

**REPORTABLE (3)**

**EDWARD MADYAVANHU**

**v**

**(1) REGGIE FRANCIS SARUCHERA  
(2) GRANT THORNTON CAMELSA CHARTERED ACCOUNTANTS  
ZIMBABWE  
(3) CAIRNS FOODS LIMITED**

**CONSTITUTIONAL COURT OF ZIMBABWE  
HARARE, MAY 28, 2018 & FEBRUARY 27, 2019**

The applicant in person

*T Chagudumba*, with *T Chagonda*, for the respondents

**IN CHAMBERS**

**MALABA CJ:** This is a chamber application for leave to appeal, condonation for late filing of the application for leave to appeal, and exemption from security for the respondents' costs.

The applicant was formerly employed by the third respondent. Sometime in 2004 he obtained judgment in the Labour Court, awarding him damages for unlawful termination of employment. The quantum of damages that he was granted came to ZW\$26 076 252.00 after

quantification by the Labour Court. However, before the third respondent could make any payment, it was placed under judicial management. The first respondent, who works for the second respondent, was appointed the Judicial Manager. The applicant then filed with the Master of the High Court a claim for his debt to be placed on the list of the third respondent's other creditors. The claim was provisionally accepted, but later revoked at the instance of the first respondent. This was because, while the applicant's debt was denominated in Zimbabwe dollars, he had lodged his claim in United States dollars amounting to USD3 057 199.00 without an order of court converting his Zimbabwe dollars claim to United States dollars. It seems that he had done the conversion of the amount himself.

The applicant then approached the High Court seeking to be reinstated on the list of creditors. The specific order that he sought read as follows:

"It is ordered that:

1. The applicant's claim be and is hereby reinstated to the creditors of the third respondent.
2. Within 48 hours of the issuance of this order, the fourth respondent avails to the applicant the payment schedule for the third respondent's judicial management creditors.
3. On a jointly and severally basis (*sic*) and within 21 days of the issuance of this order, the first, second and third respondents pay the applicant:
  - (a) The full amount of his claim in accordance with the schedule of payment of creditors of the same class.
  - (b) Interest at the prescribed rate on all overdue payments.
  - (c) The first, second and third respondents pay costs of suit."

A point *in limine* was raised by the first respondent on behalf of the second respondent to the effect that there was no legal basis for the applicant to sue the latter, as this was done solely for the reason that the first respondent worked for the second respondent.

The High Court upheld the point *in limine* and also dismissed the whole application on the merits for the following reasons -

- (a) At the time the applicant filed the application before the High Court, the third respondent was no longer under judicial management. The relief he sought could no longer bind the first respondent because he had ceased being the third respondent's Judicial Manager when it was removed from judicial management; and
- (b) The claim lodged by the applicant before the Master of the High Court was an amount which had not been properly converted at law. The court could not direct the Master to reinstate the claim.

Aggrieved by the High Court's decision, the applicant approached the Supreme Court on appeal, seeking the following relief:

"It is prayed that:

1. The High Court judgment be set aside.
2. Leave be granted for registration with the High Court in Harare for purposes of enforcement, my claim of USD3 057 199 against the third respondent which was proved and admitted in the creditors meeting held on 13 February 2013 pursuant to the company's judicial management and has never been set aside or varied.
3. Interest at the prescribed rate be paid on the claim amount from 3 November 2015, the day following the date of cancellation of the final judicial management order, to the date of final settlement.
4. The respondents pay the whole litigation costs for this matter."

In the heads of argument filed in the court *a quo*, the respondents raised three points *in limine* in regard to the relief sought. Firstly, they contended that the applicant failed to pray

for the success of the appeal, hence the relief sought was incompetent. Secondly, they argued that the relief which the applicant was seeking on appeal before the Supreme Court was different from that which he sought in the High Court. Thirdly, the respondents argued that the relief sought was fatally defective, in that the applicant sought an order for costs against all the respondents but did not seek any substantive relief against the first and second respondents.

In response to the points *in limine*, the applicant, in his heads of argument, argued that there is no provision in the Rules of the Supreme Court, 1964 which requires a party to expressly state whether or not the appeal should succeed, as the Judges can themselves simply state that the appeal succeeds or not. He explained that the intention that the appeal succeeds is apparent from the very act of appealing.

With regard to the allegation that he was seeking what he did not seek in the High Court, the applicant's position was that only the method of enforcement had changed but he still sought the same relief. On the point that he was not seeking any substantive relief against the first two respondents except for costs, the applicant argued that it is clear from his papers that the first two respondents were liable to him under delict for the third respondent's failure to pay his debt.

The Supreme Court found that there was merit in the respondents' points *in limine*, in particular that the applicant's notice of appeal did not satisfy the provisions of r 29 of the Rules of the Supreme Court, 1964. The appeal was dismissed and not struck off the roll. In explaining its decision in *Edward Madyavanhu v Reggie Francis Saruchera and Two Ors* SC 75/17 the court stated at p 9 of the cyclostyled judgment as follows:

"However, in this case, the court found that the appeal was not only incurably defective but wrong and bad in law. The appeal could therefore not properly be struck

off the roll because the appellant had no avenue, legally or procedurally, to follow in case he was inclined to bring the same appeal before this Court. It is emphasised in this respect that the appellant could not have secured the relief that he sought in the court below from the first respondent, for the simple reason that he had ceased to be the Judicial Manager of the third respondent, which in turn had ceased to be a company under judicial management. There was, therefore, no longer a list on which the appellant's claim could be included. In addition to this, the second respondent was improperly sued from the beginning because it was not an interested party in the dispute, it being the first respondent's employer."

Aggrieved by the decision, the applicant filed an application in the Constitutional Court ("the Court"). He referred to the application as a "Chamber application for condonation for late filing of the application for leave to appeal and exemption on security for the respondents' costs". A chamber application for leave to appeal was also included in the consolidated application. It is not indicated in terms of which provision the applicant made the three applications.

The applicant's allegation is that the Supreme Court dismissed his appeal on the basis that his claim for unpaid salaries, benefits and severance pay had been revoked and that the court *a quo* did not specify the authority or give any details of the revocation. He argued that the conduct of the court *a quo* was *ultra vires* the Constitution, as the decision deprived him of property on the basis of a revocation that was void. In support of the application, he filed a founding affidavit in which he set out that he was seeking condonation for the late filing of the application for leave to appeal against the judgment in *Edward Madyavanhu v Reggie Francis Saruchera and Two Ors supra* and an exemption from furnishing security for the respondents' costs of appeal. In the same founding affidavit, he also set out the reasons for the delay in filing the application for leave to appeal and the basis on which the appeal had prospects of success.

At the hearing, the Court drew the attention of the applicant to the question whether he had the right of appeal to the Court in terms of the Constitutional Court Rules SI 61/2016

(“the Rules”). The applicant submitted that he had a right of appeal as the decision of the Supreme Court ought to be set aside on the ground that it was a nullity as the case was not properly heard by the Supreme Court. He submitted that the decision of the court *a quo* was based on a revocation, which revocation was a nullity. He argued that he had a right of appeal under s 69(2) of the Constitution, as read with r 22 of the Rules. He acknowledged that *Chapter 4* of the Constitution provided for fundamental rights and proceeded to argue that the Government has an obligation to protect his property rights and the decision of the court *a quo* fell short of doing so.

In response, the respondents’ counsel submitted that it was trite that for one to appeal against a decision of the Supreme Court there must have been a constitutional matter for determination by that court. He argued that it was clear from the decision of the court *a quo* that the notice of appeal in terms of which he had sought to institute an appeal in that court was ruled to be fatally defective. He further indicated that the applicant never raised any constitutional issues in the court *a quo*, either in his written or oral submissions. He argued that there was no legal basis for what the applicant was seeking to do.

The applicant has filed an application for leave to appeal, condonation for late filing of the application for leave to appeal, and exemption from security for the respondents’ costs. The application is not provided for in the Rules. The subject matters and the reliefs sought are dealt with separately by the Rules - an application for leave to appeal is provided for in r 32; an application for condonation and extension of time within which to appeal is provided for in r 35; and security for costs is provided for in r 42 of the Rules.

An application for leave to appeal to the Court from a decision of a subordinate court is provided for in r 32(2) of the Rules. Rule 32(2) provides as follows:

“(2) A litigant who is aggrieved by the decision of a subordinate court on a constitutional matter only, and wishes to appeal against it to the Court, shall within fifteen days of the decision, file with the Registrar an application for leave to appeal and shall serve a copy of the application on the other parties to the case in question, citing them as respondents.” (My emphasis)

A person has a right to appeal against a decision of a subordinate court on a constitutional matter only. A decision of a subordinate court on a non-constitutional issue is unappealable because the Court has no jurisdiction to review such a decision. The purpose of the procedure of an application for leave to appeal provided for in r 32(2) of the Rules is to show that the Court has jurisdiction as provided for in the Constitution to hear and determine the appeal. In other words, the purpose of the procedure is to ensure that the applicant has a right of appeal to the Court against the decision of the subordinate court.

Section 167 of the Constitution makes it clear that the Constitutional Court is the highest court on all constitutional matters. Section 176(1)(b) of the Constitution provides that the Court decides only constitutional matters and issues connected with decisions on constitutional matters. Section 332 of the Constitution goes further to define a constitutional matter as a matter in which there is an issue involving the interpretation, protection or enforcement of the Constitution. The Court is a specialised institution with a narrowly prescribed jurisdiction imposing on a person seeking access to it the duty to prove that the matter sought to be brought for determination falls within its jurisdiction.

In *Lytton Investments (Private) Limited v Standard Chartered Bank Zimbabwe Limited & Anor* CCZ 11/18, at p 9 of the cyclostyled judgment, the Court said:

“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.”

Rule 32(3)(c) of the Rules requires that an application for leave to appeal to the Court must contain or have attached to it a statement setting out clearly and concisely the constitutional matter raised in the decision sought to be appealed against. The founding affidavit supporting the application must verify the fact that the cause of action arises from a decision of the subordinate court concerned on a constitutional matter or an issue connected with a decision on a constitutional matter.

The effect of the failure to meet the requirements of the procedure of an application for leave to appeal is that the person has no right of appeal from the decision of the subordinate court.

In *Rushesha & Ors v Dera & Ors* CCZ 24/17, GWAUNZA JCC (as she then was) highlighted the effect of failure to meet the requirements of the procedure of an application for leave to appeal to the Court. At p 10 of the cyclostyled judgment HER LADYSHIP said:

“I therefore find no merit in the appellant’s unsupported proposition. It evinces a misconception as to the nature and essence of an appeal. It also constitutes an attempt to turn this Court into a general court of appeal. This, in my view, is unsupportable. Specific provisions of the Constitution on the jurisdiction of both the Supreme Court and this Court prescribe what matters can properly be brought, on appeal, to this Court. In addition to this, a line of recent decisions of this Court have decisively laid down the law, based on sound authorities, and on the interpretation of relevant provisions of the Constitution, in particular ss 167(1), 169(1) and 167(5). It is noted that the appellants partially premised this ‘appeal’ on s 167(5). In short, these authorities have ruled that no appeal lies to the Constitutional Court from a decision of the Supreme Court that is not on a constitutional issue. None of the provisions and authorities alluded to provide for ‘appeals’ to this Court against the effect of a judgment properly arrived at by an inferior court.”

*In casu* there was no compliance with the requirements of the procedure of application for leave to appeal to the Court. No statement setting out clearly and concisely the constitutional matter raised in the decision of the Supreme Court was filed with the



application. The founding affidavit did not make any reference to a constitutional matter having been raised in the decision of the Supreme Court.

In *The Cold Chain (Private) Limited t/a Sea Harvest v Robson Makoni* CCZ 8/2017, the Court stated at pp 3-4 of the cyclostyled judgment as follows:

“Rule 32(3)(c) of the Constitutional Court Rules requires that the application for leave to appeal should contain or have attached to it ‘a statement setting out clearly and concisely the constitutional matter raised in the decision’. In other words, there must have been a constitutional matter raised in the subordinate court by the determination of which the dispute between the parties was resolved by that court. 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 the resolution of the dispute between the parties. See *Nyamande & Anor v Zuva Petroleum* CCZ 8/15.

Under s 332 of the Constitution a constitutional matter is one in which there is an issue involving the interpretation, protection or enforcement of the Constitution. Absence of an issue raised in the proceedings in the subordinate court requiring the interpretation, protection or enforcement of a provision of the Constitution in its hearing and determination would invariably be sufficient evidence of the fact that no constitutional matter arose in the subordinate court.” (My emphasis)

In *Chiite and Others v The Trustees of the Leonard Cheshire Homes Zimbabwe Central Trust* CCZ 10/17 the Court remarked at p 5 of the cyclostyled judgment that it would not be in the interests of justice for the Court to entertain argument on matters over which the Constitution has provided in clear and unambiguous language that the Supreme Court is the final court of appeal.

*In casu* no constitutional issue was before the court *a quo*. The issue before the court *a quo* was whether or not the document filed as a notice of appeal complied with the Rules of the Supreme Court. The determination of the question required an examination of the contents of the notice of appeal against the requirements of a valid notice of appeal. Even if the requirements of a valid notice of appeal had been complied with, the judgment of the

High Court against which the appeal would have been noted could not have given rise to grounds that raised a constitutional matter for decision by the court *a quo*.

The inevitable finding following consideration of the basis of the application is that the court *a quo* decided non-constitutional issues. The applicant has no right of appeal to the Court in the circumstances.

In *Nyamande and Another v Zuva Petroleum* 2015 (2) ZLR 351 (CC) at 354B-C ZIYAMBI JCC said:

“Having considered the submissions by the parties I agree with Mr *Chagonda* that the applicants have not established any right to approach the Constitutional Court by way of appeal. Section 167(5) relates to rules of procedure regulating the manner of approach to this Court on appeal from lower courts. It does not confer a right to appeal to the Constitutional Court on a litigant who has no right of appeal. ... Failing that, a right of appeal could only arise where the Supreme Court makes a decision on a constitutional matter. ...

Since no constitutional issue was determined by the Supreme Court, no appeal can lie against its decision ... . It follows that the applicants have not established a right of appeal to the Constitutional Court and any appeal filed in this matter by the applicants is a nullity as it conflicts with the provisions of s 169(1) of the Constitution.” (My emphasis)

A similar finding was made by GWAUNZA JCC (as she then was) in the *Rushesha* case *supra*. Discussing the import of s 169(1) of the Constitution, HER LADYSHIP at pp 10-11 of the cyclostyled judgment had this to say:

“The import of this provision needs no elaboration. Only where the Supreme Court determines a constitutional issue, may one appeal to this Court for a final determination. Because the Supreme Court in this matter did not determine any constitutional issue, the decision it rendered was final and not appealable. Since courts are not expected to, and invariably do not, render judgments that cannot be put into effect - which are in other words a *brutum fulmen* - a purported appeal against the effect of a judgment of the Supreme Court on a non-constitutional issue is in reality an appeal envisaged in s 169(1). That is, a final judgment that is not appealable no matter how well disguised any such purported appeal may be. It does not escape notice that in seeking to have the Supreme Court judgment overturned under the guise of an appeal to this Court, the appellants are, in effect, attempting to revive, and

reinstate, the judgment of the High Court, which was in their favour. What is sought would be both manifestly irregular, and bad at law.”

## **DISPOSITION**

In the result, the following order is made:

“The application is dismissed with costs.”

**GARWE JCC:** I agree

**MAKARAU JCC:** I agree

*Atherstone and Cook* Legal Practitioners, respondents’ legal practitioners