of s 3 of the Act allegedly perpetrated by the JSC. Consequently, he was obliged to pursue and adhere to his statutory cause of action without recourse to any constitutional principle or remedy.

Matter of public importance

Mr *Madhuku* entreats the Court to consider an additional factor, to wit, whether the matter is one of general public importance. Relying on *Radio Pretoria* v *Chairperson*,

Independent Communications Authority of South Africa & Anor 2005 (4) SA 319 (CC), at para. 22, he submits that, in appropriate circumstances, the interest of justice require the Court to decide a constitutional matter for the benefit of the broader public or to achieve legal certainty or for some other public purpose, even if the decision is of no practical value to the litigants involved. He further submits that the issues to be raised in the intended appeal, being anchored on the independence of the judiciary, in particular, the tenure of office of judges, ought to be authoritatively determined by this Court in the public interest. The removability of judges, so he argues, must impact on the grounds of appeal *in casu* and on the request for leave to appeal to this Court. He cites in this respect the United Nations Basic Principles on the Judiciary (1985), the Bangalore Principles of Judicial Conduct (2002) and The Appointment, Tenure and Removal of Judges under Commonwealth Principles (2015). For all of these reasons, he urges this Court to tilt in favour of granting leave to appeal.

I fully endorse the view that questions pertaining to the tenure and removal of judges from office are vital to the independence of the judiciary. That independence constitutes the cornerstone of every constitutional democracy. In this context, the security of judicial tenure is to be jealously guarded and should not be derogated from except in the clearest circumstances. It is undoubtedly a matter of considerable public importance. Nevertheless, the adjudication of any such question must be inextricably linked to the determination of a constitutional matter. Without that critical component, it would be procedurally improper to invoke and activate the jurisdictional competence of this Court to review the judgment of any subordinate court.

In the present context, having concluded that there was no constitutional issue properly raised or determined in the High Court or the Supreme Court, it is extremely difficult to tilt the balance in favour of granting leave to appeal to the full bench of the Court on the sole basis that the case raises questions of general public importance. To do so would open the floodgates to a multitude of cases that are of obvious public importance but which fall outside the jurisdictional remit of this Court. For this additional reason, I am unable to accede to the grant of leave to appeal in the present case.

Costs

The applicant has not sought costs in this matter. However, the JSC, in its heads of argument, has motivated the Court to grant costs on a legal practitioner and client scale. Similarly, the sixth and seventh respondents, through their heads of argument and submissions in court, have also sought costs, albeit on the ordinary scale. The respondents' claims for costs are premised on the argument that the application is devoid of merit.

The respondents appear to have disregarded r 55 of the Rules which, in keeping with the established practice of this Court, provides that generally no costs are awarded in constitutional matters. This practice was recently reaffirmed in *Mbatha* v *Confederation of Zimbabwe Industries & Anor* CCZ 05-2021, at p. 11. In my view, there is no basis or justification in this case to depart from the norm of not awarding costs in a constitutional matter.

Disposition

I have concluded that no constitutional matter was properly raised before the High Court or the Supreme Court and that neither court determined any constitutional question. It follows that the application for leave to appeal *in casu* is not one for leave to appeal against any decision of a subordinate court on a constitutional matter. That being the case, inasmuch as there is no constitutional issue to be determined in the intended appeal, it becomes unnecessary to consider the applicant's prospects of success on appeal. Moreover, even though the sacrosanctity of judicial independence quite properly espoused by the applicant is a matter of general public importance, I am of the considered opinion that it would not be in the interests of justice to grant leave to appeal in the instant case.

In the result, it is ordered that the application be and is hereby dismissed with no order as to costs.

GARWE JCC: I agree

HLATSHWAYO JCC: I agree

Dube, Manikai & Hwacha, applicant's legal practitioners

Kantor & Immerman, 1st respondent's legal practitioners

Civil Division of the Attorney-General's Office, 6th and 7th respondents' legal practitioners