

(1) PENELOPE DOUGLAS STONE (2) RICHARD HAROLD  
STUART BEATTIE  
*Trading as Stone/Beattie Studio Partnership*

v

(1) CENTRAL AFRICA BUILDING SOCIETY (2) RESERVE BANK  
OF ZIMBABWE (3) MINISTER OF FINANCE AND ECONOMIC  
DEVELOPMENT

CONSTITUTIONAL COURT OF ZIMBABWE  
MALABA CJ, GWAUNZA DCJ, GARWE JCC,  
MAKARAU JCC, GOWORA JCC,  
HLATSHWAYO JCC & PATEL JCC  
HARARE, MAY 30 2023

*T. R. Mafukidze* for the applicants.

*T. Magwaliba* for the first respondent.

*L. Uriri & N. Munzara* for the second respondent.

*L. Madhuku* for the third respondent.

Judgment No. CCZ 05/24  
Const. Application No. CCZ 11/23

1

**GOWORA JCC:**

1. This matter was placed before the full bench of this Court for confirmation of an order of constitutional invalidity pursuant to r 31 of the Constitutional Court Rules, 2016, (hereinafter “the Rules”) as read with s 175 (1) of the Constitution, against the judgment of the High Court, (hereinafter “court *a quo*”) in the case of *Penelope Douglas Stone & Anor v Central Africa Building Society & Ors* HC 4243/21.

2. At the end of the proceedings, the Court handed made an order the operative part of which read as follows:

- “1. The confirmation of the order of the court *a quo* is declined.
2. The order of the court *a quo* is set aside in its entirety.
3. There shall be no order as to costs.
4. Reasons for the decision are to follow in due course.”

What follows are the reasons for that order.

### **FACTUAL BACKGROUND**

3. The applicants before this Court are partners in an architectural enterprise. The first respondent is Central African Building Society (CABS). The second respondent is the Reserve Bank of Zimbabwe, (RBZ), with the third respondent being the Minister of Finance and Economic Development.
4. The applicants applied to the court *a quo* purportedly in terms of s 85 (1) of the Constitution. They sought a declarator to the effect that Exchange Control Directive No. RT 120/2018 issued by the second respondent was unconstitutional due to an alleged violation of the right to property enshrined under s 71 of the Constitution. Judgment No. CCZ 05/24 Const. Application No. CCZ 11/23
5. In addition, the applicants sought a declaration to the effect that the same directive was grossly unreasonable and *ultra vires* s 35 (1) of the Exchange Control Regulations, SI 109 of 1996, and was accordingly invalid. The constitutionality of sections 44B (3) - (4) and 44C of the Reserve Bank Act [*Chapter 22:15*] was also impugned on the premise that the provisions in question violated s 71 of the Constitution. A similar declaration was sought with respect to ss 21 (1) (b), 22 (2), 22 (4) (a) and 23 (1)-(3) of the Finance (No.2) Act of 2019 for allegedly violating the aforementioned s 71 of the Constitution.
6. Consequent to the above, the applicants sought a further declaration that the conversion of their USD 142 000 to RTGS 142 000 was unconstitutional and violated s 71. They

therefore sought an order compelling the first respondent to reimburse them the sum of USD 142 000.

7. The genesis of the dispute stemmed from the applicants' inability to access funds in USD from an account maintained by them with the first respondent. The applicants are architects and are partners in an architectural firm. The firm operates bank accounts with the first respondent. On 17 October 2018 they demanded the release to themselves of the sum of USD 142 000 from one of their accounts. By letter dated 4 October 2018 the first respondent responded to the demand and indicated that it was unable to pay them that amount as the account was now denominated in the RTGS currency following a directive from the second respondent, the RBZ. The first respondent advised them that the requested sum could not be paid out in United States Dollars on the basis of the Exchange Control Directive RT 120/2018, which essentially converted the pre-existing sum to RTGS denomination. This was confirmed in correspondence between the parties on 24 October 2018.
8. The applicants do not accept that the conversion of that account was lawful and, as a consequence, contend that a constitutional issue arose from the fiction of equating the United States Dollar with the local RTGS by the authorities. It was submitted on their behalf that the government itself had recognised the superficiality of the parity argument between the United States Dollar with the local RTGS currency. Contrary to its stated position, on the argument of parity between the USD and the local currency, Government had insisted on payment of certain obligations be made exclusively in United States Dollars. To cement their argument, the applicants made reference to the exclusive levy of fuel prices in United States Dollars. It was contended that the first

respondent would be unjustly enriched at their expense due to this legal fiction of parity.

9. They submitted before the court *a quo* that the impugned legislation served to deprive them of their rights under s 71 of the Constitution and could not be justified under the limitation clause in s 86 of the Constitution. The applicants argued that s 71 (3) of the Constitution sets out the standards for the compulsory acquisition of property which requirements were not satisfied by the impugned legislation. It was further submitted that the law of general application which authorises compulsory deprivation must also entitle claimants to apply for compensation which was not satisfied by the impugned law.
  
10. Further to this, the applicants contended that their application was properly before the court, regard being had to the judgment by the Supreme Court involving the same parties. They contended that the remarks in the judgment had given them the conviction that they could succeed in suing the respondents once they had impugned the parent statute that had given birth to the Exchange Control Directive in question. For these reasons, they contended that Exchange Control Directive No. R120/2018, ss 44B (3)-(4) and 44C of the Reserve Bank Act and ss 21, 22 and 23 of the Finance (No.2) Act of 2019 violated s 71 of the Constitution and, that, as a consequence, the first respondent was obliged to reimburse them the sum of USD 142 000.
  
11. The application was opposed by all the respondents in the court *a quo*. The first respondent raised the preliminary issue that the relief sought was defective. It argued that a declaration of constitutional invalidity could not give rise to any automatic positive rights on behalf of the applicants and further that it could not be compelled to

effect payment in a constitutional matter until such proceedings were confirmed by the Constitutional Court.

12. On the merits, it maintained that its actions in the matter were guided by validly promulgated laws. The first respondent contended that the impugned directive only mandated the deposit of foreign currency from offshore sources into Nostro accounts. However, the funds in the account maintained by the applicants had emanated from local deposits and were therefore excluded from this category. The first respondent further submitted that there could not be a claim for unjust enrichment against it because, as a building society, its funds were deposited with the second respondent, the RBZ. It noted that the second and third respondents had the requisite legal authority to regulate monetary and fiscal matters in terms of the Reserve Bank Act. The first respondent also submitted that the plea of *res judicata* was applicable *in casu* as the matter had been argued to finality in the Supreme Court. Judgment No. CCZ 05/24  
Const. Application No. CCZ 11/23
  
13. In turn, the second respondent also submitted that the matter was *res judicata* as the Supreme Court had dealt with the same matter on appeal from the court *a quo*. On the merits it submitted that the impugned legislation did not violate s 71 of the Constitution. The third respondent also associated itself with the arguments by the first and second respondents and further submitted that the impugned legislation did not take away any of the applicants' rights. Counsel for the third respondent suggested that the applicants ought to have joined Parliament to the proceedings as they had sought to impugn acts done in terms of a valid statute.

14. In response, the applicants submitted that, after the operationalisation of the Directive, the funds in their account with the first respondent, when converted at the official exchange rate, amounted to a mere US \$1 604.52 which they suggested constituted a violation of s 71 of the Constitution. They sought to counter the allegation that the issue had not been properly taken regard being had to the doctrine of *res judicata* on the basis that there had been no determination on the constitutionality of the exchange control directive by either the High Court or the Supreme Court.
15. Although the court *a quo* agreed that the subject matter in the dispute before it was the same as that previously litigated upon, it concluded that the matter was not *res judicata* because the question regarding the constitutionality of the impugned legislation remained in issue. As a consequence, it dismissed the preliminary point. It also disregarded the preliminary point raised on the principle of subsidiarity, <sup>Judgment No. CCZ 03/24</sup> ~~termining the~~ Const. Application No. CCZ 11/23 point *in limine* “pedantic and a miscarriage of justice”.
16. On the merits, the court *a quo* held that it would determine the constitutionality of the Exchange Control Directive separately from the issue that it was *ultra vires* s 35 (1) of the Exchange Control Regulations, 1996. Although its constitutional validity was not an issue for determination before it, the court *a quo* found that s 35 (1) of the Exchange Control Regulations, 1996 was not *ultra vires* s 71 of the Constitution.
17. Thereafter the court *a quo* concluded that paragraphs 2.5 and 2.6 of the Exchange Control Directive RT 120/2018 were *ultra vires* s 35 (1) of Exchange Control Regulations, 1996. It further determined that Exchange Control Directive RT 120/2018 was impeachable along with the other impugned legislative provisions in the sense that they interfered with the contractual rights of the parties and, in turn, breached s 71. The

provisions were held to invade property rights protected under s 71 (2) of the Constitution.

18. Consequent thereto, it issued an order which is now subject to confirmation by this Court. The order reads as follows:

- i. Paras 2.5 and 2.6 of the Exchange Control Directive RT 120/2018 dated 4 October 2018 are *ultra vires* s 35 (1) of the Exchange Control Regulations, 1996, SI 109 of 1996, and are hereby set aside.
- ii. Subject to s 175 (1) of the Constitution of Zimbabwe-
  1. The conversion of the amount of USD 142 000-00 standing to the credit of the applicants' savings account No. 1005428905 with the first respondent as at 28 November 2016 violated s 71 of the Constitution.
  2. Paras 2.5 and 2.6 of the Exchange Control Directive RT 120/2018 aforesaid violate s71 of the Constitution.
  3. Section 22 (1) (b) and (d) and s 22 (4) (a) of the Finance Act (No.2) Act No.7 of 2019 violate s71 of the Constitution and are hereby set aside.
  4. The first respondent shall pay the applicants the sum of USD 142 000, together with interest thereon at the rate of 5% per annum from 28 November 2016 to the date of payment.
  5. The respondents shall pay the costs of suit, jointly and severally, the one paying the others to be absolved.

### **SUBMISSIONS ON BEHALF OF THE APPLICANTS**

19. At the onset of proceedings, the parties were directed to address the Court on whether the matter was properly before the court *a quo*.

20. Mr *Mafukidze* for the applicants submitted that the matter was properly before the court *a quo*. He argued that the applicants' rights under s 71 of the Constitution had been violated by the impugned laws. He suggested that the cojoining before the court *a quo* of constitutional and non-constitutional issues was not improper. To that end, he made reference to several authorities that he contended provided exceptions to the principle of constitutional avoidance and, in this particular respect, submitted that the conflation of issues was held to be non-fatal in the seminal case of *Mudzuru & Anor v Minister of*

*Justice, Legal & Parliamentary Affairs No & Ors CCZ 12/15*, now reported as *M & Anor v Minister of Justice, Legal & Parliamentary Affairs N.O & Ors 2016 (2) ZLR 45 (CC.)*

21. Mr *Mafukidze* submitted that the principle of *res judicata* was inapplicable *in casu* because the aforementioned constitutional issues were not determined in previous litigation. Therefore, his view was that the matter was properly before the court *a quo*.

### **SUBMISSIONS ON BEHALF OF THE FIRST RESPONDENT**

22. Per *contra*, Mr *Magwaliba*, for the first respondent, submitted that the matter was not properly before the court *a quo*. Counsel contended that the matter as pleaded by the applicants went beyond the confines of an application within the contemplation of s 85 (1) of the Constitution. In addition, it was contended on behalf of the first respondent that the applicants' pleadings lacked the specificity required by the Rules and that the court *a quo, mero motu*, had identified paragraphs 2.5 and 2.6 of Exchange Control Directive RT 128/2018 as being impeachable and, therefore, unconstitutional. Judgment No. CCZ 05/24 Contention No. CCZ 12/15
23. Mr *Magwaliba* further argued that the court *a quo* overreached its jurisdictional ambit by determining a constitutional issue once it had dealt with a non-constitutional issue. In addition, it was his contention that the principle of *res judicata* was applicable *in casu* since there was previous litigation concerning the same subject matter between the same parties and, critically, premised on the same cause of action. He further submitted that the court *a quo* fell into error when it invalidated s 22 of the Finance Act [*Chapter 23:04*] because that piece of legislation sought to be impugned had only come into effect after the applicants' cause of action had allegedly arisen.



### **SUBMISSIONS ON BEHALF OF THE SECOND RESPONDENT**

24. In turn, Mr *Uriri*, who appeared for the second respondent, associated himself with and concurred with submissions made on behalf of the first respondent that the constitutional jurisdiction of the court *a quo* was not properly invoked. He made specific reference to r 107 of the High Court Rules, 2021 as indicative of the appropriate procedure to be followed in constitutional matters before the High Court. Mr *Uriri* submitted that the applicants' reliance on s 85 (1) of the Constitution placed an obligation on the applicants to establish the violation of a fundamental right. He pointed to the applicants' reliance on exceptions to the general rule of constitutional avoidance as an admission that the matter was principally non-constitutional in nature. Consequently, Mr *Uriri* submitted that the judgment of the court *a quo* ought to be set aside in its entirety.

Judgment No. CCZ 05/24  
Const. Application No. CCZ 11/23

9

### **SUBMISSIONS ON BEHALF OF THE THIRD RESPONDENT**

25. Mr *Madhuku*, for the third respondent also buttressed the point that the matter was improperly before the court *a quo*. He submitted that the constitutional relief sought before the court *a quo* was merely tangential to the motive of the applicants which was the recovery of USD 142 000. He submitted that there must be specificity in the pleadings when declarations of constitutional invalidity are sought in order to preserve the principle of the separation of powers. It was his submission that the relief sought should not be granted.

### **THE LAW**

26. Section 175 (1) of the Constitution provides that where a court makes an order concerning the constitutional invalidity of any law or the conduct of the President or Parliament, the order has no force or effect unless it is confirmed by this Court. Thus, the order of constitutional invalidity by a subordinate court does not bind the Court. It must itself conduct an examination into the constitutionality of the impugned conduct or statute as it is the sole court with the jurisdiction under the Constitution to declare such conduct or statute as being unconstitutional or invalid. As a consequence, the law requires that the Court must itself be satisfied as to the invalidity of the law or conduct being impugned. It is trite that under s 175 (1) any declaration is subject to the overarching jurisdiction and supervisory role of the Court.
27. In this enquiry, it must first decide whether the challenge to the constitutional validity of the law or impugned conduct was properly before the court *a quo*. By operation of Judgment No. CCZ 05/24 Const. Application No. CCZ 11/23 law, the confirmation proceedings before this Court are, in essence, a process of review of the proceedings before the court *a quo*.
28. The principles which are applicable in confirmation proceedings are settled. Firstly, given the limited jurisdiction of the Court as a special court, it has to be determined whether there was a constitutional matter before the subordinate court. Secondly, the constitutional matter which would have arisen in the subordinate court must have been properly before that court and that court must have had the competence to deal with the matter.
29. The power of this court in confirmation proceedings takes the form of a review of the constitutional matter to satisfy itself that the order of constitutional invalidity was

correctly made. See *S v C (A Juvenile) (Justice for Children`s Trust and Zimbabwe Lawyers for Human Rights Intervening as Amici Curiae)* 2019 (2) ZLR 12 (CC) and *Mupungu v Minister of Justice Legal & Parliamentary Affairs* CCZ 7/21. In *Makamure v Minister of Public Service, Labour and Social welfare and Anor* CCZ 21/20 MALABA CJ pertinently posited the following:

“The Court is also not bound by the order of constitutional invalidity made by the court *a quo*. In *S v Chokuramba* CCZ 10/19, the Court held at p 6 of the cyclostyled judgment as follows:

‘The Court is empowered to confirm an order of constitutional invalidity only if it is satisfied that the impugned law or conduct of the President or Parliament is inconsistent with the Constitution. It must conduct a thorough investigation of the constitutional status of the law or conduct of the President or Parliament which is the subject-matter of the order of constitutional invalidity. The Court must do so, irrespective of the finding of constitutional invalidity by the lower court and the attitude of the parties.’”

- Judgment No. CCZ 05/24  
The Law Application No. CCZ 11/23
30. The Court therein noted that the invalidity of the law Application No. CCZ 11/23  
consequence of a finding of inconsistency between the law and conduct which the  
Court might not necessarily be in agreement with.
31. Thus, the Court is empowered to confirm an order of constitutional invalidity only if it  
is satisfied that the impugned law or conduct of the President or Parliament is indeed  
inconsistent with the Constitution. See also *Phillips and Anor v Director of Public  
Prosecutions and Ors* 2003 (3) SA 345 (CC) para 8.
32. Given the foregoing, it seems to me that three issues arise for determination. The first is  
whether the court should have found that the matter was *res judicata* and, as a  
consequence, declined exercising its jurisdiction in determining the application. The  
second, but quite fundamental issue, is whether a proper constitutionally based cause of

action was placed before the court *a quo* justifying its assumption of jurisdiction and the order that it made. The respondents contend that the lack of specificity in pleading the cause of action should have non-suited the applicants before the court *a quo*. The third is whether the court *a quo* should have declined to consider the alleged unconstitutionality of the Directive based on the doctrine of subsidiarity as argued by the respondents.

### **WHETHER THE CAUSE OF ACTION WAS PROPERLY PLEADED**

33. The applicants *a quo* approached the court in terms of s 85 (1) (a) of the Constitution. The procedure in s 85 (1) (a) of the Constitution is a direct enforcement procedure for the enforcement of fundamental rights and liberties. It is meant to secure constitutional remedies. It cannot be invoked in respect of non-constitutional remedies.

34. The applicants founded their *locus standi* to institute legal proceedings in terms of s 85 (1) (a) of the Constitution on the premise of an allegation of the violation of the right to property as enshrined under s 71. What the applicants filed in the High Court can best be described as a hybrid application. They claimed *locus standi* to approach the court for a declaration of invalidity on an alleged violation of a right and in that respect invoked s 85 (1) of the Constitution.

35. A court that is approached in terms of s 85 (1) (a) of the Constitution cannot exercise its jurisdiction on any other matter besides matters that seek redress for direct and actual infringements or likely infringements of fundamental rights and freedoms set out in the Bill of Rights. Thus, where the court is approached in terms of s 85 (1) (a) of the Constitution, it must not involve itself in the determination of non-constitutional issues.

Judgment No. CCZ 05/24

Const. Application No. CCZ 11/23

36. It is evident that the proceedings *a quo* went beyond the enforcement of fundamental rights and freedoms contained in Chapter 4 of the Constitution. It is common cause that the application for constitutional relief was conjoined with a cause of action based on non-constitutional relief. It is also not in dispute that the applicants sought the declaration of invalidity of the Exchange Control Directive on the basis that it violated the right to property as enshrined in s 71 (2) of the Constitution. Further to this, a declarator was prayed for to the effect that the conversion of USD 142 000 to RTGS 142 000 was unconstitutional and invalid as it violated s 71 (2) of the Constitution.

37. The order sought further included a declarator to the effect that the Directive was grossly unreasonable and *ultra vires* s 35 (1) of the Exchange Control Regulations, SI 109/1996. This relief is not available under s 85 (1) upon which they sought to establish *locus standi* for approaching the court *a quo*. The order was not concerned with a violation of a constitutional right. It has been emphasised in a plethora of judgments of this Court that once a litigant pleads their *locus standi* under the ambit of s 85, the application must meet certain requirements. The specificity in pleading *locus standi* is of prime consideration.

38. In *Zimbabwe Human Rights Association v Parliament of Zimbabwe and Ors* CCZ 6/22, Patel JCC advanced the following:

“In essence, what the applicant has purported to do is to proceed under two mutually exclusive provisions of the Constitution, *viz.* s 85 (1) and s 167 (2) (d). This course of action was pointedly frowned upon in *Central African Building Society v Stone & Ors* SC 15/21, at p. 17, para. 38, where GWAUNZA DCJ observes that:

**‘... an application under s 85 of the Constitution should not be raised as an alternative cause of action .... . Section 85(1) is a fundamental provision of the Constitution and an application under it, being *sui generis*, should ideally be made specifically and separately as such.’** (my emphasis)

See also *Law Society of Zimbabwe v Parliament of Zimbabwe & Ors* CCZ 10/23

39. *In casu*, it is evident that the applicants conflated the constitutional application under s 85 with a non-constitutional cause of action. The link between the two is impermissible in that, in conjunction with a declaration of invalidity, they sought a declaration that Exchange Control Directive No. R120/2018 be declared grossly unreasonable and *ultra vires* its enabling provision section 35 (1) of the Exchange Control Regulations, 1996. The latter did not envisage the enforcement of a fundamental right under s 85 (1) as pleaded in the founding affidavit establishing *locus standi*. I have no hesitation in stating that not only is this impermissible but the procedure adopted was grossly irregular.
40. Further to the above, the applicants' application, purportedly made in terms of s 85 (1) (a) of the Constitution, did not specifically plead an infringement of their fundamental rights and freedoms. The law is settled that, in constitutional litigation, the constitutional issue to be decided by the court must be specifically pleaded. The requirement of specificity in constitutional litigation cannot be overlooked. The procedural requirement for specificity in pleading requires that the challenged legislation and the grounds of such challenge be properly raised in pleadings. There is need for accuracy in pleading in constitutional litigation and the required accuracy in pleading cannot be overlooked. It is critical in the determination of the issues to be decided by the court. See *Philips & Ors v National Director of Public Prosecutions* 2006 (1) SA 505 (CC) para 40 and *Shaik v Minister of Justice & Constitutional Development* 2004 (3) SA 599.
41. The failure to plead a cause of action with the required accuracy and specificity in the matter *a quo* was fatal. Despite the irregularity and the inherent conflict, the court *a quo*

found that the Directive was not grossly unreasonable but still granted an order declaring it *ultra vires* the Exchange Control Regulations. It also found that the Reserve Bank was empowered to issue Directives under the Regulations. By eschewing fundamental constitutional principles, the court *a quo* determined an application that was improperly placed before it. It must be reiterated that issues regarding the cause of action are rooted in law and not abstract personal convictions. Thus, the court *a quo*, by failing to recognise the *sui generis* nature of an application whose genesis emanates from s 85 grossly misdirected itself by assuming jurisdiction over two conflicting causes of action the determination of which was reposed under different species of the law. On this score alone, the order granted by the court *a quo* cannot be confirmed by this Court as the conflated application was not properly before it.

42. As regards the Directive, the court *a quo* considered both issues, the constitutional and the non-constitutional. First, it declared para 2.5 and para 2.6 of the Directive as being *ultra vires* s 35 (1) of the Exchange Control Regulations S.I. 109/1996. It then proceeded to set the provisions aside. Effectively therefore, the paragraphs in question were no longer of any force or effect. Unlike a declaration of constitutional invalidity, a declaration that a provision is *ultra vires* its parent statutory provision does not require confirmation by this Court. It stands to reason therefore, that once the court *a quo* made this declaration the paragraphs were no longer law. They ceased to exist.
43. Notwithstanding the declaration of invalidity and the consequential setting aside of the paragraphs in question, the court *a quo* then proceeded to declare that the same paragraphs violated s 71 of the Constitution. The court could not logically declare invalid a provision that it had already set aside.

44. An inherent theme in constitutional litigation is the consideration of whether there is a constitutional matter requiring adjudication by the Court. In the absence of an identifiable constitutional issue, the jurisdiction of this Court in any suit before it is not triggered. This point was emphasised in the case of *Moyo v Chacha & Ors* 2017 (2) ZLR 142 (CC), at p.150D, wherein the following was reiterated:

“The import of the definition of a ‘constitutional matter’ is that the Constitutional Court would be generally concerned with the determination of matters raising questions of law, the resolution of which require the interpretation, protection or enforcement of the Constitution.

The Constitutional Court has no competence to hear and determine issues that do not involve the interpretation or enforcement of the Constitution or are not connected with a decision on issues involving the interpretation, protection or enforcement of the Constitution.”

45. The learned authors' Max du Plessis, Glenn Penfold and Jason Brickhill, 1<sup>st</sup> ed. at p19, also state that:

“The quintessential example of a constitutional matter is one that involves the direct application of the Bill of Rights, that is, a constitutional challenge to law or conduct based on an unjustified infringement of a fundamental right. This includes challenges to the constitutionality of:

- (i) An Act of Parliament, a local government by law or conduct of a State functionary; and;
- (ii) a rule of the common law or customary law.”

46. The same definition of a constitutional matter is to be found in s 332 of the Constitution. This requirement also extends to other courts that, in certain respects, enjoy concurrent constitutional jurisdiction with this Court excluding those matters that are explicitly within the exclusive jurisdiction of this forum.

47. The genesis of the impugned Exchange Control Directive No. R120/2018 is s 35 (1) of the Exchange Control Regulations, 1996. The provision is worded as follows:

**“35. Authorised dealers and other persons to comply with directions**

- (1) Authorised dealers shall comply with such directions as may be given to them by an exchange control authority



relating to—

(a) the exercise of any functions conferred on them by or under these regulations;

(b) the terms on which they are to exchange foreign currency for Zimbabwean currency;

(c) the offer of foreign currency in their possession for sale to the Reserve Bank.”

48. The law is settled that where there is a statute or law designed to provide effective redress, litigants must find redress in that law rather than approaching the court pleading a constitutional issue. See *Zinyemba v Minister of Land and Rural Resettlement and Anor* 2016 (1) ZLR 23 (CC) at 26D-F, *South African National Defence Union v Minister of Defence and Others* 2007 ZACC 10 (CC), *MEC for Education, Kwa-Zulu Natal and Others v Pillay* 2008 (1) SA 474 and *Chani v Mwayera & Ors supra*.

Judgment No. CCZ 05/24  
Const. Application No. CCZ 11/23

17

49. The twin concepts of constitutional avoidance and the principle of subsidiarity are part of our law. In terms thereof where redress can be afforded in subsidiary legislation and without pleading constitutional issues, such remedies must be exhausted before approaching the court on a constitutional premise. See *Magurure and 63 Ors v Cargo Carriers International Hauliers (Pvt) Ltd* CCZ 15/2016, *Majome v Zimbabwe Broadcasting Corporation and Ors* 2016 (2) ZLR 27 (CC). In *Moyo v Sergeant Chacha & Ors* (supra), the Court held that:

“Where the question for determination is whether conduct the legality of which is impugned is consistent with the provisions of a statute, the principle of subsidiarity forbids reliance on the Constitution, the provisions of which would have been given full effect by the statute. The principle of subsidiarity has been explained in the cases of *Majome v Zimbabwe Broadcasting Corporation and Ors* CCZ 14/2016 and *Boniface Magurure and 63 Ors v Cargo Carriers International Hauliers (Pvt) Ltd* CCZ 15/2016. It states that a

litigant who avers that his or her constitutional right has been infringed must rely on legislation enacted to protect that right and may not rely on the underlying constitutional provision directly when bringing action to protect the right, unless he or she wants to attack the constitutional validity or efficacy of the legislation itself. Norms of greater specificity should be relied upon before resorting to norms of greater abstraction”

50. It was the applicants’ argument that Exchange Control Directive No. R120/2018 was *ultra vires* its parent provision. However, they did not seek to challenge the constitutional validity of s 35 (1) of the Exchange Control Regulations 1996 and, in its remarks, the court *a quo* confirmed that s 35 (1) did not violate s 71. The applicants in fact concede the validity of the provision. In view of this concession, they cannot challenge the constitutional validity of the Directive. On the doctrine of subsidiarity therefore, their constitutional challenge to the Directive is ill-founded and baseless. I am fortified in this view by the remarks of the Court in *Makanda v Magistrate Sande N.O & Ors* CCZ 03/21. In *Majome v Zimbabwe Broadcasting Corporation (Supra)*, Judgment No. CCZ/05/24, Const. Application No. CCZ 11/23 (CC), the Court stated:

“According to the principle of subsidiarity litigants who aver that a right protected by the Constitution has been infringed must rely on legislation enacted to protect that right and may not rely on the underlying constitutional provision directly when bringing action to protect the right, unless they want to attack the constitutional validity or efficacy of the legislation itself. See AJ van der Walt: “*Constitutional Property Law*” 3 ed Juta p 66, *MEC for Education: KwaZulu Natal v Pillay* 2008(1) SA 474(CC) paras 39-40, *Chirwa v Transet Ltd* 2008(2) SA 24(CC) paras. 59, 69.”

51. Regulations are subordinate legislation. When subordinate regulations are under consideration, however, it is necessary to consider them in relation to the empowering provisions under which they have been made. It is a trite principle that the doctrine of subsidiarity serves as a gate keeping function to guard against the hearing of constitutional matters on an *ad hoc* basis. It ensures that the courts apply a general

principle to all cases and that in that manner the courts are protected from criticism with regard to their decisions on which matters they consider as appropriate to determine. The principle thus ensures that there is certainty in the law and that the principle of constitutional consistency and validity required by the Constitution in the law is upheld. See *Magurure & Ors v Cargo Carriers International (Pvt) Ltd (supra)* and *Berry (nee Ncube) & Anor v Chief Immigration Officer & Anor* 2016(1) ZLR 38 (CC).

52. On the basis of the above authorities, it is evident that the doctrine of *ultra vires* as pleaded by the applicants has no comity with the remedy envisaged in respect of an application under s 85 of the Constitution. It is on this basis that the court *a quo* ought not to have proceeded to determine a constitutional question once the applicants had a remedy provided for under general law. Given the finding in favour of the applicants on a non-constitutional basis, namely on the *ultra vires* argument, Judgment No. CCZ 05/24 for Const. Application No. CCZ 11/23 the court *a quo* to have proceeded to determine issues of constitutional validity.

53. The court *a quo* was not content with merely setting aside the Directive. It considered that the task before it was to “locate the particular legislative provision, or provisions, in the whole gamut that has been impugned which the respondents relied on as the basis for that conversion, in contravention of s 71 (2) of the Constitution.” (the underlining is mine)

54. It then proceeded to issue an order declaring s 22 (1) (b) and s 22 (4) (a) as being in violation of s 71 (2). It gave no specific reason for the declaration. In its concluding paragraph it stated that paras 2.5 and 2.6 were impeachable because, among other things, they, together with the legislative provisions specifically singled out, were collectively the device by which the second and third respondents improperly interfered

with the contractual rights and obligations between the applicants and the first respondent. The court said that this interference resulted in the deprivation of the applicants' property.

55. Given my conclusion with regard to the absence of a constitutional issue based on the Directive, it becomes unnecessary to comment further on this issue.

### **WHETHER HIGH COURT SHOULD HAVE UPHELD THE PLEA OF**

#### **RES JUDICATA**

56. The applicants took this issue and argued it before the court *a quo* as a preliminary point. The respondents contend that the court *a quo* should have declined jurisdiction on the ground that the matter before it was *res judicata* Judgment No. CCZ 05/24 Const. Application No. CCZ 11/23 estoppel applied. However, the court *a quo* disregarded this procedural issue on the basis that the reasoning of the High Court in the earlier dispute between the parties was vacated by the Supreme Court under SC 15/21 and hence the constitutionality of Exchange Control Directive No. R120/2018 remained unresolved as an issue for determination.

57. The court *a quo* found, or alternatively observed, that that the first and second applicants had previously litigated on the same subject matter, involving the same respondents, "in the main impugning Exchange Control Directive RT120/2018." The court *a quo* further found that the said applicants were "now back again in this court, their cause of action having been re-formulated."

58. The learned author, Isaacs, in his text Beck's Theory and Principles of Pleading in Civil Actions, specifies in what respects a previous judgment may be *res judicata*. At p 171, he states as follows:

“The previous judgment is only *res judicata* as regards matters between the parties which the judgment actually affects and when the plea is raised, it **therefore becomes essential to determine whether the present claim is actually affected by the previous judgment.**” (my emphasis) See also *Wolfenden v Jackson* 1985 (2) ZLR 313 (S) at 316B-C.

59. An authoritative discussion on the requirements of *res judicata* was set out by Sandura JA in *Banda & Ors v Zisco* 1999 (1) ZLR 340 (S), wherein the court affirmed the *dicta* in several decided authorities on the issue. The court stated:

“The requisites of the plea of *res judicata* have been set out in a number of previous cases. In *Pretorius v Barkly East Divisional Council* 1914 AD 407 at 409, Searle J set them out as follows:

‘As to the first point, the requisites for a plea of *res judicata* have several times been laid down in this court. Application No. CCZ 11/23 Judgment No. CCZ 05/24

The three requisites of a plea of *res judicata*, said the Chief Justice in *Hiddingh v Denyssen & Ors* (1885) 3 Menz 424, quoting Voet (44.2.3), are that the action in respect of which judgment has been given must have been between the same parties or their privies, concerning the same subject matter and founded upon the same cause of complaint as the action in which the defence is raised ...

In order to determine the cause of complaint, the pleadings and not the evidence in the case must be looked at.’

Subsequently, in *Mitford's Executor v Ebden's Executors & Ors* 1917 AD 682 at 686, Maasdorp JA said the following:

‘The question now arises whether that decision was given under circumstances which preclude the plaintiff from bringing his present action. Are the first defendants entitled to set up that decision as *res judicata* in the present action? To determine that question it will be necessary to enquire whether that judgment was given in an action (1) with respect to the same subject matter, (2) based on the same ground, and (3) between the same parties.’”

60. From the above authorities, the following essential elements of the plea may be distilled as follows:

- (1) the two actions must be between the same parties or their privies;
- (2) the two actions must concern the same subject-matter, and
- (3) the two actions must be founded upon the same cause of action

61. The first two elements of the plea are common cause. The parties in the suits under discussion are the same. In its judgment, the court *a quo* made the finding that the subject matter was the same as that of the case which culminated in the appeal under SC 15/21. The third element is that both actions are founded on the same cause of action. This is related to the legality of the legislation in question. This last is the issue that the court *a quo* decided to determine.

62. The court *a quo* decided to hear the matter on the premise that it could legitimately do so on the “basis that the issue of the constitutionality of the Directive and of those legislative provisions was not determined, either to finality or at all.” The court *a quo* specifically found that the plea did not apply because the earlier judgment by the High Court which had discussed the Directive had been set aside by the Supreme Court. The court said:

“[15] I disagree that in the present application issue estoppel or *res judicata* can be invoked successfully for the reason that the Supreme Court has determined that the consideration of the constitutionality of the Exchange Control Directive RT120/2018 had not been properly motivated before this court in those proceedings and had therefore been improperly decided. The decision of this court on that point has been vacated. Manifestly, it remains open. In other words, the question of the constitutional validity of the Exchange Control Directive RT120/2018 and of s 44B (3) and (4) of the Reserve Bank Act has not been determined.”

63. The following passage of the court *a quo*'s judgment perfectly encapsulates the essence of the applicants' cause of action as follows:

“[22] Holistically, what the applicants want in these proceedings is the impeachment of the device by which the monetary authorities managed to convert their USD 142 000 bank balance into an RTGS bank balance, and thereafter to be able to stop the applicants from accessing the amount in the original currency of the deposit.”

64. It is a settled principle that where a matter is *res judicata*, no court can competently reopen it. In *Wolfenden v Jackson* 1985 (2) ZLR 313 (S) at 316B-the court held as follows:

“The *exceptio rei judicatae* is based principally upon the public interest that there must be an end to litigation and that the authority vested in judicial decisions be given effect to, even if erroneous. See *Le Roux en 'n Ander v Le Roux* 1967 (1) SA 446 (A) at 461H. It is a form of estoppel and means that where a final and definitive judgment is delivered by a competent court, the parties to that judgment or their privies (or, in the case of a judgment *in rem*, any other person) are not permitted to dispute its correctness.”

65. *In casu*, the High Court proceeded to hear the matter in the face of spirited objections from the respondents. They contended that the court was procedurally barred from hearing the parties on the specific application before it. By parity of reasoning, a finding by the High Court that the matter before it was *res judicata* would have disposed of the dispute at that stage. The respondents have raised the same issue before this Court, arguing that the High Court ought to have upheld the objection by withholding its jurisdiction. Notwithstanding the allegation of a plea of *res judicata*, the Constitution provides in s 175 (1) that where a court makes an order of constitutional invalidity, such order has no force and effect unless and until confirmed by the Court. Since confirmation proceedings are in the nature of constitutional review, the court is enjoined to carry out an independent investigation as to whether the proceedings which resulted in the order of constitutional invalidity of legislation now before it for confirmation or variation followed the adjectival or procedural tenets of constitutional

litigation before confirming or declining to confirm the proceedings as required by s 175 (1).

66. The High Court proceeded with the matter and this renders the question of the issue estoppel as being moot. Whether the matter was *res judicata* is of no moment in view of the role of the Court in confirmation proceedings following a declaration of invalidity of any law. The Court would be seized with the matter irrespective of the plea of *res judicata*. A finding that the matter was *res judicata* would not be dispositive of the dispute nor would it satisfy the requirements set out in s 175 (1) which oblige the Court to undertake a review of the proceedings resulting in the order of invalidity.
67. As I have concluded above, there was no constitutional issue for determination before the High Court. In the circumstances, it becomes unnecessary to consider the content of the right to property under s 71.

Judgment No. CCZ 05/24  
Const. Application No. CCZ 11/23

24

### **DISPOSITION**

68. The proceedings in the court *a quo* were procedurally deficient. The applicants approached the court in terms of s 85 (1) (a) of the Constitution. The procedure contemplated in s 85 is a direct enforcement procedure for the enforcement of fundamental rights and freedoms. The provision cannot be invoked in respect of non-constitutional remedies. The cause of action seeking the invalidation of the Exchange Control Directive R120/2018 on the basis that it is *ultra vires* s 35 (1) of the Exchange Control Regulations 1996 had no relationship with the protection and enforcement of fundamental rights and freedoms contained in the Declaration of rights. The same applies to the cause of action seeking the payment of USD 142 000. To the extent that the application comprised two composite causes of action, on the one hand,



constitutional and the other non-constitutional, it was therefore improperly before the court *a quo*.

69. By a combination of imprecise pleading and improper conflation of constitutional and non-constitutional issues in one application, there was no valid constitutional application before the court *a quo*.

70. The fact that it was contended by the applicants that the Exchange Control Directive R120/2018 is *ultra vires* s 35 (1) of the Exchange Control Regulations 1996 is evidence that there was no ripe constitutional question. The law is settled that where there is a statute or law designed to provide effective redress litigants must find redress in that law rather than approaching the court pleading a constitutional issue. The court *a quo* ought to have avoided the purported constitutional question before it.

Judgment No. CCZ 05/24  
Const. Application No. CCZ 11/23

25

71. In the light of these reasons, judgment was entered as afore-stated.

**MALABA CJ** : **I agree**

**GWAUNZA DCJ** : **I agree**

**GARWE JCC** : **I agree**

**MAKARAU JCC** : **I agree**

**HLATSHWAYO JCC** : **I agree**

**PATEL JCC** : **I agree**

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