

DISTRIBUTABLE: (1)

ROBIN VELA

V

AUDITOR-GENERAL

And

BDO ZIMBABWE CHARTERED ACCOUNTANTS

Constitutional Court of Zimbabwe

Makarau JCC, Hlatshwayo JCC and Patel JCC

Harare 14 November 2022 and 20 March 2023

L. Madhuku with L. Uriri and M. Ndlovu for applicant

P. Makuvaza with V. Mukumba for 1st respondent

T. Magwaliba for 2nd respondent

Application for leave to appeal

MAKARAU JCC:

This is an application for leave to appeal against a judgment of the Supreme Court handed down on 10 June 2022. The Supreme Court judgment determined two consolidated appeals against the applicant with an accompanying order of costs.

Background facts.

The applicant was the Chairman of the National Social Security Authority (NSSA), a public body set up by statute. The first respondent is the Auditor-General, the holder of a public office created by the Constitution and which, at the request of the Government, can carry out special audits of any statutory body or government-controlled entity. The second respondent is a private firm of Chartered Accountants.

On 28 February 2018, the first respondent appointed the second respondent under contract, to carry out a forensic investigation of the affairs of NSSA for the period 1 January 2015 to 28 February 2018. In due course, the second respondent produced an audit report, detailing its findings.

The report produced by the second respondent was adverse to and highly critical of the applicant as Chairman of NSSA. Chagrined, the applicant took the report on review before the High Court. In the review application, he cited both respondents. It was his contention in the main that the audit of NSSA by the second respondent in the circumstances of the matter was an administrative act or conduct subject to judicial

review at common law and under the provisions of the Administrative Justice Act [*Chapter 10.28*].

He was successful.

In its judgment, the High Court set aside the audit report on a number of bases that are not material to the determination of this application. In setting aside the report and germane to this application, the High Court held that the audit report, authored by the second respondent on behalf of and under contract with the first respondent, was an administrative act for the purposes of the Administrative Justice Act. It was its specific finding, and in its own words, that the report was that of the "first respondent acting through the auditors she had appointed." In setting aside the report, the High Court affirmatively answered the following three issues that it had set up for itself and which I paraphrase:

1. Whether when the second respondent acted for and on behalf of the first respondent it exercised administrative or public power;
2. Whether the forensic investigation by the second respondent constitutes reviewable action/conduct or decision; and
3. Whether the grounds of review alleged by the applicant were established.

The net effect of the decision of the High Court was to hold that the audit of NSSA by a private firm of Chartered Accountants, acting under contract for and on behalf of the first respondent, was an exercise of public power and consequently, was subject to judicial review. The High Court effectively upheld the applicant's main contention that a contract audit by the first respondent is an exercise of public power under agency.

Supreme Court proceedings and decision.

Unhappy with the judgment, the respondents filed two appeals under separate cover to the Supreme Court. Although it is common cause that both respondents filed separate notices of appeal, only the grounds of appeal by the second respondent are reproduced and adverted to in the judgment of the Supreme Court. The consolidated judgment is also a determination of these grounds. They read:

1. "The High Court erred in finding that the appellant's carrying out of a forensic audit on the National Social Security Authority (NSSA) at the behest of the Auditor-General (second respondent) constituted an administrative action which is subject to review at the first respondent's instance and on the alleged grounds.
2. The High Court erred in finding that the appellant in its report under consideration exhibited bias against the first respondent when there was no evidence supporting such a finding.
3. The High Court erred in concluding that the appellant did not apply its mind to the issues before it in the

absence of any evidence controverting the findings made in the audit report.

4. The High Court erred in concluding that the audit report was unfair against the first respondent in circumstances where he had been given an opportunity to respond to the allegations against him and his responses had been taken into consideration before drawing any conclusions and which such conclusions are not only supported by the evidence availed to the appellant but were properly explained in the audit report.
5. The High Court erred in setting aside the report in all aspects pertaining to the first respondent in the absence of evidence demonstrating bias or incompetence or unfair treatment or pointing to any irregularities in every such aspect."

It was the view of the Supreme Court that the two appeals before it could be disposed of by the determination of the first ground of appeal reproduced in full above. The judgment indicates that the court proceeded to set out for its determination the following issue:

"Whether the court a quo misdirected itself in holding that the appellant was exercising public authority subject to judicial review when it carried out the forensic audit for and on behalf of the second respondent."

Relying on the South African case of *Chirwa v Transnet* 2008 (4) SA 367 (CC) which discussed the attributes and characteristics that define and identify administrative authorities, and on its interpretation of s 3 of the Administrative Justice Act, the Supreme Court came to the conclusion that the second respondent was not an administrative authority and therefore the audit report it authored was not

reviewable. It proceeded further to dismiss the argument that the second respondent was an administrative authority as it was the duly appointed agent of a public authority. In doing so, the Supreme Court then interpreted S 309 of the Constitution that sets up the office of the first respondent and provides for its functions. After setting out the constitutional provision in full it was the Court's finding that the Constitution does not confer upon the first respondent the power to in turn confer administrative authority on any person.

In the ultimate, the Supreme Court upheld the two appeals and set aside the decision of the High Court.

The application for leave to appeal.

The applicant now approaches this court for leave to appeal against the decision of the Supreme Court.

In motivating the application, the applicant contends that the judgment *a quo* raises a constitutional matter in that it purports to interpret the provisions of S309 of the Constitution in determining the appeals that were before the Supreme Court.

The respondents opposed the application and jointly argued that no constitutional issue arose in the High Court and

that the appeals to the Supreme Court were specifically on the jurisdiction of the High Court in terms of the Administrative Justice Act, a non-constitutional matter. The reference to and interpretation of s 309 by the Supreme Court in its judgment must therefore be regarded as *obiter*, the respondents proceeded to argue. *Mr Magwaliba* for the second respondent went as far as suggesting that the part of the judgment referring to and interpreting the Constitution could in fact be excised from the rest of the judgment without impacting on the fullness of the judgment.

He is probably correct.

In further engagements with the Court, all counsel agreed that the judgment of the Supreme Court could have and therefore should have avoided an interpretation of s 309 of the Constitution. The non-constitutional matter that was before the Supreme Court was capable of resolution on the basis of the law of agency and an interpretation of the statute that authorizes the first respondent to farm out its duties to private audit firms.

The Supreme Court did not however avoid the Constitution.

The law on when leave of this court to appeal against a decision of a lower court may be granted has been discussed in

a number of decisions of this Court. (See *Bonnyview Estate (Private) Limited v Zimbabwe Platinum Mine (Private)Limited & Another* CCZ 6/19; *Cold Chain (Pvt) Limited t/a Sea Harvest v Makoni* 2017 (1) ZLR 14 (CC); *Chombo v National Prosecuting Authority & Others* CCZ8/22; *Ismael v St John's College & Ors* CCZ 19/19 ; *TBIC Investments (Private) Limited v Mangenje & Ors* CCZ 15/20; *Magurure & Others v Cargo Carriers International Hauliers* CCZ 15/16 and *Chani v Justice Hlekani Mwayera and Others* CCZ 2/20.)

Leave to appeal is granted if the intended appeal is against a decision of a subordinate court on a constitutional matter.

There is a growing body of law from this Court spelling out that a decision of a subordinate court is on a constitutional matter if the litigation in that court is unavoidably predicated on such a matter. Put differently, the resort to the interpretation, enforcement or protection of the Constitution in resolving the dispute between the parties must have been unavoidable, taking into account the respective applications of the principles of subsidiarity, avoidance and ripeness.

In addition, this Court has specifically held that the constitutional matter must have been pleaded in the court of

first instance such that the constitutional matter stands out clearly from such pleadings. Thus, the mere reference to the provisions of the Constitution in the judgment of the lower court, either in passing or as buttressing a common law position or statutory provision, does not trigger the appellate jurisdiction of this Court.

Therefore, where the provisions of the Constitution are resorted to in the judgment *a quo* as bulwarking or strengthening a common law position or an interpretation of a statute, such reference to the provisions of the Constitution does not and cannot thereby form the *ratio decidendi* of the judgment of the matter. The *ratio decidendi* remains the non-constitutional position at common law or as provided for by statute, albeit finding some support from the Constitution.

Finally, and in any event, where the constitutional matter is not specifically pleaded in the court of first instance but arises during those proceedings or before any other subsequent court, the provisions of s 175 (4) set out the procedure by which the matter may be referred to this Court for the purposes, not of determining the matter but for answering the requisite constitutional question that will assist in the determination of the matter. (See *Nyika and Another v Minister of Home Affairs and Another* CCZ 5/20).

Analysis.

In casu, it is common cause that the cause of action before the High Court was not predicated on a provision of the Constitution. It was rooted in administrative law in terms of which the applicant sought to have reviewed what he alleged was administrative conduct by the first respondent through the agency of the second respondent. Accordingly, the pleadings did not raise a constitutional matter. Put differently, the pleading before the High Court did not call upon that court to interpret, enforce or protect the provisions of the Constitution. Instead, the pleadings sought to establish a basis for having the audit report by the second respondent, under contract from the first respondent, reviewed and set aside.

Because no such matter had been pleaded before it, it stands to reason that the High Court did not decide a constitutional matter. As is evident from its judgment, the High Court did not invoke any provisions of the Constitution in arriving at its determination on the non-constitutional matter that was before it. The *ratio decidendi* of its judgment on the preliminary points alleging fatal misjoinder of the second respondent was rooted in the contract law of agency. It was its finding that the first respondent, a public authority, performed the audit of NSSA through the agency of the second respondent. The *ratio decidendi* of its judgement on the substantive issues

raised in the application for review was based on the application of the principles of administrative law.

From the foregoing, it follows that no constitutional matter fell for determination on appeal on the basis of the proceedings that had unfolded before the High Court and as a result of the judgment of the High Court.

The grounds of appeal that the Supreme Court relied upon for the determination of the two appeals that were before it did not raise any constitutional matter. This is common cause.

Further, the record of the appeal proceedings does not indicate that a constitutional question arose during the appeal hearing. Had one arisen, the Supreme Court would have been obliged to invoke the provisions of s 175 (4) of the Constitution to refer the question arising for answering by this Court.

In the circumstances and in view of the fact that no constitutional matter was determined by the High Court, that no constitutional matter was the subject of appeal before the Supreme Court and that no constitutional matter arose during the appeal proceedings, the text of the Constitution should not have been interpreted by the Supreme Court. And in the ordinary course

of constitutional litigation in this jurisdiction, no appeal should lie to this Court.

There is however one disconcerting aspect of this matter which exercises the mind.

As argued by all counsel, the Supreme Court purported to decide the appeals that were before it, and unnecessarily so, by interpreting the provisions of the Constitution. This purported but unnecessary interpretation of the Constitution remains extant. It also raises two possible debates. Firstly, the resort to the Constitution in a matter that did not require such an approach may arguably constitute a procedural irregularity in the proceedings of the Supreme Court. Secondly, and more importantly in my view, if the Supreme Court decided a non-constitutional matter by invoking the Constitution against the principles of subsidiarity, avoidance and ripeness, then it may have fallen into a grave error, which error can only be corrected by this Court. In this regard, it may be pertinent to note that before it went into an interpretation of the Constitution, the court a quo did not at any stage advert to and discount these principles.

It is not desirable that I debate the correctness or otherwise of judgment of the Supreme Court in any detail. This

is so in view of the order that I intend to make in this application.

I however wish to highlight that a reading of the Supreme Court judgment, *prima facie*, suggests that the court *a quo* intended the interpretation of s 309 of the Constitution to be the *ratio decidendi* of its judgment as this is the only definitive and dispositive part of the judgment. This is so because it is this interpretation of the Constitution that purports to be in direct answer to the issue that the court had to determine. The other debate on the characteristics of the second respondent as a private entity was neither here nor there, as the identity of the second respondent, as an agent of the first respondent, was never in issue at any stage of the proceedings.

I make the above observations mindful that I could be mistaken in my reading of the Supreme Court judgment. In this regard, it matters not that all counsel agree with my understanding of the resort to the Constitution by the Supreme Court, which we collectively believe was unnecessary.

I further believe that such resort to the Constitution could be misleading both in procedure and in content.

There is however the real possibility that this Court, sitting quorate, may understand the Supreme Court judgment very differently. The absence of clarity in the matter is in my mind sufficient to trigger the appellate jurisdiction of this Court to clarify the correctness of the position that the Supreme Court took or ought to have taken in the matter. I am therefore inclined to grant leave to appeal in this matter. In my view, it is eminently in the interests of justice that leave be granted to bring this matter before the Court.

For the avoidance of doubt, the order that I make is not an acknowledgment or acceptance that the matter before the Supreme Court was constitutional in nature. The order is made on the basis that in determining a non-constitutional matter, the Supreme Court resorted substantively to the provisions of the Constitution to resolve the dispute. It may have erred in this regard.

Regarding costs, there is no justification that any of the parties be mulcted with an order of costs.

In the result it is ordered that:

1. The application for leave to appeal be granted with no order as to costs.
2. The applicant is to file his notice of appeal within 10 days of this order.

PATEL JCC: I am in total agreement with the foregoing reasoning and judgment of Makarau JCC and make a few additional observations in support of the position that she has taken.

The first issue concerns the primary thrust of the decision rendered by the Supreme Court (the court *a quo*). Although there was no constitutional question before the High Court, the matter before that court having been determined on exclusively statutory and common law grounds, the court *a quo* appears to have fixated on s 309 of the Constitution in answering the question that it had formulated for determination. It found that the second respondent (BDO Zimbabwe Chartered Accountants) was not an administrative authority and that its audit reports were therefore not reviewable. Pursuant to that finding, the court proceeded to hold that s 309 of the Constitution did not confer upon the first respondent (the Auditor-General) the power to delegate to or confer administrative authority upon any other person or entity.

I fully agree with counsel for the respondents that the decision of the court *a quo* on s 309 was not entirely necessary and that the court could have determined the matter

before it

on the basis of the common law and the provisions of the Administrative Justice Act [Chapter 10:28] and the Audit Office Act [Chapter 22:18]. Having regard to the principle of subsidiarity, the matter was evidently resolvable on purely statutory or common law grounds. However, the court *a quo* declined to do so and opted instead to focus on the constitutional dimension of the case. It made a definitive ruling on the interpretation of s 309(2) of the Constitution, which ruling was dispositive of the dispute between the parties. As is aptly observed by Makarau JCC, the court may well have erred in making this foray into the constitutional realm. And this is an aspect that needs to be canvassed before the full bench of this Court.

Moving on to the substantive merits of the Supreme Court judgment, it seems to me that its decision on the interpretation of s 309 of the Constitution is not simply *obiter* but purports to be a definitive pronouncement. It remains extant and binding not only on other subordinate courts but also on the Supreme Court itself. In my *prima facie* and tentative opinion, without seeking to preempt the eventual outcome of this matter on appeal, the decision of the court *a quo* on the meaning and scope of s 309 is probably erroneous and incorrect. And unless it is duly set aside, it will undoubtedly have a largely negative impact on the proper functioning and operations of the office of the

first respondent. It then becomes necessary for me to elaborate my reasons for adopting this position.

Section 309(1) of the Constitution establishes the public office of the Auditor-General. Section 309(2) prescribes the multifarious functions of that office, viz. to audit the accounts of all governmental, provincial, metropolitan and local authority departments, to carry out special audits of the accounts of statutory bodies and government-controlled entities, and to order the taking of measures to rectify any defects in the management and safeguarding of public funds and public property. Additionally, the Auditor-General is enjoined "to exercise any other function that may be conferred or imposed on him or her by or under an Act of Parliament". Section 309(2) mandates public officers to comply with such orders as may be given to them by the Auditor-General.

Turning to the relevant provisions of the Audit Office Act, we find that s 9 of the Act specifically empowers the Auditor-General to appoint any registered public auditor to carry out any of the auditing functions "that are required by this Act or by any other enactment" and to report the results of such audit to the Auditor-General. Reading s 9 of the Act together with s 309 of the Constitution, it seems to me very difficult indeed

to conclude that the Auditor-General cannot delegate any of his or her administrative functions to a registered public auditor. By the same token, it is equally difficult to imagine that a qualified auditor, who has been duly appointed or delegated by the Auditor-General, would exercise anything other than administrative authority. In this context, the import of the maxim *qui facit per alium facit per se* is entirely apposite and unavoidable.

I consider it necessary to expatiate this analysis of the relationship between s 309 of the Constitution and s 9 of the Act so as to underscore the practical and administrative difficulties that would eventuate if the judgment of the Supreme Court on this particular aspect were to be left un-interfered with and intact. There can be no doubt that the Auditor-General is entrusted with a vast array of public auditing functions relative to the management and operations of every State entity. Given the magnitude of this task, it would be highly unrealistic to expect the office of the first respondent to perform its functions efficiently, effectively and expeditiously without the complementary assistance of auditors from the private sector. The unavoidable consequence of the Supreme Court's interpretation of s 309 of the Constitution would be to undermine the overall functionality and efficacy of that office and to divest it of its public nature and status.

It is also necessary to consider the converse impact of the Supreme Court ruling. If it were to be applied without qualification, it would be perfectly possible for the office of the Auditor-General to invoke that ruling in order to avoid its responsibility for any administrative irregularity that might be perpetrated by chartered accountants appointed by that office and acting under its aegis to carry out public auditing functions. This possibility would also serve to undermine public confidence in the operations and credibility of the office in the performance of its myriad functions.

On the procedural front, Makarau JCC has succinctly articulated the approach of this Court in considering applications for leave to appeal. That approach might ordinarily operate to preclude the grant of leave to appeal *in casu*. However, by dint of the particular circumstances of this case, coupled with the infelicitous implications of the Supreme Court's interpretation of s 309 of the Constitution, I think it prudent and necessary that the matter be fully ventilated before the entire bench of this Court.

In the final analysis, it seems to me that the intended appeal to be mounted by the applicant carries reasonable

prospects of success. I am also of the considered view that it is in the public interest and, consequently in the interests of justice, that the ruling of the court *a quo* curtailing the delegation of its administrative functions by the first respondent be revisited and either rectified or set aside.

I accordingly concur with the judgment and order rendered by the learned Makarau JCC.

HLATSHWAYO JCC : I agree

Chambati, Mataka & Makonese, applicant's legal practitioners.

Civil Division of the Attorney-General's Office, 1st respondent's legal practitioners.

Sawyer & Mkushi, 2nd respondent's legal practitioners.