<u>REPORTABLE</u> **(18)**

SHEPHERD CHIPUNZA

v

HAMMER AND TONGUES AUCTIONERS (PRIVATE) LIMITED

CONSTITUTIONAL COURT OF ZIMBABWE
GARWE JCC, GOWORA JCC, HLATSHWAYO JCC
HARARE: JUNE 18, 2024 & DECEMBER 13, 2024

Applicant in person
R. G. Zhuwarara, for the respondent

GOWORA JCC:

[1] On 29 September 2023, the Supreme Court rendered a judgment, No SC 97/23, dismissing an appeal by the applicant herein against a decision of the Labour Court, dismissing an application by the applicant for condonation for the late filing of an application for the review of the decision of the respondent dismissing him from employment.

[2] The applicant intends to bring an application for constitutional review of the judgment of the Supreme Court and, as a consequence, has filed this application in terms of r 21(2) of the rules of the Court for direct access to the Court. If leave for direct access is granted it is his intention to bring an application under s 85(1) for the enforcement of rights under

ss 56(1), 69(2) and (3) and 71(2) that he alleges were violated by the Supreme Court in its judgment referred to above.

BACKGROUND FACTS

[3] The facts surrounding this matter are the following. The applicant was employed by the respondent as a Vehicle Sales Manager on 2 June 2014. On 4 December 2014, he was charged with gross incompetence or inefficiency in the performance of his work in terms of s 4(f) of the Labour (National Employment Code) Regulations, 2006 (SI 15/06) also referred to as the National Code. A disciplinary hearing was held and the Hearing Officer found him guilty and his contract of employment was terminated.

[4] Following receipt of a letter of dismissal in December 2014, he noted an appeal to the Appeals Officer at his workplace. The appeal was not determined. The applicant apparently remained at work on what respondent termed brief re-engagement.

[5] On 10 April 2015, the applicant received another disciplinary determination, which stated that a disciplinary hearing had been held on 16 of February 2015. The disciplinary determination was accompanied by a letter of termination of his contract of employment which was dated 18 February 2015. The letter stated that he had absconded the disciplinary hearing, meaning he was found guilty in absentia. The letter confirmed that the applicant had in fact been charged for acts of misconduct in terms of ss 4(f) and two counts under s 4(a) of S I 15/06.

[6] In July 2015 he referred the matter to a Labour Officer to inquire into allegations of unfair dismissal. The Labour Officer, after failing to reach conciliation, issued a certificate of no settlement and referred the matter for compulsory arbitration on 24 July 2015. The arbitrator concluded that the appellant was unlawfully dismissed from employment and issued the following award:

> "1. The respondent to reinstate the appellant to his employment without loss of salary and benefits with effect from the date of unlawful dismissal.
>
> 2. In the event that the employment relationship is no longer tenable the parties are directed to approach the Tribunal for quantification of damages within 14 days from the date of this award.
>
> 3. The claimant is awarded costs on an ordinary scale."

[7] The respondent did not reinstate the applicant. Due to the refusal by the respondent to comply with the award to reinstate him, he proceeded to apply for quantification of damages *in lieu* of reinstatement and obtained an order for damages. The arbitrator made an award of damages in the sum of RTGS 62 700.

[8] The applicant was dissatisfied and appealed to the Labour Court against the quantum of the damages. He was successful and the award was increased to RTGS 68 676. Still aggrieved by the formula used in the quantification proceedings, he appealed to the Supreme Court under SC 265/20.

[9] At the hearing of the appeal in SC 265/20, the Supreme Court queried the validity of the proceedings before the Labour Officer, the arbitrator and the Labour Court in view of the Supreme Court judgments in *Mabeza* v *Sandvik Mining* & *Construction (Pvt) Ltd* SC

91/19 and *Sakarombe & Anor* v *Montana Carswell Meats (Pvt) Ltd* SC 44/20 in which this Court reiterated that a Labour Officer did not have jurisdiction under s 93 of the Labour Act [*Chapter 28:01*] (the Act), to entertain a matter once a determination on the merits had been made through a disciplinary process under a registered code of conduct.

[10] The Supreme Court, on the basis of the dictum in *Sakarombe N.O. & Anor* vs *Montana Carswell Meats, supra,* took the view that he had followed the wrong procedure and, invoking s 25 of the Supreme Court Act, reviewed the proceedings.

[11] By consent of the parties, on 12 March 2021, the Supreme Court made the following order:

> "1) The appeal being predicated on proceedings which are a nullity be and is hereby struck off the roll.
>
> 2) In the exercise of the Court's powers under s 25 of the Supreme Court Act: [*Chapter 7:13*], we make the following orders:
>
> (i) The proceedings and judgment of the Labour Court of the 14th of February 2020 under judgment number LC/H/44/13 and case number LC/H/179/19 are hereby set aside.
>
> (ii) The proceedings and the award of the arbitrator T C Sengwe dated 19 July 2019 which was for quantification of damages is set aside.
>
> (iii) The proceedings and the award of the arbitrator T C Sengwe dated 9th of April 2018 which reinstated the appellant without loss of salary and benefits is hereby set aside.
>
> (iv) The proceedings before the Labour Officer culminating in the referral of the matter to arbitration is hereby set aside.
>
> 3) Each party shall bear its own costs in this court and before the courts and tribunals *a quo*."

[12] Thereafter, the applicant, in an effort to have the disciplinary proceedings of 2015 reviewed, albeit out of time, proceeded to lodge an 'application for condonation for late filing of an application for review' in the Labour Court. The application was opposed.

[13] The applicant was unsuccessful. The Labour Court found that the right to have the disciplinary proceedings reviewed had prescribed through the effluxion of time. The applicant, again dissatisfied, appealed to the Supreme Court. The judgment of the Supreme Court in that appeal is the subject of these proceedings.

[14] After hearing the parties and applying the law to the facts, the Supreme Court went on to state:

> "Clearly the appellant's cause of action has prescribed. The submission that prescription ought to be reckoned from March 2021 when this Court nullified prior proceedings or from the date the *Sakarombe* case was decided is without merit as prescription is reckoned from the time one becomes aware of the cause of action. In *casu*, the appellant's cause of action is not premised on this Court's order of 12 March 2021 but on the 2015 determination by the internal disciplinary authority. The court *a quo* cannot be faulted for holding that there were no prospects of success on review as the cause of action has prescribed."

[15] The applicant is clearly aggrieved and has launched these proceedings to have the judgment set aside. The application is opposed.

THE APPLICATION

[16] The applicant has in his founding affidavit set out in detail the facts forming the genesis of his legal dispute with the respondent. The salient facts are captured in the background

facts set out above. I do not intend to repeat them. I will set out the contentions as regards the allegations of the complaint against the decision of the Supreme Court that he wishes to impugn.

[17] He seeks leave to mount a constitutional challenge against the decision of the Supreme Court on the contention that it breaches the following enshrined rights, ss 56(1), 65(1), 69(2) and (3), 71(1)(d) and 68 (1) of the Constitution. In compliance with r 22 (1), he has attached a draft of the substantive application which is in essence an exact replica of the application for direct access.

[18] I now set out his contentions as regards the allegations that his rights were violated by the Supreme Court.

ALLEGATIONS AS REGARDS A BREACH OF S 69(2) AND (3).

[19] He contends that the decision that his claim had prescribed was in breach of s 69 (2) and (3). He suggests that he had furnished evidence to the court *a quo* that he had adopted a procedure obtainable at law at the time the dispute arose.

[20] As regards the allegation that there was a violation of his rights enshrined under ss 69(2) and (3), he avers that the Labour Court was offside in relying on a wrong precedent, *viz* the *Sakarombe* decision, this notwithstanding an alleged failure on its part to treat him the same as the appellant in *Sakarombe.*

[21] He argues that although the Supreme Court was sitting to determine a non-constitutional matter, it failed to act in accordance with the requirements of the law and in the process, it violated his civil rights. He contends that s 69 includes the right to have a matter determined according to established principles of law. However, in the instant case, its error was so gross as to transcend mere faultiness. It refused to exercise a jurisdiction that was clearly and properly exercisable. Its refusal was a gross misdirection.

[22] He further contends that there was a retrospective application of the law and this impacted on his rights as enshrined in ss 69(2) and (3) and 68(1).

ALLEGATIONS AS REGARDS S 56(1)

[23] The applicant contends further that the Supreme Court in SC 265/20, invoked the *dicta* in *Sakarombe mero motu*. He contends that the parties were not called upon to present argument or to file pleadings on the point and that this failure on its part was not in terms of the law governing appeal proceedings. He contends that, when the parties appeared before the Supreme Court in SC 125/22, the point was argued but was disregarded by the court *a quo*. Thus, he contends there was a violation of ss 69(2) and (3) as well as 56(1).

[24] As regards s 56(1), the applicant avers that his circumstances were similar to those of Wonder Simukai who was the affected employee in the decision of *Sakarombe* relied upon by the court *a quo* in dismissing his appeal. His view is that the Supreme Court in Case No SC 265/20 ought to have afforded to him the same relief as granted to Simukai. His position is that the failure by that court to deal with the matters in the same manner to

his detriment is a violation of his right to protection and equal benefit of the law as provided in s 56(1).

[25] Following the decision in SC 265/20, the applicant approached the Labour Court seeking a review of the disciplinary proceedings. He contends that, as a consequence of that decision, the Labour Court should have declined jurisdiction under LC/H/179/19. He argues that, by accepting jurisdiction, it was guilty of an omission and premised on the authority of *Sakarombe* the Supreme Court should have remitted the matter to the Labour Court. He suggests that the procedure he adopted was based on an error of the law, which error he contends was common to all the parties. His position is that in setting aside the proceedings and not remitting the matter to the Labour Court, the Supreme Court had, to quote him, made a substantive order premised on discrimination, unfairness, injustice and non-existent procedural irregularities. He contends further that, although he argued this point before the court *a quo,* it was not taken into account in violation of his rights. In conclusion, he contends that *Sakarombe* introduced a new legal position that should not have been applied retrospectively.

ALLEGATIONS AS REGARDS S 71(1)(D)

[26] With regard to s 71(1)(d) of the Constitution, he contends that the decision of the Supreme Court violated his right to property when it set aside the proceedings. In sum, the contention he makes is that the arbitral award constituted property in terms of the definition afforded by the section. The award was erroneously nullified by the decision under SC 265/20 and in SC 125/22 the Supreme Court went on to uphold not only an

injustice but an absurdity and irrationality. By its conduct the Supreme Court violated his rights as enshrined in s 65(1). The decision quashed the arbitral award and rendered him jobless and redundant. The decision itself did not express justice, equity, equality and fairness in terms of the labour standards set by it.

[27] Lastly, he invokes s 68(1) which he said the Supreme Court violated when it refused the invitation to rescind its decision in SC 265/20. He argues that by ignoring the request to rescind its decision in SC265/20 which it should have done based on a common mistake by the parties, the Supreme Court, in SC 125/22 violated his right to administrative justice as provided in s 68(1).

[28] If granted leave, the applicant seeks relief in the following terms:

> "1. The application succeeds.
>
> 2. It is declared that the proceedings and the decision by the Supreme Court under SC 125/22 constitutes a violation of the applicant's rights as enshrined under sections (2), 71(1)(d), 68(1), 56(1), 65(1), 69(2) and (3) of the Constitution.
>
> 3. Consequently, the decisions of the Supreme Court under SC 265/20 and SC 125/22, that of the Labour Court under LC/H/APP/21/21 be and are hereby set aside.
>
> 4. Consequently, the applicant is granted leave to file a review application before the Labour Court within 7 days of this order.
>
> 5. The respondent shall bear the costs of the application."

[29] The application is opposed. The respondent contends that the matter does not involve constitutional matters. It states that at the core of the dispute is a labour matter in respect

of which the applicant alleges that he was unlawfully dismissed. As a result, so contends the respondent, the genesis of the dispute is concerned with labour laws and the Constitution is not in issue for consideration, enforcement or protection. Hence, there are no constitutional issues for determination.

[30] The respondent avers that the dispute before the Supreme Court and the Labour Court was whether the applicant had prospects of success in prosecuting his labour grievances. It had nothing to do with the Constitution.

[31] As regards the consent order given under SC 265/20, the respondent takes the position that the order in question was arrived at using non-constitutional remedies. It is therefore, incompetent for the applicant to raise constitutional issues this late in the day after the Labour Court and the Supreme Court have dealt with the dispute on aspects of the dispute that do not require the invocation of the Constitution.

[32] It is thus contended by the respondent that it would not be in the interests of justice for the applicant to be granted leave to directly approach the Court as the application does not raise any issue that involves constitutional matters for determination. The respondent therefore prays that the application be dismissed with costs.

[33] The view I take is that it is not in the interests of justice that the applicant be granted leave to access the Court directly.

[34] I consider that the issues for determination are as follows: whether there is a constitutional matter before the Court; whether the matter has been determined by the Supreme Court; whether the applicant can raise a constitutional matter after the Supreme Court has made a final decision on the merits of the dispute between the parties; whether it is the interests of justice for the applicant to be granted leave to access the Court directly.

DOES THE APPLICATION RAISE CONSTITUTIONAL ISSUES FOR DETERMINATION BY THE COURT

[35] What constitutes a constitutional matter has been defined in s 332 of the Constitution as a matter in which there is an issue involving the interpretation, protection of enforcement of the Constitution.

[36] The applicant has clothed his matter with allegations that his rights were violated by the Supreme Court under Case No SC 125/22 when it refused to nullify the decision it made under SC 265/20.

[37] He makes the following allegations against the Supreme Court. He suggests that the decision under SC 265/20 should have been rescinded on the basis that the there was a mistake of the law that was common to all the parties to the dispute. By failing to act and rescind the earlier order under SC 265/20 the Supreme Court had violated his rights under s 65(1) in that he had not been treated in the same manner that the appellant in *Sakarombe* was treated.

[38] He follows upon this by arguing that every person has the right to fair and safe labour standards and practices and to be paid a fair and reasonable wage. He does not say how the judgments of the Supreme Court under the two case numbers violated his rights.

[39] He suggests that there was a failure on the part of the Supreme Court to uphold the law and that the alleged failure rendered its judgment incapable of protection under the principle of the finality of its judgments.

[40] As is evident from the nature of the relief sought, the applicant wishes to have all the judgments in respect of the dispute set aside, thus enabling him to approach the Labour Court on review against the dismissal of 18 February 2015.

[41] In *Sadziwa* v *Natpak* & *Ors* CCZ 15/19, this Court stated:

> "The Court's power to adjudicate on constitutional matters ought to be construed as a means by which life can be given to the objectives set out in s 3 of the Constitution. The Court, as the highest and most authoritative tribunal in constitutional matters, is tasked with the responsibility of safeguarding the values and objectives of the Constitution. It is charged with the duty of ensuring that these objectives are realised and given effect to.
>
> Thus, it is imperative that the Court is not unduly saddled with cases that have no bearing on the interpretation, enforcement or protection of the Constitution. It is incumbent upon the Court to guard its jurisdiction jealously and eliminate the abuse of its powers. The integrity of the Court is of utmost importance and it ought to be protected.
>
> The deliberately narrow jurisdiction of the Court is meant to shield it from abuse and ensure that it only adjudicates upon that which it is constitutionally mandated to adjudicate on."

[42] The respondent has raised preliminary objections in its heads of argument to the effect that there is no constitutional matter before the Court, that the Supreme Court has already made a final decision in respect of the matter and that a constitutional matter cannot be raised in the Constitutional Court *ex post facto*. I find that the objection by the respondent that the matter is not properly before Court by reason of the absence of any constitutional issues for its determination is not properly taken.

[43] In *Meda* v *Sibanda* & *Ors* 2016 (2) ZLR 232 (CC) at 236B-D the Court, in discussing the basis upon which a party can approach this Court in terms of s 85(1) of the Constitution, held as follows in this regard:

> "It is clear from a reading of s 85(1) of the Constitution that a person approaching the Court in terms of the section only has to allege an infringement of a fundamental human right for the Court to be seized with the matter. The purpose of the section is to allow litigants as much freedom of access to courts on questions of violation of fundamental human rights and freedoms with minimal technicalities. The facts on which the allegation is based must, of course, appear in the founding affidavit.
>
> Whether or not the allegation is subsequently established as true is a question which does not arise in an enquiry as to whether the matter is properly before the Court in terms of s 85(1)."

[44] The record is clear and unambiguous. The applicant did not raise any constitutional issue before the Supreme Court and, equally, which is very pertinent to the application, the Supreme Court did not make any determination which had a bearing on the constitutional rights of the applicant. The test for the determination of whether or not a constitutional issue exist was settled in *Lytton Investments (Pvt) Ltd v Standard Chartered Bank Zimbabwe Ltd* & *Anor* supra, where the Court said:

> ".The definition of a "constitutional matter" is that it is a matter involving an issue, **the determination of which requires the interpretation, protection or enforcement of the Constitution. The nature and scope of the jurisdiction is not defined by reference to the subject, the validity of which would be challenged. It is defined in terms of the obligation to protect and enforce the Constitution.** The reason is that the subject the validity of which is challenged is the cause of the invocation of the mechanisms designed for the protection and enforcement of the foundational values and principles on which the Constitution and its order are based."(own emphasis)

[45] *In casu,* the appeal brought by the applicant before the Supreme Court was based on the refusal by the Labour Court to grant condonation. Matters involving applications for condonation are matters to do with the discretion of a court as condonation is an indulgence which can only be granted by a court after it is satisfied that an applicant deserves to be granted such indulgence. Condonation will only be granted on a consideration of the following factors:

> (a) the degree of non-compliance with the rules;
>
> (b) the explanation therefor;
>
> (c) the prospects of success on the merits;
>
> (d) the importance of the case;
>
> (e) the convenience of the court;
>
> (f) the avoidance of unnecessary delay in the administration of justice.(see *Minister of Mines and Mining Development and Anor* v *Fidelity Printers and Refineries* & *Anor* CCZ 9/22)

[46] A court must thus be satisfied that, despite the degree of non-compliance with the rules and the explanation proffered for the delay, the intended matter has prospects of success. The Supreme Court under SC 125/22 found that the applicant's cause of action had prescribed and as such the intended review application would not enjoy any prospects of

success. Such a finding cannot be classified as a matter involving, the determination of which requires the interpretation, protection or enforcement of the Constitution. There was no constitutional issue before the Supreme Court and, as such, its determination did not raise any constitutional matter.

[47] Lastly, a Supreme Court decision is final and binding upon the parties. As stated above, the Supreme Court is the final Court of appeal in all non-constitutional matters and once the Supreme Court makes a determination in an appeal such determination is final and binding. In *Rushesha & Ors v Dera & Ors* CCZ 24/17 at p. 10 the Court interpreted s 169 of the Constitution which sets out the jurisdictional powers of the Supreme Court and said:

> "The import of this provision needs no elaboration. Only where the Supreme Court determines a constitutional issue, may one appeal to this Court for a final determination. Because the Supreme Court in this matter did not determine any constitutional issue, the decision it rendered was final and not appealable."

[48] In *Lytton Investments (Pvt) Ltd* supra, at p. 22 the Court discussed the import of s 169(1) of the Constitution as read with s 26 of the Supreme Court Act. The Court stated that:

> "A decision of the Supreme Court on any non-constitutional matter in an appeal is final and binding on the parties and all courts except the Supreme Court itself. **No court has power to alter the decision of the Supreme Court on a non-constitutional matter. Only the Supreme Court can depart from or overrule its previous decision, ruling or opinion on a non-constitutional matter.** The *onus* is on the applicant to allege and prove that the decision in question is not a decision on the non-constitutional matter."(own emphasis)

[49] The Supreme Court in the present matter did not make any finding on a constitutional question or issue. The appeal noted by the applicant before the Supreme Court did not raise a constitutional issue. As such there can be no challenge against the decision of the Supreme Court before this Court. This Court, being a specialised institution, is specifically and deliberately endowed to exercise a narrow and restrictive jurisdiction to hear and determine constitutional matters only. The Constitutional Court is the supreme guardian of the Constitution and it utilizes the text of the Constitution as its yardstick to assure the realization of its true narrative force (see *Lytton Investments (Pvt) Ltd* (*supra*) at p. 9).

[50] The decision by the Labour Court that was the subject of appeal under SC 125/22 did not deal with any constitutional issues. The ratio of the decision by that court was that it was unable to adjudicate on the application for review brought to it by the applicant as his cause of action had prescribed in terms of s 94 of the Labour Act [*Chapter 28:01*]. The provision, which is couched in peremptory terms, mandates a labour officer not to entertain a claim of unfair labour practice more than two years after it arose. The Labour Court, called upon to entertain an application for review more than six years after the right to do so had arisen, could only dismiss it. That was the basis of the appeal before the Supreme Court which decision is the subject of attack in the intended application to the Court.

[51] The applicant admits that the Supreme Court did not decide a constitutional issue nor did it make reference to the Constitution in the impugned judgment. What is meant by the

definition constitutional matter was explained by the Court in *Moyo v Chacha & Ors* 2017(2) ZLR 142(CC) at p 150D as meaning:

> "The import of the definition of "constitutional matter" is that the Constitutional Court would be generally concerned with the determination of matters raising questions of law, the resolution of which require the interpretation, protection or enforcement of the Constitution.
>
> The Constitutional Court has no competence to hear and determine issues that do not involve the interpretation or enforcement of the Constitution or are not connected with a decision on issues involving the interpretation, protection or enforcement of the Constitution."

[52] The applicant accepts that there were no constitutional matters before the Supreme Court. It is the decision of the court a quo itself that he wishes to impugn. He has made allegations that the court a quo in refusing to rescind a previous decision impacting on his labour rights and in further refusing to follow the decision in *Sakarombe supra* in his favour had violated his rights under ss 56(1), 69(2) and (3) as well as s 71 of the Constitution. Given the principle expounded in Meda supra, I am satisfied that he has raised constitutional matters to trigger the jurisdiction of the Court.

[53] However, the fact that he has raised issued that relate to allegations of violations of his rights as guaranteed by the Constitution is not a sufficient reason for the applicant to be granted leave to directly approach the Court under s 85. It behooves him to convince the Court that it is in the interests of justice that he be granted such leave. Whether he is successful on the application depends on the factors that the Court is enjoined to take into account in considering the application for leave.

IS IT IN THE INTRESTS OF JUSTICE THAT LEAVE FOR DIRECT ACCESS BE GRANTED TO THE APPLICANT

[54] Rule 21(3) set out in peremptory terms the requirements for requesting leave for direct access. Of importance is the requirement that the applicant sets out the grounds on which it is contended that it is in the interests of justice that an order for direct access be granted. The factors that the Court is mandated to take into account in assessing whether it is in the interests of justice that leave be granted are provided in r 21(8). Those factors, which are not exhaustive, include the prospects of success of the substantive application if leave is granted, whether the applicant has any other remedy and whether there are disputes of fact in the matter.

[55] It is settled that the likelihood of lack of the prospects of success must move the Court to find that leave not be granted. In other words, if the Court finds that the application has no prospects of success must bring the matter to an end. The Court cannot sit to determine issues in a vacuum. The Court sits to determine live matters where the exercise of its jurisdiction resolves a dispute. Where there are no prospects of success in the process before the Court, a determination by the Court is merely for purposes of giving legal advice. It is not the business of the Court to dispense legal advice.

[56] The applicant wishes to impugn the decision of the Supreme Court and in the process the decisions made by all the courts that dealt with the dispute being set aside save for the arbitral award that he is in agreement with.

[57] The final nature of a judgment of the Supreme Court is beyond dispute. The Constitution itself provides for the finality of decision of the Supreme Court. Section 169(1) states in categoric terms that the "Supreme Court is the final court of appeal in Zimbabwe, except for matters where the Constitutional Court has jurisdiction".

[58] This statement of the law is given equal force in the Supreme Court Act [*Chapter 7:13*], the "Act", where in s 26(1) thereof it provides that there shall be no appeal from any judgment of the Supreme Court.

[59] The Supreme Court has confirmed the conclusion by the Labour Court that the applicant's cause of action has prescribed by operation of law. The Labour Act [*Chapter 28:01*], the Labour Act has provided for the factual position as regards the status of that action. The applicant has not impugned the section that provides for the prescription of disputes emanating there from.

[60] The applicant was dismissed by a letter dated 18 February 2015. He had absconded from the disciplinary proceedings inquiring into alleged acts of misconduct. The proceedings were conducted under the Labour (National Employment Code of Conduct) Regulations, 2006, S.I. 15/06, the "Code". Whilst in *Sakarombe* the affected employee appealed against the determination to the Appeals Officer at his workplace in terms of s 8 of the Code, the applicant took a different route and referred a claim of unfair dismissal to the labour officer pursuant to s 101 of the Labour Act. His claim of having been treated differently are therefore not borne out by the facts.

[61] The Supreme Court is under a duty, in terms of the law in general, and the Constitution itself, being s 44, in the exercise of its judicial functions, to respect, protect, promote and fulfil the fundamental rights and freedoms. It is one of the organs of state bound by s 44 to uphold and give effect to the rights as enshrined in the Bill of Rights.

[62] As a consequence, a failure by the Supreme Court to uphold the rights and freedoms that it is mandated to protect and give effect may give rise to allegations of violations of these rights by persons affected by its actions or omissions. As a matter of law, a litigant would have a right to apply for a constitutional review of the it's conduct under s 85(1).

[63] The case of *Lytton Investments (Pvt) Ltd* v *Standard Chartered Bank Zimbabwe Ltd and Anor* 2018 (2) ZLR 743 (CC) ought to be considered where the Court at pp 19- 20, remarked as follows:

> "The facts must show that there is a real likelihood of the Court finding that the Supreme Court infringed the applicant's right to judicial protection. The Supreme Court must have failed to act in accordance with the requirements of the law governing the proceedings or prescribing the rights and obligations subject to determination. The failure to act lawfully would have to be shown to have disabled the court from making a decision on the non-constitutional issue. 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."

[64] A litigant wishing to apply for direct access to impugn the conduct of the Supreme Court is under a legal obligation to set out those facts on which it is premised that the court

violated its rights. All that the applicant has said is that his rights were infringed by the judgment.

[65] In view of the finality of the judgments of the Supreme Court, this Court has no jurisdiction to inquire into the merits and wrongfulness of a judgment of the court *a quo*. This is a trite position that does not require restating. See Lytton supra. Any attempt on the part of this Court to entertain and grant an application the effect of which is to revisit the substance of a judgment of the Supreme Court would not only be contrary to the jurisdictional mandate of the Court, it would also violate the provisions of the Constitution that set out the jurisdictions of the courts themselves. It would result in completely rendering s 26 nugatory. The principle settled in *Lytton supra,* on the limitations of the power to review the judgments of the Supreme Court was reiterated and emphasized by GARWE JCC, in *Fairclot Investments P/L* v *Augur investments OA* & *Ors* CCZ 16/24, wherein he stated that it is not every aberration by the Supreme Court that would serve to trigger the jurisdiction of the Court to review its process *viz a viz* the impugned judgment.

[66] An analysis of the principle established in the above authority confirms the test established in *Lytton* above on the requirements that an applicant is mandated to meet in the application where the relief sought is a declaration that a judgment of the Supreme Court on a non-constitutional matter has violated a fundamental right. In order to protect the finality of the judgments of the Supreme Court and ensuring that there is certainty in the law, any litigant wishing to impugn a judgment of that court must set out facts in the

application that establish that the Supreme Court was guilty of an aberration or permissive conduct in the performance of its functions as a court of law. The facts must show that it acted in an injudicious manner that had the effect of depriving the litigant of the protection accorded by the Constitution. The conduct complained of must not relate to the merits of the dispute but to some other factor which ultimately impacted on the decision of the court and resulted in a violation of the fundamental rights of a litigant.

[67] *In casu,* the applicant does not allege any facts that point to improper conduct on the part of the court *a quo*. He attacks it for upholding what he refers to as an incorrect judgment in one breath and, in the next, he criticizes the court for failing to accord him the same treatment as was accorded the appellant in the same judgment being impugned by him. In short, he has not shown how the court *a quo* violated any of his rights. The confirmation by the Supreme Court that the right to apply for a review of the disciplinary proceedings that were concluded in 2014 has prescribed is by operation of law as provided in the Labour Act. The Supreme Court, being a court of law, must be bound by the dictates of law.

[68] The application does not raise matters requiring the invocation of the Constitution. The applicant raises issues that are in effect intended to examine the correctness of the two decisions of the Supreme Court, one of which upheld an earlier decision of that court. All the above considerations must lead to the conclusion that it is not in the interests of justice that leave be granted to the applicant to approach the Court directly under s 85 of the Constitution.

[69] In keeping with the practice of the Court there will be no order regarding costs.

DISPOSITION

[70] I opine that the application has no prospects of success, and, from that conclusion, I must find that it is not in the interests of justice for the applicant to be granted leave for direct access to the Court. The application must therefore be dismissed as being meritless.

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

1. The application for leave to directly approach the Court in terms of s 85(1) of the Constitution is dismissed.
2. There shall be no order as to costs.

GARWE JCC : **I Agree**

HLATSHWAYO JCC : **I Agree**

Mawere Sibanda legal practitioners for the respondent