REPORTABLE (09)

(1) FARAI MATSIKA

(2) FAIRGOLD INVESTMENTS (PVT) LTD

v

1) MOSES TONDERAI CHINGWENA & 37 OTHERS

CONSTITUTIONAL COURT OF ZIMBABWE
GOWORA JCC, HLATSHWAYO JCC & PATEL JCC
HARARE: 15 JANUARY, 24 JUNE 2024

Mr *L Madhuku*, for the applicants

Mr *T Mpofu*, for the first– ninth respondents

Mr *D Ochieng* with Mr *T Magwaliba* for the tenth, eleventh, thirteenth -thirtieth, thirty second and thirty sixth respondents.

No appearance for the 2nd, 12th, 31st, 33rd, 34th, 35th and 37th respondents

GOWORA JCC:

[1] On 17 October 2023 the Supreme Court was seized with an application "for a review" of a judgment by a single judge of the court sitting in chambers "purportedly" filed in terms of s 176 of the Constitution of Zimbabwe 2013 as read with s 6 of the Supreme Court Act [*Chapter 7:13*] ("the Act"). The court dismissed with costs an application for referral in terms of s 175 (4) of the Constitution and indicated that its reasons would ensue in due

course. On 19 October 2023, the Supreme Court rendered its decision declining jurisdiction in respect of the application for a review.

[2] Before this Court is an application for leave to appeal to the Constitutional Court ("the Court") against the decision of the Supreme Court ("the court *a quo*"), filed in terms of r 32(2) of the Constitutional Court Rules, 2016 ("the Rules"), as read with s 167(5)(b) of the Constitution of Zimbabwe, 2013. The applicants intend to appeal against the decision of the Supreme Court handed down in the case of *Matsika & Anor* v *Chingwena & Ors* SC 30/22

FACTUAL BACKGROUND

[3] The facts pertaining to the dispute have been succinctly set out in the judgment of GWAUNZA DCJ in *Matsika & Anor* v *Chingwena & Ors supra* and I set them out herein as they appear in the judgment. The first applicant was an employee of *Croco Holdings Private Limited* (third respondent). In this protracted dispute, he and the second applicant, *Fairgold Investments (Pvt) Limited*, approached the High Court, in terms of s 196 (1) as read with s 198, of the Companies Act [*Chapter 24:03*], (the Companies Act), alleging that the affairs of the company were being conducted in a manner which was oppressive and prejudicial to its members, including the first applicant himself. It was also averred that the latter held 30 percent of the issued shares in the third respondent through the medium of the second applicant.

[4] The respondents opposed the application and raised several

points *in limine.* These included the averments that-

i) the application was founded on material falsehoods,

ii) the shareholders' agreement relied on by the applicants was fraudulent, and

iii) the applicants did not have *locus standi in judicio* to mount the proceedings in question.

[5] After upholding all the preliminary points raised by the respondents, the High Court, made the finding, among others, that the first applicant was indeed not a shareholder in the third respondent and therefore, lacked the requisite *locus standi* to bring that application before the court. The High Court also found that the application was bad at law and that it did not meet the specific requirements of s 95 as read with s 196 of the Companies' Act. It ultimately dismissed the application with costs.

[6] Aggrieved by the decision of the High Court, the applicants sought to appeal to the Supreme Court. However, upon realizing that they had not complied with Rule 37 (2) of the Supreme Court Rules 2018, in respect of service of the process on the Registrar of the High Court, they filed a chamber application before the Supreme Court for condonation of such failure and ultimately sought an extension of time within which to note an appeal. The application was heard in chambers by a single judge of appeal who, in a fully reasoned judgment, found that the delay by the applicants in complying with the relevant procedural requirement was not inordinate. He further considered the explanation for the delay in question and found that the applicants had proffered a reasonable explanation therefor. The judge then considered the question of whether or not the matter enjoyed

reasonable prospects of success on the merits of the appeal. He found that the evidence and documents that were before the High Court did not assist the applicants' case in any way. The judge also noted with concern that the first applicant had tendered a fraudulent document in an effort to deceive the High Court. Having ultimately found that no prospects of success on appeal existed, the learned judge dismissed the application.

[7] It is this decision by one of its own judges that the applicants wished to have 'reviewed' by the Supreme Court in terms of s 176 of the Constitution as read with s 6 of the Act.

[8] Based on their grounds of review, the applicants prayed for the success of the application, the setting aside of the decision of the single judge and, essentially, its substitution with an order granting the application for condonation and late noting of the appeal in question.

[9] In disposing of the matter the court *a quo* remarked as follows:

> "In their main 'application', the applicants sought to file an appeal against the final decision of a judge of this Court, which they had attempted to disguise as an application for review in terms of s 176 of the Constitution. In the same manner that a decision of this Court on non-constitutional matters is final and not appealable, it is not capable of being 'reviewed' by the same court. In any case, the purported review was based on a provision of the Constitution that does not accord substantive review powers to this Court.
>
> The applicants at the commencement of the proceedings, sought a referral to the Constitutional Court in terms of s 175 (4) of the Constitution, of two matters. The resolution of the first of these matters by the apex Court would not have assisted this Court to determine the dispute before it. The second question for which referral was sought, amounted to an improper attempt to transfer the matter, which this Court was properly seized with, to the Constitutional Court for a determination that would not have assisted the court in resolving the same matter.

Against this background, and having found the request for referral to be on the whole frivolous and vexatious, the court dismissed the request. Further, having found that the main matter before it was in reality an appeal disguised as a 'review' and an incompetent review at that, the court issued an order declining jurisdiction to entertain the matter."

[10] The applicants are aggrieved by the decision of the Supreme Court and wish to be granted leave to file an appeal against the same.

THE APPLICATION FOR LEAVE TO APPEAL.

[11] The applicants intend to note an appeal to this Court against the judgment of the court a quo on the following grounds:

"1. The court a quo erred in law and misdirected itself in not finding that under section 175(4) of the Constitution of Zimbabwe, a request for a referral of a constitutional issue to the Constitutional Court necessarily has to be in writing.

2. The court a quo erred in law and misdirected itself in dismissing the application for referral in terms of section 175(4) of the Constitution of Zimbabwe, it applied an incorrect test in determining whether the request was merely frivolous or vexatious.

3. That, as an alternative to the above two grounds of appeal, the court *a quo's* finding that it had no jurisdiction to review and correct a decision of a single judge in chambers was an incorrect interpretation of section 176 of the Constitution of Zimbabwe."

They accordingly pray for the setting aside of the whole judgment.

[12] The application is accompanied by an affidavit deposed to by the first applicant. He contends that the application that is the genesis of the present one raised constitutional issues. He contends further that what was placed before the court *a quo* was an application for the review of the decision of a single judge sitting in chambers.

[13] The applicants aver that the application before the Supreme Court raised constitutional issues that concerned the interpretation to be placed on s 176 of the Constitution. They aver that s 176 gives the Supreme Court the power and jurisdiction to review and correct decisions of single judges of the court sitting in chambers.

[14] In addition, the applicants aver that during the course of the proceedings for review, they invoked s 175(4) of the Constitution and made a request for the referral by that court of two constitutional questions to the Constitutional Court for determination. According to the applicants the two questions sought to be referred were:

i) whether or not s 176 of the Constitution of Zimbabwe gave jurisdiction to the Supreme Court to review judgments of its single judges in chambers;

ii) whether or not s 25(3) of the Supreme Court Act was constitutional to the extent to which it is interpreted as prohibiting an application for review by the full court of a judgment of a single judge in chambers;

[15] Based on the afore-going, the applicants aver that the Supreme Court denied them an opportunity to file a written application for the referral of the two questions and, instead, ordered the applicants to make an oral application which was ultimately refused.

[16] The applicants indicate further that the Supreme Court subsequently rendered a decision on the merits of the application for review and declined jurisdiction to hear the matter, holding that, contrary to the assertions by the applicants, it did not enjoy jurisdiction in

terms of s 176 as contended to entertain an application for review as a court of first instance.

[17] The applicants contend that, notwithstanding the findings of the Supreme Court, there were constitutional matters before it. Firstly, it is contended that any application under s 175(4) is a constitutional matter. The decision by the court *a quo* on the issue was thus a constitutional matter. Secondly, on the merits of the application for review, the Supreme Court had to interpret s 176 in order to decide whether or not it had the requisite jurisdiction to hear the application mounted by the applicants.

[18] The applicants aver in addition that they have reasonable prospects of success on the merits. They contend that there are reasonable prospects that this Court will find that a single judge in chambers cannot exercise the jurisdiction of the Supreme Court with finality and that it is through s 176 of the Constitution that the Supreme Court sitting as a full court may review and correct the mistakes made by single judges sitting in chambers.

[19] On the request for referral, the applicants make two points. The first is that s 175(4) is such an important jurisdictional framework for the protection of the Constitution by the Court that, by necessary implication, every request for referral thereto must be in writing. They contend that oral applications undermine the contemplation of that framework and that, further to this, r 24 of the rules of the Court itself contemplates only written applications for referral under s 175(4).

[20] As pertains to the request itself, the applicants contend that the Supreme Court failed to apply the correct test with regard to what constitutes a frivolous or vexatious request. To this end, they contend that no reasonable court would have failed to find that the request was neither frivolous nor vexatious and they believe that the finding to the contrary by the Supreme Court stands to be reversed by this Court.

[21] Ultimately, they aver that the matter is one of public importance. They maintain that the question whether or not the Supreme Court has the power of review over the decisions of single judges sitting in chambers is an issue of national importance. So too is the question whether or not s 175(4) permits oral applications. They contend that the position of the Court on these issues will serve to clarify the law.

[22] The application is opposed. The premise upon which the respondents have opposed the grant of the relief being sought is solely based on legal arguments as there are no factual disputes in contention.

[23] The respondents argue in sum that the Supreme Court does not enjoy powers of review except for those provided for under s 25 of the Act. They argue therefore that the declination of jurisdiction on the part of the court *a quo* was procedural and that the present application is a misadventure. On the question of the refusal of the application for referral the contention made is that there could not have been a proper referral according to the law as this is a request that can only arise during proceedings. In the absence of the lawful exercise of jurisdiction on the part of the Supreme Court, it is argued, the

applicants could not have been legally entitled to make a request for the referral of any matter to the Court pursuant to s 175(4) of the Constitution.

THE LAW

[24] The jurisdiction of the Constitutional Court is delineated in specific terms by the Constitution itself. Section 167(1) states that the Court is the highest court in all constitutional matters, decides only constitutional matters and issues connected with decisions on constitutional matters and makes the final decision on whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.

[25] The rules of the Constitutional Court 2016, make provision for an application for leave to appeal against a decision of a subordinate court on constitutional matters only. R 32(2) provides:

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

[26] The application for leave to appeal has been made in terms of r 32(2) set out above. The requirements of the rule are to be read in tandem with the Constitution under which the rules are made. Section 167(5) permits any litigant to appeal, in terms of the rules, against the decision of a subordinate court when it is in the interests of justice to do so. Thus, the jurisdiction of the Court is restricted to the determination of those matters that are concerned with decisions on constitutional matters only. It has not been imbued with any

other jurisdiction beyond this and cannot arrogate to itself any power to do or act otherwise.

[27] The Court's limited and restricted jurisdiction was settled in *Lytton Investments (Pvt) Ltd* v *Standard Chartered Bank Zimbabwe Ltd and Anor* 2018(2) ZLR 743, at 749D wherein the Court opined:

> "The Court is a specialised institution, specifically constituted as a constitutional court with the narrow jurisdiction of hearing and determining constitutional matters only. It is the supreme guardian of the Constitution and uses the text of the Constitution as its yardstick to assure its true narrative force. It uses constitutional review predominantly, albeit not exclusively, in the exercise of its jurisdiction."

[28] In turn, the rules of the Court serve to cement its jurisdictional ambit and the procedure that must be adopted and complied with in line with the constitutional provisions. Consequent thereto, r 32(3)(c) obliges an applicant to furnish with the application a statement setting out clearly and concisely the constitutional matter raised in the decision and any other issues that are alleged to be connected with a decision on the constitutional matter.

[29] In *Cold Chain (Pvt) Ltd t/a Sea Harvest v Makoni* 2017(1) 14, the Court, at p17C-D, said:

> "… For an applicant to succeed in an application of this nature, he or she must show that the constitutional issue raised in the court *a quo* is one which the determination by the court was necessary for the disposition of the dispute between the parties. In other words, the decision on the constitutional matter must have been so inextricably linked to the disposition of the controversy between the parties that the success or failure of the relief sought was dependent on it." (emphasis added)]

[30] What was placed before the court *a quo* was an application for "the review" of the judgment of a single judge of that court purportedly made under s 176 of the

Constitution. Despite spirited and sustained entreaties from the applicants to proceed otherwise, the court *a quo* found that it was not empowered at law to entertain such an application. It was emphatic that s 176 did not extend its jurisdiction beyond what was spelt out in the Constitution and the Supreme Court Act *[Chapter 7:13]*, (the "Act"). It was on that premise that it declined jurisdiction.

[31] Notwithstanding the unambiguous finding and statement by the court *a quo* on the construction to be placed on s 176, the applicants persist with their contention that, by virtue of the wording of s 176, the court *a quo* was properly seized with the application and should have, as a result, adverted to the request for referral that was argued before it. They thus contend that the court *a quo* was presented with a constitutional matter during the proceedings and that an appeal properly lies to the Court as appears from the grounds set out in the draft notice of appeal.

[32] The issues that the Court must grapple with are firstly, whether the application before the court and *a quo* was proper at law and, if so, whether there was a constitutional matter for determination by that court and secondly, if there was a constitutional matter whether the request for referral to the Court was properly made.

THE JURISDICTION OF THE SUPREME COURT

[33] The jurisdiction of the Supreme Court is spelt out in s 169 of the Constitution and, it reads as follows in relevant part:

"**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."

[34] The Act confirms the status of the court as the final court of appeal except in matters where the Constitutional Court has jurisdiction. Section 80 of the former Constitution is a mirror of s 169 (1) above. The status of the Supreme Court as the final court of appeal is further cemented and guaranteed by s 26(1) of the Act which provides that there "shall be no appeal from any judgment or order of the Supreme Court".

[35] The application that the court *a quo* was required to preside over by the applicants was for the review of the decision of a single judge of that court sitting in chambers. The Supreme Court, being a creature of statute, as was found by it, can only do that which the enabling statute, which in this case includes the Constitution, permits it to do. In construing statutory provisions, a court is guided by the canons of interpretation which dictate that words in a provision of a statute must be accorded their ordinary and grammatical meaning unless to do so would result in an absurdity.

[36] That the Supreme Court does indeed have powers of review is not in dispute. What is in contention is what precisely those powers constitute and how are they exercised by the court *a quo*. Those powers are conferred upon it by its enabling statute. The powers of review that it enjoys are spelt out in section 25 which reads as follows:

"**25 Review powers**

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

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

(3) Nothing in this section shall be construed as conferring upon any person any right to institute any review in the first instance before the Supreme Court or a judge of the Supreme Court, and provision may be made in rules of court, and a judge of the Supreme Court may give directions, specifying that any class of review or any particular review shall be instituted before or shall be referred or remitted to the High Court for determination."

[37] From the foregoing, the conclusions that I must arrive at are that, firstly, the court *a quo* is empowered to exercise powers of review over the proceedings and decisions of "inferior courts, tribunals and administrative authorities." In order for the decisions of a single judge of that court to be subject to this power of review, the applicants needed to satisfy the Court that such judge acting alone, constituted an inferior court, tribunal or administrative authority as specified in s 25 of the Act. There is no suggestion from the applicants that such is the case *in casu.*

[38] The application for review itself is actually premised on the allegation that a single judge of the Supreme Court is disabled by law from making a determination in chambers that brings finality to a dispute. Zimbabwe is a country that has an established legal system that has been tried and tested over time and, more specifically, has existed for more than a

century. Thus, not only has it settled common law principles on substantive issues, it has also enacted legislation providing for the same. It also has a wealth of adjectival law setting out the procedures to be followed by the courts that make up its jurisdictional tribunals. It is to these laws that the applicants needed to advert to in approaching the court *a quo* for an attempt to review a process emanating from the court. They have not done so. Other than an assertion on their part that their view must prevail, the applicants have not set out any law, either under the common law or statute, that supports their contention.

[39] Secondly, in the Supreme Court, by statutory authority, the power of review is only exercisable in the face of a gross irregularity from the proceedings or decisions emanating from an inferior court, tribunal or administrative authority. As discussed above, a single judge of the Supreme Court sitting in in chambers is not an inferior court, tribunal nor administrative authority nor can such a description be implied or applied to the judge. In addition, the applicants did not impugn the proceedings presided over by a single judge in chambers based on any alleged irregularity.

[40] The source of their grievance is premised on the mistaken view that a judge of the Supreme Court sitting in chambers is not enabled by law to dismiss an application properly placed before such judge in accordance with the provisions of r 43(7). Again, the jurisdictional ambit being wished on the court *a quo* was not based on any settled legal principles. Indeed, it is correct to state that the applicants, fully aware that the application for condonation and extension of time within which to note an appeal would be dealt with

in chambers in terms of the rules, were satisfied as to the legality of the assumption of jurisdiction by a single judge to hear and determine the application. It goes without saying that, if the applicants had succeeded in the chamber application, the exercise of jurisdiction by a judge sitting in chambers would not have been in contention.

[41] A perusal of the section makes it evident that the review jurisdiction of the court *a quo* is limited to decisions of inferior courts, tribunals, and administrative authorities. Section 25(1) is clear and unambiguous in its terms. On a proper construction thereof, the decision of a single judge of the Supreme Court cannot be said to be one made by an inferior court, tribunal, or administrative authority and, as a consequence, be subject to review by it.

[42] Section 25(1) is unambiguous and cannot, by any stretch of imagination, be construed as empowering the court *a quo* to review a decision of a single judge of its own court. The review powers of the court *a quo* are solely limited to the decisions of inferior courts, tribunals, and administrative authorities. Pollak, *The South African Law of Jurisdiction*, 3rd ed, 2019, pertinently states that:

> "…the Supreme Court's power to review the proceedings of administrative and quasi-judicial bodies, tribunals, etc, does not derive from its inherent jurisdiction but is part of the general jurisdiction of the court."

[43] The general jurisdiction of the court *a quo* is spelt out in the preamble to the Supreme Court Act which states that it is:

> "AN ACT to make provision for the jurisdiction, powers, practice and procedure of the Supreme Court of Zimbabwe and for the making of rules and regulations in

> connection therewith; to make provision for appeals from decisions of courts and tribunals in Zimbabwe; *to confer powers of review on the Supreme Court of Zimbabwe*; and to provide for matters incidental to or connected with the foregoing." (emphasis added)

[44] Thus, any review powers to be exercised by the Supreme Court can only be lawfully implemented within the four corners of s 25. Therefore, the court *a quo* was correct in declining jurisdiction to hear the application for review because such a purported application does not fall within the review jurisdiction of the Supreme Court.

[45] The applicants have urged this Court to invoke the provisions of section 6 of the Act as a default provision that empowers the Supreme Court to assume jurisdiction to determine an application for the review of a decision of one of its judges sitting in chambers. That section provides:

> **"6 Practice and procedure**
> In any matter relating to records, practice and procedure for which no special provision is contained in this Act or in rules of court, the matter shall be dealt with by the Supreme Court or a judge thereof as nearly as may be in conformity with the law and practice for the time being observed in England by the Court of Appeal"

[46] It was suggested by the applicants that in deciding whether or not the Supreme Court had jurisdiction to entertain the application for review, s 6 is one of the provisions that the court should have regard to. I am inclined to accept the submissions on behalf of the respondents that there exist no jurisdictional facts for the assumption of jurisdiction for review under the guise of the provision in question. To begin with there is no evidence that the Act or the rules are deficient in any manner as regards the practice and procedure to be followed in any matter that the Supreme Court is properly seized with. That was

never the case presented to the court a quo. In addition, assuming that such deficiencies exist, the applicants are procedurally bound to lead evidence on the law prevailing in England as regards the said practices and procedures in the Court of Appeal and their applicability *in casu*. This was not done.

[47] Lastly, s 25(3) of the Act proscribes the institution by any person of any review proceedings before the Supreme Court as a court of first instance and, as a consequence, the court is unable to entertain any application for the review of any decisions or proceedings wherein it would act as a court of first instance. The section underscores the position that the court exercises appellate jurisdiction only and cannot hear such an application at first instance.

[48] Section 34 empowers the Supreme Court, through the office of the Chief Justice, to make rules of court for the regulation of all matters in relation to the proceedings of the Supreme Court, including any matter in respect of which rules of court may, in terms of the Act, be made. Section 34(2) sets out the matters in relation to which the exercise of the jurisdiction of the Supreme Court may be implemented and the procedures to be followed. Section 34(2) is pertinent in that it permits the court to make rules, amongst other matters, regulating the time within which any requirement of the rules is to be complied with; the extension of such time; the circumstances in which an appeal shall be deemed to have been abandoned and the condonation of the noting of an appeal out of time in special circumstances in any case where this is not expressly or by necessary implication prohibited by the enactment concerned.

[49] I make reference to the last requirement as it is the one at issue herein. Where an application for condonation and extension of time to file any process is warranted, a litigant approaches the court in terms of r 43(1). An application for appropriate relief must be filed in accordance with the terms and conditions thereof. Once filed, r 43(7) provides that a judge may make such order on the application as he or she thinks fit and shall, if an extension of time is granted, deal also with any question of leave to appeal which may be involved. Thus, the judgment rendered by the single judge refusing condonation and an extension of time within which to note the appeal is permissible under the rules of the court itself. Neither section 34 nor r 43 permitting this exercise of jurisdiction by a single judge in chambers has been impugned in this matter.

[50] The court *a quo* found that the law did not permit it to act as prayed by the applicants and, correctly in my view, declined jurisdiction to hear the application on the merits. However, this is not the end of the matter. The applicants contend that, notwithstanding the provisions of s 25 of the Act and section 169 of the Constitution, the Supreme Court has inherent jurisdiction to hear such a matter and have argued that this jurisdiction is provided for in s 176 of the Constitution.

THE INHERENT JURISDICTION OF SUPERIOR COURTS

[51] It is a settled universal principle that Superior Courts enjoy what is generally referred to as inherent jurisdiction or power. The concept of inherent jurisdiction has been the subject of much debate. It has also baffled the legal space regarding its precise definition

or the meaning that can be ascribed to it. Regardless of the jurisdiction that has made an attempt to come up with a precise definition, it has been defined mostly by what courts can do in the exercise of their inherent jurisdiction or power. As a result, it has variously been defined as the unwritten power of the court that enables the court to dispense justice between man and man.

[52] *Jacob* states that:

> "the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court; it is its very life-blood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction, which is inherent in a superior court of law, is that which enables it to fulfil itself as a court of law. The juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner."[1]

[53] The applicants contend that this inherent jurisdiction is the power that the court should utilise whenever necessary to assume jurisdiction in the interests of justice. It is suggested that as the power already exists, the assumption of jurisdiction is a function that the court should recognise as part and parcel of the inherent jurisdiction that is the preserve of superior courts to ensure that justice is achieved between the litigants that appear before the court. The applicants argue that the power vesting in the courts is substantive and is not limited in scope.

[1] H Jacob "The Inherent Jurisdiction of the Court (1970) 23 Current Legal Problems 23. 51

[54] The grievance of the applicants stems from the decision by the court *a quo* that it had no jurisdiction to determine their application for review based on the premise that superior courts should, and indeed are obliged to, resort to these powers that are vested in them when there arises a need to do so in the interests of justice. In this contention, apart from a reliance on s 176 of the Constitution and a number of provisions of the Act, it is pertinent to state that the applicants have not submitted any other legal basis upon which the Court may assume jurisdiction.

[55] The applicants are correct in submitting that the Supreme Court is a superior court in which inherent powers in here. They have, however, not offered a comprehensive definition of what inherent jurisdiction means or entails nor have they explained the extent to which any superior court may exercise such jurisdiction without breaching its own jurisdictional limitations.

[56] The contrary position adopted by the respondents is this. The superior courts enjoy inherent jurisdiction or power to protect, regulate or control their processes. They however argue that such power is procedural and does not confer upon superior courts the wherewithal to assume a jurisdiction not specifically bestowed upon them by law. In this case, as the Supreme Court is a creature of statute, such jurisdiction as it enjoys must be found either in the Constitution or the Act.

[57] They contend further that the court's inherent jurisdiction is used as a procedural device in facilitating the exercise of a jurisdiction that is already substantially conferred and cannot be employed as suggested by the applicants.

[58] *In casu*, whether the applicants can obtain leave to appeal hinges primarily on whether they are correct in asserting that the Supreme Court should have resorted to its inherent jurisdiction and determined the application for review filed by the applicants, or conversely, whether in fact the court *a quo* had the jurisdiction to entertain the application for review that the applicant sought relief from.

[58] Inherent jurisdiction has often been described as a metaphysical and amorphous concept that defies definition. Courts and eminent jurists from numerous and diverse jurisdictions have over the years attempted to define the term inherent jurisdiction or power. Despite this it remains a nebulous and difficult concept to expatiate. What is not in doubt however is the fact that its roots stem from the English law. This was jurisdiction that was originally conferred on the superior courts of the common law in England, and was derived, not by virtue of any statute or rule of law, but traditionally by the very nature of such courts as superior courts of record. This is where the term 'inherent' emanates from. It is accepted that one of the essential characteristics of a superior court of law requires that it be invested with the power to maintain its authority in order to prevent the abuse of its processes. Without a doubt this is a power that defines the essence of a superior court as without this power the functions of the court would be severely curtailed, if not

rendered dysfunctional. It would in that respect be no different to courts and tribunals owing their very existence to statute.[2]

[59] According to *Jacob,* op. cit., the power which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law. The juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner. In view of the established power of the exercise by the courts of discretion bestowed upon them, it is correct to state that courts have exercised their inherent jurisdiction whenever the interests of justice required them to do so. However, the exercise of inherent powers by the court must be understood within the context of the *dicta* above that the inherent powers that it is imbued with is not unlimited and exercise of this power must be tempered with caution. The extent of exercise of these powers, which are residual, are for the protection and regulation of the court's processes. They are not meant and are not intended for a court to assume a jurisdiction that the law itself has not bestowed upon it. Thus, the applicants' contention that the Supreme Court can arrogate to itself jurisdiction, not otherwise specifically bestowed upon it, is without foundation or legal standing.

[60] The exercise by the superior courts of inherent jurisdiction under the common law and the extent of its exercise were discussed by the Supreme Court in *Bheka* v *Disability Benefits Board* 1994(1) ZLR 353(S), at 356, wherein the court stated:

[2] See Jacob (supra)

"The nature of the inherent jurisdiction of a superior court was recently the subject of a scholarly exposition by Flemming J in *Chunguete v Minister of Home Affairs & Ors* 1990 (2) SA 836 (W). After referring to a number of English and South African authorities, the learned judge came to the conclusion that such jurisdiction is limited to the procedural field. At 848G–H he explained this as follows:

'—What is appropriately called the inherent jurisdiction' is related to the Court's functioning towards securing a just and respected process of coming to a decision and is not a factor which determines what order the Court may make after due process has been achieved. That is a function of the substantive law. The Court — always — is charged with holding the scales of justice. It is not within its task to add weights to the scales by detracting from a right given by the substantive law or granting a right not given by the substantive law.'

See also Taitz: The Inherent Jurisdiction of the Supreme Court at p 55, para (d)."'

[61] Under the common law, Superior Courts exercise their inherent jurisdiction to protect and control their processes. The exercise by the Supreme Court of this jurisdiction in order to protect and control its processes was confirmed 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."

See also *Chiangwa v Apostolic Faith Mission in Zimbabwe* CCZ 6/23

[62] Accordingly, the settled position is that the nature of inherent jurisdiction is that these are powers that are incidental to the ordinary jurisdiction of superior courts. Thus, they are built in as an integral and essential component or characteristic of the court's existing jurisdiction. They are not separate nor are they additional. This was emphasised in *Moulded Components and Rotomoulding Ssouth Africa (Pty) Ltd* v *Coucourakis & another* 1979 (1) SA 457, where BOTHA J said:[3]

> "I would sound a word of caution generally in regard to the exercise of the Court's inherent power to regulate procedure. Obviously, I think, such inherent power will not be exercised as a matter of course.
>
> The Rules are there to regulate the practice and procedure of the Court in general terms and strong grounds would have to be advanced, in my view, to persuade the Court to act outside the powers provided for specifically in the Rules. Its inherent power, in other words, is something that will be exercised sparingly. As has been said in the cases quoted earlier, I think that the Court will exercise an inherent jurisdiction whenever justice requires that it should do so. I shall not attempt a definition of the concept of justice in this context. I shall simply say that, as I see the position, the Court will only come to the assistance of an applicant outside the provisions of the Rules when the Court can be satisfied that justice cannot be properly done unless relief is granted to the applicant."

[63] The inherent powers of a court are in fact part and parcel of the court's integral discretion in the conduct of its business as a court. These are powers that determine and control the manner in which a court is empowered to adjudicate disputes. This was the *dictum* by the

[3] At 462H-463B

court in *Ex Parte Millsite Investments Co (Pty) Ltd*. 1965(2) SA 582(T) at 585 G-H, where the inherent jurisdiction of the Supreme Court was described as follows:

> "... apart from powers specifically conferred by statutory enactments and subject to any deprivations of power by the same source, a Supreme Court can entertain a claim or give any order which, at common law, it would be entitled to entertain or give. It is to that reservoir of power that reference is made where in various judgments Courts have spoken of the inherent power of the Supreme Court... *The inherent power is not merely one derived from the need to make the court's order effective, and to control its own procedure, but to hold the scales of justice where no specific law provides directly for a given situation*". (emphasis added)

[64] In their alternative ground of appeal, the applicants contend that the court *a quo* misinterpreted s 176 of the Constitution when it held that it had no jurisdiction to review and correct a decision of a single judge in chambers. The applicants' case is premised on the contention that s 176 of the Constitution gives the court *a quo* jurisdiction to review interlocutory judgments of judges sitting in chambers. They argued that no finality could be given to a judgment made in chambers to the exclusion of the power of the full court to review such a judgment. In addition, the applicants are of the view that a full court always has jurisdiction to review judgments made in chambers.

[65] Following upon the promulgation of the current Constitution and particularly as a result of the reference to inherent jurisdiction of the superior courts in s 176, the question of the exercise by the courts of this concept has assumed major significance. Of recent, the High Court has been called upon to determine the question of the inherent jurisdiction it enjoys and the limits, if any, that the law places upon it in the exercise of the powers that adhere to it. The High Court is a court of original jurisdiction and is thus imbued with inherent jurisdiction. As a consequence, fully alive to the dangers of assuming jurisdiction it did

not possess, in construing the import of s 176, was moved to make a distinction between inherent jurisdiction and the inherent powers conferred upon the court. In *Machote v Zimbabwe Manpower Development Fund* HH 813/15 at p.3, Tsanga J posited the following:

> "Jurisdiction of a court essentially refers to the authority that a court has to hear and determine a dispute that is brought before it. This is in distinction to the court's *"inherent power*" to do something as dealt with by s 176 of our Constitution. In terms of this section, the Constitutional Court, the Supreme Court and the High Court all have *inherent powers* to protect and regulate their own process and to develop the common law or customary taking into account the interests of justice and the provisions of this Constitution. Such *inherent powers* can thus be inherent procedural powers or inherent substantive powers and are exercised on the premise that the court in question already has jurisdiction in the first place. Thus, regulation of process as exhorted by s 176 would be largely an exercise of inherent procedural powers while development of common law and customary law as per s 176 would be largely an exercise of inherent substantive powers." (emphasis is added)

[66] In the same vein, in *Derdale Investments (Pvt) Ltd v Econet Wireless (Pvt) Ltd & Ors* 2014(2) ZLR 662(H), the court commented as follows:

> 'The concept of inherent jurisdiction is described by Jerold Taitz *The Inherent Jurisdiction of the Supreme Court* (Juta, Cape Town, 1985) as follows:
>
> > 'The inherent jurisdiction of the supreme court may be described as the unwritten power without which the court is unable to function with justice and good reason. As will be observed below, such powers are enjoyed by the court by virtue of its very nature as a superior court modelled on the lines of an English superior court…'
>
> In *Halsbury's Laws of England* 4 ed (Butterworth's, London), inherent power is defined as follows:
>
> > 'In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them'."

[67] The above authorities accentuate the principle that the inherent jurisdiction of the Supreme Court may be resorted to in the regulation of the court's process and to achieve justice between litigants. Nevertheless, the inherent jurisdiction of the Supreme Court is not unlimited as some restrictions are placed on the exercise of this power.

[68] Thus, in a nutshell, inherent jurisdiction is the power vested in superior courts that permits the courts to decide the manner in which they may adjudicate upon a subject-matter, adjudicate between parties, decide upon relief or decide upon any combination of these factors. It must be noted that this power exists independently of the powers spelt out in any rules of court. Inherent jurisdiction vesting in a superior court exists due to the fact that a superior court's inherent jurisdiction derives independently of statute or other rule of law, and arises from its very nature as a superior court of record. This position was emphasised by Menzies J in *R v Forbes* as follows:

> "Inherent jurisdiction is not something derived by implication from statutory provisions conferring particular jurisdiction; if such a provision is to be considered as conferring more than is actually expressed that further jurisdiction is conferred by implication according to accepted standards of statutory construction and it would be inaccurate to describe it as 'inherent jurisdiction', which as the name indicates, requires no authorizing provision."[4]

See also *Zimbabwe Rural District Councils Workers' Union v Nyanga Rural District Council & Ors* HH 118/22.

[4] [1972]HCA 34: (1972)127CLR 1.7

[69] The applicants contend that the advent of the 2013 Constitution heralded a new era wherein the jurisdiction of the superior courts was extended. In this regard, the argument goes, notwithstanding the clear prohibition in s 25 against the Supreme Court acting as a court of first instance to entertain an application for review, such power is found in s 176 and the provision should be construed as having endowed the superior courts with the necessary jurisdiction to decide those matters not mentioned in the laws that have specified the jurisdictional limits of the courts. The contention that the applicants rely on in this application as well as the purported review application before the court *a quo* is that superior courts are endowed with inherent jurisdiction or rather inherent power that enables these lofty tribunals to extend the ambit of their jurisdiction instead of narrowing the same. The way I understand the argument is that the courts have the inherent power to assume jurisdiction where appropriate.

WHETHER SECTION 176 HAS ENDOWED SUPERIOR COURTS WITH ADDED JURISDICTION

Section 176 reads as follows:

> "**176 Inherent powers of Constitutional Court, Supreme Court and 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."

[70] Based on their understanding of the above provision, the applicants contend that s 176 must be accorded a purposive and contextual construction that gives expression to the underlying values of the Constitution. Following the suggested approach, the applicants

argue that the Court should be able to conclude that a full court of the Supreme Court has the jurisdiction to review an interlocutory judgment of a single judge of the court. They suggest that by parity of reasoning therefore no judgment of a single judge sitting in chambers is final and that, based on that premise, the full court has the jurisdiction to undertake a review.

[71] The contrary view expressed by the respondents is that in so far as the question of the application of a court's inherent jurisdiction in the adjudication of disputes is concerned, that inherent jurisdiction is a procedural device used by the court in facilitating the exercise of jurisdiction. They reject the applicants' premise to construe, under s 176, a jurisdictional power conferred upon the Supreme Court to review proceedings emanating from the judgments of judges sitting in chambers determining chamber applications premised on its rules.

[72] The Constitution of South Africa contains a provision that is an equivalent to our s 176, being s 173. This section provides:

Inherent power

> "173. The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice"

[73] The South African Supreme Court of Appeal had the occasion to construe the meaning to be ascribed thereto in *Oosthuizen* v *Road Accident Fund* (258/10) [2011] ZASCA 118, where the court stated:[5]

> "Our courts derive their power from the Constitution and the statutes that regulate them.[2] Historically the Supreme Court (now the high court), in addition to the powers it enjoyed in *terms* of statute, has always had additional powers to regulate its own process in the interests of justice. This was described as an exercise of its inherent jurisdiction. That power is now enshrined in s 173 of the Constitution. Citing I H Jacob *Current Legal Problems*, Freedman C J M adopted the following definition of 'inherent jurisdiction':[3]
>
> > '. . . the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of the law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."'

[74] Within this jurisdiction, the High Court has on a number of occasions been called upon to construe the provisions of s 176 as it pertains to the inherent jurisdiction of that court. There have been several decisions from the courts in South Africa on s 173 of its Constitution and it is pertinent that I turn to them for guidance. In *Oosthuisen (supra)* the court was called upon to interpret the meaning and import to be placed on the phrase "the inherent jurisdiction of the superior courts to control, protect and regulate their processes" as provided for in a similarly worded section of the Constitution of South Africa. The court stated:[6]

> [15] " ……It appears that the appellant was ultimately contending that the high court is entitled and indeed, in the present circumstances, compelled to come to the appellant's assistance by exercising its inherent jurisdiction to regulate its own process.

[5] At para 13
[6] at paras 15, 17 -18

[16] ……n/a……..

[17] **A court's inherent power to regulate its own process is not unlimited. It does not extend to the assumption of jurisdiction which it does not otherwise have.** In this regard see *National Union of Metal Workers of South Africa & others* v *Fry's Metal (Pty) Ltd*[5] where this Court stated that:
'While it is true that this Court's inherent power to protect and regulate its own process is not unlimited – it does not, for instance, "extend to the assumption of jurisdiction not conferred upon it by statute"…'"

[18] Section 173 does not give any of the courts mentioned therein, including the high court, carte blanche to meddle or interfere in the affairs of inferior courts. Historically, the high courts have always had supervisory powers over the magistrates' courts by way of for example review in terms of s 24 of the Supreme Court Act 59 of 1959 and s 304 of the Criminal Procedure Act 51 of 1977. **Moreover, a high court may only act in respect of matters over which it already has jurisdiction. A high court can therefore not stray beyond the compass of s 173 by assuming powers it does not have".** (emphasis added)

[75] In defining the meaning of the same section, the South African Constitutional Court in the case of *Mukaddam* v *Pioneer Foods (Pty) Ltd, Mukaddam* v *Pioneer Foods (Pty) Ltd* 2013(5) SA 89(CC), stated that:

"…But sometimes circumstances arise which are not provided for in the rules. The proper course in those circumstances is to approach the court itself for guidance. *After all, in terms of s 173 each superior court is the master of its process.*

[42] … *The language of the section suggests that each court is responsible and controls the process through which cases are presented to it for adjudication*. The reason for this is that a court before which a case is brought is better placed to regulate and manage the procedure to be followed in each case so as to achieve a just outcome. For a proper adjudication to take place, it is not unusual for the facts of a particular case to require a procedure different from the one normally followed. *When this happens it is the court in which the case is instituted that decides whether a specific procedure should be permitted*." (emphasis added)

[76] Even though the concept of inherent jurisdiction was discussed in *Oosthuisen (supra)* within the context of s 173 of the South African Constitution, its definition and the power

of the courts to resort to it for adjudication had been before the court as a subject of discussion prior to the incidence of the South African Constitution. In *Ex Parte Millsite Investments Co (Pty) Ltd*. 1965(2) SA 582(T) at 585 G-H, the inherent jurisdiction of the Supreme Court was described as follows:

> "...apart from powers specifically conferred by statutory enactments and subject to any deprivations of power by the same source, a Supreme Court can entertain a claim or give any order which, at common law, it would be entitled to entertain or give. It is to that reservoir of power that reference is made where in various judgments Courts have spoken of the inherent power of the Supreme Court... *The inherent power is not merely one derived from the need to make the court's order effective, and to control its own procedure, but to hold the scales of justice where no specific law provides directly for a given situation*". (emphasis added)

[77] From the authorities cited above, it is evident that the inherent jurisdiction of the Superior Courts has long been acknowledged and applied by our courts and it goes without saying that the power is derived from the common law which is its source. However, with the advent of the new Constitution the inherent jurisdiction of the courts has now been reasserted under s 176 of the Constitution.

[78] Whilst the court in *Machote supra,* makes a semantic distinction between inherent jurisdiction and inherent powers, the essence of the matter is that s 176 of the Constitution may be relied on only concerning matters that are ordinarily within the jurisdiction of the court concerned. It therefore stands to reason that any superior court, in the exercise of its inherent jurisdiction, has the discretion to regulate its own process in a matter over which it enjoys jurisdiction where there is a need for the exercise of inherent jurisdiction and where its own procedures or rules do not provide a mechanism to deal

with a situation the court is confronted with. In this manner the court then regulates its procedure to protect its own process.

[79] To achieve clarity on this issue it becomes pertinent therefore to define what is meant by regulation and process. The Collins English Dictionary has the following definitions in respect of the words 'regulate' and 'process'.

-To regulate is to-: adjust as required, control, adjust e.g an instrument so that it operates properly, bring into conformity with a rule, a principle or usage. In American English the definition of regulate is to-:

control direct, or govern according to a rule, system principle or method, adjust to a particular standard, rate, degree requirement or amount, adjust (a clock etc) so as to ensure accuracy of performance, put in good order.

On the other hand, process is defined as-:

a series of actions or steps taken to achieve a particular end; a method of doing or making something according to a particular set of actions.

[80] Whilst the jurisdiction of a court is specifically accorded in the Constitution and its enabling Act, its procedures are regulated by the rules that it makes. The exercise of inherent jurisdiction does not entail the creation of additional jurisdiction or the amendment of rules. Rather it is a residual power that the court possesses and retains for use in the interests of justice, or when not to do so may result in an injustice. In other words, it is a power that the court calls upon to fashion a remedy in the interests of justice. From the definition of the critical words 'regulate' and 'process' I am unable to

find, as the applicants urge me to, that the Supreme Court, or for that matter the Constitutional Court and the High Court, through the advent of s 176, have been given, in addition to what they already have, the power to assume additional jurisdiction as and when they want to do so. They have, however, in terms of the section, been given the power to develop the common law.

[81] Section 176 cannot be read as giving the Supreme Court extended powers of review not specified in the Constitution itself or in the Act. Whilst the Supreme Court has powers of review, those powers cannot be exercised contrary to those spelt out in terms of s 25 of the Supreme Court Act itself. Had the legislature intended that the Supreme Court have overreaching powers of review, s 25 would not contain the restrictions that it has over the exercise of review powers by the court. An interpretation that permits the assumption of jurisdiction by the superior courts premised on s 176 of the Constitution would result in a conflict between that section and the sections of the Constitution that spell out the jurisdiction of the superior courts in this jurisdiction. As regards the Supreme Court such a construction would render s 25 of no force or effect. The legislature is presumed to know the law and a construction such as the one sought by the applicants would lead to an absurdity in the legislation. It is a construction that goes against the canons of statutory interpretation.

[82] Moreover, it is axiomatic that superior courts generally are imbued with powers of review over the decisions or proceedings of inferior courts or tribunals. They have not been imbued with the power to review their own decisions. Added to this it is a settled

principle that the Supreme Court may only act in respect of matters over which it already has jurisdiction and is, as a result, disabled by law from straying outside the jurisdiction it enjoys under the Constitution and the Act on the premise that section 176 in some way permits it to do so. See *Guwa v Willoughbys Investments (Pvt) Ltd* 2009 (1) ZLR 380 (S)

WHETHER THERE WERE PROCEEDINGS FOR REVIEW BEFORE THE SUPREME COURT

[83] As noted above, s 176 of the Constitution and s 6 of the Supreme Act do not clothe the court *a quo* with inherent jurisdiction to hear an application for the review of the judgment of its single judge in chambers. This is buttressed by the restriction placed on the exercise of inherent jurisdiction by the Supreme Court that it cannot be used to create a substantive right or law. See *Oosthuizen* v *Road Accident Fund (supra)* paras 21-27, where it was held that a High Court may not use its inherent jurisdiction to create a right. Thus, the applicants are wrong to interpret s 176 of the Constitution in conjunction with section 6 of the Supreme Court Act as allowing the court *a quo* to review a decision of its single judge in chambers.

[84] *In casu*, the applicants sought to argue that s 176 of the Constitution gives the court *a quo* the authority to determine an application for the review of a single judge in chambers. I am unable to agree with that contention. Any attempt to do otherwise would be unlawful. It is evident that the applicants attempted to circumvent the parameters of the right to review that is firmly established by s 25 of the Supreme Court Act by misconstruing the meaning of s 176 of the Constitution. The applicants could not lawfully do so as to permit

them to do so would have resulted in a new legal right being created. This goes against the scope and meaning of s 176. This was underscored by the Supreme Court of Canada in the case of *College Housing Co-Operative Ltd* v *Baxter Student Housing Ltd* [1976] 2 S.C.R 475 at p. 3:

> "Inherent jurisdiction cannot, of course, be exercised so as to conflict with a statute or rule. Moreover, because it is a special and extraordinary power it should be exercised only sparingly and in a clear case."

[85] It therefore follows that one cannot rely on the inherent jurisdiction of the Supreme Court to override the provisions of statute and rules of court in an effort to obtain relief from the court in the absence of jurisdiction. The effect of the court *a quo* declining jurisdiction to determine the application for review means that there was no decision on the merits on a constitutional basis. In the case of *Muza* v *Saruchera & Ors* 2019(1) ZLR 446, at p 449B-D, MALABA CJ aptly held that:

> "……..The purpose of the right of appeal granted to a person under r 32(2), the procedure of an application for leave to appeal provided therein, and the contents of the application required under r 32(3)(c), of the Rules *are premised on the existence of a decision by a subordinate court on a constitutional matter*.
>
> The purpose of the Rules is to ensure proper exercise of jurisdiction by the Court. *The matter that gives rise to the need for the Court to exercise its jurisdiction must be a constitutional matter decided by the subordinate court*.
>
> The object of the exercise of jurisdiction by the Court is always the protection, promotion and enforcement of the supremacy of the Constitution. *Where there is no decision by a subordinate court to justify the allegation of actual or threatened violation of a constitutional provision, the Court would have no cause for the exercise of its jurisdiction*." (emphasis added)

[86] Given the foregoing, I am constrained to find that it is not in the interests of justice that the applicants be granted leave to appeal against the decision of the court *a quo*. The application, therefore, fails on that basis.

[87] Consequently, as the applicants approached the court *a quo* on the basis of the wrong provisions of the law, the application was improperly before the court *a quo*. The proceedings before the court *a quo* were a nullity and no appeal can lie against them. It is well settled that anything done contrary to the provisions of the law is a nullity – See *Mcfoy* v *United Africa Co Ltd* [1961] 3 ALL ER 1169 at 1172.

[88] In addition to the above, the law requires that there be finality to litigation. Consequent thereto, the decision of the court *a quo* on the application for condonation and extension of time to note an appeal was final in nature. This is provided for in s 169 of the Constitution as read with s 26 of the Supreme Court Act, both of which state that all decisions of the Supreme Court, including those of a single judge in chambers, in non-constitutional matters are final and not subject to appeal. In *Rushesha & Ors* v *Dera & Ors* CCZ 24-17, s 169 of the Constitution was interpreted as follows:

> "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."

[89] Given the above, it is clear that this application for leave to appeal has no merit and ought to be dismissed.

COSTS

[90] The respondents have prayed for an order of costs against the applicants. Collectively they have argued that the application amounts to an abuse of court process and for that reason, the applicants must be mulcted with costs on a punitive scale. It is a settled practice of this Court that generally no costs are awarded unless there is conduct warranting such an order. This principle was reiterated in *Bere v JSC & al* CCZ 10/22, where the Court said:

> "The respondents appear to have disregarded r 55 of the Rules which, in keeping with the established practice of this Court, provides that generally no costs are awarded in constitutional matters. This practice was recently reaffirmed in *Mbatha* v *Confederation of Zimbabwe Industries & Anor* CCZ 05-2021, at p. 11. In my view, there is no basis or justification in this case to depart from the norm of not awarding costs in a constitutional matter."

The remarks of the Court in the above quoted passage apply with equal force *in casu*. I see no reason to depart from the same.

DISPOSITION

[91] On the facts of this case, I find that the applicants have failed to establish that they enjoy good prospects of success on appeal. Accordingly, the application for leave to appeal cannot succeed.

In the result, the Court makes the following order:

The application for leave to appeal be and is hereby dismissed with no order as to costs.

HLATSHWAYO JCC : I agree

PATEL JCC : I agree

Lovemore Madhuku Lawyers, applicants' legal practitioners

Atherstone & Cook, 1st, 3rd – 9th respondents' legal practitioners

Bere Masamba – 10th, 11th, 13th-, 30th 32nd & 36th respondents' legal practitioners