

DISTRIBUATABLE (6)

**RITA MARQUE MBATHA
v
NATIONAL FOODS (PRIVATE) LIMITED**

**CONSTITUTIONAL COURT OF ZIMBABWE
GARWE AJCC, GOWORA AJCC & HLATSHWAYO AJCC
HARARE: 29 MARCH 2021 & 13 JULY 2021**

Applicant in person

A.K Maguchu, for the respondent

**Judgment No. CCZ 06/21
Constitutional Application No. CCZ 14/20**

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GOWORA AJCC: This is an application for leave to appeal to the Constitutional Court (“the Court”) against a decision of the Supreme Court (“the court *a quo*”) made in terms of r 32(2) of the Constitutional Court Rules, 2016 (“the Rules”). The premise on which the application is based is that the decision of the court *a quo* violated the applicant’s fundamental rights.

FACTUAL BACKGROUND

The facts of this matter are largely common cause. The applicant was employed by the respondent as a personal assistant to the Managing Director, Transport Division. By letter dated 15 June 2009, the applicant was notified that the respondent had restructured its divisions to avoid going into insolvency and that the restructuring had resulted in the

abolishment of her post. Consequent thereto, she was offered two options, viz: a retrenchment package or alternatively, placement on garden leave pending redeployment to any other available post within the respondent. Altogether, the exercise affected nine other employees in the respondent's transport division whose posts had been similarly abolished.

The applicant expressed her displeasure with the respondent's decision by issuing a memorandum to her employer requesting a grievance hearing. The hearing did not take place. Aggrieved by the respondent's failure to arrange the hearing, the applicant referred the dispute to a labour officer. The matter proceeded to conciliation but no settlement was reached and the dispute was referred to compulsory arbitration under the provisions of s 93 of the Labour Act [*Chapter 28:01*] ("the Act").

On 30 October 2009, the arbitrator issued an arbitral award and ordered that the applicant be reinstated without loss of salary and benefits, and that, if reinstatement was no longer tenable, the parties should, within 30 days, negotiate a severance package in lieu of reinstatement. The respondent failed to reinstate the applicant within 30 days but thereafter offered the applicant a position as personal assistant to the warehouse director. She accepted the offer.

However, the applicant was still dissatisfied with her conditions of service. She raised new grievances arising from her new workstation, namely, lack of access to the internet, the requirement that she share a printer, and the general condition of her office.

At the end of March 2010, the applicant resigned from employment after having worked a mere six days of that month. She averred that the office allocated to her made her

ill. Consequent to that, the applicant approached a labour officer alleging that she had been constructively dismissed by the respondent. The dispute was conciliated to no avail and the matter was once again referred to arbitration.

The arbitrator found that the applicant had failed to prove her claim for constructive dismissal and found for the respondent. Aggrieved by that decision, the applicant noted an appeal to the Labour Court on the ground that the arbitrator had grossly misdirected himself by concluding that there was no evidence to prove constructive dismissal. The Labour Court dismissed the appeal on the basis that the applicant had failed to prove how the absence of access to the internet, use of a communal printer, the belated reinstatement, the condition of the office and alleged unilateral variation of her conditions of service, could be interpreted as an attempt to constructively dismiss her from employment.

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The applicant was still aggrieved and noted an appeal to the court *a quo*. The issue for determination before that court was whether or not the applicant had been constructively dismissed. The court *a quo* held that the Labour Court had not misdirected itself in finding that the applicant had failed to prove her claim that she had been constructively dismissed by the respondent. The appeal was, as a consequence, dismissed with an appropriate order of costs.

The applicant has approached this Court seeking leave to appeal against the decision of the court *a quo*. She alleges that the court *a quo*'s decision made "conflicting and incorrect findings which cumulatively denied the applicant the benefit of her constitutional rights and negated the granting of the relief prayed for." It is also alleged that the court *a quo*

disregarded the constitutional matters raised before it, mainly that the applicant was deliberately housed in an inhabitable office which was making her ill.

The decision of the court *a quo* is also impugned on the basis that it allegedly condoned the respondent's "reprehensible conduct" in forcing the applicant to use a staircase which she said was not gender-sensitive and, in the process, subjecting her to an acute invasion of the most intimate core of her privacy and impaired her dignity. In that regard, the applicant claims that her fundamental rights as enshrined in ss 51, 56(1), 69(1), and 164(1) of the Constitution were violated by the decision of the court *a quo*.

The application is opposed. The respondent avers that there was no constitutional matter before the court *a quo* and, therefore, no proper appeal may lie against its decision. The respondent also submitted that the applicant is simply aggrieved by the general decision of the Supreme Court on the legal issue pertaining to her constructive dismissal. Lastly, the respondent prays that the application is ill-conceived and prays for its dismissal.

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ISSUE FOR DETERMINATION

The crisp issue for determination is whether or not the application for leave to appeal is properly before the Court.

THE LAW AND THE FACTS

Section 167(5(b) of the Constitution provides that the Rules must allow a person, when it is in the interests of justice and with, or without leave of the court, to appeal directly to the Court from any other court. Rule 32(2) is the pertinent rule in that regard and it gives effect to s 167(5(b) of the Constitution. It reads:

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

In *The Cold Chain (Pvt) Ltd t/a Sea Harvest v Makoni* 2017 (1) ZLR 14 (CC) the Court eloquently set out the requirements which ought to be satisfied in an application of this nature at p 15H- 16E 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).

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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 matter it was never called upon to decide for the purposes of the resolution of the dispute between the parties. See *Nyamande & Anor v Zuva Petroleum* CCZ 8/15.

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

- 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.”

These requirements were aptly summarised in *Bonnyview Estate (Pvt) Ltd v Zimbabwe Platinum Mine (Pvt) Ltd & Anor* CCZ 6/19 at p 5 of the cyclostyled judgment as follows:

- “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.”

The requirement that an applicant must intend to appeal against a decision of a lower court on a constitutional matter only must be rationalized in juxtaposition with s 167(1) of the Constitution which outlines the narrow jurisdiction of the court. Section 167(1) states the following:

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(1) The Constitutional Court—

(a) is the highest court in all constitutional matters, and its decisions on those matters bind all other courts;

(b) decides only constitutional matters and issues connected with decisions on constitutional matters, in particular references and applications under s 131(8) (b) and para 9(2) of the Fifth Schedule” (emphasis added)

In the same respect, the Court in *Sadziwani v Natpak (Pvt) Ltd & Ors* CCZ 15/19, emphasized its special jurisdiction in the following terms at pp 17-18 of the cyclostyled judgment:

“The Constitutional Court is a specialised court endowed with the purposefully narrow jurisdiction to determine constitutional matters only. The language of s 167(1) (b) of the Constitution is clear enough in this respect. The Court is established in terms of s 166 of the Constitution and s 167 provides for the jurisdiction of the Court.

In the *Lytton Investments* case *supra*, at p 9 of the cyclostyled judgment, the Court emphasised the special jurisdiction of the Court in the following terms:

‘The Court is a specialised institution, specifically constituted as a constitutional court with the narrow jurisdiction of hearing and determining

constitutional matters only. It is the supreme guardian of the Constitution and uses the text of the Constitution as its yardstick to assure its true narrative force. It uses constitutional review predominantly, albeit not exclusively, in the exercise of its jurisdiction.’

Where no constitutional issues are pertinent, the jurisdiction of the Court under s 167 of the Constitution is not triggered. In *Brink v Kitshoff NO* 1996 (4) SA 197 (CC), the South African Constitutional Court had the following to say at p 213E-F:

‘[28] The jurisdiction of this Court is limited to the interpretation, protection, and enforcement of the provisions of the Constitution (in terms of s 98(2) of the Constitution) and any other matter over which it is expressly given jurisdiction. Neither the question of when an estate becomes entitled to the proceeds of a life insurance policy in terms of section 44 nor the question of when a *concursum creditorum* will be initiated, are constitutional questions. This Court accordingly does not have jurisdiction over such matters.’

The Court is a specialist court and not a court of general jurisdiction. The principle of constitutional supremacy ensures that the jurisdiction of the Court, as defined in s 167 of the Constitution, is narrowly defined and given constitutional protection. In addition, the very definition of a constitutional matter itself, in terms of s 332 of the Constitution, presupposes that not every matter is a constitutional matter. If the resolution of a matter does not require the protection, interpretation or enforcement of the Constitution, it is not a constitutional matter and the Court cannot assume jurisdiction over it.”

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Rule 32 makes it clear that a party must intend to apply for leave to appeal against a decision of a subordinate court on a constitutional matter only. Further to that, the applicant must clearly and concisely set out the constitutional question that was raised before and determined by the lower court and lastly the applicant must demonstrate prospects of success on appeal.

To succeed, therefore, the applicant must first demonstrate that the court *a quo* made a decision on a constitutional matter which decision is appealable to the court in terms of r 32. In considering this issue, the remarks in the *Cold Chain* case are pertinent. In that case, the court discussed the test to be applied in determining whether or not the court *a quo* determined a constitutional matter. It held as follows at p 17A-B:

“The principles to be applied in the determination of the question whether the Supreme Court determined a constitutional matter are clear. It is not one of those principles that the court against whose judgment leave to appeal is sought should have referred to a provision of the Constitution. There ought to have been a need for the subordinate court to interpret, protect or enforce the Constitution in the resolution of the issue or issues raised by the parties. The constitutional question must have been properly raised in the court below. Thus, the issue must be presented before the court of first instance and raised again at or at least be passed upon by the Supreme Court, if one was taken.” (emphasis added)

In casu, it is apparent that the court *a quo* did not make a determination on a constitutional matter. What was before it was a simple matter of labour law, more specifically relating to the issue of whether or not the applicant had been constructively dismissed by the respondent. It identified the issue for determination in the following words at p 12 of the cyclostyled judgment:

“WHETHER OR NOT THE COURT A QUO CORRECTLY FOUND THAT THE APPELLANT WAS NOT CONSTRUCTIVELY DISMISSED?”

The appellant is challenging the findings of the court *a quo*. The position of law on such a challenge is settled. The findings of a lower court cannot be interfered with unless it is proven that they are grossly irrational. The law was clearly stated in *ZINWA v Mwoyounotsva* SC 28/15, where this Court held that:

“It is settled that an appellate court will not interfere with factual findings made by a lower court unless those findings were grossly unreasonable in the sense that no reasonable tribunal applying its mind to the same facts would have arrived at the same conclusion; or that the court had taken leave of its senses; or, put otherwise, the decision is so outrageous in its defiance of logic that no sensible person who had applied his mind to the question to be decided could have arrived at it, or that the decision was clearly wrong.”

In determining this appeal I will assess the correctness or otherwise of the determinations of the court *a quo* under the subheads it used in determining the appeal before it.”

In deciding that the applicant had not been constructively dismissed by the respondent, the court *a quo* did not interpret, protect or enforce the provisions of the Constitution. There was, before the court, no constitutional issue for determination. Instead,

the issue before the court was principally one on employment and it considered and applied the law on constructive dismissal as contained in s 12B (3)(a) of the Labour Act [*Chapter 28:01*]. As such, the issue of whether or not the applicant was constructively dismissed is a matter that fell entirely in the realm of employment law. The conclusion, therefore, is that the court *a quo* did not decide a constitutional matter.

From a perusal of the papers filed by the applicant, it appears that she is dissatisfied with the findings of the court *a quo*. The gravamen of her attack on the court *a quo*'s decision evinces a classic dissatisfaction with the findings of the court and nothing more. The grounds of appeal and the relief that the applicant seeks should leave to appeal be granted are telling in this regard. They are couched in the following manner:

“GROUNDS OF APPEAL

1. The court *a quo* erred in finding that the appellant was not constructively dismissed.
2. The court *a quo* erred by condoning a deliberate breach of statutory duty and violation of constitutional rights by the respondent.
3. The court *a quo* made a gross misdirection on the facts, amounting to a misdirection, in overlooking evidence, not exercising its equitable discretion at all, notwithstanding facts proffered which manifested good cause for the relief sought for constructive dismissal. (sic)
4. The court *a quo* committed a serious misdirection and acted capriciously by failing to exercise its discretion properly through an award of costs against the appellant where there were no exceptional or substantial reasons which warranted the same. (sic)

WHEREFORE, after the documents filed of record and hearing counsel:

1. The appeal succeeds with costs.
- 2.

IT IS DECLARED:

3. That the applicant's right to protection of the law enshrined in section 56(1) of the Constitution of Zimbabwe was infringed by the Supreme Court of Zimbabwe, in Judgment No. SC 149/20 in the matter between *Rita Marque Mbatha v National Foods (Pvt) Ltd*, SC 686/19, in that the Supreme Court failed to appreciate that it was obliged to set aside the Labour Court judgment No. LC/H/306/2019 based on the doctrine of stare decisis.

ACCORDINGLY, IT IS ORDERED

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4. That the Judgment No. SC 149/20 of the Supreme Court in Case No. SC 686/19 be and is hereby declared null and void and of no force or effect and is set aside.
5. The appeal [against the Labour Court's finding that the applicant was not constructively dismissed] is allowed with costs.
6. The arbitral award handed down on the 21st of August 2010 is hereby varied to read as follows:
 - (a) The claimant was constructively dismissed
 - (b) The respondent is ordered to pay claimant damages for dismissal
 - (c) Each party to bear its own costs.
7. In the event that parties fail to agree on the quantum of damages payable to the appellant, either party may approach the Labour Court on a matter of urgency for quantification thereof."

What emerges from the above is that the applicant does not seek relief from an allegation of a perceived violation of her fundamental rights as enshrined in the Constitution. She does not seek relief where the enforcement, protection, or interpretation of the Constitution is the cause for determination. What she essentially seeks is the setting aside of the decision of the court *a quo* on the merits of the dispute between herself and the respondent, that of alleged constructive dismissal. **Judgment No. CCZ 06/21** Constitutionally Application No. CCZ 14/20

that was raised before and determined by the court *a quo*, the applicant cannot successfully approach the Court for an order for leave to appeal. The institution of an application for an order for leave to appeal to the Court presupposes that there is a constitutional matter which was determined by a lower court, which matter is appealable to the Court. The purpose of the application would be to show that it is in the interests of justice that the constitutional matter concerned be heard and determined by the Court, it being common cause that s 167 (5)(b) of the Constitution makes the interests of justice a paramount consideration in determining whether or not the leave to appeal against a decision of a lower court should be granted.

Having considered all of the above, it cannot be gainsaid that no constitutional issues arise for determination consequent to the alleged infringements of the applicant's constitutional rights. The remarks of MALABA DCJ (as he then was) in *Chiite and Ors v*

The Trustees of the Leonard Cheshire Homes Zimbabwe Central Trust CCZ 10/17 are apposite. He stated the following at pp 5-6 of the cyclostyled judgment:

“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 and Anor v South African Post Office* 2011(a) BCLR 905 (CC) paras 28 and 57.”

Having found that no constitutional issue was placed before and determined by the court *a quo*, it follows that its decision was not on a constitutional matter. This means that the decision is final and non-appealable. Section 169(1) of the Constitution gives constitutional recognition to the principle of finality in litigation in non-constitutional matters and it provides the following:

“169 Jurisdiction of Supreme Court

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

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The above constitutional provision must be read together with s 26(1) of the Supreme Court Act [*Chapter 7:13*] which states that:

“26 Finality of decisions of Supreme Court

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

The position of the law as regards the finality of non-constitutional decisions by the Supreme Court was put beyond dispute by MALABA CJ in *Lytton Investments (Pvt) Ltd v Standard Chartered Bank Zimbabwe Ltd and Anor* CCZ 11/18 at p 22 of the cyclostyled judgment as follows:

“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 the power to alter the decision of the Supreme Court on a non-constitutional matter. Only the Supreme Court can depart from or overrule its previous decision,

ruling, or opinion on a non-constitutional matter. The *onus* is on the applicant to allege and prove that the decision in question is not a decision on the non-constitutional matter.”

The conclusion I have come to is that there is no proper application for leave to appeal before this Court. In my view, this finding should in ordinary course conclude the matter. However, the applicant has sought to impugn the decision of the court *a quo*, and the nature of the applicant’s attack on the decision of the court *a quo* deserves comment from this Court.

The basis of the applicant’s attack against the decision of the court *a quo* is that it allegedly violated her fundamental rights. As has been established above, it is common cause that the matter before the court *a quo* was one involving non-constitutional issues relating to the applicant’s alleged constructive dismissal. The basis of the present application is that the conduct of the court *a quo* resulted in a constitutionally objectionable decision.

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An attack against a judgment of a subordinate court on the basis that the judgment violates a fundamental right of the applicant must be brought to the court in terms of s 85(1) of the Constitution. It cannot be brought to court by way of an appeal against a decision of the court *a quo*. This position was settled in *Lytton Investments (Pvt) Ltd* case *supra* at pp 15-16 of the cyclostyled judgment wherein the court stated:

“In *Prosecutor General Zimbabwe v Telecel Zimbabwe (Pvt) Ltd* 2015 (2) ZLR 422 (CC) the applicant sought to approach the Court in terms of ss 167(1) and 176 of the Constitution. He sought an order setting aside a judgment of the Supreme Court directing him to issue a certificate of *nolle prosequi* to Telecel Zimbabwe (Pvt) Ltd. No constitutional matter had been raised before the Supreme Court. The applicant approached the Court because he was dissatisfied with the judgment. He did not approach the Court in terms of s 85(1) of the Constitution.

The Court dismissed the application because the applicant had failed to establish the basis on which he sought to approach it directly, seeking an order setting aside a Supreme Court judgment on a non-constitutional matter. One of the preliminary

points on which the application was dismissed was that it was not brought in terms of s 85(1) or other constitutional provisions that provide for such direct approach’.

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

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

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

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

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

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

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DISPOSITION

From the foregoing, it stands to reason that the applicant has failed the first rung of her cause. A perusal of the papers filed by the applicant established a failure on her part to meet the first requirement of r 32 of the Rules which requires that a litigant must intend to appeal against a decision of a lower court on a constitutional matter only. The applicant has not demonstrated that a constitutional matter ever arose or was determined by the court *a quo*. This in my view, obviates the need to consider the other requirements prescribed under r 32.

Ergo, absent a constitutional issue raised before and determined by the court *a quo*, the remedy of appeal is not available to the applicant. It is now settled that it is only a decision of a subordinate court on a constitutional matter that can be appealed to the Court. It is accepted that there was no constitutional issue that was raised before and determined by the court *a quo*. The result, therefore, is that the present application has no merit and ought not to succeed.

It is accordingly ordered as follows:

“The application be and is hereby dismissed with no order as to costs.”

GARWE AJCC : I agree
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HLATSHWAYO AJCC : I agree

Dube Manikai & Hwacha, respondent`s legal practitioners