

REPORTABLE (11)

LYTTON INVESTMENTS (PRIVATE) LIMITED

v

(1) STANDARD CHARTERED BANK ZIMBABWE LIMITED

(2) ATTORNEY-GENERAL OF ZIMBABWE

**CONSTITUTIONAL COURT OF ZIMBABWE
HARARE, NOVEMBER 21, 2017 & NOVEMBER 20, 2018**

L Madhuku, for the applicant

D Tivadar, for the first respondent

No appearance for the second respondent

IN CHAMBERS

MALABA CJ: This is a chamber application for leave for direct access to the Constitutional Court (“the Court”) in terms of r 21 of the Constitutional Court Rules SI 61/2016 (“the Rules”). The applicant intends to file the main application with the Court should leave for direct access be granted.

The matter that is intended to be placed before the Court is the constitutional validity of a decision of the Supreme Court in a case involving a non-constitutional issue. The allegation is that the decision of the Supreme Court in case SC 45/17 infringed the applicant’s fundamental right to equal protection of the law and the right to a fair hearing, enshrined in

s 56(1) and s 69(2) respectively of the Constitution of Zimbabwe (“the Constitution”). The main application is intended to be made in terms of s 85(1) of the Constitution.

The question is whether the validity of a decision of the Supreme Court in a case involving a non-constitutional matter can be challenged on the ground that it has infringed a fundamental right or freedom enshrined in *Chapter IV* of the Constitution. Does a litigant have a right under s 85(1) of the Constitution to approach the Court for appropriate relief, alleging infringement of a fundamental right or freedom by a decision of the Supreme Court in a case not involving a constitutional matter?

The question has arisen because s 169(1) of the Constitution and s 26(1) of the Supreme Court Act [*Chapter 7:13*] (“the Act”) are to the effect that a decision of the Supreme Court on a non-constitutional matter is final and not appealable.

The Court holds that the remedy provided for under s 85(1) of the Constitution is for the protection of the fundamental rights and freedoms enshrined in *Chapter IV* from infringement by the conduct of any person or body. It can be invoked for the protection of a litigant and enforcement of a fundamental right or freedom, where the infringement has disabled the Supreme Court from making the decision on the non-constitutional matter.

The circumstances of the case show, however, that the decision of the Supreme Court is on the non-constitutional issue. There are no prospects of success if leave for direct access to the Court for the hearing and determination of the main application is granted. It is not in the interests of justice to grant leave for direct access. The reasons for the decision follow.

On 16 July 2015 the applicant filed an application in the High Court for leave to institute a class action in terms of s 3 of the Class Actions Act [*Chapter 8:17*]. The application was dismissed on 19 January 2017. The applicant accepts that the judgment of the High Court

was based on the finding that the pending case it had against the first respondent constituted a bar to the application.

The only question before the High Court was whether a party with a pending case before a court can institute a class action on the same cause without withdrawing the pending case. It was a question of law which the High Court answered in the negative. In dismissing the application, the High Court said at pp 5-6 of cyclostyled judgment number HH 35-17:

“Taking such a position cannot be correct because the applicant herein is the one that instituted the earlier proceedings to protect its interests. It should have occurred to the applicant that it is not the only one in this predicament and not proceeded on its own. Alternatively, withdrawal of proceedings may have been ideal if it then intended to apply for class action. The applicant is the driver of that process. The applicant has to decide what it is it wants. The applicant’s initial case is in limbo whilst it chases other persons’ interests. Indeed, the law allows the good and concerned to institute class actions but, given the applicant’s circumstances, it is not the court’s view that the applicant can be allowed another bite at the cherry. It seems the applicant by making this application wants to draw others to its cause. This in other words would be an attempt at joinder proceedings via the back door. The courts cannot be clogged by matters by the same entity pertaining to the same respondent on a similar matter where a decision can clarify an issue and put (an) end to the legal point. The applicant’s case pertaining to breach of contract by the respondent is still before the court. In my view, the decision that the court will make will be binding in similar cases where the facts point to breach of contract arising out of failure to provide loan amounts agreed to despite paying the requisite facility fees. Thus if the applicant succeeds in its initial claim, those that the applicant seeks to protect would derive legal benefit from the precedence set.

It lies within the court’s discretion to grant leave sought. I am not satisfied that the applicant’s circumstances warrant the granting of leave sought. It is due to the foregoing reasons that leave to institute class action is denied.”

The applicant appealed against the judgment of the High Court on 7 February 2017. The Supreme Court dismissed the appeal on 11 July 2017. The applicant says it was “shocked” to hear the Supreme Court conclude in an *ex tempore* judgment that the High Court had resolved the application on the merits. The applicant accepts that the decision of the Supreme Court is on the sole issue that was for its determination. The legal basis of its alleged dissatisfaction with the decision is not clear.

The applicant nonetheless states that the Supreme Court went beyond the “mistakes of law it is permitted to make”. According to it, the decision of the Supreme Court is so

“outrageous” that no reasonable court can make such a decision. The complaint is that “the Supreme Court cannot hide behind its status as a final court of appeal while making determinations that are outrageous in their defiance of acceptable canons of legal reasoning”. The contention is that the Supreme Court misconstrued the appeal. In the founding affidavit the applicant avers that:

”12. Where a court makes a determination so wrong that no reasonable court, applying its mind to the facts and the law, could ever have made such a determination, the right to protection of the law is infringed.”

The applicant states further that it is bothered by the question whether the Supreme Court is free to make “outrageously wrong decisions” on non-constitutional matters merely because it is the highest court of appeal in such cases. The applicant further contends that the Supreme Court is not supreme. It is the Constitution which is supreme. As such, where the Supreme Court makes a decision that infringes a fundamental right or freedom an application for redress ought to lie to the Court under s 85(1) of the Constitution.

Section 85(1) of the Constitution provides:

“85 Enforcement of fundamental human rights and freedoms

- (1) Any of the following persons, namely —
- (a) any person acting in their own interests;
 - (b) any person acting on behalf of another person who cannot act for themselves;
 - (c) any person acting as a member, or in the interests, of a group or class of persons;
 - (d) any person acting in the public interest;
 - (e) any association acting in the interests of its members;

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 an award of compensation.”

The relief sought in the main application intended to be filed should leave for direct access be granted is of an order in the terms that:

“IT IS DECLARED:

1. That the applicant’s right to equal protection of the law enshrined in section 56(1) of the Constitution of Zimbabwe was infringed by the Supreme Court of Zimbabwe, sitting at Harare on 11 July, 2017 in the matter of *Lytton Investments (Pvt) Ltd v Standard Chartered Bank Zimbabwe Limited*, SC 45/17 in that the Supreme Court completely misconstrued the appeal before it.
2. That the applicant’s right to a fair hearing enshrined in section 69(2) of the Constitution of Zimbabwe was infringed by the Supreme Court of Zimbabwe, sitting at Harare on 11 July, 2017 in the matter of *Lytton Investments (Pvt) Ltd v Standard Chartered Bank Zimbabwe Limited*, SC 45/17 in that the Supreme Court completely misconstrued the appeal before it.

ACCORDINGLY, IT IS ORDERED:

3. That the judgment of the Supreme Court in SC 45/17 be and is hereby declared null and void and of no force and effect and is set aside.

That the Registrar of the Supreme Court be and is hereby directed to set down for hearing, before a differently constituted panel of judges, the appeal in SC 45/17.”

The applicant accepts that the judgment of the Supreme Court cannot be appealed against. The founding affidavit states in part:

“There is no other remedy. This is because the Supreme Court is the final court of appeal in matters not raising constitutional issues. There was no constitutional matter in SC 45/17. So there is no room for appeal.”

The applicant did not attempt to show that the utterances made by the Supreme Court show that it failed to act in terms of the objective standards prescribed by the procedural and substantive laws governing the proceedings before the court. There was nothing in the founding affidavit in support of the application for direct access suggesting that because of the alleged utterances the Supreme Court disabled itself from making a decision on the non-constitutional matter.

The words used by the applicant in the founding affidavits in support of the main application intended to be filed with the court and the application for leave for direct access

show that the applicant is disgruntled with the decision of the Supreme Court. The reason is that the appeal upheld the decision of the High Court on the non-constitutional matter before it.

The application for direct access is opposed by the first respondent. The first respondent argued that it is in the interests of justice to have finality to litigation of disputes brought on appeal to the Supreme Court. The contention was that the Court should not be turned into a third tier appellate court. It further argued that the applicant was afforded a chance to be heard by the Supreme Court. There is no basis for the claim of an infringement of the right to a fair hearing.

The first respondent avers that the decision of the Supreme Court is constitutional and did not breach any of the fundamental rights the applicant alleges it infringed. The contention is that whatever language the applicant chooses to express its grievance against the judgment it does not alter the fact that the Supreme Court upheld the decision of the High Court on a non-constitutional matter.

The fact of the filing of the application for leave for direct access and reference to the main application intended to be filed show that the applicant believes that it has a right under s 85(1) of the Constitution to approach the Court for appropriate relief, alleging that the decision of the Supreme Court infringed its fundamental right to equal protection of the law and to a fair hearing.

Consideration of the relevant constitutional provisions supports the view that the validity of a decision of the Supreme Court in proceedings involving non-constitutional matters may be challenged on the ground that it has infringed a fundamental right or freedom enshrined

in *Chapter IV* of the Constitution. The basis of the right of a party to the proceedings to challenge the validity of a decision of the Supreme Court in the circumstances is the Constitution itself. The right given to a litigant under s 85(1) of the Constitution to approach the Court for appropriate relief on the allegation stated is correlative to the constitutional obligation imposed on the Supreme Court as a body exercising public authority.

The Constitution provides in s 2(1) that any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency. Conduct is inconsistent with the Constitution when it violates any of its operative provisions. Considering that the Constitution is the supreme law of the land, it follows that any conduct, including a decision of the Supreme Court, which has the effect of infringing a fundamental right or freedom enshrined in *Chapter IV* of the Constitution would be inconsistent with the Constitution and therefore invalid. The broad statement of principle recognises acceptable limitations to derogable fundamental rights and freedoms to achieve legitimate objectives.

Respect for fundamental rights and freedoms is one of the foundational values and principles set out in s 3 of the Constitution. It is a foundational value, which must be upheld by any body exercising public authority. Section 3 of the Constitution sets out the objective principles which underscore the importance of fundamental human rights and freedoms and the mechanisms for their protection in the exercise of power under public or private law. What is done in terms of the provisions of the Constitution is supposed to uphold and give effect to the foundational values and principles of the Constitution.

Section 44 of the Constitution makes specific provision for the protection of fundamental rights and freedoms enshrined in *Chapter IV*. It provides that the State and every person, including juristic persons and every institution and agency of the Government at every

level, must respect, protect, promote and fulfil the fundamental rights and freedoms set out in *Chapter IV*. The obligation carries with it the duty not to infringe the fundamental rights or freedoms concerned.

The constitutional obligation to protect fundamental rights and freedoms in its general application binds the Supreme Court in the exercise of judicial power in a case involving non-constitutional matters. Respect for and protection of fundamental rights and freedoms is everyone's duty. In other words, fundamental human rights and freedoms are not just defenses against State authority. They are also objective values and principles to be adhered to as acceptable standards of behaviour in social, economic and political relations.

Section 45(1) of the Constitution puts the matter of the obligation on the Supreme Court to respect and protect fundamental rights and freedoms enshrined in *Chapter IV* in the context of the performance of its judicial function in the type of cases under discussion beyond any doubt. It expressly provides that *Chapter IV* "binds the State and all executive, legislative and judicial institutions and agencies of Government at all levels". Conduct which is an expression of a claim to public authority must be lawful. The decision of the Supreme Court must be lawful in the sense that it must be a decision on a non-constitutional matter.

The law of constitutional jurisdiction is contained in the specific provisions of the Constitution. According to this law, the constitutional jurisdiction aims to ensure the supremacy of the Constitution, the rule of law and protection of the fundamental human rights and freedoms, amongst other values and principles set out in s 3 of the Constitution.

For the protection of the fundamental rights and freedoms and enforcement of the corresponding obligations to respect, protect, promote and fulfil them, the Constitution

established identifiable remedies. It gave power to the courts, particularly the Constitutional Court, the Supreme Court and the High Court, to hear and determine constitutional matters. They include allegations of infringement of fundamental rights and freedoms.

The definition of a “constitutional matter” is that it is a matter involving an issue, the determination of which requires the interpretation, protection or enforcement of the Constitution. The nature and scope of the jurisdiction is not defined by reference to the subject, the validity of which would be challenged. It is defined in terms of the obligation to protect and enforce the Constitution. The reason is that the subject the validity of which is challenged is the cause of the invocation of the mechanisms designed for the protection and enforcement of the foundational values and principles on which the Constitution and its order are based.

The Court is a specialised institution, specifically constituted as a constitutional court with the narrow jurisdiction of hearing and determining constitutional matters only. It is the supreme guardian of the Constitution and uses the text of the Constitution as its yardstick to assure its true narrative force. It uses constitutional review predominantly, albeit not exclusively, in the exercise of its jurisdiction.

The specialisation of constitutional review is intended –

- (a) to strengthen the protection of fundamental human rights and freedoms;
- (b) to ensure the supremacy of the Constitution;
- (c) to promote a modern and rational constitutional adjudication; and
- (d) to favour an active constitutional decision-making process.

The Constitution gives any person who alleges infringement of a fundamental human right or freedom which adversely affected or affects his or her or its interests or the public interest the right to approach a court for appropriate relief.

The remedy of individual constitutional complaint enshrined in s 85(1) of the Constitution for the protection and enforcement of all of the fundamental rights and freedoms is a simple and prompt procedural remedy. The essence of the remedy is the allegation of infringement of a fundamental right or freedom. The existence of fundamental human rights and freedoms influenced the choice of the procedure for their enforcement.

The right of access to the remedy created under s 85(1) of the Constitution is given to and reserved for a person who alleges that a fundamental right or freedom has been, is being or is likely to be infringed. The remedy is a means carefully designed for the achievement of the constitutional objective of ensuring respect for the foundational values and principles of the supremacy of the Constitution, the rule of law and the fundamental rights and freedoms enshrined in *Chapter IV* of the Constitution.

The individual constitutional complaint against infringement of fundamental rights and freedoms is a procedure for constitutional review that is separate from but additional and complementary to the other constitutional remedies. These include referrals under s 175(4) of the Constitution; confirmation of orders of invalidity under s 175(3) of the Constitution; and the applications specified under ss 167(1)(b) and 167(2) (b), (c) and (d) of the Constitution. The Constitution gives a comprehensive idea of justice.

The scope of the right to approach the Court for appropriate relief under s 85(1) of the Constitution is not limited by specific objects against which the allegations of infringement of

a fundamental right or freedom can be made. A constitutional complaint provided for under s 85(1) of the Constitution can be lodged against any act of public authority. A decision of the Supreme Court in a case involving a non-constitutional issue would fall within the category of acts, the constitutional validity of which may be challenged on the grounds prescribed under s 85(1) of the Constitution.

The Supreme Court is under the obligation as the custodian of the Constitution to protect fundamental rights and freedoms. It does so by enforcing through appropriate adjudicatory processes the obligations borne by others when exercising power under public or private law. It is itself under the constitutional obligation not to violate fundamental rights or freedoms when performing judicial functions in cases involving non-constitutional issues. In other words, the protection of the exercise of jurisdiction in non-constitutional matters is subject to due compliance with the obligation to protect fundamental rights or freedoms, the infringement of which would disable the Supreme Court from making a decision on the non-constitutional issue.

A party to a case involving a non-constitutional matter may approach the High Court or the Constitutional Court, alleging that the decision of the Supreme Court in those proceedings infringed his or her or its fundamental right or freedom and move the court for appropriate relief. The party has the right to make the allegation of infringement of his or her or its fundamental right or freedom.

The allegation made under s 85(1) of the Constitution that a decision of the Supreme Court has infringed the fundamental right or freedom of the complainant in a case involving a non-constitutional issue raises a constitutional matter. It does not mean that fundamental human rights are not implicated in a case involving a non-constitutional issue. They are. The difference

is that infringement of a fundamental right or freedom is not alleged as the direct cause of action in a case involving a non-constitutional matter. The matter in dispute which gives rise to the application under s 85(1) of the Constitution is the alleged infringement of a fundamental right or freedom by the decision of the Supreme Court in a case involving a non-constitutional matter.

The only restrictive condition to the exercise of the right, apart from issues of *locus standi*, is that direct access to the Court would have to satisfy the admissibility requirements prescribed under r 21 of the Rules. Rule 21 of the Rules requires that direct access to the Court in terms of the procedure prescribed under s 85(1) of the Constitution should be with leave of the Court or Judge. Accessibility of the Court is limited to cases where direct access is in the interests of justice.

Rule 21(3) of the Rules requires that an application for leave for direct access to the Court must show that it is in the interests of justice for the matter to be brought directly. The rule provides that for the purpose of meeting the test the application should set out the following:

- “(a) the grounds on which it is contended that it is in the interests of justice that an order for direct access be granted; and
- (b) the nature of the relief sought and the grounds upon which such relief is based; and
- (c) whether the matter can be dealt with by the Court without the hearing of oral evidence or, if it cannot, how such evidence should be adduced and any conflict of facts resolved.”

Rule 8 of the Rules provides that in determining whether or not it is in the interests of justice for a matter to be brought directly to the Court, the Court or Judge may, in addition to any other relevant consideration, take the following into account:

- “(a) the prospects of success if direct access is granted;
- (b) whether the applicant has any other remedy available to him or her;
- (c) whether there are disputes of fact in the matter.”

The purpose of the admissibility requirements prescribed under r 21(3) and r 21(8) of the Rules is to ensure that only well-founded challenges to the constitutional validity of decisions of the Supreme Court in cases involving non-constitutional matters are brought directly to the Court.

The obligation on the Court to protect and enforce the Constitution includes the duty to give effect to remedies designed for the protection and enforcement of the fundamental human rights and freedoms enshrined in *Chapter IV*. There is no doubt that in terms of the Constitution the Court has the power to protect fundamental human rights and freedoms. The power to hear and determine a cause followed by the granting of an appropriate relief presupposes that those who have the causes falling within the jurisdiction of the Court have the right to approach the Court with their causes to be heard and determined. Section 85(1) of the Constitution deliberately narrows the category of potential litigants to those persons who allege that a fundamental human right or freedom enshrined in *Chapter IV* has been, is being or is likely to be infringed. The process inevitably involves adversarial litigation.

The recognition of the existence of the remedy under s 85(1) of the Constitution against decisions of the Supreme Court, in cases involving non-constitutional matters, does not open floodgates to cases alleging infringement of fundamental rights or freedoms by the Supreme Court. The filtering mechanism for leave for direct access effectively prevents abuse of the remedy. The rules requiring leave for direct access ensure that the power of constitutional review is exercised by the Court in reviewable cases only.

The case law of the Court on the subject already supports the proposition advanced by Mr *Madhuku* that the remedy under s 85(1) of the Constitution is available for the protection of fundamental rights and freedoms against infringement by decisions of the Supreme Court in cases involving non-constitutional matters.

The case of *Martin v Attorney-General* 1993 (1) ZLR 153 (S) is authority for the general principle that a party to proceedings can approach the Court for appropriate relief on the allegation that the decision of the lower court violated his or her or its fundamental right to the equal protection of the law. The relevance of the case lies in the fact that it shows the existence of a remedy in the former Constitution involving the exercise of original jurisdiction by the Supreme Court sitting as a Constitutional Court to protect and enforce fundamental rights and freedoms against infringement by judicial decisions. See also: *Catholic Commission for Justice and Peace v Attorney-General and Ors* 1993 (1) ZLR 242 (S) at 250G-251A.

In *Matamisa v Mutare City Council (Attorney-General Intervening)* 1998 (2) ZLR 439 (S) the Supreme Court, sitting as a Constitutional Court, proceeded on the basis that a party to proceedings could approach the Court directly in terms of s 18(1) of the former Constitution, alleging that a decision of the Supreme Court violated his or her or its fundamental right to the protection of the law. The Court accepted that it had original jurisdiction to hear and determine such an application. Upon consideration of the merits of the case, the Court held that the application was in reality a disguised appeal against a final judgment of the Supreme Court.

In *Williams and Anor v Msipha and Ors* 2010 (2) ZLR 552 (S) the Supreme Court, sitting as a Constitutional Court, acknowledged the fact that a party may challenge the constitutional validity of a judicial decision on the ground that it infringed his or her or its fundamental right to the protection of the law, enshrined in s 18(1) of the former Constitution. The Supreme Court said:

“The Constitution guarantees to any person the fundamental right to the protection under a legal system that is fair but not infallible. Judicial officers, like all human beings, can commit errors of judgment. It is not against the wrongfulness of a judicial decision that the Constitution guarantees protection. ...

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

In *Prosecutor General Zimbabwe v Telecel Zimbabwe (Pvt) Ltd* 2015 (2) ZLR 422

(CC) the applicant sought to approach the Court in terms of ss 167(1) and 176 of the Constitution. He sought an order setting aside a judgment of the Supreme Court directing him to issue a certificate of *nolle prosequi* to Telecel Zimbabwe (Pvt) Ltd. No constitutional matter had been raised before the Supreme Court. The applicant approached the Court because he was dissatisfied with the judgment. He did not approach the Court in terms of s 85(1) of the Constitution.

The Court dismissed the application because the applicant had failed to establish the basis on which he sought to approach it directly, seeking an order setting aside a Supreme Court judgment on a non-constitutional matter. One of the preliminary points on which the application was dismissed was that it was not brought in terms of “s 85(1) or other constitutional provisions that provide for such direct approach”.

At p 426B-C of the judgment GWAUNZA JCC (as she then was) said:

“Direct applications to the Constitutional Court are to be made only in terms of the provisions referred to above, as well as in terms of and as provided for in s 85(1). The specialised nature of the applications referred to in s 167(1)(b) and s 167(2) (b), (c) and (d), however, makes these provisions irrelevant to this case.

Therefore, the only way the applicant could have validly brought an application directly to this Court would have been in terms of s 85(1). As conceded by his counsel, the applicant did not do so, but sought to rely on the two provisions mentioned.”

After quoting s 85(1) of the Constitution, HER LADYSHIP went on to say:

“What is clearly evident from this provision is that the relief sought and to be granted by the court in terms of this section must relate to fundamental rights and freedoms enshrined in the relevant *Chapter*, and nothing else. Such relief may include a declaration of the rights said to have been or about to be violated. The applicant did not allege that the right he alleges was violated by the Supreme Court was an enshrined fundamental right.”

The authorities show that the question whether a decision of the Supreme Court in a case involving a non-constitutional issue has violated or is violating a fundamental right or freedom enshrined in *Chapter IV* of the Constitution is a matter falling within the original jurisdiction of the Court. The question can be brought directly to the Court for determination in terms of s 85(1) of the Constitution when doing so is in the interests of justice. The question whether direct access is in the interests of justice arises because the same question can be placed before a lower court sharing concurrent jurisdiction with the Court.

The fact that upon consideration of the merits an applicant fails to satisfy the requirements for leave for direct access to the Court does not mean that he or she or it had no right to approach the Court, alleging that the decision of the Supreme Court has violated his or her or its fundamental right or freedom. The right to approach the Court is a constitutional right, not dependent on the strength of the merits of the application.

Recognition of the availability of the remedy under s 85(1) of the Constitution against a decision of the Supreme Court which allegedly violated or is violating a fundamental right or freedom gives effect to the inner unity of the values forming the basis of the constitutional order characteristic of a democratic society. The principle of finality enshrined in s 169(1) of the Constitution, as read with s 26 of the Act, does not protect a decision of the Supreme Court from constitutional review when the allegation is that it has violated or is violating a

fundamental right or freedom and direct access to the Court is in the interests of justice. To hold otherwise would undermine the supremacy of the Constitution and the rule of law as foundational values and principles of the constitutional order.

The fact that a decision of the Supreme Court is the subject the validity of which is challenged cannot be a reason for claiming that a party cannot approach the Court in terms of s 85(1) of the Constitution, alleging that the decision has violated or is violating his or her or its fundamental right or freedom. The cause of action is the alleged infringement of the fundamental right or freedom which the Court is under the constitutional obligation to protect. There is no exclusion of decisions of the Supreme Court in cases involving non-constitutional issues from the individual constitutional complaint system enshrined in s 85(1) of the Constitution. Constitutional rights conferred without express limitation should not be cut down by reading implicit limitations into them.

What is of importance is not the nature of the object against which the complaint of constitutional invalidity is made. It is the kind of effect the matter is alleged to have had or to be having on the fundamental right or freedom concerned that determines the cause of action. In other words, the determinant juristic fact is the alleged infringement on the fundamental right or freedom as the prohibited effect, as opposed to the effect of promotion of the right or freedom concerned. So the decision of the Supreme Court becomes a subject of the exercise of the right to approach the Court for relief in terms of s 85(1) of the Constitution by reason of the allegation that it has infringed or is infringing a fundamental right or freedom enshrined in *Chapter IV* of the Constitution.

It is important to emphasise the fact that the right to approach the Court, the procedure to be followed, and the grounds on which the right is to be exercised, are provided for by the Constitution itself. The Constitution itself has restricted the right to approach the Court directly

under s 85(1) of the Constitution to the vindication of fundamental rights or freedoms, no matter the source of the infringement of the right or freedom concerned. The Constitution binds the Court to recognise the right and its exercise in the manner prescribed, provided the requirements for leave for direct access are met. To take no notice of the right would be a breach by the Court of its obligation to protect fundamental rights and freedoms enshrined in *Chapter IV* of the Constitution. Section 85(1) of the Constitution enables the Court to perform its obligation under the Constitution. It gives effect to the principle of accountability in terms of which where there is an allegation of infringement of a fundamental right or freedom the judicial process is available to investigate the complaint and redress the infringement if proved.

It is clear from the consideration of the objective for the establishment of the remedy under s 85(1) of the Constitution that the possibility of an individual having direct access to the Court for the protection of fundamental rights and freedoms is consistent with the general spirit of the Constitution, which strongly affirms the central role of human dignity and fundamental rights and freedoms.

Mr Madhuku took the view that in an application for direct access all one needed to do was to allege the violation of a constitutional right. The applicant asserted that the mere alleging of infringement of a constitutional right means a constitutional matter has been raised for jurisdictional purposes. *Mr Madhuku* buttressed the contention by reference to *Meda v Sibanda & Ors* 2016 (2) ZLR 232 (CC) where at p 236B the Court said:

“It is clear from a reading of s 85(1) of the Constitution that a person approaching the Court in terms of the section only has to allege an infringement of a fundamental human right for the Court to be seized with the matter. The purpose of the section is to allow litigants as much freedom of access to courts on questions of violation of fundamental human rights and freedoms with minimal technicalities.”

The institution of an application for leave for direct access to the Court presumes that there is a constitutional matter over which the Court has concurrent jurisdiction with a lower

court. The purpose of the application would be to show that it is in the interests of justice that the constitutional matter concerned be heard and determined by the Court directly as the court of first and final instance.

The parties proceeded on the basis of the existence of the constitutional question, which is whether the decision of the Supreme Court in the case involving the non-constitutional matter infringed the applicant's fundamental rights to equal protection of the law and to a fair hearing.

The Court turns to determine the question whether the applicant has shown that direct access to it is in the interests of justice. Two factors have to be satisfied. The first is that the applicant must state facts or grounds in the founding affidavit, the consideration of which would lead to the finding that it is in the interests of justice to have the constitutional matter placed before the Court directly, instead of it being heard and determined by a lower court with concurrent jurisdiction. The second factor is that the applicant must set out in the founding affidavit facts or grounds that show that the main application has prospects of success should direct access be granted.

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

The theory of constitutional review of a decision of the Supreme Court in a case involving a non-constitutional matter is based on the principle of loss of rights in such

proceedings because of the court's failure to act in terms of the law, thereby producing an irrational decision. There must, therefore, be proof of the failure to comply with the law. The failure must be shown to have produced an arbitrary decision.

Arbitrariness and inconsistencies threaten the claim to judicial authority. The remedy under s 85(1) of the Constitution is not for the protection of fundamental rights and freedoms in the abstract. Concrete review requires that there be clear and sufficient evidence of the facts on the basis of which allegations of infringements of fundamental rights or freedoms are made.

The Court has to take into account the comity due to the Supreme Court by virtue of its status in the hierarchy of courts in the legal system. It would not be in the interests of justice to have the constitutional question whether the decision of the Supreme Court in a case involving a non-constitutional matter has infringed fundamental rights of an applicant determined by the High Court. The Supreme Court exercises appellate jurisdiction over decisions of the High Court. On the other hand, the Court hears and determines constitutional matters only and is the highest court on those matters. The remedy provided for under s 85(1) of the Constitution demonstrates the versatility of the system for the protection of fundamental rights and freedoms, as it allows for both centralised and diffused constitutional review.

It would be in the interests of justice to have the question whether the decision of the Supreme Court has violated the fundamental rights of the applicant to equal protection of the law and to a fair hearing heard directly by the Court as a court of first and final instance.

It would not be in the interests of justice to grant direct access to the Court when the matter has no prospects of success. Consideration of the grounds on which the application for direct access and the intended substantive application are based leads to the finding that the main application would have no prospects of success if direct access was granted.

There is no allegation of breach of the principle of fairness, which is the essence of judicial protection of the right to equal protection of the law. The founding affidavit does not say that the Supreme Court failed to determine the non-constitutional matter because it failed to take into account factors it was required to consider by the law governing the conduct of the proceedings and determination of the non-constitutional matter. There is no mention of the law that governed the conduct of the proceedings or prescribed the rights and obligations in dispute. Compliance with the requirements constituting the objective standard applicable in similar cases is the basis of the guarantee of the right to equal protection of the law the applicant would have been entitled to enjoy.

The case sought to be brought directly to the Court is that the Supreme Court reached a wrong decision on the non-constitutional matter. That the applicant seeks to attack the validity of the decision of the Supreme Court on the ground that it is “outrageously wrong” is clear from the founding affidavits. The relief sought is an order setting aside the decision which upheld the decision of the High Court and no other.

It is necessary to look closely at the legal effect of such an approach in the context of deciding whether there are prospects of success in the main application if direct access was granted. In deciding whether the case presented is reviewable, the Court takes into account the law that declares a decision of the Supreme Court on a non-constitutional matter final and unappealable.

A litigant who approaches the Court in terms of s 85(1) of the Constitution alleging an infringement of a fundamental right or freedom by the Supreme Court would have to allege and prove that, in the exercise of its jurisdiction, the Court would not be involved in the examination and determination of the non-constitutional issue which was before that court on

appeal. The determination of such an issue is reserved exclusively for the Supreme Court by the Constitution.

Section 169(1) of the Constitution, which covers the jurisdiction of the Supreme Court, provides:

“The Supreme Court is the final court of appeal for Zimbabwe, except in matters over which the Constitutional Court has jurisdiction.”

The principle that the Supreme Court is the final court in all non-constitutional matters is given effect to by s 26 of the Act. The section provides:

“26 Finality of decisions of Supreme Court

- (1) There shall be no appeal from any judgment or order of the Supreme Court.
- (2) The Supreme Court shall not be bound by any of its own judgments, rulings or opinions nor by those of any of its predecessors.”

The principles that emerge from s 169(1) of the Constitution, as read with s 26 of the Act, are clear. A decision of the Supreme Court on any non-constitutional matter in an appeal is final and binding on the parties and all courts except the Supreme Court itself. No court has power to alter the decision of the Supreme Court on a non-constitutional matter. Only the Supreme Court can depart from or overrule its previous decision, ruling or opinion on a non-constitutional matter. The *onus* is on the applicant to allege and prove that the decision in question is not a decision on the non-constitutional matter.

The applicant misconceived the effect of the principle of finality of decisions of the Supreme Court on non-constitutional matters enshrined in s 169(1) of the Constitution, as read with s 26(1) of the Act. It believed that the purpose of the principle was to protect “correct” decisions of the Supreme Court. According to the applicant, “wrong” or “outrageously wrong”

decisions of the Supreme Court are an infringement of the fundamental right to equal protection of the law. The contention is that s 85(1) of the Constitution provides an aggrieved litigant with the remedy for the redress of such an infringement. The reasoning is flawed because it starts from the premise that there can be “correct” and “wrong” decisions of the Supreme Court on non-constitutional matters.

What is clear is that the purpose of the principle of finality of decisions of the Supreme Court on all non-constitutional matters is to bring to an end the litigation on the non-constitutional matters. A decision of the Supreme Court on a non-constitutional matter is part of the litigation process. The decision is therefore correct because it is final. It is not final because it is correct.

The correctness of the decision at law is determined by the legal status of finality. The question of the wrongness of the decision would not arise. There cannot be a wrong decision of the Supreme Court on a non-constitutional matter. A decision declared by the Constitution to be final and binding cannot at the same time be open to challenge on the ground that it violates the fundamental right to the equal protection of the law.

The law of finality of decisions of the Supreme Court on non-constitutional matters applies to all litigants equally, whether they become winners or losers in the litigation process. The declaration of finality of a decision of the Supreme Court on a non-constitutional matter is itself a protection of the law. Once a decision is as a matter of fact a decision of the Supreme Court on a non-constitutional matter, no inquiry into its legal effect can arise. There would be no proof of infringement of a fundamental right or freedom as a juristic fact. It is enough for the purposes of the protection of finality and therefore correctness that the decision is on a non-constitutional matter.

In the absence of a higher court to say so, a decision of the Supreme Court on a non-constitutional matter cannot be said to be wrong. In *Williams and Anor v Msipha NO and Ors supra* at 567C the Supreme Court said:

“A wrong judicial decision does not violate the fundamental right to the protection of the law guaranteed to a litigant because an appeal procedure is usually available as a remedy for the correction of the decision. Where there is no appeal procedure there cannot be said to be a wrong judicial decision because only an appeal court has the right to say that a judicial decision is wrong. See *Maharaj v A G of Trinidad & Tobago (No. 2)* (PC) [1979] AC 385 at 399 D–H; *Boordman v Attorney General* [1996] 2 LRC 196 at 205i–206b.” (my emphasis)

In *Lane and Fey NNO v Dabelstein and Ors* 2001 (2) SA 1187 (CC) [4] the Constitutional Court of South Africa held:

“Even if the [Supreme Court of Appeal] erred in its assessment of the facts, that would not constitute the denial of the [‘right to a fair trial and to fair justice’]. The Constitution does not and could hardly ensure that litigants are protected against wrong decisions. On the assumption that section 34 of the Constitution does indeed embrace that right, it would be the fairness and not the correctness of the court proceedings to which litigants would be entitled.”

It is at the stage of the consideration of the application for leave for direct access that the Court or Judge has to determine the question whether the validity of the decision of the Supreme Court is being raised as a genuine constitutional issue.

A principle has developed out of the consideration of applications seeking to attack final decisions of the Supreme Court on the ground that they violate the right to equal protection of the law. The applications have invariably been dismissed on the ground that they are appeals disguised as applications for constitutional review. In that way, the integrity of the jurisdiction of the Court on constitutional matters and that of the Supreme Court on non-constitutional matters is preserved.

In the *Prosecutor General* case *supra* GWAUNZA JCC (as she then was) said at 428C-F:

“The court thus effectively affirmed the finality of the Supreme Court judgment on a matter that was not determined by that court as a constitutional issue. By that token, the matter was not one that fell into the category of those over which the Constitutional Court had jurisdiction. As already stated, these are matters that are properly brought to the Constitutional Court.

I find the authority cited above to be eminently apposite *in casu*. This is because while the applicant did not specifically state so in his application, in reality the matter was an appeal brought to this Court under the guise of an application. This is abundantly evident from the relief that is outlined in his draft order. It is even more evident from his summary of the background to the intended application, as already indicated. He indicated that he wished to approach this Court ‘for an order setting aside the Supreme Court judgment on the basis that it interferes with the independence of his office and as such it is *ultra vires* provisions of s 260 of the Constitution of Zimbabwe ...’. Like in the case referred to above, the issue that I have underlined, and others that the applicant sought to bring before this Court, similarly ‘arose’ after the Supreme Court judgment was pronounced. They could not have been, and in fact were not, raised before the Supreme Court and, needless to say, not determined by it as constitutional matters. The issues therefore did not meet the requirement for inclusion into ‘matters over which the Constitutional Court has jurisdiction’.

On the basis of the authority cited above, and upon a proper interpretation of the relevant provisions alluded to in this context, the judgment of the Supreme Court on these matters, which the applicant sought to have reversed, was final and definitive. It is a decision that may not be interfered with by this Court.” (my emphasis)

See also *Matamisa’s case supra* at 442G-443B.

In the *Prosecutor-General’s case supra* the Court emphasised the need for parties wishing to apply to it directly for appropriate relief to do so upon establishing a proper basis for such an approach. That would insulate the Court against a potential flood of undeserving cases at the instance of parties who may be disgruntled with decisions of lower courts, including the Supreme Court.

As long as the remedy for the perceived violation of the right to equal protection of the law involves the Court in considering the non-constitutional matters as the means of vindicating that right, the Court would be doing what it has no power to do. An unauthorised means cannot be justified by a legitimate end. It matters not that the remedy is presented in the form of a

review procedure under s 85(1) of the Constitution. It is in substance an appeal disguised as an application for constitutional review.

Mr Tivadar submitted that this case is different from a situation where the Supreme Court in its conduct of an appeal, as opposed to the judgment it renders at the end, commits a violation of the Constitution. He gave as an example a case where the Supreme Court decided that it would not hear one party's legal practitioner on account of his race. In such a case there would be failure of jurisdiction. The decision would not be a result of an objective assessment of the facts in issue. It would flow directly from the violation of the party's fundamental rights not to be discriminated against and to equal protection of the law.

The decision in the case referred to by *Mr Tivadar* would be a means of satisfying the personal racial prejudices of the members of the Supreme Court who would have substituted them for the purposes of the Constitution. The decision would be untenable and therefore objectively arbitrary. In other words, there would be no judicial decision on the non-constitutional matter. A decision which is shown not to be on a non-constitutional matter when it should be would not be in conformity with the Constitution.

In the founding affidavits supporting the application for direct access and the main application, the applicant accepts that the judgment appealed against from the High Court was to the effect that a party with a case pending in a court cannot make an application for leave to institute a class action on the same cause without withdrawing the pending case. The question whether a party in a case pending in a court can apply for leave to institute a class action on the same cause without withdrawing the pending case was the only issue for determination. It was a question of law. The High Court agreed with the respondent on the question. It dismissed the application. The appeal to the Supreme Court was on the ground that the High Court

misdirected itself on the question of law. After hearing oral submissions on behalf of both parties, the Supreme Court dismissed the appeal and upheld the decision of the High Court.

To say that the decision of the Supreme Court is “outrageously wrong” is a clever way of avoiding having to say that the Supreme Court misdirected itself. It is a subjective allegation that lacks merit. A thing is not necessarily what it is as per the words used to describe it. It is what it is as per its substance. The decision, the validity of which the applicant wants brought directly for determination by the Court on the allegation that it has infringed its fundamental rights to equal protection of the law and to a fair hearing, is the same decision that dismissed the appeal and upheld the judgment of the High Court. In other words, the Supreme Court reached the same decision on the non-constitutional issue as the High Court. It is clear that had the Supreme Court found in its favour the applicant would not have made the allegations of infringement of its rights.

The allegation by the applicant that in the course of delivering the judgment *ex tempore* the Supreme Court said that the High Court had considered the merits of the case is a mere red herring designed to divert attention from the fact that the application sought to be placed before the Court in terms of s 85(1) of the Constitution is a disguised appeal against the decision of the Supreme Court. The utterance the Supreme Court may have made is not a decision. There is only one decision which the applicant seeks to have set aside through the procedure under s 85(1) of the Constitution. The effect of the decision is the dismissal of the appeal and confirmation of the decision of the High Court on a non-constitutional issue. Such a decision cannot be evidence of a violation of a fundamental human right or freedom. It was a question not arising under the Constitution.

There is no suggestion anywhere in the founding affidavits that the Supreme Court failed to act in terms of any law governing appeal proceedings generally. To say that the Supreme Court “completely misconstrued” the appeal is not to say that it did not apply its mind to the grounds of appeal. It is simply a disguised and exaggerated way of saying the Supreme Court misdirected itself in the consideration of the grounds of appeal and came to a wrong decision.

There was no issue on the nature, content and scope of the question that was before the Supreme Court for determination. It was not said what construction the Supreme Court was required to put on the question before it. To say an appellate court “completely misconstrued” an appeal without reference to any procedural and substantive standard does not take the allegation beyond the making of it. No principle of procedural law is alleged to have been violated by the Supreme Court in the conduct of the proceedings or in decision-making. The application in respect of which direct access to the Court is sought is a disguised appeal against the effects of the decision of the Supreme Court on a non-constitutional matter. *Rushesha and Ors v Dera and Ors CCZ 24/17*.

One of the fundamental aspects of the rule of law is the principle of legal certainty. This principle requires that no party to a proceeding shall be entitled to request the review of a final judgment solely for the purposes of obtaining a rehearing and a new determination of the case.

There are no prospects of the main application succeeding should leave for direct access to the Court be granted. It would not be in the interests of justice to grant leave for direct access where there are no prospects of success.

DISPOSITION

In the result, the following order is made:

“The application is dismissed with costs.”

Mundia and Mudhara Legal Practitioners, applicant’s legal practitioners

Gill, Godlonton and Gerrans, first respondent’s legal practitioners