SLICE DISTRIBUTORS (PRIVATE) LTD

v

(1)INNSCOR AFRICA LTD (2) REGISTRAR OF DEEDS
(3) ATTORNEY GENERAL

CONSTITUTIONAL COURT OF ZIMBABWE
GARWE JCC, GOWORA JCC & PATEL JCC
HARARE JANUARY 30 & NOVEMBER 8, 2024

L Madhuku with *M. Nkomo,* for the applicant

T Zhuwarara with *R. Zhuwarara,* for the first respondent

No appearance for the second and third respondents

GOWORA JCC:

[1] This is a court application for direct access brought in terms of s 167(5) of the Constitution of Zimbabwe, 2013 ("the Constitution") as read with r 21 of the Constitutional Court Rules, 2016 (the Rules). If granted leave, it is the intention of applicant to bring an application under s 85(1) of the Constitution to enforce its fundamental rights under s 61, 64 and 71 of the Constitution.

THE BACKGROUND

[2] The applicant and the first respondent, hereafter referred to as the respondent, are companies incorporated in terms of the laws of Zimbabwe. Both are engaged in the marketing and supply of fast food, specializing in chicken and side dishes.

[3] In 1987 the respondent established a brand called Chicken Inn. In 2006 it registered a trademark in respect of that brand under the Trade Marks Act [*Chapter 26:04*], "the Act". The brand registered comprised a rooster, two heart symbols and the phrase '*luv dat chicken*'. It also had a logo with a distinctive colour scheme of red, white, yellow and black.

[4] In 2010, the applicant followed suit and established a brand called Chicken Slice, which became a worthy competitor to the respondent. It registered its own trademark for its brand incorporating the words '*I luv it*'. It used that phrase to market its products.

[5] In 2019, irked by the use by the applicant of the phrase '*I luv it*', the respondent launched proceedings against the latter and issued summons in the High Court. It alleged that the use of the phrase by the applicant was causing confusion on the part of its customers. It also alleged that the applicant was passing off its products as if they were its own. It therefore sought an order interdicting the applicant from using the phrase '*I luv it*' in marketing its products.

[6] The applicant contested the claim. The applicant averred that the word '*luv*' was used in a descriptive manner hence it was not a trademark. The applicant insisted that the respondent did not have exclusive rights in the word and as a consequence denied that it was guilty of infringing the respondent's trade mark. It also denied passing off its products as those of the respondent.

[7] The matter proceeded as a special case in terms of r 52 of the High Court Rules, 2021.

In compliance therewith, the parties filed a statement of agreed facts in terms of the rules.

Rule 52 thereof reads as follows in relevant part:

> "***52. Special cases***
>
> (1) The parties to any civil action or suit may, after summons has been issued, agree upon a written statement of facts or the questions of law arising therein in the form of a special case for the adjudication or opinion of the court.
>
> (2) The statement referred to in subrule (1) shall set out the facts agreed upon, the questions of law in dispute between the parties and their contentions thereon.
>
> ……
> ……
>
> (10) If the question in dispute is one of law, and the parties are agreed upon the facts, the facts may be admitted and recorded at the trial and the court may give judgment without hearing evidence.

[8] In compliance with subrule above, the parties submitted a document termed an agreed statement of facts. The statement is captured in an excerpt from the judgment of the High Court. The excerpt reads as follows:

(a) "In 1987, the plaintiff established a brand called Chicken Inn as a restaurant. In 2010, the 1st defendant established Chicken Slice, also a brand and a competitor of the plaintiff in the restaurant business.

(b) The plaintiff registered a trademark No. 1070/2006 in class 29. The presentation consisted of a chicken, two heart symbols and a phrase 'luv dat chicken'. A certificate of Registration with ARIPO in classes 29, 30 and 43 was attached. The plaintiff asserts that the trademark has been used by it since 1987. Further that it carries an identifiable logo with a distinctive colour scheme of red, white, yellow and black.

(c) Sometime in March 2019, the plaintiff became aware that the 1st defendant was using a mark containing the term 'luv' in its phrase, 'I luv it' in marketing products similar to those of the plaintiff. It has also been using a colour scheme resembling that of the plaintiff since its inception in 2010.

(d) The 1st defendant is the registered user of a trade mark 'Chicken Slice', having been assigned to it from Packers International in April 2016. It was registered in class 43, on the 20th of November 2012, under no. 755/2022. The trade mark consists of a chicken device in yellow, red and white, a red circle and an orange ribbon and the words 'Chicken Slice'; in red, white and black.

(e) On the 24th of September 2019, the 1st defendant registered a trade mark for Slice Grill and Burger, incorporating the words, "I luv it" in class 43 under registration number 250/2019.

(f) The plaintiff has through its social media accounts been receiving comments regarding the perceived resemblance of the Chicken Inn and Chicken Slice brands.

(g) The plaintiff wrote to the 1st defendant demanding that it ceases to use the term 'luv' and desist from use of similar colour schemes. The 1st defendant takes a position that the plaintiff does not have exclusive use of the term 'luv' and that the two brands do not resemble each other. They also consider the demand to be anti-competitive.

The agreed facts contained annexures. In addition, the parties filed written submissions advancing their understanding of the law on the issues raised. The matter was then set down as an opposed one as per R52 (5)."

[9] The respective trademarks of the parties, the parties' packaging materials, newspaper adverts and copies of social media comments from various unidentified customers were annexed to the statement of agreed facts. The High Court also set out the issues as agreed by the parties. The issues are set out as follows:

" (a) Whether the 1st defendant infringed the plaintiff's registered trade mark no 1070/2006 in any way?

(b) Whether the 1st defendant passed off any of its products as those of plaintiff as alleged or at all?

(c) If there was an infringement or passing off, what are the appropriate remedies?"

[10] Consequent thereto, the parties filed heads of argument. After hearing submissions from the parties, the High Court dismissed the application with costs. It found that "the respondent's customers" were not likely to be confused by the use of words '*I luv it*' by the applicant. It concluded that the respondent had failed to establish an infringement of its trademark as claimed. It further found that, except for the word '*luv*', the marks used by the applicant and the first respondent were markedly different. With regards to the claim of passing off, the High Court found that there was "insufficient evidence" to

suggest that the applicant had in fact passed off any of its products as those of the first respondent.

[11] The respondent was aggrieved and appealed to the Supreme Court. It was the respondent's contention that the use of the phrase 'I luv it' by the applicant infringed its registered trademark.

[12] *Per contra*, the applicant countered the attack by insisting that the respondent had not objected when it registered its own trademark and that the respondent, subsequent thereto, has not sought its expungement. It argued that the respondent ought to have objected when it registered its trademark with the phrase '*I luv it*'.

[13] The court *a quo* held, correctly in my view, that in considering whether or not there is trademark infringement, the trademark should be looked at in its totality. From this premise, it then went on to find that, when the respondent registered its trademark, it was restricted from using the word chicken exclusively. The court expressed the view that the use of the word '*luv*' by the applicant in marketing its products had created confusion between the products of the applicant and those of the respondent.

[14] As regards the allegations that the applicant was guilty of passing off its own products as those of the respondent, the court *a quo* found that there was "no evidence" to prove that the applicant passed off its goods as those of the respondent.

[16] It then allowed the appeal in part, and proceeded to issue an interdict in favour of the respondent.

[17] Aggrieved, the applicant has approached this Court seeking direct access to the Court for a determination and consequential relief under s 85(1) based on allegations that the judgment by the court *a quo* violates its rights as enshrined in ss 61, 71, and 64 of the Constitution. There is also an allegation of the violation of the right to the protection of the law and equal treatment and benefit of the law. The latter allegation was abandoned by counsel for the applicant at the hearing.

THE APPLICATION

[18] The application is filed in terms of s 167(5) of the Constitution as read with r 22(2) of the Rules of the Constitutional Court. The applicant, in its founding affidavit, narrates the setting up of the rival fast food entities by the respondent and the applicant in due course. The deponent confirms the registration by the respondent of its trademark in 2006 under class 29 which related to poultry, meat and milk products.

[19] Thereafter the applicant came onto the market as a rival and, in due course, caused the registration of its own trademark. The graphics of the respective trademarks were produced before the High Court as attachments to the agreed statement of facts filed by the parties.

[20] Sometime in 2019, the respondent sent a letter to the applicant demanding that it cease and desist from infringing its trademark number 1070/2006. In the same letter the respondent demanded that the applicant desist from using colour schemes similar to those of its registered trademark.

[21] The Applicant responded to the letter from the Respondent demanding that it stop using the word "luv" in marketing its products. The applicant indicated that the respondent did not have exclusive use of the word and/or the colours that made up its marketing paraphernalia. It indicated further that the marks used by both parties did not resemble each other.

[22] In its response, the Applicant also highlighted that the demand amounted to anti-competitive behaviour. It made reference to the World Trade Organization Agreement on Trade Related Aspects of Intellectual Property Rights, commonly known as the TRIPS Agreement which mandates member states, including Zimbabwe, to ensure that enforcement of Intellectual property rights does not unreasonably curtail competition.

[23] The applicant contends that the decision of the Supreme Court allowing the appeal and interdicting it from using its registered trademark violated its fundamental rights and, as a result, the applicant was constrained to file this application to vindicate those rights.

[24] The applicant contends that the judgment violates at least three of its fundamental rights as follows: the right to property under s 71, the right to carry on a trade or occupation under s 64 and the right to freedom of expression under s 61. In addition, the applicant alleges that its right to protection and benefit of the law was violated by the Supreme Court.

[25] The applicant contends that every court, including the Supreme Court itself, is bound by the Constitution and, further, that a court may, itself, be the organ of state infringing fundamental rights. According to the applicant, the focus in this application

under s 85(1) of the Constitution is to attack the manner in which the Supreme Court reached its decision. This is because the approach to this Court under s 85(1) of the Constitution is in the form of a constitutional review process.

[26] The application is opposed. The respondent avers that it established a fast-food outlet, Chicken Inn in 1987. In 2006, the respondent registered its trademark under reg. number 1070/2006, comprising the head of a rooster, two heart symbols and the colours red, white, black and yellow. The mark also included the words "*Luv dat chicken*".

[27] The applicant came onto the market in 2010 and set up as a competitor also serving fried chicken and chips. The respondent avers that in 2018, the applicant started using a mark similar to that of the respondent comprising the same colour scheme as in its registered trade mark. It also had the words "luv it". Resulting from this there arose so much confusion that it became difficult to distinguish the applicant's products from those of the respondent. The respondent took issue and issued summons in the High Court for appropriate relief.

[28] It is the view of the respondent that the intended application is a disguised appeal and that in setting aside the judgment of the High Court and granting the relief that the respondent had sought, the Supreme Court had considered all the issues before it and found that the applicant had infringed the respondent's trademark. It is suggested on behalf of the respondent that the applicant is unhappy with the decision of the Supreme Court and wishes to have it set aside on the substance. To this end, the respondent contends that the purpose of the application is not to raise genuine constitutional issues but for the applicant to vindicate its loss in the court *a quo.*

[29] The respondent also avers that the court *a quo* did not decide a constitutional matter nor was there a constitutional matter before it for determination. As a result, it is contended that there is no constitutional matter for determination justifying the trigger of jurisdiction on the part of this Court. It is the contention of the respondent that there is no suggestion in the founding affidavit that the proceedings in the Supreme Court in any way violated its rights. What is pertinent is that the applicant attacks the reasoning of the of the court *a quo.*

30] In addition, the respondent has raised a procedural issue and complains that the applicant has not complied with r 21(3) in that the founding affidavit has not set out any facts establishing why it would be in the interests of justice for the applicant to be granted direct access to approach the Court for the relief sought. Instead, all it addresses are what it considers prospects of success.

[31] The respondent prays for the dismissal of the application for leave to approach the Court.

ARGUMENTS IN THIS COURT

[32] Mr *Madhuku,* counsel for the applicant, argued that the court *a quo* failed to apply the laid down procedures of adjudication when it interdicted the applicant from using its registered trademark. He argued that the court *a quo* erred when it interdicted the applicant from using its registered trademark in circumstances where the requirements for the granting of an interdict were not established. He insisted that the respondent

ought to have applied to the Registrar of Trademarks for the expungement of the applicant's trademark instead of approaching the courts.

[33] Counsel submitted that the applicant's right to own property as enshrined in section 71 of the Constitution of Zimbabwe was arbitrarily taken away because the procedure provided for in terms of the Trademarks Act [*Chapter 26:04*] was not followed before the interdict was granted. Counsel suggested that the effect of the decision by the court *a quo* was to set aside a registered trademark contrary to the provisions of the Trade Marks Act.

[34] He further submitted that interdicting the applicant from using a registered trademark infringes the applicant's right to property as enshrined in s 71(2) and (3) of the Constitution. In this regard, it was argued that the non-consideration of speech protective *(sic)* trademark rules, without further explanation on its part, infringes the applicant's right to freedom of occupation, trade and profession protected by s 64 of the Constitution as well as its right to freedom of expression as protected by s 61. Mr *Madhuku* submitted that he was abandoning the argument, contained in the applicant's heads of argument, to the effect that the applicant's right to equal protection of the law as provided for in terms of s 56 of the Constitution was violated.

[35] In opposing the application, Mr *Zhuwarara*, counsel for the respondent, raised preliminary objections. Firstly, he submitted that the intended constitutional application was a disguised appeal against the decision of the Supreme Court. He argued that the appeal was dealt with in accordance with the law governing the hearing and

determination of appeals. It was his case that the founding affidavit seeks to raise constitutional issues which are non-existent in this case.

[36] Counsel argued further that the jurisdiction of the Constitutional Court is limited to the determination and adjudication of constitutional matters only. As a consequence, so went the argument, the applicant should be non-suited for want of jurisdiction.

[37] Secondly, he averred that the applicant's founding affidavit concentrates on the issue of prospects of success without dealing with the question relating to whether or not it is in the interests of justice for the application to be granted.

]38] Lastly, he contended that the applicant seeks to have the decision of the court *a quo* set aside in its entirety, yet part of the judgment was made in its favour.

[39] On the merits, Mr *Zhuwarara* argued that the intended application was a disguised appeal against the judgment of the court *a quo*. He insisted that the applicant seeks to challenge the substantive part of the decision of the court *a quo* under the guise of alleged breach of fundamental human rights. He argued that direct access is only granted in deserving cases and this case is not such a case.

[40] Counsel reiterated that it is settled that the decision of the Supreme Court on a non-constitutional matter is final. He relied on the *dicta* in *President of the Senate* v *Gonese* CCZ 01-21 to support his argument. As a result, he prayed for the dismissal of the application.

ISSUES FOR DETERMINATION

[41] From the pleadings filed by the parties herein, I discern the issues for determination as being the following:

1. Whether or not the application complies with r 21(3) (a) of the Constitutional Court Rules, 2016.
2. Whether it is in the interests of justice that leave for direct access to the court be granted.

Whether or not the application complies with r 21(3) (a) of the Constitutional Court Rules, 2016.

[42] The respondent, as a preliminary objection to the application, has contended that the applicant's founding affidavit does not address the question as to whether or not it is in the interests of justice for leave for direct access to be granted to it. The rule provides that:

> "(3) An application in terms of sub rule (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."

[43] A litigant seeking relief in terms of the above must establish, in the application, the grounds upon which it is contended that it is in the interests of justice for an order of direct access to be granted. The interests of justice are determined based on the consideration of several factors. Some of the factors which this Court may consider in

determining the interests of justice are found in r 21(8). These are, however, not exhaustive. 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 there are disputes of fact in the matter."

[44] In *Liberal Democrats & Ors* v *President of the Republic of Zimbabwe E D Mnangagwa NO & Ors* 2018 (2) ZLR 47 at 54 (CC), this Court noted that:

> "It is imperative for an applicant for an order for leave for direct access to indicate that it is in the interests of justice that an order for direct access be granted. Where the affidavit does not satisfy the requirement, the application has no basis. Rule 21(3) (a) requires that the founding affidavit should have regard to the matters that show why the interests of justice would be served if an order for direct access is granted."

[45] The applicant, apparently acting on the advice of its legal practitioners, did not set out, as a separate issue, the grounds upon which it believed that it was in the interests of justice that it be granted leave for direct access. What it did was to address what it considered as prospects of success of the application. Therefore, what it did was to attack the judgment of the court *a quo* on the allegations that it, the judgment, had infringed three of its fundamental rights as enshrined in the Constitution.

[46] It then goes on to state how the court *a quo*, in eight respects, failed to act in accordance with the law and thereby infringed its fundamental rights. To this extent I believe that the grounds required to be stated under r 21(3) (a) have been sufficiently set out albeit in an inelegant manner.

[47] In the process, it then addresses the prospects of success of the intended substantive application. I am unable to find that the preliminary objection was well taken.

THE LAW

[48] The Constitutional Court only exercises such jurisdiction as is accorded to it by the Constitution. This is trite. Therefore, its jurisdiction cannot be triggered unless the matter that it is seized with is either constitutional in nature or raises constitutional issues for determination by it.

[49] It is accepted by both parties herein that the Supreme Court did not have before it a constitutional matter for determination nor did its decision require the interpretation, enforcement or protection of the Constitution.

[50] As a consequence, in order for the Court to assume jurisdiction *in casu*, the applicant is required to establish that the intended application to the Court raises a constitutional matter for determination by it.

[51] The guiding principle in an application such as the present, where an applicant alleges the violation of a right emanating from court proceedings, was settled in *Lytton Investments (Private) Limited* v *Standard Chartered Bank Zimbabwe Limited* & *Anor* 2018(2) ZLR 743(CC), wherein the Court noted at pp 747-748 that:

> "Consideration of the relevant constitutional provisions supports the view that the validity of a decision of the Supreme Court in proceedings involving non-constitutional matters may be challenged on the ground that it has infringed a fundamental right or freedom enshrined in [*Chapter 4*] of the Constitution. The basis of the right of a party to the proceedings to challenge the validity of a decision of the Supreme Court in the circumstances is the Constitution itself. The right given to a litigant under s 85(1) of the Constitution to approach the Court for appropriate

> relief on the allegation stated is correlative to the constitutional obligation imposed on the Supreme Court as a body exercising public authority. …

And later at p750

> "The scope of the right to approach the Court for appropriate relief under s 85(1) of the Constitution is not limited by specific objects against which the allegations of infringement of a fundamental right or freedom can be made. A constitutional complaint provided for under s 85(1) of the Constitution can be lodged against any act of public authority. A decision of the Supreme Court in a case involving a non-constitutional issue would fall within the category of acts, the constitutional validity of which may be challenged on the grounds prescribed under s 85(1) of the Constitution."

[52] The Constitution accords the right to any litigant seeking to enforce a fundamental right under s 85 to approach the Court for appropriate relief. *In casu*, the applicant has sought that the Court issue an order declaring that the Supreme Court violated its rights in the manner it dealt with the appeal wherein it granted an interdict in favour of the respondent the effect of which was to stop it from using its registered trademark. What the applicant must establish is that it is in the interests of justice that it be granted leave to approach the Court to obtain redress.

[53] As an additional preliminary objection to the application for direct access, the respondent argued that the intended application is a disguised appeal against the decision of the Supreme Court. The Supreme Court is the final court of appeal and no decision of the Supreme Court is appealable unless the Supreme Court determines a constitutional matter. This is trite. In *Lytton Investments (Pvt) Ltd* v *Standard Chartered Bank Zimbabwe Ltd & Anor, supra,* at 756 it was held as follows:

> "A decision of the Supreme Court on any non-constitutional matter in an appeal is final and binding on the parties and all courts except the Supreme Court itself. No court has the power to alter the decision of the Supreme Court on a non-constitutional matter. Only the Supreme Court can depart from or overrule its previous decision, ruling, or opinion on a non-constitutional matter. The *onus* is on

the applicant to allege and prove that the decision in question is not a decision on a non-constitutional matter."(Emphasis added.)

[54] Similar sentiments were expressed in *Denhere* v *Denhere & Anor* 2019 (1) ZLR 554 (CC) at 569 wherein this Court held that:

"It is only an appeal court that can make a declaration on the correctness or otherwise of a judgment. In the absence of the right to appeal, the judgment cannot be said to be wrong. Just because a party thinks a judgment is wrong, that does not make it so. No judicial authority can pronounce on the correctness or otherwise of decisions of the Supreme Court on non-constitutional matters." **(added emphasis)**

[55] The applicant is not seeking leave to appeal against the decision of the court *a quo* and it cannot do so. It is seeking the vindication of alleged violation of fundamental rights arising from the decision of the Supreme Court. Any party alleging the violation of a right by a court may approach the High Court or this Court for relief. The rider, however, is that in order to obtain leave to approach this Court directly, the applicant thereto must show that it is in the interests of justice that leave be granted. To this end, the application must comply with the requirements spelt out in rule 21 of the rules of this Court.

[56] To determine the preliminary point it therefore behoves me to consider whether it is in the interests of justice that the applicant be granted leave for direct access to the Court.

Whether it is in the interests of justice that leave for direct access to the court be granted

[57] In accordance with the requirements of the Constitution and r 21(3) above, an applicant who approaches this court seeking direct access must show that it is in the interests of justice for leave for direct access to be granted. This position was clearly articulated in

the case of *Mbatha* v *Confederation of Zimbabwe Industries & Anor* CCZ–5-21 at p 6 where it was held that:

> "The Constitutional Court is a specialised court and in terms of s 167(1) (b) decides only constitutional matters and issues connected with decisions on constitutional matters. It thus exercises jurisdiction as a court of first instance and an appeal court. In view of the limited jurisdiction of this Court, direct access to the court for the exercise of its jurisdiction for the vindication of a fundamental right premised on s 85 of the Constitution as a court of first instance is granted to a litigant who is able to show that it is in the interests of justice for direct access to the court to be granted to such litigant."

[58] A reading of the decision of the court *a quo* shows that the court *a quo* did not make a determination on a constitutional matter. This Court, in *Mukondo* v *The State* CCZ 08-20, at p 5, discussed the circumstances under which the jurisdiction of this Court can be invoked in a situation where the Supreme Court did not make a determination on a constitutional matter. It was held as follows:

> "Where the jurisdiction of the Court is sought to be invoked on the allegation that the decision of a subordinate court on a non-constitutional matter violated a fundamental human right, the applicant must show that the violation was a result of failure by the subordinate court to act in accordance with the law governing the proceedings concerned leading to an arbitrary decision"

[59] In the *Lytton Investments case supra*, the Court held as follows at p755 of the judgment:

> "The theory of constitutional review of a decision of the Supreme Court in a case involving a non-constitutional matter is based on the principle of loss of rights in such proceedings because of the court's failure to act in terms of the law, thereby producing an irrational decision. There must, therefore, be proof of the failure to comply with the law. The failure must be shown to have produced an arbitrary decision."

[59] The Court in the same judgment at p 754 went on to state that:

> "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 the granted."

[60] In *casu*, counsel for the applicant argued that although the Supreme Court did not determine a constitutional issue, its decision infringed the applicant's fundamental rights because it interdicted the applicant from using an extant registered trademark. In *Mwoyounotsva* v *Zimbabwe National Water Authority* CCZ 17-20 p8 it was held that:

> "The Supreme Court is the final court of appeal in non-constitutional matters and is established in terms of the law. It is consequently under a legal obligation to protect fundamental rights and freedoms. It does so by enforcing such rights and freedoms through appropriate adjudicatory processes. It is itself under the constitutional obligation not to violate fundamental rights or freedoms when adjudicating over cases involving non-constitutional issues. In other words, the protection of the exercise of jurisdiction in non-constitutional matters is subject to due compliance with the obligation to protect fundamental rights or freedoms, the infringement of which would disable the court from making a decision on the non-constitutional issue."

The impugned decision of the court a quo.

[61] The Supreme Court, based on the papers in the record, was moved to find that the High Court had erred in not granting the order for an interdict that the respondent had prayed for. The court *a quo* reasoned as follows:

> "[44] We agree with Mr *Zhuwarara* that the court *a quo* erred in failing to properly apply the legal tests attendant to trademark infringement claims. The appellant is entitled to the interdict it seeks as the continued use of the phrase 'l luv it', in products under The Chicken Slice mark, creates deception and confusion between the appellant's products and the first respondent's products as viewed by the notional consumer."

[62] The applicant's view is that in adjudicating a non-constitutional matter, the Supreme Court violated its right to own property and the right to freedom to choose a profession, occupation, or a trade as provided for in terms of s 71(2) and s 64 of the Constitution

respectively. It insisted that the court *a quo* ought not to have interdicted it from using a registered trademark. The right to own property is protected under s 71(2) of the Constitution. The section provides that:

> "Subject to section 72 every person has the right, in any part of Zimbabwe to acquire, hold, occupy, use, transfer, hypothecate, lease or dispose of all forms of property, either individually or in association with other."

[63] The right to freedom of profession, trade or occupation is provided for in terms of s 64 of the Constitution. The section provides that:

> "Every person has the right to choose and carry on any profession, trade or occupation but the practice of a profession, trade or occupation may be regulated by law."

[64] The court *a quo* found that there had been unauthorized use of a registered trade mark by the applicant. It also stated that the High Court had ignored the evidence that was in the stated case.

[65] Section 8 proscribes the unauthorised use of a registered trademark. It provides as follows:

> "**8 Infringement of rights given by registration in Part A or Part B**
>
> (1) Subject to this section and to sections *ten* and *eleven*, **a registered trade mark shall be infringed by any unauthorised use in the course of trade,** whether as a trade mark or otherwise, of a mark that is identical to the registered trade mark or so nearly resembling it as to be likely to deceive or cause confusion, where that mark is used in relation to the same or similar goods or services as those in respect of which the trade mark is registered."(added emphasis)

[66] The applicant argues that the failure by court *a quo* to take into consideration the laid down procedure in the Act had the effect of arbitrarily taking away its constitutionally

protected rights. The applicant contends that the court ought to have taken into consideration that the respondent should have approached the Registrar of Trademarks for redress. In fairness to the court *a quo*, it must be stated that there is no indication that these provisions were brought to its attention for consideration. Therefore, these are issues that are not before us for consideration.

[67] In addition, the applicant argues that the approach that the respondent took by seeking an interdict against its use of a registered trademark is arbitrary and contrary to the law and that, in turn, the court *a quo*, by granting the interdict, also is guilty of arbitrarily acting contrary to the law.

[68] The argument by the applicant is that the right to own trademarks is regulated by the Trade Marks Act. Its case is that the court *a quo* failed to act in accordance with the requirements of the law governing the proceedings when it did not consider ss 37 and 38 of the Trade Marks Act. I do not consider it necessary to construe ss 37 and 38 in resolving the heart of the matter.

[69] It is trite that the validity of a judgment of the Supreme Court may be challenged under s 85 on the premise that it has violated a fundamental right. However, the exercise of this right pursuant to the provisions of s 85 where the decision of the Supreme Court is impugned on the basis of an allegation of the violation of a fundamental right depends on the ability of the litigant to show that, in arriving at the impugned decision, the Supreme Court acted contrary to law in the manner that it conducted its processes thereby tainting its ultimate decision.

[70] The Supreme Court is the final court of appeal within the jurisdiction. Section 169(1) of the Constitution, states that the Supreme Court is the final court of appeal except for matters where the Constitutional Court has jurisdiction. As a consequence, by law, its decisions are final. The finality of its judgments or orders is confirmed by the Supreme Court itself, [*Chapter 7:13*], by providing as follows:

> **"26 Finality of decisions of Supreme Court**
>
> (1) There shall be no appeal from any judgment or order of the Supreme Court."

[71] This Court, therefore, is bound by the dictates of law not to stray from its mandate under the Constitution to determine only matters concerned with constitutional issues. It does not have, nor can it assume, appellate jurisdiction over decisions that have no constitutional issues emanating from the Supreme Court. By law, it can only exercise appellate jurisdiction if the Supreme Court itself was seized with a constitutional or it made a decision on a constitutional issue.

[72] In rare circumstances, the Court may be constrained to consider whether the Supreme Court in matters before it has violated the constitutional rights of a litigant. The principles applicable in such cases have already been referred to above.

[73] The test that Court must apply in an application where a decision of the Supreme Court is subjected to scrutiny under s 85 is very stringent, this being necessitated by the principle that the decisions of the Supreme Court in terms of the Constitution itself are

final and no appeal can lie against them except on a constitutional issue. This trite position was reiterated in Lytton supra, where MALABA CJ said:[1]

> "The law of finality of decisions of the Supreme Court on non-constitutional matters applies to all litigants equally, whether they become winners or losers in the litigation process. The declaration of finality of a decision of the Supreme Court on a non-constitutional matter is itself a protection of the law. Once a decision is as a matter of fact a decision of the Supreme Court on a non-constitutional matter, no inquiry into its legal effect can arise. There would be no proof of infringement of a fundamental right or freedom as a juristic fact. It is enough for the purposes of the protection of finality and therefore correctness that the decision is on a non-constitutional matter.
>
> In the absence of a higher court to say so, a decision of the Supreme Court on a non-constitutional matter cannot be said to be wrong. In *Williams and Anor* v *Msipha NO and Ors supra* at 567C the Supreme Court said:
>
> "A wrong judicial decision does not violate the fundamental right to the protection of the law guaranteed to a litigant because an appeal procedure is usually available as a remedy for the correction of the decision. Where there is no appeal procedure there cannot be said to be a wrong judicial decision because only an appeal court has the right to say that a judicial decision is wrong. See *Maharaj* v *A G of Trinidad & Tobago (No. 2)* (PC) [1979] AC 385 at 399 D–H; *Boordman* v *Attorney General* [1996] 2 LRC 196 at 205i–206b." **(my emphasis)**
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> In *Lane and Fey NNO* v *Dabelstein and Ors* 2001 (2) SA 1187 (CC) [4] the Constitutional Court of South Africa held:
>
> "Even if the [Supreme Court of Appeal] erred in its assessment of the facts, that would not constitute the denial of the ['right to a fair trial and to fair justice']. The Constitution does not and could hardly ensure that litigants are protected against wrong decisions. On the assumption that section 34 of the Constitution does indeed embrace that right, it would be the fairness and not the correctness of the court proceedings to which litigants would be entitled."

[74] The tenor of the contentions by the applicant and the arguments advanced in support of the contentions tend to suggest that the applicant seeks the intervention of the Court in the substance of the judgment and not the process or the manner that the court

[1] At p 757 B-G

conducted the appeal. Implicit in the approach of the applicant is a request that the Court exercise appellate jurisdiction over the proceedings in the court *a quo*.

[75] The argument proffered on behalf of the applicant was that the court *a quo* erred when it interdicted the applicant from using its registered trademark. An error on the part of a court speaks to a misdirection on its part as opposed to a departure from laid down principles as regards the process itself.

[76] The applicant in the founding affidavit set out what it believes to be the test to be applied by the Court in applications such as this. It accepts therein that the fundamental consideration for the Court is whether or not the Supreme Court failed to act in terms of the law governing appeal proceedings generally. In this regard the applicant criticised the Supreme Court for granting an interdict against its use of its own trademark. It suggests that there were alternatives remedies available to the respondent under the governing legislative framework.

[77] In further expansion of its allegations, the applicant contended that the Supreme Court should have afforded the respondent those protections available to it under s 8(1) (a) of the Act. It contends that by granting an interdict in the face of a registered interdict, and ruling that the respondent had exclusive use to the word "luv", the court *a quo* did not operate within the bounds of the law.

[78] In all, the applicant referred to eight aspects in respect of which it contends the court *a quo* infringed its rights. All eight complaints raise issues that are to do with the substance of the judgment. They are all concerned with the reasoning of the court *a quo*

in coming to a decision upholding the appeal by the respondent. The objection by the respondent that the application is a disguised appeal is thus borne out by the averments of the applicant itself.

[79] Recently, in *Fairclot Investments P/L* v *Augur Investments P/L* CCZ 16/24, this Court, in considering an application for direct access to vindicate rights allegedly violated by a judgment of the Supreme Court, had this to say regarding the necessary circumstances under which the Court may assume jurisdiction.

> "[46] …….. Whilst an aggrieved party to non-constitutional litigation has the right to approach this Court alleging that a decision of the Supreme Court has infringed a fundamental right, the applicant must show in his or her or its application that there is a likelihood that this Court would find that the decision of the court infringed his/her/its right to judicial protection. He or she or it must show that the Supreme Court infringed his or her or its right to judicial protection in failing to act in accordance with the requirements of the law governing proceedings or prescribing the rights and obligations subject to determination. In *Feathers Mukondo, supra*, as well as *Lytton, supra,* the test was stated to be whether the violation was as a result of failure by the subordinate court to act in accordance with the law governing the proceedings concerned leading to an arbitrary conclusion. That failure to act in accordance with law must be shown to have disabled the Supreme Court from making a decision on a non-constitutional issue. There must, therefore, be proof of the failure to comply with the law and the failure must be shown to have produced an arbitrary decision. That is the test that an aggrieved party must satisfy. The test is not whether substantively or procedurally the decision of the Supreme Court was correct.
>
> [47] But what does this test mean exactly? Is it every aberration, perceived or otherwise, that entitles a litigant to institute a s 85 (1) application? In *Lytton's* case, supra, an example of such a failure by the Supreme Court is given. The example is this. The Supreme Court decides not to hear one party's legal practitioner principally on account of his race. Thereafter, in the absence of that legal practitioner, it renders a decision. In such a case, the decision would not be a result of a lawful and objective assessment of the facts in issue. The ultimate decision would flow directly from the violation of a party's fundamental right not to be discriminated

against or to a fair trial. Further examples that come to mind would include situations such as where the court unduly refuses a litigant the legal right to be represented by a lawyer of his/her choice or where a party is prevented from making submissions in support of his case. Another example would be one where it comes to the attention of a litigant that the Court had received a bribe from the other party or a member of the Court was biased. Or where a Court fails to determine an issue raised by a party that is potentially dispositive of the matter before the Court. In all these instances, the decision that follows can be impugned on the basis that it violated certain fundamental rights.

[48] It seems to me, therefore, that it is the propriety of the process leading to the decision rather than the correctness of the decision itself which would entitle a litigant to approach this court in terms of s 85 (1)of the Constitution. Bearing in mind that a decision of the Supreme Court on a non-constitutional matter is final and binding, it is impermissible for this Court to arrogate to itself the power to sit as an appeal court over decisions of the Court. We must, as a court, resist that temptation. Substantive or procedural incorrectness of final judgments by the Supreme Court is not what the test envisions. There ought to have been some other conduct on the part of the Court that would have resulted in the violation of a litigant's fundamental rights. That conduct must have preceded the decision sought to be impugned. In other words that conduct must have tainted the ultimate decision of the Court".

[80] In this case, I must, with respect, associate myself fully with the above remarks. It is axiomatic that in every legal proceeding there are constitutional issues at play. Every law, whether under statute or common law feeds into the Constitution, it being the supreme and ultimate law. If this Court were to stray from its jurisdictional ambit and mandate and grant access to complaints of alleged violations emanating from the court process, the justice delivery system would grind to a halt. The certainty required in the law would be impaired and courts would be unable to do justice between man and man for fear of being brought up on review before the Constitutional Court on allegations of violations of rights which do not fit into the jurisdiction of the Court. The hierarchy of the court system exists for a purpose and that is to ensure that each court is given the

freedom to operate as the law has provided. The law has not provided for general appellate jurisdiction for the Court and, for obvious reasons, it must remain so unless altered by law.

[81] This Court, as a creature of statute, is only able to exercise its jurisdiction within the parameters of the Constitution and the Constitutional Court Act [*Chapter 7:22*]. The applicant, as alluded to earlier, is not seeking leave to appeal against the judgment of the court *a quo* on the substance.

[82] I am unable to find that the application enjoys prospects of success on the merits. Despite its understanding of the test governing the challenge to the validity of judgments of the Supreme Court, the applicant has not, in any manner, alleged that the court *a quo* had failed to act in terms of the law governing the appeal process. It did not allege the failure to abide by established legal principles in the manner it conducted itself in the appeal process. The complaints it raises are in fact disguised grounds of appeal.

[83] Accordingly, I must find that the application, not having prospects of success, must fail as it is not in the interests of justice for leave to approach the Court directly to be afforded to the applicant.

Disposition

[84] The application does not enjoy prospects of success. Rule 21(8) enjoins the Court, in considering an application for direct access, to take several factors into account. The Court must decide, amongst other issues, whether it is in the interests of justice to grant

leave for direct access to the Court. Prospects of success loom rather large in this endeavour. A finding that the application does not enjoy prospects of success must, inevitably, lead the Court to conclude that it is not in the interests of justice for direct access to the granted.

[85] In the result the following, order will issue:

1. *The application for leave to approach the Court directly under s 85 be and is hereby dismissed.*

2. *There shall be no order as to costs.*

GARWE JCC : I agree

PATEL JCC : I agree

Donsa-Nkomo & Mutangi applicant's legal practitioners

Lunga Mazikana first respondent's legal practitioners