REPORTABLE: (6)

COSSAM CHIANGWA
v
APOSTOLIC FAITH MISSION IN ZIMBABWE

CONSTITUTIONAL COURT OF ZIMBABWE
MAKARAU JCC, GOWORA JCC & PATEL JCC
HARARE: 29 MARCH 2022 & 15 JUNE 2023

L. Madhuku, for the applicant

M. Mbuyisa, for the respondent

GOWORA JCC:

[1] On 25 January 2022, the applicant filed an application seeking direct access to this Court in terms of s 167(5)(a) of the Constitution of Zimbabwe, 2013 ("the Constitution") as read with r 21(2) of the Constitutional Court Rules, 2016 ("the Rules). If leave is granted, it is his intention to file an application in terms of s 85(1) of the Constitution for the vindication of two of the fundamental rights that he alleges were violated by a High Court decision. The two fundamental rights in question are the right to access the courts and the right to equal protection and the benefit of the law respectively. The allegation made in the application is that the common law remedy that permits execution of a judgment pending appeal violates the Constitution.

FACTUAL BACKGROUND

[2] The respondent is a common law *universitas* that is governed by its constitution. It is a church with various stations throughout the country. The applicant is a former member of the respondent's executive leadership structure.

[3] The facts surrounding this dispute are mostly common cause. Over an extended period of time, the respondent's executive, which included the applicant, wrangled over the control of the respondent and its assets. The dispute spilled into the courts, initially the High Court. The High Court found in favour of the other members of the executive and declared them as the duly authorised representatives of the respondent. It also gave them the right to possess and control the assets in dispute.

[4] The applicant was aggrieved. He noted an appeal to the Supreme Court. On 28 May 2021, the Supreme Court rendered its judgment in which it upheld the judgment of the High Court. The court determined that the other members of the executive were the duly authorised representatives of the respondent. The applicant was ordered to pay costs. At the core of the dispute was the right to occupy Stand 696 New Ardlyn, Westgate, Harare. This property had previously been under the stewardship of the applicant.

[5] Consequent to the Supreme Court's decision, the applicant and his acolytes voluntarily departed from Stand 696 New Ardlyn, Westgate, Harare. However, on 11 October 2021, the applicant returned and unlawfully appropriated the aforesaid premises from the respondent's elected officials.

[6] An application for a *mandament van spolie* was filed by the respondent under a certificate of urgency for the ejection of the applicant from the premises. The application succeeded. The High Court ordered that the applicant be ejected and that the possession thereof be restored to the respondent's executives. Aggrieved

with the decision of the High Court, the applicant appealed to the Supreme Court. In response, the respondent, under HC 6465/21, applied for leave to execute the judgment pending the determination of the appeal.

[7] During the hearing of the application for leave to execute the judgment pending appeal, the applicant made an application for a referral to this Court of a constitutional question on the basis of certain constitutional issues that he alleged emanated from the matter. The crux of his challenge was whether the common law remedy of execution pending appeal was consistent with the Constitution.

[8] The application was opposed by the respondent. It argued that the request was frivolous and vexatious. It contended that there was no violation of any constitutional provisions in the intended application for relief before the High Court.

[9] On 13 January 2022, the High Court rendered its judgment on the application for a referral of the matter to the Court. The court *a quo* refused the application. It ruled that it lacked merit. The court *a quo* reasoned further that there was nothing unconstitutional for a court to order the execution of its own judgment pending appeal as the law permitted this exercise of discretion on the part of the High Court. It thereafter proceeded to determine the merits of the respondent's application for execution pending appeal. The court *a quo* noted that the applicant had previously vacated the premises in question in compliance with an order of court. However, he had reclaimed control through violent means, and, as a consequence, the noting of the appeal was meant to deny the respondent’s

representatives access to the property in question whilst he contested the right to control the assets of the respondent. It is that determination which forms the basis of the present application that is before the Court.

[10] In *casu*, the applicant seeks to challenge the determination by the High Court. He avers that its decision was wrongful because his request was neither frivolous nor vexatious. It is submitted on his behalf that the prospective substantive application enjoys considerable prospects of success.

[11] The application is opposed. The respondent submits that the present application is frivolous and vexatious. It avers that its effect is meant to frustrate the effect of various judgments that have been granted against the applicant.

[12] The major part of the reasons for opposing the application constitute legal argument which I will advert to later in the judgment.

APPLICANT'S SUBMISSIONS BEFORE THIS COURT

[13] The applicant advances the argument that once an appeal is before the Supreme Court, the court *a quo* ceases to have jurisdiction over the matter. He contends that this is the essence of s 162 of the Constitution as read with ss 168 and 169 thereof. It is contended on his behalf that the common law rule of execution pending appeal runs contrary to the principle of law that only the Supreme Court has power over its own rules and orders.

[14] In addition, the applicant argues that the established hierarchy of the Courts is disrupted by the common law remedy, which enables the High Court to determine a matter pending before the Supreme Court. He submits that the High Court would, on that premise, be taking sides in the appeal under the guise of determining the prospects of success. The applicant posits that in that process, the right of access to the appellate court is impinged upon by the interference of the High Court. Despite the right of appeal against any determination by the High Court, the applicant submits that there is no alternative remedy available to him.

[15] Mr *Madhuku* submitted that the applicant's constitutional rights were violated by the High Court's refusal to refer the constitutional question to the Constitutional Court. Questioned by the Court as to whether the applicant was challenging the procedural or substantive propriety of the court *a quo*'s decision, he submitted that there was no distinction between the two. He asserted that the established jurisprudence of the Court merely highlighted that once a wrong decision has been made, it can be challenged both procedurally and substantively in a superior court. According to him, the only permissible exception is a Supreme Court decision due to its status as a final decision of the apex court in non-constitutional matters.

[16] Mr *Madhuku* submitted further that the court *a quo* did not apply the established test under s 175(4) of the Constitution to determine whether the application for referral was frivolous or vexatious. He made reference to the judge *a quo*'s alleged failure to explicitly state whether the application was frivolous or vexatious as evidence of a wrong approach that ultimately led to a wrong

decision. It was contended that the constitutional issue of the High Court's jurisdiction to determine applications for leave to execute pending appeals was not addressed and that the matter was neither frivolous nor vexatious.

[17] In response to the Court's question as to whether there was an adherence to the Rules in respect of the application filed before the High Court, Mr *Madhuku* submitted that r 24(4) of the Constitutional Court Rules, 2016 did not apply as there were no disputes of fact between the parties. He contended further that the applicant's right to access under s 69(3) of the Constitution was violated by the law, which gives the High Court the power to determine applications for leave to execute pending appeals. Mr *Madhuku* added that given that the Supreme Court becomes seized with a matter upon the noting of an appeal, it is befitting that this Court decides the issue of which court had jurisdiction over such an application.

[18] In discourse with counsel, the Court noted that the High Court was not disabled by any law from entertaining applications for leave to execute pending an appeal. The Court further quizzed counsel on the issue of an alternative remedy available to the applicant. Mr *Madhuku* conceded that the applicant could have sought leave to appeal against the decision by the High Court. However, he submitted that the remedy was not practical as the same arguments would be regurgitated in the High Court and Supreme Court on appeal. Mr *Madhuku* countered by proposing that in the event the High Court's present authority was held as being unconstitutional, the Court was at large to utilise its just and equitable powers under s 175(6) of the Constitution to ensure that the legislature is given adequate time to address the *lacuna* that would arise as a result of its determination in the applicant's favour.

[19] Mr *Madhuku* argued that the respondent had not addressed the Court on whether or not there was an infringement of the right of access to a court under s 69(3) of the Constitution. He submitted that the question was important as it brings into focus the issue as to whether the court *a quo*'s determination rendered the appeal in the Supreme Court academic. Mr *Madhuku* reiterated that the applicant was challenging the authority of the lower court to deal with a matter that was pending before the Supreme Court. He reasoned that alternatively placing the application before a different Judge in the High Court would suggest a concession that the alternative remedy was readily accessible.

RESPONDENT'S SUBMISSIONS

[20] *Per contra*, Mr *Mbuyisa* submitted that there was a pending matter in the Supreme Court on the substance of the dispute between the parties. However, he abandoned this line of argument after the Court pointed out that the question of the jurisdiction of the High Court was not pending before the Supreme Court. In addition to the above, counsel submitted that there was an alternative remedy accessible to the applicant. He asserted that the applicant's fears that the High Court would revisit its earlier decision could have been allayed by a request to place the matter before a different Judge. Thus, he reasoned that the applicant ought to be disabled from challenging the judgment of the court *a quo* before the Constitutional Court.

[21] On behalf of the respondent, counsel argued that the grant of the present application would not be consonant with the interests of justice. He submitted that

both the High Court and the Supreme Court have already decided the validity of the applicant's leadership credentials within the respondent.

[22] In addition to the above, the respondent reasoned that the application for referral and leave to execute pending appeal were made in light of an order for spoliation granted against the applicant. Counsel submitted that the balance of convenience favours the preservation of the *status quo ante* that existed before the applicant took matters into his own hands after he had voluntarily vacated the premises before again depriving the respondent's congregants of the same.

[23] The respondent contended that the substantive application bears little, if any, prospects of success on the merits. The contention made was that the determination of an application for leave to execute pending appeal by the High Court does not limit the jurisdiction of the Supreme Court to properly determine the matter on appeal. In this regard, Mr *Mbuyisa* submitted that the applicant's right to access the Supreme Court was not affected by the High Court's decision ordering the execution of its own judgment pending appeal. In addition, he contended that the hierarchy of the courts is not distorted by the grant of an application for leave to execute. He stressed that the rights under ss 56(1) and 69(3) of the Constitution are not absolute.

[24] Counsel argued strongly that the applicant had an obvious misapprehension of the law in suggesting that the application by the High Court of s 176 of the Constitution to regulate its processes violates the aforesaid fundamental rights. He further submitted that the present proceedings are part of the applicant's

strategy to unduly frustrate the respondent's administration of its operations and assets.

[25] The contention by the applicant that there is no alternative remedy was also disputed. Counsel for the respondent suggested that the Supreme Court is in a position to determine the substantive rights of the parties irrespective of the order for execution pending the appeal. The respondent contended that the applicant had refrained from exposing the entire factual background of the dispute because it highlighted his deplorable conduct.

[26] On the question of the alleged infringement of s 69(3) of the Constitution, Mr *Mbuyisa* submitted that the court *a quo*'s determination did not constitute a diminution of the Supreme Court's authority over the appeal lodged by the applicant. He argued that the High Court considered as a factor the balance of convenience in such applications when there was a need for it to regulate its own processes. In addition, Mr *Mbuyisa* insisted that the court *a quo*'s determination could only be challenged where a procedural irregularity was evident.

APPLICATIONS FOR DIRECT ACCESS UNDER R 21

[27] An application for direct access to the Court is premised on the provisions of s 167(5)(a) of the Constitution. The section requires that the application be brought in terms of the rules of the Court. Rule 21(2) is relevant. The principles governing applications for direct access are contained in r 21(3) which reads as follows:

> "(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."

[28] The importance of compliance with the rules of this Court in an application for direct access to the Court was stressed in the case of *Liberal Democrats & Ors v President of The Republic of Zimbabwe E.D. Mnangagwa N.O. & Ors CCZ 7/18,* wherein MALABA CJ advanced the following:

> "An application for direct access is regulated by the Rules. An applicant has to satisfy all the requirements of the Rules. The Court found that the applicants failed to comply with the Rules in this regard. There has to be actual compliance with the contents of the provisions of the applicable rule. It is not a question of mere formality. 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." (*my emphasis)*

[29] Section 167(5) of the Constitution provides that any person may bring a constitutional matter before the court directly subject to the Rules of the court. The jurisdiction of the court in considering an application for leave for direct access under the section can only be triggered when the court is satisfied that the matter is in the interests of justice. Rule 21(8) sets out the factors that the court may consider in determining the phrase "interests of justice". (See *Mwoyounotsva v Zimbabwe National Water Authority CCZ 17/20* at pp 6 – 7, para 19). The rule reads as follows:

> "In determining whether or not it is in the interest of justice for a matter to be brought directly to the Court, the Court or Judge may, in addition to any other relevant consideration, take the following into account—
> (a) the prospects of success if direct access is granted;
> (b) whether the applicant has any other remedy available to her;
> (c) whether are disputes of fact in the matter."

See also *Chiwaridzo v TM Supermarkets (Private) Limited & Ors CCZ 19/20* at p 5.

[30] The Constitution limits the Court's jurisdiction and under s 167(2)(b), it is only empowered to preside over and determine constitutional matters and issues connected with decisions on constitutional matters. Thus, the exercise of its jurisdiction over other matters that do not have the flavour of "a constitutional matter" would be an illegality under the law. The court, therefore, must ensure that only those matters that can pass muster as a constitutional matter are placed before it. This has been referred to as a sifting mechanism to protect the court from unwarranted matters finding their way to the court's corridors. The special jurisdiction of the court has been reaffirmed by a plethora of authorities.

The learned authors *I. Currie* and *J. De Waal,* in their book *The Bill of Rights Handbook* 6th Edition, (Cape Town: Juta & Company, 2013) at p 128, state that:

> "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 purely academic interest and to hear cases without the benefit of the views of other courts having constitutional jurisdiction. Moreover, according to the Constitutional Court, 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."

[31] Turning to this jurisdiction, in the case of *Denhere v Denhere & Anor* CCZ 9/19 at p 12, this Court held that:

> "The underlying requirement is that the application ought to clearly illustrate that it is in the interests of justice that an order for direct access be granted. As was noted by the Court in the *Lytton Investments (Private) Limited* case *supra*, the filtering mechanism for leave for direct access effectively prevents abuse of the remedy."

[32] The present application will therefore be assessed in light of the above considerations. The aforementioned factors will be considered cumulatively in order to ascertain whether or not it is in the interests of justice to grant the applicant direct access to this Court's jurisdiction.

[33] This approach was reaffirmed in the case of *Zimbabwe Development Party & Anor v President of The Republic of Zimbabwe & Ors* CCZ 3/18 at p 12 as follows:

> "The correct approach in dealing with an application for an order of direct access to the Court is one that accepts the principle that all relevant factors required to be taken into account must be made available for consideration. The Court or Judge must consider all the relevant factors in deciding the question whether the interests of justice would be served by an order granting direct access to the court. The weight placed on the different factors in the process of decision making will depend on the circumstances of each case and the broader interests of a society governed by the rule of law."

WHETHER OR NOT THE APPLICATION TO CHALLENGE THE DISCRETION OF THE HIGH COURT IS IN THE INTERESTS OF JUSTICE

[34] The prospects of success in the intended substantive application constitute an important and fundamental consideration that principally informs the court's decision on whether or not to grant direct access. In *Mvududu v Agricultural and Rural Development Authority (ARDA) & Anor* CCZ 10/21, the court highlighted the importance of assessing the prospects of success as follows:

> "One of the factors for consideration by the court is whether or not the application has prospects of success. In *Lytton Investments (Pvt) Ltd v Standard Chartered Bank Limited and Another CCZ 11/18*, the court stated:
>
> > "The court turns to determine the question whether the applicant has shown that direct access to it is in the interests of justice. Two factors have to be satisfied. The first is that the applicant must state facts or grounds in the founding affidavit, the consideration of which would lead to the finding that it is in the interests of justice to have the constitutional matter placed before the court directly, instead of it being heard and determined by a lower court with concurrent jurisdiction. The second factor is that the applicant must set out in the

founding affidavit facts or grounds that show that the main application has prospects of success should direct access be granted."

[35] The application is premised on an alleged violation of the applicant's rights by the High Court. The jurisdiction of this Court is restricted by the Constitution itself. As a consequence, the court is disabled by law from adjudicating on matters that are not in keeping with its jurisdictional competence.

[36] In *casu*, the applicant's complaint on the determination handed down by the court *a quo* in granting leave to execute relates to the constitutionality of the remedy. He summarises the issues as being:

"Whether or not the High Court's common law jurisdiction to order an execution of its judgment pending an appeal already pending in the Supreme Court:

a. Is consistent with the hierarchy of courts provided for in s 162 of the Constitution of Zimbabwe 2013.
b. involving as it does, a lower court determining the prospects of success of an appeal already before a superior court is consistent with the mandatory duty of the courts to be impartial as provided for in subs 1 and 2 of s 164 of the Constitution of Zimbabwe, 2013.
c. involving as it does a lower court determining the prospects of success of an appeal already before a superior court is consistent with the fundament right of every person to a fair hearing enshrined in s 69(2 as read with s 3(1)(b)of the Constitution of Zimbabwe, 2013
d. involving as it does a lower court determining the prospects of success of an appeal already before a superior court is consistent with the fundamental right of every person to access to the courts enshrined in s 69(3)as read with s 3(1)(b) of the Constitution of Zimbabwe, 2013."

[37] The applicant has challenged the inherent power of the High Court to regulate its own processes, that is, to cause the suspension of or, as the case may be, the enforcement of its own judgments pending an appeal before the Supreme Court. In para 7 of the draft order sought the applicant seeks an order declaring that it is the Supreme Court, in the exercise of its inherent jurisdiction, that has the power to regulate its processes and that it may, in exceptional cases, order the execution

of a judgment appealed against pending the determination of an appeal before it. In my view the issue that arises is how the Supreme Court assumes the power to order the execution of a judgment that did not emanate from itself. It is pertinent, therefore, to consider and examine the respective powers of the High Court and the Supreme Court and the extent thereof insofar as the execution of judgments pending an appeal is concerned.

THE INHERENT JURISDICTION OF THE SUPERIOR COURTS

[38] The Supreme Court and the High Court are both Superior Courts. These courts have inherent power to regulate their processes in respect of matters that come before them, subject to limitations imposed on them by the common law or by statute.

[39] Even though the Supreme Court is a superior court, it is a creature of statute. Its jurisdiction and the ambit of its powers are governed by the Constitution and the Supreme Court Act [*Chapter 7:13*]. Section 169(1) of the Constitution spells out the jurisdiction of the Supreme Court. 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.
>
> (2) Subject to subsection (1), an Act of Parliament may confer additional jurisdiction and powers on the Supreme Court.
>
> (3) An Act of Parliament may provide for the exercise of jurisdiction by the Supreme Court and for that purpose may confer the power to make rules of court.
>
> (4) n/a

[40] In terms of sub-section (3) above, the jurisdiction of the Supreme Court in civil appeals is set out in s 21 of the Supreme Court Act. It provides as follows:

"**21 Jurisdiction in appeals in civil cases**

(1) The Supreme Court shall have jurisdiction to hear and determine an appeal in any civil case from the judgment of any court or tribunal from which, in terms of any other enactment, an appeal lies to the Supreme Court.
(2) Unless provision to the contrary is made in any other enactment, the Supreme Court shall hear and determine and shall exercise powers in respect of an appeal referred to in subsection (1) in accordance with this Act."

[41] I turn next to consider the jurisdictional ambit of the High Court.

Section 171 of the Constitution provides:

"170 High Court
(not relevant)

171 Jurisdiction of High Court
(1) The High Court—
(*a*) has original jurisdiction over all civil and criminal matters throughout Zimbabwe;

(a) has jurisdiction to supervise magistrates courts and other subordinate courts and to review their decisions;

(*c*) may decide constitutional matters except those that only the Constitutional Court may decide; and
(*d*) has such appellate jurisdiction as may be conferred on it by an Act of Parliament.

(2) An Act of Parliament may provide for the exercise of jurisdiction by the High Court and for the exercise of jurisdiction by the High Court and for that purpose may confer the power to make rules of court."

[42] The clear distinction between the High Court and the Supreme Court is evident from a reading of the provisions of the Constitution itself. Whilst the High Court is said to be a court with original jurisdiction over all civil and criminal matters throughout Zimbabwe, the Supreme Court is, on the other hand, the highest court

of appeal on matters excluding constitutional matters. It is obvious, therefore, that the jurisdiction of the Supreme Court is restricted to that established by the Constitution itself. This, however, must not be understood to mean that it is confined to the determination of appeals only. S 176 of the Constitution has confirmed the common law principle that Superior Courts have inherent power to regulate their own processes. That section provides as follows:

"**176 Inherent powers of the Constitutional Court, the Supreme Court and the High Court**

The Constitutional Court, the Supreme Court and the High Court have inherent power to protect and regulate their own process and to develop the common law or the customary law, taking into account the interests of justice and the provisions of this Constitution."

[43] The applicant contends, rightly so in my view, that the Supreme Court has inherent jurisdiction and the power to control its processes. It is a jurisdiction that the court exercises when it is seized with a process that is directly linked to matters that are pending before it. The exercise of the inherent power to control its processes was clarified by the court in *Net One Cellular (Pvt) Ltd v Net One Employees & Anor* 2005(1) ZLR 275(S). At 280-282, His Lordship CHIDYAUSIKU CJ stated:

> "The first issue to be resolved is whether I have jurisdiction to entertain this Chamber application. This application is not one that involves original jurisdiction. It is ancillary to two appeals this court is already seized with. Once this court is seized with a matter, it has inherent jurisdiction to control its judgment. See *South Cape Corporation* v *Engineering Management Services* 1977 (3) SA 534 and the cases referred to in that case. The inherent jurisdiction to control the court's judgment includes, in my view, jurisdiction to control the court's process, that is, jurisdiction to determine whether or not the execution of a judgment should be permitted pending the hearing of an appeal. I will assume jurisdiction in this case on that basis. I can also assume jurisdiction in terms of s 25 of the Supreme Court Act [*Chapter 7:13*]. I shall revert to this proposition later. It is trite that at common law, a party cannot execute a judgment appealed against: see *South Cape Corporation supra*. The party wishing to execute despite the appeal can, however, approach the court *a quo*, if it has such jurisdiction, for leave to execute despite the noting of an

appeal. In the present case, the employees simply sought execution after registering the award without first seeking leave of the court to do so. The employer sought, unsuccessfully, an order from the High Court to stop the execution. The employees, after registering the arbitrator's award with the High Court, should have applied for leave to execute after the noting of an appeal."

[44] What emerges from the above is that the Supreme Court, in the exercise of its inherent power to control its own processes, can interfere in the process of the execution of a judgment on a matter pending before it on appeal.

[45] The power of the Supreme Court to have recourse to its inherent power under the common law was confirmed in *Universal City Studios Inc & Ors v Network Video (Pty) Ltd* 1986(2) SA 734(A), at 754G-H. The Appellate Division of South Africa reaffirmed that the Supreme Court had the power to regulate its own procedures. The court stated:

"There is no doubt that the Supreme Court possesses an inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice (see *Stuart v Ismail* 1942 AD 327; *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms)Bpk* 1972 (1) SA 773 (A) at 783A - G; also *Ex parte Millsite Investment Co (Pty) Ltd* 1965 (2) SA 582 (T) H at 585 - 6; *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and Another* 1979 (2) SA 457 (W) at 461F - 462H). It is probably true that, as remarked in the *Cerebos Food* case (at 173E), the Court does not have an inherent power to create substantive law, but the dividing line between substantive and adjectival law is not always an easy one to draw (*cf Minister of the Interior and Another v Harris and Others* 1952 (4) SA 769 (A) at 781C - H; *Botes v Van Deventer*1966 (3) SA 182 (A) at 198H; *Yew Bon Tew v Kenderaan Bas Mara* [1982] 3 All ER 833 (PC) at 836B; Salmond *Jurisprudence* 11th ed at 503 -4; Paton *Jurisprudence* 4th ed para 127). Salmond (*op cit* at 504) states that:

> "Substantive law is concerned with the ends which the administration of justice seeks; procedural law deals with the means and instruments by which those ends are to be attained."

[46] The applicant, however, contends that the power that inheres in the Supreme Court to control its processes is wider than merely granting a stay of execution and includes the discretion to determine an application for leave to execute a judgment of the High Court where an appeal has been filed. This power, contends the applicant, is found in the provisions of s 176 of the Constitution.

[47] The common rule of practice is that the noting of an appeal against a judgment of the High Court automatically suspends the judgment and, as a result, no execution against that judgment shall take place. Any execution against the judgment is unlawful and of no legal force or effect. The position on the execution of judgments pending appeal under the common law was settled in *Reid & Another v Godart & Another* 1938 A.D 511, where DE VILLIERS JA at 513

said:

> "Now, by the Roman-Dutch law the execution of all judgments is suspended upon the noting of an appeal; that is to say, the judgment cannot be carried out, and no effect can be given thereto, whether the judgment be one for money (on which a writ can be issued and levy made) or for any other thing or for any form of relief granted by the Court appealed from. That being so, I see no reason why the Rule should be confined to judgments on which a sheriff may levy execution. The foundation of the common-law rule as to the suspension of a judgment on the noting of an appeal, is to prevent irreparable damage from being done to the intending appellant, whether such damage be done by a levy under a writ, or by the execution of the judgment in any other manner appropriate to the nature of the judgment appealed from".

The learned Judge went on to hold -

> "... that irreparable damage might be done to the applicants if the judgment were not suspended on the noting of the appeal, for the estate of the testator might be distributed by an executor in terms of the previous will. The damage would be as irreparable as in a case where a levy is made under a writ".

[48] This Court is not, however, seized with the issue of the stay of a judgment pending appeal but rather with the execution of such judgment upon application by the judgment creditor. The burning issue is whether or not the power of the court, the High Court, that granted the judgment has now been ousted by s 176 of the Constitution. The seminal authority under Roman Dutch law, as to which the court can determine such an application, is *South Cape Corporation (Pty) Ltd v Engineering Management Services (supra)*, in which CORBETT JA said:[1]

> "Whatever the true position may have been in the Dutch Courts, and more particularly the Court of Holland (as to which see *Ruby's Cash Store (Pty.) Ltd*. v *Estate Marks and Another*, 1961 (2) SA 118 (T) at pp. 120 - 3), it is today the accepted common law rule of practice in our Courts that generally the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with the leave of the Court which granted the judgment. To obtain such leave the party in whose favour the judgment as given must make special application. (See generally *Olifants Tin "B" Syndicate v De Jager*, 1912 AD 377 at p. 381; *Reid and Another v Godart and Another*, 1938 AD 511 at p. 515; *Gentiruco A.G. v Firestone SA (Pty.) Ltd*., 1972 (1) SA 589 (AD) at p. 667; *Standard Bank of SA Ltd*. v *Stama (Pty.) Ltd*., 1975 (1) SA 730 (AD) at p. 746.)"

[49] The authorities referred to above were concerned with and dealt with the principle that a judgment creditor is entitled, at law, to apply for leave to execute a judgment on appeal pending the determination of that appeal. The question of which court has the jurisdiction to consider and determine such an application or should do so had not been settled. This was the issue that the court was faced with in *Hermannsburg Mission v Sugar Industry Central Board* 1981(4) S.A 717, at 726A-B. In that case, it was stated that:

> "It is quite clear that it is only the court granting the order appealed against which has, at common law or in terms of the Rules, the power to give leave to allow its judgment to be carried into effect pending the decision of the appeal,

[1] At 544H-545B

and it follows that this Court has no jurisdiction to grant any of the relief sought."

[50] When the above passage is viewed against the comments of the learned former Chief Justice in *Net One Cellular (Pvt) Ltd v Net One Employees & Anor (supra*), it must be accepted that the court that grants a judgment has the jurisdiction to entertain and grant leave for its execution pending appeal. While it cannot be denied that s 176 grants all superior courts the inherent power to control their own processes, it cannot be gainsaid that the exercise of that power must be judicious. It is an exercise of discretion. In the formulation of the argument by the applicant, it is contended that in considering an application for leave to execute pending appeal, the High Court is forced to join common cause with one or other of the litigants. Counsel referred to this process as the court taking sides. I am unable to agree.

[51] An application for leave to execute a judgment pending an appeal is available because, by operation of the law, the noting of an appeal automatically suspends the decision appealed against with the effect that it cannot be carried into execution. However, if, despite the appeal, the successful party wants to execute the judgment in the interim, he has to seek the leave of the court that granted the judgment. The application would be premised on the principle that the court has an inherent power to control its own process.

[52] The general rule is that a party who obtains an order against another is entitled to execute it. It is trite at law that a successful litigant should not be deprived of the fruits of a judgment obtained in his favour, unless there are special circumstances

or special grounds that justify a stay of execution to be granted as aforesaid. The court, therefore, retains an inherent power to manage that process having regard to the applicable rules of procedure. What is required for a litigant to persuade the court to exercise its discretion in favour of granting a stay in the execution of the court's judgment has been stated in a plethora of authorities. In ***Mupini* v *Makoni*** 1993(1) ZLR 80(S) at 83B-D, the court stated the position of the law clearly thus:

> "In the exercise of a wide discretion, the court may, therefore, set aside or suspend a writ of execution, or, for that matter, cancel the grant of a provisional stay. It will act where real and substantial justice so demands. The *onus* rests on the party seeking a stay to satisfy the court that special circumstances exist. The general rule is that a party who has obtained an order against another is entitled to execute upon it. Such reasons against execution issuing can be more readily found where, as *in casu*, the judgment is for ejectment or transfer of property for in such instances the carrying of it into operation could render the restitution of the original position difficult. See *Cohen* v *Cohen* (1) 1979 ZLR 184(a) 187C, *Judgment Investment Company Ltd* v *Preget* (2) 1981 ZLR 132 (G) at 134G-135B, *Chibanda* v *King* 1983 (1) ZLR 116 (H) at 119 C-H; *Strime* v *Strime* 1983 (4) SA 850(C) at 852 A"
> See also *Humbe v Maduna & Ors* SC 81/21.

THE EXERCISE BY THE SUPERIOR COURTS OF THE POWER TO REGULATE THEIR PROCESSES

[53] The Court is being urged to find that as a result of the incidence of s 176 under the Constitution, the High Court can no longer hear and determine applications for leave to execute against judgments emanating from that court in the event of appeals having been noted against such judgments. According to the applicant, the common law power to do so that used to inhere in the High Court has been ousted by the Constitution and now reposes in the Supreme Court. Any exercise of that power by the High Court, it is further argued, would be against the spirit of s 176 and, consequently, illegal.

[54] From the above authorities, it is evident that the High Court has the power to regulate its own processes and that this includes the ordering of the execution of its judgments pending appeal. It is relief that is granted in special circumstances. The execution of a judgment before it becomes final by reason of appeal is therefore recognized. However, this highly exceptional relief must find itself firmly founded upon good reasons for the exercise of this discretion on the part of the court.

[55] The principles that a court must have regard to in an application for a stay of execution of a judgment are akin to those considered when deciding whether or not to grant leave to execute against a judgment pending appeal – see *Nzara* v *Tsanyau and Others* 2014 (1) ZLR 674 (H); *Old Mutual Life Assurance Company (Pvt) Ltd* v *Makgatho* HH 39-07. They are:

"1. An appellant has an absolute right to appeal and test the correctness of the decision of the lower court before he or she is called upon to satisfy the judgment appealed against.

2. Execution of the judgment of the lower court before the determination of the appeal will negate the absolute right that the appellant has and is generally not permissible.

3. Where, however, the appellant brings the appeal with no *bona fide* intention of testing the correctness of the decision of the lower court, but is motivated by a desire to either buy time or harass the successful party, the court, in its discretion, may allow the successful party to execute the judgment notwithstanding the absolute right to appeal resting in the appellant.

4. In exercising its discretion, the court has regard to the considerations suggested by CORBETT JA in *South Cape Corporations (Pty) Ltd* v *Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 545.

5. Where the judgment sounds in money and the successful party offers security *de restituendo* and the appellant has no prospects of success on appeal, the court may exercise its discretion against the appellant's absolute right to appeal.

6. An application for leave to execute pending appeal cannot be determined solely on the basis that the appellant has no prospects of success on appeal,

especially where the whole object of the appeal is defeated if execution were to proceed (see *Woodnov Edwards and Another* 1966 RLR 335."

[56] Invariably, the decision of whether or not to grant an application for leave to execute turns on the relative strength or weakness of the appeal. This necessarily entails the court that granted the judgment treading the same path during the initial proceedings leading to the judgment under appeal by the superior court. It also entails the court peeking into an appeal that is pending before the appellate court and, in some way, pronouncing a verdict on it. In this exercise, it takes into account the following considerations:

a. the potentiality of irreparable harm or prejudice being sustained by the Appellant if leave is granted;
b. conversely, the potentiality of irreparable harm or prejudice sustained by the respondent on appeal if leave to execute is not granted;
c. the prospects of success on appeal, including the question as to whether the appeal is frivolous or vexatious or noted, not with the *bona fide* intention of reversing the judgment appealed against, but for some other motive e.g. to gain time.
d. where there is the possibility of irreparable harm to both parties, the balance of hardship or convenience.

[57] In invoking the above considerations, a deliberation on the protection of the respective rights of the parties is also embarked on when assessing the issue of irreparable harm and potential prejudice. Given that the order is not granted for the mere asking and, further, that it is granted after an assessment of pertinent considerations, it becomes apparent that those safeguards are put in place to protect the rights of both parties that are constitutionally guaranteed as prejudice

may befall either party. See *Amalgamated Rural Teachers Union of Zimbabwe & Anor v ZANU PF & Anor* HMA 37-18

[58] As is evident from the foregoing, the application to execute a judgment pending appeal is premised on the principle that the court exercises its inherent power to control its process in order to give effect to the overriding principle that the court must ensure that its processes result in achieving real and substantial justice: See *Santam Insurance Company Ltd v Paget* 1981 ZLR 132, at p 134 – 135

[59] In my view, the above *dicta* apply forcefully in the present matter. The application of the remedy for leave to execute pending appeal forms part of the High Court's authority to regulate its own processes. It is not equivalent to a usurpation of the functions of the Supreme Court. This is so because in assessing the prospects of success on appeal, the court is tasked with assessing whether the applicant has established an arguable case justifying that execution should be carried out notwithstanding the pending appeal. The automatic stay of execution upon noting of appeal, as a rule of practice, is not a firm rule of law but a long-established practice regarded as generally binding, subject to the court's discretion.

[60] At the core or pith of the inquiry relating to an application of this kind is the duty of the court to determine what is just and equitable. In this endeavour the court has to assess the prospects of success of the appeal. In assessing the prospects of success in the upper court, the court has to consider whether the appellant has got an arguable case or whether it, the appeal, is manifestly a predictable failure. This

process cannot in any way be said to be a violation of the applicant's right to a fair hearing. On the other hand, it constitutes the exercise by the court of its discretion in controlling its own process and ensuring that no abuse of court processes ensues. Indeed, an assessment of prospects of success cannot be termed a violation of the applicant's right of access to the Supreme Court as, where an appeal is noted out of time, and the justice of the case demands, an order staying execution is always granted if circumstances require that a stay should be granted on the basis of real and substantial justice.

[61] The courts, as confirmed by section 176, have the inherent jurisdiction to control their own processes. Section 176 in point of fact reaffirms this common law power. Apart from the expression that the courts have inherent power to control their own processes, the powers are not specified, nor are the processes set out. An ambiguity then ensues when the exercise of discretionary power by one court is alleged to be an infringement of the power of another court.

[62] What are inherent powers and from whence does a court get such power? The word "inherent" is an adjective and is very wide in itself. In the Merriam-Webster Dictionary, it is defined as – "involved in the constitution or essential character of something, belonging by nature or habit, or intrinsic". It has been defined variously as meaning existing in and inseparable from something as a permanent, a permanent essential or characteristic attribute or quality, an essential element, something intrinsic or essential. In legal terms it may be defined as vested in or attached to a person or office as a right of privilege.

[63] Thus, the inherent jurisdiction of superior courts or their inherent powers are those powers which are inalienable from courts. It therefore stands to reason that inherent powers are an integral part of the self-created general jurisdiction at common law and may be exercised by a court to do full and complete justice between the parties before it.

[64] The principle of the inherent jurisdiction of superior courts was discussed by LORD DIPLOCK *in Bremer Vulkan v South India Shipping (H.I.)* [1981] A.C. 909, at 977D-H, wherein he stated as follows:

> "The High Court's power to dismiss a pending action for want of prosecution is but an instance of a general power to control its own processes so as to prevent its being used to achieve injustice. Such a power is inherent in its constitutional function as a court of justice. ……..
> So, it would stultify the constitutional role of the High Court as a court of justice if it were not armed with power to prevent its process being misused in such a way as to diminish its capability of arriving at a just decision of the dispute. The power to dismiss a pending action for want of prosecution in cases where to allow the action to continue would involve a substantial risk that that justice could not be done is thus properly described as an "inherent power" the exercise of which is within the "inherent jurisdiction" of the High Court. It would, I think, be conducive to legal clarity if the use of these two expressions were confined to the doing by the court of such acts which it needs must have power to do in order to maintain its character as a court of justice."

[65] I would venture to suggest that the exercise of inherent jurisdiction is a broad doctrine of the English law allowing a court to control its own processes and to control the procedures before it. The power stems not from any particular statute or legislation, but is rather an integral part of the constitution of the court itself. These are powers invested in a court to control the proceedings brought before it. Thus, the court may

use its power to ensure convenience and fairness in legal proceedings. It may utilize this power to stop abuse of processes or vexatious litigation.

[66] On a proper construction of the law I do not envisage a scenario arising out of one court's power under s 176 undermining the power of another court under the same provision. The applicant has not placed before the court any credible argument that would lead to a finding that the inherent powers of the Supreme Court are being hijacked by the High Court when it determines applications for leave to execute a judgment pending an appeal. Any determination in this regard would still be liable to be appealed against to the Supreme Court. It is correct, as contended by the applicant, that once it renders its judgment, the High Court becomes *functus officio*, but notwithstanding this scenario, I am of the view that it retains its inherent power over the judgment under those circumstances that I set out below.

[67] That the Supreme Court enjoys an inherent jurisdiction to control its processes is beyond dispute. In view of the fact that both the High Court and the Supreme Court enjoy this inherent power it is necessary to examine in what context the Supreme Court can, if it can, entertain an application for leave to execute a judgment pending an appeal before it.

[68] It is evident that the applicant wishes to read into s 176 an absolute power on the part of the Supreme Court to entertain applications for leave to execute judgments pending appeal. Notwithstanding the sentiments expressed above, it is, however, evident that the Supreme Court can entertain such an application where the

circumstances of the case demand, and that allow it to do so. Each case can only be determined according to the prevailing circumstances and it would not be in accordance with the tenets of justice for this court to delineate what those situations may entail. Suffice it to say that in the exercise of its inherent power and in order not to allow an injustice, the Supreme Court may, and can entertain an application for leave to execute a judgment pending appeal. This would accord with the tenets of justice and would be a proper exercise of the inherent jurisdiction of the Supreme Court in controlling its processes.

[69] In this instance, the applicant has not pointed to the court any provision that would imbue the Supreme Court with any other power over its proceedings except as is evident from the Constitution, the common law and its enabling Act. The Supreme Court cannot order the execution of a judgment that is not its own. That is the realm of the High Court in regulating its own process and ensuring that frivolous appeals are dealt with. The Supreme Court cannot act outside the law. It is a creature of statute and must exercise such jurisdiction as the law has imbued it with. I do not, from my reading of s 176, discern the power to order the execution of a judgment that is not its own except in the situations adverted to above.

[70] In addition to the above, I cannot envisage a process that is more prejudicial to the appellant than the Supreme Court entertaining an application for leave to execute a judgment pending an appeal that is before it. Whilst the High Court would be obliged to consider the prospects of success of the appeal, the Supreme

Court would be placed in the unenviable position not to predetermine the merits of the appeal itself.

[71] The position is no different in South Africa. In *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Services* 1996(3) SA 1 (A), the court made the following remarks:

> "The short answer is that the Court's 'inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice' (per Corbett JA in *Universal City Studios Inc and Others v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) at 754G), does not extend to the assumption of jurisdiction not conferred upon it by statute. As explained in *R v F Milne and Erleigh (6)*1951 (1) SA 1 (A) at 5 *in fin*,'
>
> > '(this) Court was created by the South Africa Act and its jurisdiction is to be ascertained from the provisions of that Act as amended from time to time and from any other relevant statutory enactment'.
>
> Nowadays its jurisdiction derives from the Supreme Court Act and other statutes but the position remains basically the same. (*Sefatsa and Others v Attorney-General, Transvaal, and Another* 1989 (1) SA 821 (A) at 833E-834F; *S v Malinde and Others* 1990 (1) SA 57 (A) at 67A-B.) The Court's inherent power is in any event reserved for extraordinary cases where grave injustice cannot otherwise be prevented *(Enyati Colliery Ltd and Another v Alleson* 1922 AD 24 at 32; *Krygkor H Pensioenfonds v Smith* 1993 (3) SA 459 (A) at 469G-I)."

[72] The above *dictum* was, however, qualified in *Numsa v Fry's Metals (Pty) Ltd* 2005 (5) SA 433 (SCA), where at 444-445 the court opined as follows:

> "[23] It is true that in *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service*, Hefer JA said that the jurisdiction of the Appellate Division 'derives from the Supreme Court Act and other statutes'. This conformed with the interim Constitution, which was then in force. This Court does not have original jurisdiction: its jurisdiction derives from the Constitution. It is also correct that at common law a Court has no automatic jurisdiction to hear an appeal from another court: 'An appeal can only lie by virtue of some statutory provision.' Yet ch 8 of the Constitution superseded both the common-law and the interim Constitution. It subsumed the common law powers of this Court, and not only conferred jurisdiction in constitutional matters on it, but

> constituted it the highest Court of Appeal in all matters except constitutional matters. It did so in unqualified terms, and those terms are now the source of this Court's jurisdiction. They must, we consider, be given their full effect in interpreting the provisions of the LRA"

[73] Thus, in the exercise of the court's discretionary power, frivolous appeals can be handled by allowing a lower court to decide whether a ruling should be enforced while an appeal is pending. It does not involve a constitutional matter or inquiry. The dispute can be resolved without invoking the Constitution. The issue raised as to which court can determine such an application does not involve the interpretation, the protection or the enforcement of the Constitution.

WHETHER THE APPLICANT HAS ESTABLISHED VIOLATIONS OF HIS FUNDAMENTAL RIGHTS

[74] The applicant argues that the application of the common law remedy violated his constitutional rights under s 56(1) and s 69(3) of the Constitution. He posits that his request for a constitutional referral was neither frivolous nor vexatious.

[75] Section 56(1) of the constitution provides that all persons are equal before the law and have the right to equal protection and benefit of the law. This Court has had occasion to consider the import of the provision in the case of *Nkomo v Minister of Local Government, Rural & Urban Development & Ors* CCZ 6/16. Ziyambi JCC posited the following:

> "The right guaranteed under s 56 (1) is that of equality of all persons before the law and the right to receive the same protection and benefit afforded by the law to persons in a similar position. It envisages a law which provides equal protection and benefit for the persons affected by it. It includes the right not to be subjected to treatment to which others in a similar position are not subjected. In order to found his reliance on this provision the applicant must show that by virtue of the application of a law he has been the recipient of

> unequal treatment or protection that is to say that certain persons have been afforded some protection or benefit by a law, which protection or benefit he has not been afforded; or that persons in the same (or similar) position as himself have been treated in a manner different from the treatment meted out to him and that he is entitled to the same or equal treatment as those persons."

[76] Herein, the applicant merely raises bald allegations of his unequal treatment. The basis of the alleged violation of his right arises from the election of the court *a quo* to deny his request for referral of the matter to this Court. It is the court *a quo*'s determination of his request as frivolous and vexatious that he founds the claim under s 56(1) of the supreme law. However, he fails to lay out any material facts to give credence to the allegation that the court *a quo* discriminated against him in applying the law. He has not shown any differentiation in treatment between him and any other party by the manner in which the court dealt with the matter s application for referral to the Court. He has further not shown how the refusal by the court denied him the benefit of the law

[77] The case of *Nkomo (supra)* is unequivocal on the consequences following upon the failure of an applicant to demonstrate the unequal treatment that he has been subjected to by the court *a quo*. The Court made the following remarks at para .11:

> "Clearly the guarantee provided by s 56(1) is that of equality under the law. The applicant has made no allegation of unequal treatment or differentiation. He has not shown that he was denied protection of the law while others in his position have been afforded such protection. He has presented the Court with no evidence that he has been denied equal protection and benefit of the law… In short, the applicant has come nowhere near to establishing that his right enshrined in s 56(1) of the Constitution has been infringed. He is therefore not entitled to a remedy." (*my emphasis)*

[78] Further to the above, and more critically, the applicant has not challenged the validity of the exercise of the discretion by the High Court in *casu.* In terms of s 175(4) of the Constitution, the relevant court may refuse the request for referral by the parties if it considers such an application to be frivolous or vexatious. It is

apparent that the presiding judicial officer is endowed with limited discretion in the matter. The applicant does not challenge the substance of the court *a quo*'s exercise of its discretion under 175(4) of the constitution. The court found the application to be frivolous and vexatious. It rightly dismissed the application.

[79] The import of the term frivolous was considered in the case of *Williams & Anor v Msipha NO* 2010 (2) ZLR 552 (S)by MALABA DCJ (as he then was) who stated the following:

> "In *S v Cooper & Ors 1977 (3) SA 475 (T)* at 476 D, Boshoff J said that the word "frivolous" in its ordinary and natural meaning connotes an action or legal proceeding characterised by lack of seriousness as in the case of one which is manifestly insufficient. The raising of the question for referral to the Supreme Court under s24(2) of the Constitution would have to be found on the facts to have been obviously lacking in seriousness, unsustainable, manifestly groundless or utterly hopeless and without foundation in the facts on which it was purportedly based."

See also *Martin v Attorney General & Anor* 1993 (1) ZLR 153 (S) at p 157

[80] If due regard is had to the full background of the matter, it is evident that the application for referral was not made in good faith. The applicant's action in forcibly entering upon the premises and depriving the respondent's representatives of possession of the premises was the sole reason for the institution of the spoliation proceedings in the High Court. He resorted to self-help and sought the assistance of the court to unduly frustrate the respondent from effectively enforcing the judgment of the Supreme Court in which his dispute with the respondent's executives was settled.

[81] By seeking a referral before the hearing of the application for leave to execute, as rightly alleged by the respondent, the applicant sought to buy more time to vex the respondent and further his cause in the dispute regarding ownership of the

church premises. In short, the dismissal of his referral application was in no way a violation of s 56(1) of the Constitution. In my view, this argument lacks merit and cannot be sustained.

[82] In *casu*, the High Court stated as follows:[2]

> "The back-drop against which the applicant seeks execution has been articulated by the applicant. The applicant's incentive in seeking enforcement rests in not only having won their litigation on spoliation but, it is also against the backdrop of having won the Supreme Court matter in the church's leadership wrangle. The applicant also seeks enforcement expeditiously against the backdrop of the respondent having left the church only to return by force to take over the premises. The respondent, on the other hand, believing as he does that his congregants are in the majority, seeks to delay the enforcement of that judgment on the basis that the court erred. Generalised arguments that deliberately skirt the context of each case in which execution is sought cannot therefore be a basis for creating an imagined constitutional crisis. Materially, there is therefore nothing inherently unconstitutional in a court ordering execution of its judgment where it firmly believes that the appeal has been lodged to simply buy time. Allowing a lower court to determine whether a judgment should be enforced pending an appeal is a way of dealing with frivolous appeals."

[83] As stated in ***Old Mutual Life Assurance Company (Private) Limited V L. Makgatho*** HH 39-07:

> "Where, however, the appellant brings the appeal with no *bona fide* intention of testing the correctness of the decision of the lower court but is motivated by a desire to either buy time or to harass the successful party, the court, in its discretion, may allow the successful party to execute the judgment notwithstanding the absolute right to appeal vesting in the appellant."

[84] As regards the alleged unconstitutional exercise of its discretionary power by a court ordering execution in a matter which is on appeal in a higher court, it is clear that the law provides a constitutional right of appeal that is available to the unsuccessful party, whether it is the plaintiff or the defendant. Even though there

[2] At pp4-5, para 9 of the cyclostyled judgment

is a presumption that the trial court's decision is correct, a litigant still has the opportunity to have the lower court's decision upturned on appeal. The implication of this is that where execution has been carried out pursuant to the judgment of the lower court, the judgment of the appeal court would become a pointless victory, especially where, as a result of execution against the judgment, the judgment debtor suffers irretrievable prejudice or injury. The law is, therefore, cognisant of the need for the Court of Appeal to protect not only the *res* but also to ensure that its judgment is not rendered nugatory upon being delivered. An appeal against the order granting leave to execute would by operation of law suspend its execution. In this way, the court preserves the *res* and, at the same time, protects its judgment from being rendered nugatory. This constitutes part of the inherent power to control the court's processes.

[85] On a proper reading of the Constitution, it cannot be said that the power to control the execution of a judgment that vests in the High Court has been ousted by the incidence of s 176 of the Constitution. I am certain that such a construction would be reading into the provision a legal position that is unsustainable at law. Section 176 confirms the inherent jurisdiction of the superior courts and does not in any express or implied manner detract from the powers of the respective courts.

[86] In addition, the applicant also alleges that his right to a fair trial under s 69(3) was violated by the court *a quo*. He stresses that the determination of the application for execution pending appeal effectively pre-empts the Supreme Court's decision. He argues that his right of access to the Supreme Court is militated against by the court *a quo*'s decision.

[87] The full import of s 69 of the constitution was considered recently in the case of *Sadiqi v Muteswa* CCZ 14/21 on p 9**.** PATEL JCC succinctly summarised the aforesaid section as follows:

> "Section 69 of the Constitution enshrines and protects the right to a fair hearing. It guarantees that the courts are open to every person. However, this is subject to the rules put in place to regulate court proceedings and bring order to the justice delivery system. When the dirty hands doctrine is applied to refuse to entertain a litigant who is in violation of a court order, he is not being denied the right to a fair hearing. This is actually a measure that is necessary to preserve the dignity and the authority of the courts so that the citizenry at large can continue to enjoy the right to a fair hearing. It is an essential part of the inherent power that the courts enjoy so as to protect their own processes."

[88] In *Mugwambi v Ajanta Properties (Pvt) Ltd* HH 77/08, MAKARAU JP (as she then was), stated as follows on p 2 of the cyclostyled judgment:

> "The power to grant stay of execution pending appeal is a common law exercise of the power that inheres in this court. In this regard, the court enjoys the discretion of the widest kind. The main guiding principle for the court in determining such applications is to grant stay where real and substantial justice requires such a stay or conversely, where injustice would otherwise be done. (See *Standard Bank of South Africa Ltd and Another v Malefane and Another*: *in re Malefane v Standard Bank of South Africa Ltd and Another* 2007 (4) SA 461 (Tk); *Road Accident Fund v Strydom 2001* (1) SA 292 (C). *Williams v Carrick* 1938 TPD 147 at 162; *Strime v Strime* 1983 (4) SA 850 (C) and *Graham v Graham* 1950 (1) SA 655 (T))."

[89] By parity of reasoning, the High Court's common law jurisdiction to order the execution of its judgment pending an appeal pending in the Supreme Court is thus consistent with the hierarchy of courts provided in s 162 of the Constitution. Further, the assessment of prospects of an appeal already before a superior court is consistent with the obligation on all courts to be impartial and to do justice between man and man.

[90] It is noted that the applicant seems to query the jurisdiction of the High Court. He relies on the provisions of s 176 of the Constitution and argues that the power to order execution of judgments under appeal no longer vests in the High Court but now reposes in the Supreme Court. In this regard, he contends that when it ordered execution pending appeal, the High Court violated his perceived fundamental rights under ss 56(1) and 69(3) of the Constitution. This misconception was canvassed in the case of *Mutasa and Anor v The Speaker of the National Assembly and Ors* CCZ 9/15. It was held at page 14 that:

> "It would be absurd to come to a conclusion that an act done in terms of the provisions of the Constitution can violate someone's rights under the same Constitution. In other words, the applicants could not have been successful in challenging an act that was sanctioned by the supreme law of the land.
> The Constitution is one document that contains provisions that are consistent with each other. One provision of the Constitution cannot be used to defeat another provision in the Constitution. Different provisions of the Constitution must be interpreted with a view to ensuring that they operate harmoniously to achieve the objectives of the Constitution."

[91] In light of the foregoing, the prospects of success in the main matter are negligible as the applicant has not established any cogent reasons to support a violation of his fundamental rights. This directly impacts upon the present application and I am constrained to find that it would not be in the interests of justice to grant direct access to this judicial forum.

THE AVAILABILITY OF AN ALTERNATIVE REMEDY TO THE APPLICANT

[92] It is settled that in an application for direct access, this Court may also consider the availability of alternative remedies to the applicant. In opposing the application, the respondent avers that the applicant still enjoys a right of appeal to the Supreme Court and that this matter is alleged to be still pending. This contention has not been disputed by the applicant.

[93] Rule 21(8) sets out the availability of any other remedy as one of the factors that are indicative of whether or not an application has prospects of success. In *Makoto v Mahwe N. O. & Anor CCZ 29/19* at page 10, this Court held that:

> "If a remedy is available to a party, whether it is a factual or a legal remedy, courts will not normally consider a constitutional question unless the existence of a remedy depends on it."

[94] In my view, the Court ought to refrain from addressing the constitutional question as the Supreme Court is seized with the real dispute between the parties which relates to possession and the subsequent ownership issues surrounding the premises in question. I am fortified in these remarks by the sentiments of this Court in the case of *Chawira & Ors v Minister of Justice, Legal & Parliamentary Affairs & Ors CCZ 3/17* at p 9 – 10. It was held that:

> "As we have already seen, in the normal run of things courts are generally loathe to determine a constitutional issue in the face of alternative remedies. In that event they would rather skirt and avoid the constitutional issue and resort to the available alternative remedies. This has given birth to the doctrine of ripeness and constitutional avoidance ably expounded by EBRAHIM JA in *Sports and Recreation Commission v Sagittarius Wrestling Club and Anor* 2001 (2) ZLR 501 (S) at p 505G …."

[95] In my view, the applicant has failed to show that he does not have alternative remedies available to him.

DISPOSITION

[96] From the foregoing, it is the Court's view that the application lacks merit. The application must therefore fail for the reasons that the substantive application has no prospects of success and also that there exist alternative remedies for the applicant.

In the result, I make the following order:

The application is dismissed with no order as to costs.

MAKARAU JCC: **I agree**

PATEL JCC: **I agree**

G S Motsi Law Chambers, Applicant's Legal Practitioners

Mtetwa & Nyambirai Law Firm, Respondent's Legal Practitioners