

**DISTRIBUTABLE:** (1)

**LIZIWE MUSEREDZA AND 303 OTHERS (LISTED)**

**v**

**(1) MINISTER OF AGRICULTURE, LANDS, WATER AND  
RURAL RESETTLEMENT (2) MAPARAHWE PROPERTIES  
(PRIVATE) LIMITED (3) KINGSDALE HOUSING  
COOPERATIVE SOCIETY LIMITED (4) EXECUTOR,  
ESTATE OF LATE PIETER NICHOLAS NEL (5)  
HARDWORK CHIMINYA (6) GIVEMORE DUBE (7)  
PRETTY KURERA (8) SPIWE MATAMBO (9) EXECUTOR,  
ESTATE OF LATE SIBANGANI KOKERA (10) ATTORNEY  
GENERAL OF ZIMBABWE (11) REGISTRAR OF DEEDS**

**CONSTITUTIONAL COURT OF ZIMBABWE  
GOWORA JCC, HLATSHAWYO JCC & PATEL JCC  
HARARE: 4 OCTOBER 2021 & 28 MARCH 2022**

*L Madhuku*, for the applicants

*L Uriri*, for the second respondent

*A Dracos*, for the fourth respondent

No appearance for the first, third and fifth to tenth respondents

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

**GOWORA JCC**

[1] This is an application for leave for direct access to the Court brought in terms of s 167(5)(a) of the Constitution as read with r 21 of the Rules of the Constitutional Court 2016. The applicants are a group of persons residing on a piece of land over

which the second respondent claims ownership. They intend to approach the Court under s 24 of the Constitutional Court Act, 2021 for the rescission of a judgment of the Court issued under CCZ 43/15.

## **BACKGROUND FACTS**

- [2] The applicants are residents on a piece of land described as a certain piece of land situated in Hartley district, being Kingsdale of Johannesburg, measuring 161, 8238 hectares.
- [3] In 2001 the State gazetted the land described above and, through that process, compulsorily acquired it under the land reform programme. In support, the applicants have attached to their papers an Extraordinary Government Gazette dated 22 June 2001 confirming the acquisition. The applicants contend that, consequently, title to the land is vested in the Government of Zimbabwe.
- [4] Further, the applicants claim that they were allocated stands on the piece of land under the programme. However, they have not produced any documents to the Court to sustain their claim.
- [5] The applicants claim that, unbeknown to them, the first to ninth respondents obtained an order by consent under CCZ 43/15. The second respondent was permitted in terms of that order to obtain necessary permits have the land surveyed and to sell any stands to any other party or parties. They allege that as a result of this, and contrary to their wishes, they entered into agreements of sale in respect of their individual stands. Thus,

the second respondent erroneously continues to hold itself as the owner of the piece of land to their prejudice.

[6] The parties are agreed that the following facts are common cause. In 2001 the piece of land described above was gazetted for acquisition under the land reform programme. It is common cause that the Administrative Court set aside the acquisition in 2003.

[7] On 2 October 2013, this Court set aside the acquisition of the piece of land following its further gazetting in 2005. This order was followed by an order obtained by consent under CCZ 43/15, the *causa* for the application *in casu*. This order, issued on 18 November 2015, was in the following terms:

IT IS ORDERED BY CONSENT THAT:

1. Kingsdale Housing Cooperative Society Limited be and is hereby joined to these proceedings as the second respondent.
2. It is declared that the applicants' right under s 68(1) of the Constitution of Zimbabwe to fair, just, and prompt administrative action has been violated.
3. It is declared that Kingsdale of Johannesburg, measuring 161,8238 hectares in the District of Hartley, is private land.
4. Consequently, it is ordered that:
  - 4.1 The first respondent be and is hereby ordered to withdraw its acquisition of land aforesaid and shall cause the publication of such withdrawal in the Government Gazette and the Herald Newspaper within fourteen (14) days of this order.

- 4.2 The land aforesaid vests in the first applicant who shall proceed with urban development of the said land up to the issuance of title surveys in accordance with permits issued or to be issued by the relevant town planning authority.
  - 4.3 Any agreement of sale between first applicant and any other person as of 26 February 2015 (the date of purported acquisition) remains valid and enforceable.
  - 4.4 All persons, with the exception of the second respondent's registered members as at 12 November 2013, in illegal occupation or possession of any portion of the said land forthwith vacate the land failing which the Sheriff of Zimbabwe or his lawful Deputy be and is hereby authorised to eject them.
  - 4.5 The first applicant hereby donates to the Government of Zimbabwe twenty-one (21) hectares of land in the area covered by Garikai/Hlalani Kuhle Housing Scheme and ZESA Servitudes.
  - 4.6 The first applicant shall develop the land in terms of para 4.2 above, and the members of the second respondent and persons referred to in para 4.3 above shall compensate the first applicant for the remaining land measuring 140 hectares at US\$5.00 per square metre in accordance with the terms of a Deed of Settlement to be signed by the parties and incorporated into the order of the Administrative Court.
5. Each party to bear its own costs.

[8] It is common cause that the applicants have entered into separate agreements of sale in respect of the individual stands that each applicant occupies. The applicants contend

that the judgment issued under CCZ 43/15 should be set aside. They place reliance for this contention on s 24 of the Constitutional Court Act [Chapter 7:22], (“the Act”). They allege that the judgment was granted in their absence. They allege that the judgment was granted in error as the land is State land following its acquisition in 2001. They further allege that they were forced, by circumstances, into purchasing from the second respondent the stands allocated to them under the land reform programme pursuant to the judgment. They contend that they have been and continue to be prejudiced by the erroneous order in CCZ 43/15.

- [9] On the premises stated above, the applicants approach the Court for leave to have the judgment under CCZ 43/15 rescinded. Rescission is sought on the basis that the judgment was erroneously sought or granted. The applicants aver that the land in question was State land and remains State land under s 72(4) (a) of the Constitution due to its listing in Schedule 7 of the former Constitution in 2005. The parties erred in not bringing this fact to the attention of the Court at the hearing. The applicants contend that the judgment is unconstitutional as it is contrary to s 72(4) (a). They argue that none of them was party to the consent order under CCZ 43/15.

#### **THE REQUIREMENTS FOR LEAVE FOR DIRECT ACCESS**

- [10] The Constitutional Court is a specialised court with jurisdiction to hear only deserving cases. Direct access to the Court is an extraordinary procedure granted in deserving cases that meet the requirements set out in the rules of the Court. Rule 21(3) of the Rules of the Constitutional Court 2016 requires that an applicant for leave for direct access to the Court must show that it is in the interests of justice for access to be granted by the Court. Thus, r 21(3) provides as follows:

- “(3) An application in terms of sub rule (2) shall be filed with the Registrar and served on all parties with a direct or substantial interest in the relief claimed and shall set out—
- (a) the grounds on which it is contended that it is in the interests of justice that an order for direct access be granted; and
  - (b) the nature of the relief sought and the grounds upon which such relief is based; and
  - (c) whether the matter can be dealt with by the Court without the hearing of oral evidence or, if it cannot, how such evidence should be adduced and any conflict of facts resolved.”

[11] Rule 21(8) provides:

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

[12] In *Zimbabwe Development Party & Anor v The President & Ors* 2018 ZLR 485 (CC) at p 492 MALABA CJ commented thus:

“In order for direct access to be granted, the applicants had to show that they had prospects of success in the main matter. In *Transvaal Agricultural Union v Minister of Land Affairs and Another* 1996 (12) BCLR 1573, 1997 (2) SA 621 (CC) at para [46], the Constitutional Court of South Africa said in part:

‘[46] The applicant has failed to establish that this is a case in which the ordinary procedures ought not to have been followed. There are important issues which are within the jurisdiction of the Supreme Court and which need to be resolved by it before this Court is approached for relief. As far as the other issues are concerned, there is neither the urgency *nor the prospects of success necessary to justify direct access to this Court*. The application for direct access must therefore be dismissed.’ (my emphasis)

[13] In *Bruce and Another v Fleecytex Johannesburg CC and Others* 1998 (2) SA 1143 (CC), 1998 (4) BCLR 415 (CC) at para [7], CHAKALSON P remarked:

“[7] *Whilst the prospects of success are clearly relevant to applications for direct access to this Court; there are other considerations which are at least of equal importance*. This Court is the highest Court on all constitutional matters.

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

[14] It is common cause that the applicants are in occupation of individual stands on the land, which is the subject of the dispute, under agreements of sale concluded between them and the second respondent. It is also common cause that the contracts of sale have not been cancelled in respect of some of the applicants. The record shows that the second respondent obtained a judgment for the eviction of the first applicant from the stand. However, none of the applicants are claiming a right of occupation through the agreements of sale. Rather, their alleged right to occupation is premised on the allegation that they were allocated stands under the land reform programme.

[15] If granted access, the applicants seek an order in the following terms:

1. That it be and is hereby ordered that the judgment by this Court in CCZ 43/15 handed down as an order on 18 November 2015 is rescinded for the reason that it was granted in error.
2. That for the avoidance of doubt, and arising from the order in para 1, in the exercise of the Court’s inherent powers under s 176 of the Constitution as read with s 175(6)(b) of the same Constitution, it is declared that certain piece of land known as Kingsdale of Johannesburg, in the district of Hartley measuring 161,8238 hectares is State land under s 72(4) of the Constitution of Zimbabwe.
3. The respondents (if they oppose this order) shall pay the costs of this application jointly and severally, the one paying the others being absolved.

## SUBMISSIONS BEFORE THE COURT.

Submissions in relation to the two issues went as follows.

[16] Mr *Madhuku*, appearing for the applicants contended that the High Court Rules are inapplicable in *casu*, and that the matter may be brought to Court by way of s 24 of the Act. To that end, he argued that there was no question of delay in bringing the application for rescission as s 24 did not make provision for a time frame for filing the application. He contended further that there were no time limits placed on alleged violation of the Constitution.

In so far it related to the locus standi of the applicants, Mr *Madhuku* argued that the applicants had an interest to protect. He further contended that they were absent from the process when the judgment was issued and have, therefore, the requisite *locus standi in judicio*.

[17] Mr *Uriri* was of a contrary view. He argued that whilst s 24 restates the substantive power of the Court, the procedural aspects are provided for in s 26. In his view, s 24 restates the substantive power of the Court. The procedural aspects of the exercise of that power are set out in s 26 where the Chief Justice is empowered to promulgate rules of court to provide for the procedure the Court is to follow. He contended that the failure by the applicants to adhere to the rules of the Court was fatal to the application. He suggested that the application was in fact a nullity.

[18] Coming to the question of locus standi, Mr *Uriri* submitted that the applicants had not established on the papers that they had *locus standi* to apply for the rescission of the judgment. They had not established that they had an interest that required protection



through the setting aside of the judgment in question. He reiterated that interest in the context of locus standi must be personal as relates to the person seeking relief.

[19] Mr *Dracos*, on the other hand made the following submissions. He argued that it was not in the interests of justice for the application to be granted. The applicants had become aware as early as July 2017 of the existence of the judgment. The application was filed after a period of four years and there was no attempt to explain the delay in bringing it to Court. He contended that r 29 of the Rules of the High Court applied in *casu* and on the premises of the rule the applicants were not entitled to the relief they were seeking.

There were no submissions on the question of locus standi by the fourth respondent.

I propose to consider the two issues ad seriatim.

[20] In *Liziwe Musedza & 385 Others v Minister of Agriculture, Lands Water & Rural Resettlement & Ors* CCZ 11/21, the applicants approached the Court for substantially the same relief as sought in the main application attached to this application. In the matter above, they approached the Court under r 449 of the High Court Rules 1971(now repealed). The Court considered the matter in terms of 449 which provided in relevant part:

**“449. Correction, variation and rescission of judgments and orders**

- (1) The Court or a judge may, in addition to any other power it or he may have, *mero motu* or upon the application of any party affected, correct, rescind, or vary any judgment or order—
  - (a) that was erroneously sought or erroneously granted in the absence of any party affected thereby; or
  - (b) in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission; or
  - (c) that was granted as the result of a mistake common to the parties.

- (2) The Court or a judge shall not make any order correcting, rescinding or varying a judgment or order unless satisfied that all parties whose interests may be affected have had notice of the order proposed.”

[21] In that matter, the contention of the applicants was to the effect that an application under rule 449 did not require leave as provided for in r 21 of the Constitutional Court Rules 2016. Writing for the Court, MAKARAU JCC commented as follows at pp13-14 of the cyclostyled judgment:

“As discussed above, an application to this Court in terms of r 449 of the High Court Rules as read with r 45 of the Rules is in the exclusive jurisdiction of this Court by operation of the law of practice and procedure. This is so because only this Court can correct or vary its own order sought or given in error and in the absence of a party adversely affected by the order.

Such an application is *sui generis* in a number of respects. Whilst it is brought to set aside an extant order of the Court, it in essence seeks to bring before the court new facts or fresh legal argument for consideration. This is so because the applicants have perforce to allege that a material fact or law was not brought to the attention of the Court and was therefore not considered by it before it made the order that is under challenge. In *casu*, evidence of the “new” fact was sought to be led through the founding affidavit in the form of the Government Notice that listed the land in dispute. The new matter that the applicants wish the Court to determine is therefore the effect of this new evidence on the ownership of the land in dispute.

Secondly, the application is not between the same parties who were before the Court in the matter that resulted in the extant order. It is brought by applicants who again perforce have to allege that they were not before the Court when the order was granted. It therefore introduces not only a new matter but new parties.

.....

The practice of this Court therefore is that, where a litigant wishes to bring a new and fresh cause and the matter is not listed in r 21 as one for which leave is not required, then leave must be sought even if the matter is in the exclusive jurisdiction of the Court. The practice is based on and highlights the gate-keeping function of an application for leave.”

[22] Pursuant to that judgment, the applicants have filed an application for leave for direct access. Undoubtedly, the applicants require the leave of court to approach the Court

for relief. The intended application for rescission of judgment does not fall within the applications that are exempted from leave in terms of r 21(1) of the rules of the Constitutional Court. R 21(1) provides:

“(1) The following matters shall not require leave of the Court—

- (a) disputes concerning an election to the office of President or Vice-President;
- (b) disputes relating to whether or not a person is qualified to hold the office of President or Vice-President;
- (c) referrals from a court of lesser jurisdiction;
- (d) determinations on whether Parliament or the President has failed to fulfil a constitutional obligation;
- (e) appeals in terms of section 175(3) of the Constitution against an order concerning the constitutional validity or invalidity of any law;
- (f) where the liberty of an individual is at stake;
- (g) challenges to the validity of a declaration of a State of Public Emergency or an extension of a State of Public Emergency.

*The significance of Court Rules in the adjudication process.*

[23] The law should be and the procedure for applying the law must work efficiently, inexpensively and effectively. This principle of fairness is provided for in the Constitution and the right of access to the Court is a fundamental right. The Constitution of Zimbabwe 2013 has provided for access to the court in s 69(2) and (3) for the adjudication of civil rights. It provides:

**“69 Right to a fair hearing**

- (2) In the determination of civil rights and obligations, every person has a right to a fair, speedy and public hearing within a reasonable time before an independent and impartial court, tribunal or other forum established by law.
- (3) Every person has the right of access to the courts, or to some other tribunal or forum established by law for the resolution of any dispute.

[24] However, the right of access to courts does not give a litigant the licence to unilaterally decide on the procedure for accessing the court. The procedure applicable is as a consequence rooted in fairness and this is concretised by the power of the Court to enact rules that delineate procedural requirements. This Court has in a plethora of authorities emphasised the obligation of litigants to adhere to the law and adopt the process set out in rules. In *Kombayi v Berkout* 1988(1) ZLR 53, (S), at 56D-57A, the court in that matter emphasised the obligation by litigants and their legal practitioners to observe the rules of the respective courts wherein relief is sought. The court said:

“Although this court is reluctant to visit the errors of a legal practitioner on his client, to whom no blame attaches, so as to deprive him of a re-hearing, error on the part of a legal practitioner is not by itself a sufficient reason for condonation of a delay in all cases. As Steyn CJ observed in *Saloojee & Anor NNO v Minister of Community Development* 1952 (2) SA 135 (A) at 141C:

“There is a limit beyond which a litigant cannot escape the results of his attorney’s lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the rules of the Court. Considerations *ad misericordium* should not be allowed to become an invitation to laxity.”

A duty is cast upon a legal practitioner, who is instructed to prosecute an appeal, to acquaint himself with the procedure prescribed by the Rules of the Court to which a matter is being taken on appeal. That no effort has been made to comply with the Rules of Court in the instant case is further exemplified by the failure of the applicant’s attorney to satisfy the requirement of Rule 31(1) of the Supreme Court Rules: that an application for extension of time within which to appeal “shall be accompanied by a copy of the judgment against which it is sought to appeal.”

The Notice of Appeal itself is defective, in that it does not comply with the mandatory provisions of Rule 29, sub-rules (a), (c) and (e) which require: (i) that the court by which the judgment appealed against was given be stated; (ii) that there be some indication as to whether the whole or part only of the judgment is appealed against; and (iii) that the exact nature of the relief sought be stipulated. There is almost a total disregard of the Rules.”

[25] It is trite therefore that the rules form the backdrop of procedure, and that this serves to buttress the rules of natural justice that there be an equal playing field where every

party is afforded a right to be heard in their cause. See *Metsole v Chairman, Public Service Commission & Anor* 1989(3) ZLR 147(S). The roles that the Rules play was explained in *Makaruse v Hide & Skin Collectors (Pvt) Ltd* 1996(2) ZLR 60(S), at p 65D-F, as being:

“By virtue of the power conferred on this court by r 4 to condone any non-compliance with the rules, none of the provisions of the rules are strictly peremptory. “The rules are, however, 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 a court to act outside the powers provided for specifically in the Rules.” Per Botha J (as he then was) in *Moulded Components v Coucourakis & Anor* 1999(2) SA 457 (W) at p 462-3. Thus the inherent power to prevent abuse of the machinery of the court is a power which has to be exercised with great caution, and only in a clear case: *Hudson v Hudson supra* at 268. Non-compliance of the rules will only be condoned upon good cause shown by the applicant. There must be a reasonable and acceptable explanation for the failure to comply with the Rules, and the applicant for condonation must also show reasonable prospects of success. See *General Accident Insurance Co SA Ltd v Zampelli* 1988 (4) SA 407 (C) at 411C-D.”

[26] Rules of court are put in place to facilitate the expeditious and fair dispatch of cases. The courts have an inherent power to regulate and protect their processes. This was reiterated in *Mukaddam v Pioneer Foods (Pty) Ltd, Mukaddam v Pioneer Foods (Pty) Ltd* 2013(5) SA 89(CC), at paras [28],[31], [32] and [34]. The Court made the following observations:

“[28] ....Our Constitution guarantees everyone the right of access to courts which are independent of other arms of government. But the guarantee in s 34 of the Constitution does not include the choice of procedure or forum in which access to courts is to be exercised. This omission is in line with the recognition that courts have an inherent power to protect and regulate their own process in terms of s 173 of the Constitution, to which I shall turn in a moment.

[31] However, a litigant who wishes to exercise the right of access to courts is required to follow certain defined procedures to enable the court to adjudicate a dispute. In the main these procedures are contained in the rules of each court. The Uniform Rules regulate form and process of the high courts. The Supreme Court of Appeal and this court have their own rules. These rules confer procedural rights on litigants and help in creating certainty in procedures to be followed if relief of a particular kind is sought.

- [32] It is important that the rules of courts are used as tools to facilitate access to courts rather than hindering it. Hence rules are made for courts and not that the courts are established for rules. Therefore, the primary function of the rules of courts is the attainment of justice. 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 fact 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.” (my emphasis)

[27] It goes without saying that rules of court serve an important purpose. They must not, and, cannot be disregarded unless the court has been persuaded, on very strong grounds, to do so. This is why a litigant who wishes to exercise the right to access the court is required to follow certain and specified procedures. In this context, rules of court not only ensure certainty of the processes of court proceedings, the litigants are also provided with a fair playing ground for the adjudication of disputes. It is fair to state that the rules ensure that the interests of justice are served.

#### **WHETHER THE APPLICATION HAS PROSPECTS OF SUCCESS ON THE MERITS**

[28] The Court holds that it is not in the interests of justice that the applicants be granted leave for direct access in this matter. The view of the Court is that, upon considering the matter, the applicants have not established that the application has prospects of success on the merits. The reasons for so finding are on two bases. The first is that the applicants have not made an application for the rescission in terms of the rules that entitle them to apply for rescission of the impugned judgment by the Court in the exercise of its powers under the Act. They have, instead, purported to rely on s 24 of

the Constitutional Court Act, which provision does not provide for such an application. The second, the more important basis, is that the applicants have not established the requisite *locus standi in judicio* to apply for rescission of the judgment.

[29] The Court will proceed on the basis that this application is one in terms of s 24 of the Constitutional Court Act 5/2021 (“the Act”), which provides as follows:

**“24 Correction, variation, and rescission of judgments or orders**

- (1) The Court may, in addition to any other power it may have, on its own initiative or upon the application of any party affected, correct, rescind or vary any judgment or order—
  - (a) that was erroneously sought or erroneously granted in the absence of any party affected thereby; or
  - (b) in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission; or
  - (c) that was granted as the result of a mistake common to the parties.
- (2) The Court shall not make any order correcting, rescinding, or varying a judgment or order unless satisfied that all parties whose interests may be affected have had notice of the order proposed.”

[30] In turn Section 26 (1) of the Act provides as follows in relevant part:

**“26 Rules of Court**

- (1) Subject to subsections (2) and (3), the Chief Justice, after consultation with a committee appointed by him or her, may make rules relating to any of the following matters—
  - (a) the manner and form of procedure before the Court; and
  - (b)
  - (c)
  - (d)
  - (e)
  - (f)
  - (g)
  - (h)
  - (i) the time within which any requirement of the rules is to be complied with and the extension of such time; and
  - (j)

- (l)
  - (m)
  - (n)
  - (o)
  - (p)
  - (q)
  - (r)
  - (s) generally to give effect to the jurisdiction conferred upon the Court by any enactment; and
  - (t)
- (2) Rules shall have not effect until they have been approved by the Minister and published in a statutory instrument.
- (3) The Constitutional Court Rules, 2016 published in Statutory Instrument 61 of 2016, shall continue to be in force until they have been repealed or amended.”

[31] In *casu*, the applicants contend that the judgment was not only granted in error; additionally, it adversely affected their right to occupy the stands as beneficiaries under the land reform programme. In terms of s 24(1) (a) of the Act, the Court has the power to correct, rescind or vary any judgment that was erroneously granted in the absence of a party affected thereby. On a proper construction of the provisions set out above, the Court’s jurisdiction is invoked ‘upon the application of a party affected’. I do not understand the provisions to mean that a party may apply to court absent reference to a particular rule of court. S 24 spells out the Court’s substantive power once seized with an application. S 24 is not the procedural route one takes to make an application. It gives the Court the jurisdiction to entertain such an application. To enable a court to determine the application, an applicant must place reliance on the Rules of the Court promulgated to regulate access to that court.



[32] The need for the adherence to Rules is a requirement even where the dispute sought to be adjudicated is rooted in constitutional law. In *Marx Mupungu v Minister of Justice, Legal & Parliamentary Affairs & Ors* CCZ 7/21, the Court observed:

“Additionally, it is necessary to underscore the point that access to this Court or any subordinate court under s 85 is subject to regulation by rules of court. This is made explicitly clear by s 85(3) which dictates that rules of every court must provide for the procedure to be followed in cases where relief is sought under s 85(1). It is also spelt out in s 167(5) of the Constitution *vis-a-vis* direct access to the Constitutional Court.

One cannot institute an action or application in the High Court, or any other subordinate court, without due observance of and compliance with the Rules of that court. The Rules inform a litigant what is required of him to access the court concerned. If he fails to observe or comply with those Rules, he will inevitably be non-suited.”

[33] Evidently, contrary to the argument by the applicants, the procedural aspects of approaching the Court find expression in s 26 which provides for the promulgation of rules of Court to regulate the processes of the Court. In ss (1), provision is made for the manner and form of procedure before the Court as well as the time within which any requirement of the rules is to be complied with and the extension of such time. It is trite that rules of court provide for the form, manner and time frame for the bringing of litigation before a court. This is because courts have inherent jurisdiction to control their processes. Rescission of judgments is one of the procedures that rules of court make specific provision for. The applicants cannot seek a rescission merely on the premise of the power exercisable by the Court to set aside the judgment in issue. The Court must be requested to exercise its discretion as provided for in the rules. That has not been done in this case.

[34] It is a trite principle of the law of interpretation that statutory provisions in an Act of Parliament must be construed as a whole as opposed to individually. They must be read together. It stands to reason therefore that while s 24 spells out the Court’s power

to correct, vary or rescind its judgments or orders, the procedural aspect of the exercise of that power can only be done in compliance with s 26. The rules of the Court have to prescribe the procedure for such exercise.

[35] In terms of r 45 of the Rules of the Constitutional Court 2016, in any matter not dealt with in terms of the rules, the practice and procedure of the Court, shall follow as near as may be, the practice and procedure of the Supreme Court, or where the rules of the Supreme Court are silent, the High Court become the default rules. It is trite that the rules of the Supreme Court do not provide for the rescission, correction or variation of judgments but the High Court rules so provide.

[36] The High Court Rules, 2021, were promulgated on 23 July 2021. Rule 29 which provides for the variation and rescission of judgments reads:

“(1) The court or a judge may, in addition to any other powers it or he or she may have, on its own initiative or upon the application of any affected party, correct, rescind or vary-

- (a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby; or
- (b) an order or a judgment in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission; or
- (c) an order or judgment granted as a result of a mistake common to both parties.

(2) Any party desiring any relief under this rule may make a court application on notice to all parties whose interests may be affected by any variation sought, within one month after becoming aware of the existence of the order or judgment.”

[37] Whilst the Act makes provision for the invocation of its jurisdiction, the rules provide for the procedure under which the Court exercises its jurisdiction. The applicants have not however invoked the rules of court for an order for the rescission of the impugned judgment. They have sought reliance on s 24 of the Act. The Rules of the High Court have prescribed the procedure to be followed and are apposite in *casu*. The applicants

have not made an application in terms of the rules of court. I am not persuaded that the Act gives the applicant the right to approach the court for redress. S 24 spells out the power that a court may exercise upon the application of a party. The rules comprise procedural law and must form the premise of a litigant's approach to an appropriate court. It is trite that courts insist on parties' compliance with the rules and that where this has not been done or is impossible condonation for failure to adhere to the rules be sought and obtained.

[38] Rule 449 in terms of which relief was sought in *Liziwe Musedza & Ors v Minister of Agriculture, Lands & Rural Resettlement & Ors (supra)* is no longer in force. Reliance should have been placed on r 29 of the High Court Rules 2021. Rule 29 (2) requires that an application under the rules be brought to Court within a month from the date that the applicant has knowledge of the judgment.

[39] The first applicant who has assumed a leading role in the litigation surrounding the dispute which is the subject matter of this application, has not stated in categorical terms when she became aware of the judgment. However, there is on record an affidavit deposed to by her on 27 July 2017 in which she makes reference to the judgment sought to be set aside. This application was only filed on 25 August 2021, a period in excess of four years from when the record reveals the applicants would be taken as having had knowledge of the judgment. According to r 29(2) of the Rules of the High Court 2021 which were promulgated on 23 July 2021, the applicants are out of time. Even if the matter were to be considered in terms of r 449 the applicants would still be out of Court. It cannot be gainsaid that the applicants have not been vigilant in pursuing relief in *casu*. The application was not brought expeditiously. I am fortified

in this view by the remarks of GUBBAY CJ in *Grantully (Pvt) Ltd & Anor v UDC Ltd* 2000(1) ZLR 361, at p366 to the following effect:

“It was said by the appellants that they only became aware that the judgment had been erroneously granted when they received advice of that fact on 25 July 1997, some five years and six months later. Such length of time, whatever the reason thereof, is unreasonable. But what made the appellants wholly undeserving of the Court’s indulgence was that after being advised that aggregate interest had been awarded, they allowed a further ten weeks to pass before filing their application. And even when informed by the respondent’s legal practitioners on 27 August 1997 that it was not accepted that the judgment was in any way erroneous, it was five weeks before the necessary relief was sought.

I have, therefore, no hesitation in agreeing with the learned judge that the bringing of the application amounted to an abuse of the process of the Court and was not to be sanctioned.”

[40] I believe that the remarks of the learned jurist are more than apposite in *casu*. At the very least, the appellants in *Grantully* case (*supra*) attempted to explain the delay. In the instant case, the applicants have not found it necessary to advise the Court when they became aware of the judgment. This becomes necessary since what was sought is the Court's indulgence. In the exercise of its discretion, the Court must weigh all the factors that require that an applicant act expeditiously. Unfortunately the applicants have decided not to be candid with the Court and take it into their confidence. The delay under r 29 of the High Court Rules 2021 or 449 of the repealed rules is inordinate. The delay, being obvious, condonation for their failure to adhere to the rules ought to have been applied for. No condonation was sought. They were clearly mistaken in taking that position.

[41] The applicants have failed to adhere to the rules of the Court. They have been unable to bring the application timeously or in any event within the time limits prescribed by r 29(2). In the absence of an order of Court condoning the failure to abide by the rules means that the applicants are non-suited. The court is of the view that in the absence

of condonation there is no valid application before the Court. Therefore, there are no prospects of success on the merits due to the failure to adhere to procedural precepts *in casu*.

I turn to the second issue for determination, that of *locus standi in judicio*

[42] For the Court to invoke its jurisdiction to exercise power granted under s 24, the applicants must establish that they are parties affected by the judgment. It cannot be set aside on a mere whim. The applicants have to show that some right has been prejudiced by the issuance of the judgment in question. Since they allege that the land is State land, it is incumbent that they establish *locus standi in judicio* to invoke the jurisdiction of the Court to exercise its power in their favour.

[43] “In law, standing or *locus standi* is a condition that a party seeking a legal remedy must show that they have by demonstrating to the court sufficient connection to and harm from the law or action challenged to support that party’s participation in the case.”<sup>1</sup>

[44] In *Sibanda & Ors v The Apostolic Faith Mission of Portland Oregon (Southern African Headquarters) Inc* SC 49/18, HLATSHWAYO JA considered the principle of *locus standi* and stated the following:

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

*In casu* it is common cause that the respondent is a branch of the parent church. However, the respondent is endowed with the power to sue and be sued in its own name. It is further common cause that the respondent is under the leadership

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<sup>1</sup> Description from Wikipedia

appointed by the parent church. The Constitution of the respondent is approved by the mother church. The first appellant has been in control of the respondent's assets on the basis of being an overseer appointed by the mother church. The main allegation *a quo* was that the appellants were no longer members of the respondent and hence should cease to control the assets of the respondent.

The respondent as a branch of the mother church, had an unfettered direct interest in the matter in that the first appellant purported to act on the respondent's behalf when he was on suspension. The first appellant had been divested of the power to act on behalf of the respondent. It is common cause that the first appellant was on suspension when he caused the letter of 3 February 2012 to be drafted. He purported to communicate to the mother church an incorrect position that the respondent was also the author of the letter in question. The respondent who had not authored the letter in question surely has a direct interest in a matter where its previous leader purports to act on its behalf without its authority. Therefore, the respondent's *locus standi* in the Court *a quo* cannot be gainsaid."

[45] It is settled that the principle of *locus standi* is concerned with the relationship between the cause of action and the relief sought. Thus, a party needs to show that they have a direct, personal and substantial interest in the matter in contention. In *Zimbabwe Stock Exchange v Zimbabwe Revenue Authority* SC 56/07, MALABA JA (as he then was) said:

"The common law position on *locus standi in judicio* of a party instituting proceedings in a court of law is that to justify participation in the action; the party must show that he or she has a direct and substantial interest in the right which is the subject matter of the proceedings and the relief sought."

[46] The above authorities speak to the legal position as pertains to *locus standi* generally. As this application is concerned with an alleged violation of the Constitution, it is only appropriate that the Court considers the issue of *locus standi* in the light of decided authority on constitutional matters.

[47] This Court in the case of *Mawarire v R G Mugabe & Ors* CCZ 1/13, accepting the applicant's right to access the court stated:

"Even under the pre-2009 requirements, it appears to me that the applicant is entitled to approach this Court for relief. Certainly, this Court does not expect to appear before it only those who are dripping with the blood of the actual infringement of their rights or

those who are shivering incoherently with the fear of the impending threat which has actually engulfed them. This Court will entertain even those who calmly perceive a looming infringement and issue a declaration or appropriate order to stave the threat, more so under the liberal post-2009 requirements.”

[48] This decision was followed by a long line of authorities that established a trend in which the Courts sought to broaden the principle that *locus standi* should not be strictly construed in constitutional matters. To otherwise and apply too strict a construction would result in deserving cases failing to see the light of day further prejudicing an applicant deserving protection in pursuit of a fundamental right properly protected under the Constitution.

[49] The position is settled that the new Constitution has expanded the *locus standi* of persons seeking to approach the Court for the enforcement of an alleged breach of a fundamental right. Accordingly, in *Meda v Matsvimbo Sibanda & Ors* CCZ 10/16, MALABA CJ made the following pertinent remarks:

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

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

[50] The applicants claim that they are beneficiaries to State land under the land reform programme. While the acquisition of the land is provided for in the Constitution, the right to occupy gazetted land is provided for in the Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*]. Thus, any right of occupation on the part of the applicants must be consistent with the rights set out in the relevant legislation, in this

instance, the Gazetted Lands Act. In addition, a person claiming such right must show that he or she has lawful authority to occupy the land claimed.

[51] Section 3(1) of the above Act reads:

**“3 Occupation of Gazetted land without lawful authority**

- (1) Subject to this section, no person may hold, use or occupy Gazetted land without lawful authority.”

[52] What is lawful authority? The Act sets out several categories of documents under which lawful authority may be granted. The Act defines lawful authority as follows:

“lawful authority” means—

- (a) an offer letter; or  
(b) a permit; or  
(c) a land settlement lease; and lawfully authorised” shall be construed accordingly;

“offer letter” means a letter issued by the acquiring authority to any person that offers to allocate to that person any Gazetted land, or a portion of Gazetted land, described in that letter;

“permit”, when used as a noun, means a permit issued by the State which entitles any person to occupy and use resettlement land;

“resettlement land” means land identified as resettlement land under the Rural District Councils Act [*Chapter 29: 13*].

- (2) Any word or expression to which a meaning has been assigned in the Land Acquisition Act [*Chapter 20:10*] shall have the same meaning when used in this Act.



[53] In addition, the Act provides for land settlement leases described in the following terms:

“land settlement lease” means a lease of any Gazetted land, or a portion of Gazetted land, issued by the State to any person, whether in terms of the Rural Land Act [Chapter 20:18] or the Agricultural Land Settlement Act [Chapter 20:01] or otherwise;

[54] The applicants needed to establish a real and substantial interest in the rescission of the judgment. They had to show that the judgment in issue directly affected their rights, interests, or potential rights or interests. They needed to show that the interests of justice favoured a finding of *locus standi in judicio* in their favour. Alternatively, they needed to establish a connection to and harm from the judgment sought to be rescinded. They did not.

[55] Apart from a bald statement in the founding affidavit that the applicants were beneficiaries under the land reform programme, no one has attached any document as proof of the claim. To claim a right of occupation to Gazetted land under the programme, a person must exhibit any of the documents described as constituting lawful authority. Neither the first applicant nor her cohorts have even alluded to having such lawful authority. Instead, what is before the Court are copies of agreements of sale between the applicants and the second respondent. The agreements of sale are not the lawful authority contemplated under the Act.

[56] Any person claiming lawful authority to occupy or use State land must produce an offer letter, permit or lease relating to the agricultural land in question. See *Taylor-Freeme v The Senior Magistrate, Chinhoyi* CCZ 10/14, *Zinyemba v The Minister of Lands & Rural Resettlement & Anor* CCZ 3/16.

[57] The Court has already settled what constitutes lawful authority under the Act. In *Taylor-Freeme vs The Senior Magistrate, Chinhoyi & Anor* (supra), the Court defined lawful authority as follows:

“Lawful authority” means an offer letter, a permit and a land settlement lease. The documents attached to the defence outline are not offer letters, permits or land settlement leases issued by the acquiring authority. They do not constitute “lawful authority” providing a defence to the charge the applicant is facing.”

[58] The Court is of the view that the applicants lack the necessary *locus standi* to bring an application for the rescission of the judgment in CCZ 43/15. They have failed to establish their claim to be beneficiaries under the land reform programme with lawful authority to occupy the land in question which they assert remains vested in the State. It follows that they cannot claim to be parties affected by the judgment that they seek to rescind within the meaning of s 24(1) (a) of the Act.

[59] The absence of *locus standi*, in this case, leaves the applicants without a paddle. It means that the application they intend to bring in the main matter has no prospects of success.

[60] In the premises, for this additional reason, it is only appropriate that the Court makes a finding that it is not in the interests of justice for the applicants to be granted direct access to the Court.

## DISPOSITION

[61] The applicants have not adhered to the Rules of the Constitutional Court. The application they brought to Court was invalid and contrary to the adjectival law of our

jurisdiction. R 29 required that an application be made within a month after a litigant obtains knowledge of the judgment. They completely ignored its provisions and made no reference to the rule.

In addition, the applicants have not established that they are parties who were or were affected by the judgment impugned. They have not shown any right that has been adversely affected by the judgment in question. They have in effect no legal interest in the decision at issue. Accordingly, they have no standing to have the judgment set aside.

[62] The absence of *locus standi* militates against their prospects of success. They have no right to protect or enforce and as a consequence they cannot be granted leave. The issue of standing allows the Court an opportunity to determine whether a party is entitled to approach the Court for appropriate relief. Where a party is disabled due to want of standing, it stands to reason therefore that application for leave is still born. It has no prospects of succeeding.

[63] Accordingly, due to the above factors, the application is dismissed with no order as to costs.

**HLATSHWAYO JCC:** I agree

**PATEL JCC:** I agree

*Lovemore Madhuku Lawyers*, legal practitioners for the applicants

*Mudimu Law Chambers*, legal practitioners for the 2<sup>nd</sup> respondent

*Honey and Blackenberg*, legal practitioners for the 4<sup>th</sup> respondent

No appearance for the 1<sup>st</sup> and 3<sup>rd</sup> respondent