

REPORTABLE (6)

BONNYVIEW ESTATE (PRIVATE) LIMITED

v

(1) ZIMBABWE PLATINUM MINE (PRIVATE) LIMITED

(2) MINISTRY OF LANDS AND RURAL RESETTLEMENT

**CONSTITUTIONAL COURT OF ZIMBABWE
HARARE, JANUARY 18, 2019 & FEBRUARY 27, 2019**

E Matinenga, for the applicant

K Kachambwa, with *D Muchada*, for the first respondent

No appearance for the second respondent

IN CHAMBERS

MALABA CJ: This is a chamber application for leave to appeal to the Constitutional Court (“the Court”) from a decision of the Supreme Court in terms of r 32(2) of the Constitutional Court Rules SI 61/2016 (“the Rules”). The rule provides that “a litigant who is aggrieved by the decision of a subordinate court on a constitutional matter can apply to the Constitutional Court for leave to appeal against such decision”.

The Court holds that the present application is without merit and ought to be dismissed with costs. The reasons for the decision are set out below.

The applicant is a duly registered company and was the owner of a commercial farm in Chegutu known as Bulfield Farm, measuring 1223.1078 hectares in extent. In 1995

BHP Minerals (“BHP”) discovered a large platinum deposit in the area and subsequently acquired mining rights by obtaining a Special Mining Lease in terms of the Mines and Minerals Act [*Chapter 21:05*]. BHP was granted a servitude over 788 hectares of the farm in exchange for four million Zimbabwean dollars and a Notarial Deed of Servitude was duly registered in respect of the same.

In 2001 another entity, by the name of Hartley Platinum Mines (Pvt) Ltd, entered into a lease agreement with the applicant, in terms of which the applicant leased part of the farm. The first respondent subsequently assumed all the lease rights and mining rights from the two companies.

In 2000 Bulfield Farm was listed for compulsory acquisition through a *Government Gazette* dated 1 September 2000. On 15 October 2004 a notice of compulsory acquisition in terms of s 8 of the Land Acquisition Act [*Chapter 20:10*] (“the Act”) was issued in respect of the farm. The effect of that notice was that all acquired land vested in the State. In 2005 the Constitution of Zimbabwe was amended by the promulgation of ss 16A and 16B. In terms of these amendments, all agricultural land that was identified for acquisition and gazetted by the State was deemed to have been acquired by the State from the date of gazetting.

After the expiry of the lease, the first respondent remained in occupation of the land. It refused to renew the lease agreement on the basis that the land had been acquired by the State and that the applicant had lost all rights and title to it. The first respondent took the view that the applicant could not claim rentals for land it did not own.

The applicant approached the High Court, seeking a declaratory order that it was entitled to all benefits deriving from the first respondent’s occupation of the section of Bulfield Farm over which the applicant had passed the Notarial Deed of Servitude. It is pertinent to note at this point that in its founding affidavit before the High Court the applicant

stated that, although Bulfield Farm had been listed for compulsory acquisition in 2000, it had objected to the acquisition and the farm was subsequently delisted through a government notice.

The first respondent opposed the application and raised a preliminary point that the applicant had no *locus standi in judicio* to seek the relief that it did. It averred that the farm having been compulsorily acquired by the State, ownership now vested in the State. The applicant had no right to claim rentals over land which it did not own.

At the hearing of the matter, the High Court was of the view that the issue of *locus standi* had to be dealt with first as its resolution could dispose of the application in its entirety. The court found that the applicant had failed to prove its allegation that the farm had been delisted and ought to be deemed not to have been compulsorily acquired. It further found that no evidence had been attached by the applicant in terms of s 5(7) of the Act to show that a notice had been published in the *Government Gazette* withdrawing the notice of acquisition.

Consequently, it was held that Bulfield Farm had been compulsorily acquired in October 2004 when the acquisition order was gazetted and that the acquisition was given constitutional recognition when the farm was listed in terms of s 16B(2)(a)(i) of the former Constitution. The High Court held that the effect of the acquisition of Bulfield Farm was the alienation of all the applicant's rights in the farm, save the right to claim compensation from the State for any improvements effected on it before its acquisition. As ownership now vested in the State, the court found that the applicant did not have *locus standi* to institute proceedings claiming payment of rentals by the first respondent and the application was dismissed.

Aggrieved by that decision, the applicant noted an appeal to the Supreme Court (“the court *a quo*”) on 12 July 2017. Whilst the Notice of Appeal was timeously filed with the Registrar of the court *a quo*, the applicant failed to serve a copy of the notice on the Registrar of the High Court within the prescribed period, thereby rendering the Notice of Appeal out of time and fatally defective. Thereafter the applicant filed an application in the court *a quo* for condonation of the late filing of the appeal and extension of time within which to appeal.

The court *a quo* dismissed the application and found that the applicant had no prospects of success on appeal. It upheld the High Court’s reasoning that the acquisition of land by the State necessarily meant the extinction of rights held by the applicant as owner and the consequent loss of *locus standi* on its part to bring any action based on the extinguished rights. Further, the court *a quo* found that the applicant incorrectly sought to challenge the correctness or otherwise of the acquisition of the land itself by the State, which issue had not been raised in the High Court and thus could not be argued on appeal. The sole ground of appeal that the applicant sought to raise on appeal was held to be incompetent, as the constitutionality of the acquisition of the land had not been challenged in the High Court. Accordingly, the court *a quo* dismissed the application.

The applicant was dissatisfied with that decision and filed the application on 12 October 2018.

The requirements of an application of this nature were set out in *The Cold Chain (Pvt) Ltd t/a Sea Harvest v Makoni* CCZ 8/17 at pp 3-4 of the cyclostyled judgment as follows:

“The requirements for leave to appeal to the Court from a subordinate court are these:

- a) Firstly, there must be a constitutional matter for determination by the Constitutional Court on appeal. The reason is that in terms of s 167(1) of the Constitution the Constitutional Court is the highest court in all constitutional matters and decides only constitutional matters and

issues connected with decisions on constitutional matters. Rule 32(2) of the Constitutional Court Rules makes it clear that only a litigant who is aggrieved by the decision of a subordinate court on a constitutional matter only has a right to apply for leave to appeal to the Constitutional Court (the underlining is for emphasis).

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* 2015 (2) ZLR 351 (CC).

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.

- b) Secondly, the applicant must show the existence of prospects of success for leave to be granted. In *Nehawu v University of Cape Town* 2003 (2) BCLR 154 (CC), the Constitutional Court of South Africa held that the applicant must show that there are reasonable prospects that the Constitutional Court 'will reverse or materially alter the judgment if permission to bring the appeal is given'."

What is clear from the above authority is the following -

1. The applicant must intend to apply for leave to appeal against a decision of a subordinate court on a constitutional matter.
2. The constitutional question must be clearly and concisely set out.
3. The applicant must demonstrate prospects of success on appeal.

In casu, it is the applicant's contention that a constitutional matter was raised before the High Court and the court *a quo*. The applicant annexed to the application the founding

affidavit in the application before the High Court, which is said to have raised a constitutional issue pertaining to the acquisition of a portion of Bulfield Farm which was the subject of the Servitude Agreement. In terms of para 34 of the founding affidavit, the applicant sought the following relief:

“In the circumstances I seek an order that solely with respect to the land which is the subject of the servitude, it is ordered that the provisions of Amendment 17 do not apply to the leased area of the property and the applicant is entitled to all benefits that flow therefrom.”

The draft order to the application read as follows:

- “1. The applicant is entitled to all benefits deriving from the occupation by the respondent of that section of Bulfield Farm which is the subject of Notarial Deed of Servitude 11-7-95.
2. The respondent shall pay the applicant’s costs.”

Section 332 of the Constitution defines a constitutional matter as “a matter in which there is an issue involving the interpretation, protection or enforcement of this Constitution”.

What constitutes a constitutional matter was discussed by the Court in *Moyo v Sergeant Chacha & Ors* CCZ 19/17 at p 15 of the cyclostyled judgment as follows:

“The import of the definition of ‘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.”

After perusal of the papers filed in the High Court, it is apparent that the relief that was sought in the High Court did not involve the interpretation, protection or enforcement of the Constitution. Thus, no constitutional matter was raised or determined. What the applicant

simply sought was a declaration protecting its commercial interests in respect of a portion of Bulfield Farm.

That there was no constitutional matter before the High Court is even further apparent from the *ratio decidendi* of the court in dismissing the application. It reasoned that the applicant had failed to establish, on the papers filed of record, that the farm was subsequently delisted and should be deemed not to have been compulsorily acquired and that the applicant did not withdraw its formal admission that the farm had been acquired by the State. The issue of the acquisition and subsequent delisting of Bulfield Farm was a factual one and not a question of law. It did not involve the interpretation, protection or enforcement of the Constitution.

What the applicant had pleaded before the court was that the farm had been compulsorily acquired and was subsequently delisted by a Government Notice after it had objected to the acquisition. It then had to produce proof of the delisting but failed to do so. The basic principle at law is that he who alleges must prove. The applicant made an affirmative assertion of a fact which was not self-evident and thus had an obligation to prove the same. See *Liberal Democrats & Ors v President of the Republic of Zimbabwe E.D. Mnangagwa N.O. & Ors CCZ 7/18*. It failed to prove the facts it alleged. The result was that the High Court held that the acquisition of Bulfield Farm meant the alienation of all the applicant's rights and title, which now vested in the State. As such, it was found that the applicant had no *locus standi* to seek the declaratory order that it sought.

As already found above, there was no constitutional issue raised before the High Court. Neither did the court deal with one. The constitutionality of the acquisition of the farm itself was never questioned, even through the intended ground of appeal that the applicant sought to argue in the court *a quo*. The sole ground of appeal read as follows:

“The court *a quo* erred and misdirected itself at law in finding that the appellant did not have *locus standi in judicio* to institute action seeking the relief it sought against the first respondent arising out of a purported compulsory acquisition of a portion of Bulfield Farm by the second respondent, which portion of Bulfield Farm was the subject of a Notarial Deed of Servitude registered in favour of the first respondent on 11 July 1995.”

That ground of appeal did not raise any constitutional issue before the court *a quo*. In response to the applicant’s argument that it intended to challenge the constitutionality of the acquisition of the farm by the State as the land was not agricultural land, the court *a quo* dismissed the application before it. It held at p 4 of the cyclostyled judgment in *Bonnyview Estates (Pvt) Ltd v Zimbabwe Platinum Mines (Pvt) Ltd* SC 58/18 as follows:

“It cannot be disputed that acquisition of the land by the State necessarily meant the extinction of rights in the land held by the applicant as owner and the consequent loss of *locus standi* on its part to bring any action based on the extinguished rights, which was the *ratio decidendi* of the court *a quo*’s decision. The correctness of this finding is beyond reproach. To its credit, the applicant does not seek to challenge it on appeal. Instead, and incorrectly so, the applicant seeks to challenge the correctness or otherwise of the acquisition of the land itself by the second respondent on behalf of the State. It argued that it intends on appeal to raise the constitutionality or otherwise of the acquisition of its land by the State as the land in dispute is not agricultural.

With respect, this issue was not before the court *a quo* and therefore cannot be an issue on appeal. It is clearly an incompetent ground of appeal in the matter. An incompetent ground of appeal cannot be raised or sustained on appeal and it therefore does not and cannot enjoy any prospects of success on appeal. A ground of appeal that enjoys prospects of success on appeal is one that if successfully argued on appeal will result in the setting aside of the decision appealed against. An improperly raised ground of appeal cannot be argued on appeal and will thus have no effect on the judgment appealed against.”

Simply put, the *ratio decidendi* applied by the court *a quo* in dismissing the application for condonation and extension of time within which to note an appeal was that the application had no prospects of success on appeal. This was because the ground of appeal was incompetent and it raised a point that did not arise from the pleadings that were before the High Court.

It is settled law that a point of law can be raised for the first time on appeal if it involves no unfairness or prejudice to the party against whom it is raised. See *Kufa v The President of the Republic of Zimbabwe & Ors* CCZ 22/17. However, in this case, the position that the applicant sought to take in the court *a quo* would lead to manifest prejudice to the respondents, in that it sought to raise a fresh ground for the first time on appeal as the sole ground of appeal. Clearly this was not acceptable.

In argument before the Court, *Mr Matinenga*, for the applicant, said that the High Court erred, in that it did not direct itself to the central issue of whether or not the portion of Bulfield Farm had been acquired in terms of the law. It was argued that the portion of Bulfield farm, measuring 788 hectares in extent, which was subject to the Notarial Deed of Servitude, was not compulsorily acquired by the State as it was the subject of mining rights. It was alleged that the High Court fell into error in failing to find that the portion of the farm was unlawfully acquired. Thus, the applicant had the necessary *locus standi* to challenge the acquisition before the High Court.

In the Court's view, this argument would hold water had the applicant been in possession of separate title deeds, evincing its ownership of that specific part of the farm that was subject to the servitude. However, it is common cause that Bulfield Farm was held under one title deed and was compulsorily acquired as a whole by the State. This renders baseless the applicant's argument that the High Court ought to have considered the constitutionality of the acquisition of part of the farm when the farm was acquired as a whole.

The application also fails to satisfy the requirements of r 32(3)(c) of the Rules, which are to the effect that an application for leave to appeal should contain a "statement setting out clearly and concisely the constitutional matter raised in the decision and any other issues,

including issues that are alleged to be connected with a decision on the constitutional matter”.
(emphasis added)

The rationale behind this requirement is that the court seized with the matter must be made conscious of the constitutional question that it ought to determine. The constitutional issue that is to be decided by the court *a quo* ought to be raised by the party that seeks to benefit from its determination. The raising of a constitutional issue in a clear and concise manner allows the court to direct its mind to that issue. Thus, it is crucial that the court ought to have exercised its mind on the issue that was before it and made a determination. It is imperative that the constitutional question be properly raised and not be left hidden in the pleadings before the court.

In Canada, the Supreme Court is the highest court in the land. The Supreme Court Act (R.S.C., 1985, c. S-26) gives birth to the Rules of the Supreme Court of Canada (SOR 2002/1556). Part 5 of these Rules governs applications for leave to appeal and r 25(1)(c)(ii) is of importance. It provides as follows:

“Application for Leave to Appeal

25 (1) An application for leave to appeal shall be bound and consist of the following, in the following order:

- (a) a notice of application for leave to appeal in Form 25, citing the legislative provision that authorises the application for leave to appeal;
- (b) beginning with the court of first instance or the administrative tribunal, as the case may be, and ending with the court appealed from,
 - (i) copies of the reasons, if any, for the respective judgments of the lower courts, as issued by the lower courts,
 - (ii) copies of all formal judgments or orders, as signed and entered, and

- (iii) copies of all draft orders, the final versions of which shall be filed separately immediately after they are signed and entered;
- (c) a memorandum of argument divided as follows:
 - (i) Part I, a concise overview of the party's position with respect to issues of public importance that are raised in the application for leave to appeal and a concise statement of facts,
 - (ii) Part II, a concise statement of the questions in issue and, if the proposed appeal raises an issue in respect of the constitutional validity or applicability of a statute, regulation or common law rule or the inoperability of a statute or regulation, a concise statement of the issue." (the emphasis is mine)

In *Crowell v Randell* 35 U.S. 368 the United States Supreme Court, in interpreting similar provisions, as encapsulated in the Judiciary Act of 1789, said:

"In the interpretation of this section of the Act of 1789, it has been uniformly held, that to give this court appellate jurisdiction two things should have occurred and be apparent in the record: first, that some one of the questions stated in the section did arise in the court below; and secondly, that a decision was actually made thereon by the same court, in the manner required by the section. If both of these do not appear on the record, the appellate jurisdiction fails. It is not sufficient to show, that such a question might have occurred, or such a decision might have been made in the court below. It must be demonstrable, that they did exist, and were made."

In *Cardinale v Louisiana* 394 U.S. 437 (1969) MR JUSTICE WHITE also held at p 438:

"Although *certiorari* was granted to consider this question, the fact emerged in oral argument that the sole federal question argued here had never been raised, preserved, or passed upon in the state courts below. It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In *Crowell v Randell*, 10 Pet. 368 (1836), JUSTICE STORY reviewed the earlier cases commencing with *Owings v Norwood's Lessee*, 5 Cranch 344 (1809), and came to the conclusion that the Judiciary Act of 1789, c. 20, § 25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.'"

In casu, that there was no clear and concise statement setting out the constitutional matter in the two subordinate courts cannot be meaningfully disputed. This is because there

was no constitutional issue that was determined by the High Court or the court *a quo*. There is, therefore, no constitutional question that can be characterised as having been properly raised. In the absence of such constitutional question, the application fell short of the requirements of r 32(3)(c) of the Rules. The result is that the applicant cannot allege that the court *a quo* misdirected itself in respect of a matter that it was never called upon to decide for the purposes of the resolution of the dispute between the parties.

This brings to the fore the issue relating to the hierarchy of courts in non-constitutional matters. In this regard, s 169(1) of the Constitution becomes paramount. It provides as follows:

“169 Jurisdiction of Supreme Court

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

In *Rushesha & Ors v Dera & Ors* CCZ 24/17 GWAUNZA JCC (as she then was), at p 10 of the cyclostyled judgment, interpreted this provision in the following manner:

“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.”

In *Lytton Investments (Pvt) Ltd v Standard Chartered Bank Zimbabwe Ltd & Anor* CCZ 11/18, the Court held at p 22 of the cyclostyled judgment that the principles that emerge from s 169(1) of the Constitution, as read with s 26 of the Act, are clear. The Court then said:

“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.”

Further, s 26(1) of the Supreme Court Act [*Chapter 7:13*] reaffirms the above position. It states:

“26 Finality of decisions of Supreme Court

(1) There shall be no appeal from any judgment or order of the Supreme Court.”

As is apparent from the above provisions, the Supreme Court is the final court of appeal except in matters where the Court has jurisdiction. As already found, there was no constitutional issue raised before and determined by the High Court. Neither was there a constitutional issue raised before and determined by the court *a quo*. The dismissal of the application by the court *a quo* remains final. It cannot be appealed against.

The critical effect is that the first requirement in an application for leave to appeal to the Court, which is to the effect that a constitutional matter ought to have been raised in the subordinate court, has not been satisfied.

The second requirement in an application of this nature, as set out in *The Cold Chain* case *supra*, is that the applicant must demonstrate the prospects of success on appeal.

In assessing the prospects of success, it is pertinent to analyse the draft Notice of Appeal that was attached to this application. The grounds of appeal are set out as follows:

- “1. The court *a quo* erred in finding that the ground of appeal on which the appellant relied was not a ground of appeal that could be properly raised.
2. The court *a quo* erred in finding that the issue of the constitutionality of the acquisition of the land was not before the High Court.
3. In any event, the court *a quo* erred in finding in effect that a constitutional point cannot be raised for the first time on appeal.”

Based on those grounds, the relief sought is as follows:

- “1. The late filing of the notice of appeal be and is hereby condoned.

2. The applicant is granted an extension of time within which to note its appeal.
3. The notice of appeal shall be deemed to have been filed on the date of the grant of this order (or on such date as may be fixed by the judge).
4. There shall be no order as to costs.”

A reading of the grounds of appeal and the relief sought shows that the applicant is aggrieved with the denial of condonation and extension of time within which to appeal by the court *a quo*. In other words, the applicant queries the correctness of the court *a quo*'s judgment. There has been no demonstration of prospects of success by the applicant. All that the applicant has done is to pray for the condonation of the late noting of the appeal in the court *a quo*. No constitutional relief is sought. Consequently, there is no reasonable prospect that the Court would reverse or materially alter the judgment of the court *a quo* if permission to bring the appeal is given.

The refusal by the court *a quo* to grant condonation did not involve the determination of a constitutional issue. Neither did the dismissal of the application before the High Court. As such, the Court has no jurisdiction to hear and determine the question of the wrongness or otherwise of the decision of the court *a quo* on a non-constitutional issue.

The remarks by the Court in *Chiite & Ors v The Trustees of the Leonard Cheshire Homes Zimbabwe Central Trust* CCZ 10/17 at pp 5-6 of the cyclostyled judgment are apposite. The Court held as follows:

“What the Court has before it are disgruntled litigants who have attempted to try and obtain redress under the guise of an appeal on a constitutional matter. Their criticism of the judgment of the Supreme Court set out in what purports to be grounds of appeal is no more than a raging discontent over the factual findings of the Supreme Court. The grievances of the losers in the Supreme Court have all the hallmarks of a mere dissatisfaction with the factual findings by that court. See *De Lacy & Anor v South African Post Office* 2011(a) BCLR 905(CC) MOSENEKE DCJ paras 28 and 57.”

The applicant is simply disgruntled with the decision of the court *a quo* on a non-constitutional issue.

DISPOSITION

The application is dismissed with costs.

MAVANGIRA JCC: I agree

BHUNU JCC: I agree

Venturas & Samukange applicant's legal practitioners
Dube, Manikai & Hwacha first respondent's legal practitioners