

REPORTABLE: (9)

TENDAI MASHAMANDA

v

**(1) BARIADE INVESTMENTS (PRIVATE) LIMITED (2)
PUWAYI CHIUTSI (3) THE REGISTRAR OF DEEDS (4)
THE SHERIFF OF THE HIGH COURT (5) ELLIOT
ROGERS (6) ATTORNEY GENERAL ZIMBABWE**

**CONSTITUTIONAL COURT OF ZIMBABWE
GARWE JCC, HLATSHWAYO JCC & PATEL JCC
HARARE: 6 JULY 2022 & 25 JULY 2023**

L Madhuku for the applicant

T L Mapuranga for the first respondent

C Damiso for the fifth respondent

**AN APPLICATION FOR AN ORDER FOR LEAVE FOR DIRECT ACCESS TO THE
CONSTITUTIONAL COURT**

Judgment No. CCZ 9/23

Constitutional Application No. CCZ 12/22

1

HLATSHWAYO JCC:

[1] This is an application for direct access to this Court made in terms of r 21 of the Constitutional Court Rules, 2016 ("the Rules").

[2] The applicant is Tendai Mashamanda. The first respondent is Bariade Investments (Pvt) limited a company duly incorporated in terms of the laws of Zimbabwe. It was the appellant in SC-09-20. The second respondent, Puwai Chiutsi, was one of the respondents in SC-09-20. The third respondent, the Registrar of Deeds is a public official appointed in terms of s 4 of the Deeds Registry Act [*Chapter 20:05*]. The fourth respondent is the Sheriff of the High Court cited as the officer responsible for

executing judgments of the High Court. The fifth respondent, Eliot Rogers, was the fifth respondent in SC-09-20.

- [3] It is the applicant's case that the Supreme Court, in its determination in SC 9/20, infringed several of his constitutional rights. These rights are the following; the right to the protection of the law which he says is enshrined in s 56 (1) of the Constitution, the right to a fair hearing in terms of s 69 (2) and the right of access to the courts enshrined in terms of s 69 (3) of the Constitution.

BACKGROUND

- [4] Sometime in 2012, the fifth respondent obtained judgment in the High Court under HC 3331/14 against the second respondent. The court ordered the sale in execution of the second respondent's property known as the remainder of Subdivision C of Lot 6 of Lots 190,191,192,193,194 and 195, Highlands Estate of Welmoed (hereinafter referred to as "the property"). On 18 September 2017, the first respondent participated in the Sheriff's sale by public auction of the property and was declared the highest bidder after offering to pay USD\$270 000.

- [5] Thereafter, the second respondent lodged an objection to the confirmation of the sale by the fourth respondent in terms of r 359 (1) of the High Court Rules 1971 (hereinafter referred to as "**the High Court Rules**") and the objection was dismissed. Subsequently, the second respondent filed a court application under case number HC 11349/17 in which he sought the setting aside of the confirmation by the Sheriff of the sale of the disputed property, to the first respondent. MATHONSI J (as he then was) dismissed the application on the basis that the second respondent had conducted himself in a dishonourable and unworthy manner by misappropriating trust funds and

that, “he had employed every trick in the book to avoid paying his debt” to the fifth respondent.

[6] The second respondent then proceeded, unsuccessfully, to file an urgent chamber application for an interdict against the transfer of the property pending the outcome of the appeal that he had filed. Notwithstanding the fact that the second respondent had failed to secure an interdict against transfer of the property in question to the first respondent, the latter submitted it became aware that the first respondent had not only sold the property in question, but had also transferred it into the applicant’s name on 8 February 2019 under Deed of Transfer No.708/19.

[7] The fifth respondent then filed an urgent chamber application under HC 1444/19 in which he sought the cancellation of Deed of Transfer No.708/19. This was on the basis that the second respondent’s conduct was fraudulent since he had knowingly sold the property which was under judicial attachment without the knowledge of the fourth and fifth respondents. As a result, the fifth respondent argued, the sale in question was null and void. The court *a quo* dismissed the application, not on the merits, but on the basis that it could not grant a final order in an urgent chamber application which sought a provisional order. The fifth respondent went on to appeal to this Court against that decision and the appeal was heard jointly with second respondent’s appeal.

[8] Thereafter, the first respondent filed an application for the cancellation of Deed of Transfer No.708/19 under HC 2620/19. The court *a quo* dismissed the application holding that the matter was *res judicata* because it had already been decided by

MANZUNZU J in HC 1444/19, a circumstance that rendered the court *functus officio*. The court also held that a *pignus judiciale* could not conclusively be considered to have been created over the property in question since the first respondent had not proved the existence of a *caveat* registered against the title deed in the first respondent's name.

[9] Aggrieved, the first respondent noted an appeal to the Supreme Court – ((‘the court *a quo*’)) – under case number SC 9-20. The argument advanced by the first respondent was that the High Court had erred in coming to the conclusion that the material and live issue of the second respondent's fraud and forgery was not relevant to the just determination of the matter which was before it.

[10] It was the first respondent's further argument that the High Court had erred when it came to the conclusion that the judgment of the High Court, per MANZUNZU J, concerned the same subject matter as the application before it. The first respondent also argued that the High Court had erred in not coming to the conclusion that the question of equities was not a live issue before it and that it (the Court) had to determine, instead of, the question of the validity of the sale and transfer to the appellant in view of the *pignus judiciale* brought about by the attachment in execution.

[11] In disposing of the matter the court *a quo* held that the original judgment by MATHONSI J (as he then was) had been competently made and that it was an order against the transfer of the property in question otherwise than through the process ordinarily followed after a sale in execution is duly confirmed. The court *a quo* went

further to hold that although the property was still in the second respondent's name, it had ceased to be his to deal with as he wished from the moment that it was attached in execution and thereafter sold to the appellant because of the *pignus* that was operating against the property.

[12] The court *a quo* then dealt extensively with the judgment by CHITAPI J under judgment number HH 477/21. In analysing the judgment, the court *a quo* found that the processes leading to the default judgment granted by CHITAPI J as well as the order itself were irregular. That judgment was subsequently reviewed by the court *a quo* in terms of s 25 of the Supreme Court Act [*Chapter 7:13*]. The result was that the order of CHITAPI J was vacated.

[13] The Applicant was aggrieved and has approached this Court for direct access in terms of s 167 (5) (a) of the Constitution of Zimbabwe. The Applicant submits that three of his fundamental rights enshrined in Chapter 4 of the Constitution were infringed by the Supreme Court in SC 09/20 through judgment number SC-24-22. As already noted, the three rights that the applicant alleges were infringed are the right to the protection of the law as enshrined in terms of s 56 (1) of the Constitution, the right to a fair hearing enshrined in s 69 (2) of the Constitution and the right of access to the courts as enshrined in s 69 (3) of the Constitution.

[14] The first respondent has opposed the application and has argued that the Applicant lost the appeal on a non-constitutional matter. The first respondent further argues that the court *a quo* determined the appeal that was before it, prior to dealing with the irregular judgment by invoking s 25 of the Supreme Court Act. None of the

applicant's rights were therefore infringed either by the Supreme Court or by any other person. It is further argued that the provisions of s 25 of the Supreme Court Act are constitutional and that the Supreme Court's action of invoking that section are valid.

[15] The fifth respondent has also opposed the application and his first argument is that the present application is an abuse of court process because the Supreme Court did not infringe any of the applicant's rights in its determination. He further contends that the court *a quo* acted within its jurisdiction, and that it exercised its review powers according to s 25 (2) of the Supreme Court Act. He further submits that a *pignus judiciale* is a recognized part of our law.

PROCEEDINGS IN THIS COURT

Judgment No. CCZ 9/23

Constitutional Application No. CCZ 12/22

6

[16] *Mr Madhuku*, for the applicant, argued that it is now trite in this jurisdiction that a party cannot challenge a decision of the Supreme Court on the basis that it was wrong. However, a Supreme Court decision can infringe a party's rights in the manner in which it determines the matter. He submitted that the Supreme Court infringed the applicant's right to equal protection of the law in terms of s 56 (1) of the Constitution, the right to a fair hearing in s 69 (2) and the right of access to the courts as enshrined in s 69 (3) of the Constitution.

[17] Counsel for the applicant further argued that the Supreme Court acted without jurisdiction when it set aside the High Court's decision under judgment number HH 477/21. He argued that the effect of CHITAPI J's judgment rendered the appeal

moot. According to the applicant, the setting aside of the High Court's decision was unprocedural as the Supreme Court acted outside the record.

[18] It was the applicant's further argument that the Supreme Court had erroneously invoked its review authority under s 25 (2) of the Supreme Court Act [*Chapter 7:13*] in reviewing a default judgment. This, it was submitted, is contrary to its review powers. It was the applicant's argument that a default judgment cannot be reviewed under the limited review powers granted to the Supreme Court. *Mr Madhuku* further argued that the Supreme Court applied a non-existent law. Whilst the law holds that the Supreme Court cannot be wrong, it cannot, however, invent a law and must always seek to apply an existing law.

[19] *Per contra*, *Mr Mapuranga*, for the first respondent raised a preliminary point that the applicant did not have *locus standi* to challenge the s 25 (2) portion of the judgment of the Supreme Court. It was his argument that the judgment dealt with a long-standing dispute regarding execution which had started in 2017 and was completed in 2018. *Mr Mapuranga* submitted that the applicant only came into the picture in 2019. He further argued that in the circumstances having a financial interest did not endow the applicant with the necessary *locus standi*.

[20] In response to the point *in limine* raised by the first and fifth respondents, counsel for the applicant submitted that such an argument was a misdirection. He submitted that the applicant had *locus standi* on the basis that the Supreme Court infringed his rights in terms of s 56 (1), s69 (2) and (3) of the Constitution.

[21] On the merits, *Mr Mapuranga* submitted that there were no prospects of success in this matter. He argued that there was no law that was raised by the applicant that would have protected the allegedly infringed rights. *Mr Mapuranga* further argued that the Supreme Court provided ample authority for the view that a property subject to a *pignus judiciale* could not be sold. He argued that the decision made by the Supreme Court was therefore not novel and, accordingly, the argument by the applicant lacked merit.

[22] He further argued that the applicant's submission that a default judgment cannot be reviewed was based on an entirely misplaced principle. He stated that there was no principle that disabled the review of a default judgment. *Mr Mapuranga* further stated that s 25 of the Supreme Court Act gave the Supreme Court the jurisdiction to act in the manner it did. It was his contention that the question of review was addressed and that none of the parties in the Supreme Court were willing to defend the default judgment granted by CHITAPI J.

[23] Mrs *Damiso*, for the fifth respondent, associated herself with the preliminary point raised by the first respondent in relation to the applicant's *locus standi* to bring the application. On the merits, she submitted that the application could not succeed as articulated by the first respondent. However, she added that the content of the right in s 18 (1) of the old Constitution now appears and is subsumed in and under numerous other provisions of the current Constitution which are, for example, s 68, s 69 and s 70. She argued that it is these sections that continue to give life to the right previously protected in s 18 (1) of the old Constitution.

[24] She further argued that very minimal submissions had been made by the applicant in impugning s 25 (2) of the Supreme Court Act. She submitted that the impugned provision would remain valid until declared unconstitutional. She submitted that it was trite in this jurisdiction that a court will not readily declare a provision unconstitutional. It was her argument therefore that if there is an alternative interpretation that avoids declaring a provision invalid, the Court ought to follow that approach. In the circumstances, she argued that there needed to be more substantial arguments made than a mere reference to constitutional invalidity contained in two paragraphs.

PRELIMINARY POINT

[25] It is imperative to deal first with the preliminary point raised by *Mr Mapuranga* for the first respondent. *Mr Mapuranga* argued that the applicant did not have the necessary *locus standi* to challenge the s 25 (2) portion of the judgment of the court *a quo*. The portion of the judgment referred to by *Mr Mapuranga* was the portion wherein the court *a quo* set aside the judgment by CHITAPI J in HH 477/21. The matter in HH 477/21 involved the second respondent as the applicant and the first, fourth, and fifth respondents as the respondents. It is common cause that the applicant was not party to those proceedings, hence any order made would not have had any effect on him.

[26] In law, standing or *locus standi* is a condition that a party seeking a legal remedy must show that they have by demonstrating to the court sufficient connection to and harm from the law or action challenged to support that party's participation in the case. Considering the principle of *locus standi*, the Supreme Court in ***Sibanda & Ors v The***

Apostolic Faith Mission of Portland Oregon (Southern African Headquarters) Inc

SC 49/18 held as follows:

“It is trite that *locus standi* is the capacity of a party to bring a matter before a court of law. The law is clear on the point that to establish *locus standi*, a party must show a direct and substantial interest in the matter. See *United Watch & Diamond Company (Pty) Ltd & Ors v Disa Hotels Ltd & Anor* 1972 (4) SA 409 (c) at 415 A-C and *Matambanadzo v Goven* SC 23-04.”

It is settled that the principle of *locus standi* is concerned with the relationship between the cause of action and the relief sought. Thus, a party needs to show that they have a direct, personal and substantial interest in the matter in contention. See ***Liziwe Musedzera & Ors v Minister of Agriculture, Lands, Water and Rural Settlement & Ors CCZ 1/22*** at p 22.

[27] There is no doubt that the applicant bought the property in question at a public auction and was declared the highest bidder after offering the sum of US\$ 270,000.00. It follows, therefore, that the applicant would have a direct and substantial interest in any matter regarding anything concerning the property. The fact that he was not cited in the proceedings in HH 477/21 does not take away the fact that the applicant had bought the property and that he had a direct and substantial financial interest in it.

[28] The above states position applies to private law litigation specifically. The position is however now settled that the new Constitution has expanded the *locus standi* of persons seeking to approach the Court for the enforcement of an alleged breach of a fundamental right (public law litigation). In this regard I can do no better than cite the remarks of MALABA CJ in ***Meda v Matsvimbo Sibanda & Ors CCZ 10/16*** at p 5 wherein he held as follows:

“It is clear from a reading of s 85(1) of the Constitution that a person approaching the Court in terms of the section only has to allege an infringement of a fundamental right for the Court to be seized with the matter. The purpose of the section is to allow litigants as much freedom of access to the courts on questions of violation of fundamental human rights and freedoms with minimal technicalities.”

See also the *dicta* in ***Chirambwe v Parliament of Zimbabwe & Ors CCZ 4/20*** and ***Gonese & Anor v President of Zimbabwe & Ors CCZ 10/18***.

[29] *Mr Madhuku*, for the applicant submitted that the court *a quo* infringed his client’s (the applicant’s) rights when it acted without jurisdiction. He argued that the court *a quo*’s decision to invoke and determine a matter under s 25 (2) of the Supreme Court Act without hearing the parties was an infringement of the applicant’s rights enshrined in ss 56, 69 (2) and (3) of the Constitution.

Judgment No. CCZ 9/23

Constitutional Application No. CCZ 12/22

11

[30] That mere allegation alone is sufficient to establish *locus*. On the reasoning in *Meda, supra*, the preliminary point raised by the first respondent stands dismissed.

ISSUE FOR DETERMINATION

[31] The sole issue that arises for determination in this application is whether or not it is in the interest of justice to grant direct access to this Court.

[32] Applications of this nature are regulated by the rules of this Court. The applicant therefore has to first satisfy the requirements as set out in r 21 (3). It was stated in ***Liberal Democrats & Ors v The President of the Republic of Zimbabwe E.D. Mngangagwa N.O & Ors CCZ 7/18***, at p 10, as follows:

“...direct access to the Constitutional Court is an extraordinary procedure granted in deserving cases that meet the requirements prescribed by the relevant rules of the Court.”

[33] Rule 21 (3) of the Rules contains the requirements that ought to be satisfied in an application of this nature. It states the following:

“(3) An application in terms of subrule (2) shall be filed with the Registrar and served on all parties with a direct or substantial interest in the relief claimed and shall set out—

- (a) the grounds on which it is contended that it is in the interests of justice that an order for direct access be granted; and
- (b) the nature of the relief sought and the grounds upon which such relief is based; and
- (c) whether the matter can be dealt with by the Court without the hearing of oral evidence or, if it cannot, how such evidence should be adduced and any conflict of facts resolved.” (emphasis added)

[34] Currie I and de Waal J in “*The Bill of Rights Handbook*” (6th edn, Juta & Co (Pty) Ltd, Cape Town, 2013), at p 128, discuss the importance of the requirement that an applicant should show that it is in the interest of justice that the application be granted. They state as follows:

“Direct access is an extraordinary procedure that has granted by the Constitutional Court in only a handful of cases... The Constitutional Court is the highest court on all constitutional matters. If constitutional matters could be brought directly to it as a matter of course, the Constitutional Court could be called upon to deal with disputed facts on which evidence might be necessary, to decide constitutional issues which are not decisive of the litigation and which might prove to be of purely academic interest, and to hear cases without the benefit of the views of other courts having constitutional jurisdiction. Moreover, it is not ordinarily in the interests of justice for a court to sit as a court of first and last instance, in which matters are decided without there being any possibility of appealing against the decision given.”

[35] It is settled law that the appellate jurisdiction of the Court is triggered only where a constitutional matter arose in the court *a quo* and was decided by that court. See ***Sadziwani v Natpak (Private) Limited & Ors*** CCZ 15/19 at p 6. 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”. The

jurisdictional effect of the definition of a constitutional matter was discussed in **Moyo v Sergeant Chacha and Ors** CCZ 19/17 at p 15 of the 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.”

[36] It also ought to be noted that the mere citation of constitutional provisions or alleged infringements of constitutional rights does not mean that a constitutional issue has been raised. In **Magurure and Ors v Cargo Carriers International Hauliers (Pvt) Ltd t/a Sabot** CCZ 15/16 the Court had occasion to deal with this aspect. It stated as follows at p 4 of the judgment:

“Have the applicants brought to the Court for determination a matter in which there is an issue involving the interpretation, protection or enforcement of the Constitution? The fact that the applicants allege that the respondent has by the conduct it is alleged to have committed infringed their fundamental right to fair and safe labour practices enshrined in s 65(1) of the Constitution does not mean that they have raised a constitutional matter. It is for the Court to decide whether the determination of the legality of the conduct of the respondent if proved would require the interpretation and application of s 65(1) of the Constitution.”

[37] The applicant *in casu* merely challenges the correctness of the findings made by the court *a quo* but no constitutional issues arise therefrom. In **The Cold Chain (Pvt) Ltd t/a Sea Harvest v Makoni 2017 (1) ZLR 14 (CC)** at 17A-B, 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:

“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)

[38] The applicant alleges that his right to equal protection of the law in terms of s 56(1) of the Constitution was violated by the manner in which the court *a quo* disposed of the matter. In the court *a quo* was an appeal from the decision of the High Court, which decision was not based on the enforcement or interpretation of the Constitution.

The court *a quo* determined that it was clear that the second respondent could not dispose of the property whose sale the court under HC 604/18 had confirmed [which in our view was correct]. Once the Sheriff’s sale was confirmed by the High Court, the second respondent could no longer deal with or dispose of the property as he wished. The decision under HH 604/18 was competently made and should remain extant. It was further determined by the court *a quo* that the second respondent, being a senior legal practitioner, could not have failed to appreciate that he was acting contrary to law. It was further determined that because there was a *pignus judiciale* over the property, the second respondent did not have the legal competency to dispose of the property after it was attached.

Judgment No. CCZ 9/23

Constitutional Application No. CCZ 12/22

14

[39] The decision of the court *a quo* was made in accordance with the law. I find nothing to fault in the reasoning of the court *a quo* on this point. The court *a quo* acted within the confines of the law and as determined in *Denhere, supra*, the Court remarked thus at p 24 of the judgment:

“When the Supreme Court, like any other court, sits to decide an appeal, all it is required to do is to dispose of the matter in a manner which is consistent with the law. A judicial decision is the end result of a process that is regulated by law. In other words, a person has a right to a fair judicial process.”

[40] Such determination by the court *a quo* cannot be said to have been irregular. I find no basis for the suggestion that the applicant's rights under s 56 of the Constitution were violated by the court *a quo*. There is no indication as to how the court *a quo* could have violated the applicant's right to equal protection of the law. The allegations by the applicant are meritless and thus it is not in the interest of justice to grant an order of direct access to this Court.

[41] The applicant's further grievance appertains to the manner in which the court *a quo* handled the matter. His argument was that the court acted without jurisdiction which was then contrary to a fair hearing under s 69 (2) and a mockery of the right of access to the courts as protected by s 69 (3). The applicant further argued that determining a matter under s 25 (2) of the Supreme Court Act without hearing the parties on whether the section was applicable in the circumstances is a clear infringement under s 69 (2) and (3) of the Constitution.

Judgment No. CCZ 9/23

Constitutional Application No. CCZ 12/22

15

[42] The applicant's contention is that the court *a quo* acted without jurisdiction when it set aside the decision of CHITAPI J under HH 477/21. The judgment under HH 477/21 was a default judgment which set aside the decision by MATHONSI J (as he then was) under HH 604/18 which had endorsed the confirmation of the sale of the contested property by the Sheriff. The court *a quo* found that the determination by CHITAPI J was not consistent with what had been sought by the parties and invoked the powers of review under s 25 of the Supreme Court Act.

[43] The Supreme Court Act confers upon the Supreme Court various powers and one such provision is s 25. The section provides as follows:

“REVIEW POWERS

1. Subject to this section, the Supreme Court and every judge of the Supreme Court shall have the same power, jurisdiction and authority as are vested in the High Court and the judges of the High Court, respectively, to review the proceedings and decisions of inferior courts of justice, tribunals and administrative authorities.

2. The power, jurisdiction and authority conferred by subs (1) may be exercised whenever it comes to the notice of the Supreme Court or a judge of the Supreme Court that an irregularity has occurred in any proceedings or in making of any decision notwithstanding that such proceedings are, or such decision is, not the subject of an appeal or application to the Supreme Court.[emphasis added]”

[44] From a reading of the above provision, the Supreme Court has the power to review decisions of lower courts. These powers are anchored by the provisions of s 169(2) of the Constitution, which provides thus:

“Subject to subsection (1), an Act of Parliament may confer additional jurisdiction and powers on the Supreme Court.”

As observed in the case of **Chombo v National Prosecuting Authority & Ors** S–158–21, the Supreme Court’s power of review has always been there and that power has been made use of in this jurisdiction since time immemorial. The powers of review can be invoked by a court *mero motu* whenever an irregularity has come to the court’s attention.

[45] The applicability of s 25 of the Act was extensively canvassed in the case of **PG Industries Zimbabwe (Pvt) Ltd v Bvekerwa & Ors** SC 53/16 at page 17H to 18D wherein it was stated:

“In terms of s 25(2) this court is imbued with powers to set aside proceedings that are irregular even if those proceedings are not the subject of an appeal or application before the court. I am fortified in this view by the remarks of ZIYAMBI JA in **The Chairman Zimbabwe Electoral Commission & 2 Ors v Roy Bennet & Anor** SC 48/05, as follows:

‘Section 25(2) confers additional jurisdiction which may be exercised when it comes to the notice of the Supreme Court or a judge of that court that an irregularity has occurred in proceedings not before it on appeal or application. Thus s 25(2) deals with irregularities in respect of which no appeal or

application is before the Supreme Court and the review is undertaken at the instance of the Supreme Court and not of any litigant’.”

[46] The Supreme Court has mostly recently exercised this power of review by setting aside decisions of the High Court - see *MDC & Ors v Timveos & Ors* SC-9-22. What the court *a quo* did in *casu* was not any different from what the Supreme Court has been empowered to do. An irregularity occurred and then it came to the attention of the court. Acting in terms of the powers conferred upon it in terms of s 25 (2) of the Supreme Court Act, the court *a quo* duly exercised its powers and set the decision aside. The court *a quo* acted in terms of the law.

[47] The review powers do not require the court to invite parties to first make submissions before the court makes a decision, although the court will ordinarily bring to the attention of the parties the irregularity, which it duly did in **Judgment (No. CCZ 9/22) Constitutional Application No. CCZ 12/22** (the parties were prepared to support the irregularity). The court simply makes a determination *mero motu* after noticing an irregularity and alerting the parties to it where possible. The court *a quo* in exercising its review powers cannot in the circumstances be said to have violated the applicant’s right to a fair hearing and access to the courts. The right to a fair hearing was not violated neither was the right of access to court. The application has no prospects of success in that regard.

[48] Taking into account the above, I am of the considered view that there was no misdirection by the court *a quo* justifying the grant of direct access. The applicant is merely dissatisfied by the findings of the Supreme Court on the merits. He was aggrieved that he did not receive a judgment that was in his favour. He seeks a second bite of the cherry. However, the law does not allow the Court to undertake such a

course to review decisions of the court *a quo* on non-constitutional matters. That is so because decisions of the court *a quo* are final, except in matters where the court *a quo* makes a determination on a constitutional matter. The applicant cannot be allowed to approach the Court in order to attack the correctness of the decision of the court *a quo* on a non-constitutional matter. As stated in *Lytton Investments supra* at pp 23-24 of the judgment:

“What is clear is that the purpose of the principle of finality of decisions of the Supreme Court on all non-constitutional matters is to bring to an end the litigation on the non-constitutional matters. A decision of the Supreme Court on a non-constitutional matter is part of the litigation process. The decision is therefore correct because it is final. It is not final because it is correct.”

[49] Once it is accepted that the court *a quo*'s decision was on a non-constitutional matter, the question of the constitutionality of the decision falls outside the jurisdiction of the Court. The jurisdiction of the Court cannot be exercised over the matter of the correctness or otherwise of the decision of the court *a quo* on a non-constitutional matter because doing so would not serve the purpose and objective for which the narrow and specialised jurisdiction was conferred on the Court under the Constitution.

[50] Regarding costs, the settled practice of this Court is to refrain from granting an order for costs unless exceptional circumstances warrant an award of costs. See *Mbatha v Confederation of Zimbabwe Industries & Anor* CCZ-5-21 at p. I am unable to find any inappropriate conduct on the applicant's part warranting an award of costs in favour of the respondents. There would therefore be no legal basis for such an order of costs.

DISPOSITION

[51] The applicant has failed to establish the basis upon which this Court should grant direct access. We do not find favour in the arguments that there was a violation of the rights enshrined in ss 56, 69 (2) and 69 (3) of the Constitution. It is therefore not in the interests of justice to grant direct access.

Accordingly, the application is dismissed with no order as to costs.

GARWE JCC : I agree

PATEL JCC : I agree

Judgment No. CCZ 9/23

Constitutional Application No. CCZ 12/22

Samukange, Hungwe, Attorneys, applicant's legal practitioners.

Gill, Godlonton & Gernnas, first respondent's legal practitioners.

Tendai Biti Law, fifth respondent's legal practitioners.