CHRISTMAS MAZARIRE

v

(1) OLD MUTUAL SHARED SERVICES (PRIVATE) LIMITED

(2) RETRENCHMENT BOARD

(3) THE MINISTER OF PUBLIC SERVICE, LABOUR AND SOCIAL WELFARE

(4) THE ATTORNEY-GENERAL

CONSTITUTIONAL COURT OF ZIMBABWE

Garwe JCC, Makarau JCC & Hlatshwayo JCC

HARARE: 4 June 2024 & 7 October 2024

Application for direct access.

Applicant in person.

T Mpofu, for the 1st respondent.

No appearances for the 2nd to the 4th respondent.

Makarau JCC-

[1] This is an application for direct access in terms of R 21 of the Constitutional Court Rules, 2016. In the application, the applicant alleges that the first respondent violated his fundamental labour rights that are guaranteed by s 65 of the Constitution of Zimbabwe, 2013 ("the Constitution"). As against the second respondent, he alleges that it violated his rights to administrative justice as guaranteed by s 68 of the Constitution, as well as his right to access certain information that was in its custody. Ultimately, he alleges that in its decision handed down under case number SC351/22, the Supreme

Court violated his rights to a fair hearing and his right to the equal protection and benefit of the law among other rights.

[2] If granted leave, the applicant intends to file an application under s 85 (1) of the Constitution, making the various allegations summarised above. On the basis of the allegations, he intends to firstly seek various orders declaring that his rights have been infringed as alleged, secondly, that the Supreme Court decision under case no SC 351/22 be declared unconstitutional, and, finally, that the first respondent be ordered to pay to him certain specified sums of money.

Background

[3] On a date that is not material, the applicant was employed by the first respondent. In March 2014, the first respondent decided to retrench him and proceeded to do so. This was without any prior notice to the applicant. Also, and with immediate effect, the first respondent ceased payment of the applicant's salary and benefits. The applicant successfully approached the High Court which ordered his reinstatement and restoration of his salary and benefits.

[4] In July 2014, the first respondent reinstated the applicant's salary and benefits and immediately gave him notice of its intention to retrench him again. It thereafter sought the approval of the third respondent to proceed as intended. This it did by lodging the application with the second respondent, the Retrenchment Board, for onward transmission to and approval by the third respondent.

[5] The record, which is not chronologically arranged, indicates that the parties may have first appeared before the second respondent on 26 June 2014, and thereafter in November 2014 and January 2015 to make oral submissions in support of their respective positions regarding the intended retrenchment. The dates are of no import and are merely captured here for completeness.

[6] On 2 March 2015, the second respondent notified the parties that the application by the first respondent to retrench the applicant had been approved subject to certain terms and conditions. Part of the letter by the second respondent to the parties reads:

> "*It is hereby notified that the Minister of Labour and Social Services, in terms of s 9 of s 12 C of the Act, has considered the proposal of (the first respondent) to retrench the (applicant) on 25 February 2015 and has approved the retrenchment subject to terms and conditions which are listed in Annexure 2 of this form*".

[7] The terms and conditions upon which the retrenchment was approved were the payment of an award under the following headings and utilizing the formula stipulated:

"Gratuity (service)	*I month salary/ per year worked*
Stabilisation allowance	*2 months' salary*
Severance pay	*13, 5 months' salary."*

[8] On 16 April 2015, the first respondent paid over to the applicant, a certain sum of money representing its computation of the retrenchment award in accordance with the terms and conditions stipulated by the third respondent. In computing the award, the

first respondent used the applicant's pensionable salary, and excluded the applicant's non-pensionable benefits and allowances.

[9] Whilst not disputing the payment, the applicant alleges that it prejudiced him of the sum of US$97 247.07. It is and remains the applicant's contention that the first respondent ought to have used what he terms the "total guaranteed pay" which would have included the benefits and allowances that he was entitled to over and above the pensionable salary.

[10] I pause momentarily to note that not only did the alleged underpayment of the retrenchment award mark the genesis of the dispute between the parties and the litigation that then followed, but it is also the epicenter of this application. The applicant is still desirous of collecting the debt owed to him by the first respondent as a result of this alleged underpayment. Thus, as is clear from the draft order that the applicant attaches to the intended application, quite apart from seeking orders of constitutional invalidity against the conduct of the first and second respondents and the judgment of the Supreme Court, the applicant intends to seek an order compelling the first respondent to pay over this long overdue debt with interest.

[11] I return to the facts of the matter. Upon realizing that he and the first respondent were not agreed on the model of computing the retrenchment award, the applicant referred the dispute to the second respondent with detailed submissions. In these submissions, the applicant makes it clear that the dispute between him and the first respondent would

have been obviated had the first respondent paid to him an award based on his computation model which included all allowances and benefits that he was entitled to.

[12] The second respondent declined jurisdiction to determine the newly referred dispute as to what "salary" ought to have been used in computing the retrenchment award. In its written advice to the parties, it wrote that it had no jurisdiction "over disputes arising from terms and conditions of employment."

[12] Unhappy with that decision, the applicant sought to have it reviewed by the Labour Court. He was unsuccessful. The application for review was dismissed. Leave to appeal was however granted and, on appeal, he was successful. The order of the Labour Court was set aside and the Labour Court was ordered to determine the review application afresh.

[13] On 29 September 2021 and in compliance with the directive from the Supreme Court, the Labour Court reviewed the decision of the second respondent, which it set aside. In doing so, the Labour Court found that the second respondent had the requisite jurisdiction to determine the model to be adopted in computing the appellant's retrenchment award. It then ordered the second respondent to determine the dispute within 30 days of its order.

[14] Holding a contrary view regarding the jurisdiction of the second respondent, the first respondent appealed to the court *a quo*. This it did with the leave of the court. In turn,

the applicant filed a cross-appeal whose details are not on record. He did this without the leave of the trial court.

[15] At the hearing of the appeal, the applicant's cross-appeal was nullified for want of leave whilst the appeal by the first respondent was upheld on the merits. It is however not necessary that I analyse in any detail the findings of the court *a quo* as its decision on the matter, being non-constitutional, is final and binding.

[16] The applicant was not satisfied with the turn of events. He filed this application for direct access and, after presenting the backdrop of the litigation between the parties that I have set out above, made the various allegations against the first and second respondents and the Supreme Court that I have set out in the introductory part of the judgment.

[17] I again pause for a moment to make two general observations regarding the application before the Court. Firstly, due to the passage of time between the date when the dispute between the applicant and the first respondent arose and the date of the filing of this application, including the intervening litigation, some allegations by the applicant have become historical and dated. Having been overtaken by other juristic events and the lapse of time, such allegations cannot validly be litigated upon under s 85 (1) of the Constitution. I shall discuss this fully in due course. Secondly and equally important, the allegations made in the application and the consequent relief to be sought in the intended application constitute a consolidation and/or conflation of common law and statutory

law breaches, going all the way back to 2015, and dressed up currently as constitutional issues. Due to the consolidated and conflated nature of the claims that the applicant intends to bring, the applicant will for instance, pray for constitutional relief against the decision *a quo* and in the same breath, pray for contractual relief from the first respondent. He will also seek a review of alleged irregularities in the processes of the second respondent when the dispute was pending before it. Again, in due course, I shall discuss the importance of utmost discipline in pleading constitutional matters.

The oral submissions

[18] At the hearing of this application, the applicant submitted that he stood by the papers that he had filed of record. In addition, he emphasized that the first respondent had, in its quest to terminate his employment with it, violated his rights to fair and safe labour practices as guaranteed by s 65 of the Constitution. This it did by terminating his employment without notice.

[19] Maintaining that the second respondent had jurisdiction to determine whether his retrenchment award ought to have been computed using his total guaranteed pay instead of his pensionable salary, the applicant argued that the process before the second respondent remained inconclusive. This, he submitted, had the effect of violating his rights to administrative justice guaranteed under s 68 of the Constitution.

[20] Against the Supreme Court, the applicant argued that the court *a quo* erroneously referred to s 12 C (2) of the Labour Act [*Chapter 28:*01]when it should have referred to

s 12 C (1). In resorting to the wrong law, the court *a quo* erroneously ousted the jurisdiction of the second respondent, his argument continued. It was his further view that this had the effect of depriving him of a forum in which to have the issue resolved. It was thus his argument that the decision *a quo* impinged on his rights, in s 69 (3) of the Constitution, to have the dispute with the first respondent resolved by a tribunal set up by law. The applicant argued that in addition to ousting the jurisdiction of the second respondent, the court *a quo* also failed to determine three other issues that were before it and thereby violated his right to the equal protection and benefit of the law as guaranteed by s 56 (1) of the Constitution.

[21] In opposing the application, *Mr Mpofu*, counsel for the first respondent, made one broad submission. He argued that on the totality of the submissions made by the applicant, the jurisdiction of this Court is not triggered. Put differently, it was his argument that the intended application under s 85 (1) would be incompetent and futile as it did not raise any constitutional matter. In particular, he argued that the applicant had failed to demonstrate that in making the decision that it did, the Supreme Court had abdicated its judicial authority. Absent such a demonstration, the decision of the Supreme Court was protected by the principle embodied in s 169 of the Constitution, restricting the reviewability of Supreme Court decisions and thereby concretizing the rights of the parties.

The issue

[22] The crisp issue that then falls for determination in this application is whether it is in the interests of justice that access be granted to the applicant to bring the intended constitutional suit against the first and second respondents as well as to seek the setting aside of the decision *a quo* on the basis that it infringes one or more of his fundamental rights as alleged in his affidavits. In the particular circumstances of this case, as pleaded, the narrow issue becomes whether the applicant has pleaded a constitutional cause of action against any of the respondents which will engage the jurisdiction of this Court.

The law

[23] The law on when direct access to this Court may be granted is settled. The threshold to be met is laid out in the Constitution itself and is supplemented by the rules of this Court. The constitutional provision and the rules of the Court have been interpreted in various decisions of this Court. These decisions have held that access to this Court is not had for the mere asking nor is it had because the applicant genuinely believes that his or her dispute can only be resolved by this Court, having litigated unsuccessfully in all the other lower courts. Direct access to this Court is reserved for those cases that are *prima facie* constitutional and can only find resolution and redress through the interpretation, enforcement or protection of the Constitution, in circumstances where the interests of justice demand that the matter be determined by this Court in the first instance. Where redress is available through the application of principles of the common law or the provisions of statute law, the principles of subsidiarity and avoidance jointly operate against the grant of direct access to this Court. Similarly, where other courts in the land can competently determine the issue in the first instance, this Court will withhold its

jurisdiction and direct access will be denied. (See *Mwenye & Anor* v *Minister of Justice, Legal and Parliamentary Affairs & Anor* CCZ 05/23; *Makanda* v *Sande N.O & Ors* CCZ 03/21; *Tendai Bonde v National Foods Limited* CCZ4/24 and *Zimbabwe Consolidated Diamond Company of Zimbabwe (Private) Limited v Adelcraft Investments (Private) Limited* CCZ 2/24)).

[24] The broad test in granting direct access to this Court is therefore whether or not it is in the interests of justice that a matter be dealt with by this Court, in the first instance. This, in essence, is the purpose of the procedure set out in R 21 of the Constitutional Court Rules, 2016. An application for direct access that purports to trigger the appellate or review jurisdiction of this Court is therefore not only incompetent but, an abuse of process. To my mind, where a cause of action giving rise to a dispute between the parties has already been litigated upon in the lower courts on a non-constitutional basis, it is not competent to bring the same cause of action before this Court, in the first instance, even where it is re-packaged as a constitutional matter.

[25] This Court has further held that the mere tagging of a constitutional provision to the cause of action giving rise to the dispute between the parties does not make the cause of action a constitutional matter. (See *Moyo* v *Chacha & Ors* 2017 (2) ZLR 142 (CC); *Chani* v *Mwayera N.O & Ors* 2020 (1) ZLR 17 (CC)). A constitutional matter only arises where the relief necessary to address and redress the dispute between the parties in the first instance, is obtained from interpreting, protecting and/or enforcing the text of the Constitution and not from any other laws subsidiary to the Constitution.

[26] In considering whether or not to grant access, it is now emerging that, quite apart from a consideration of the substantive law issues arising from the intended application, a jurisprudence is also emerging around the adjectival issues. The thrust of such jurisprudence is to assess whether the intended constitutional matter, has been properly pleaded. This requirement has been discussed largely as an indicator of whether or not the Court will have jurisdiction to determine the issue as pleaded. Thus, the intended application must be properly pleaded if leave is to be granted, or alternatively put, if the Court is to have jurisdiction to determine the matter.

[27] In *Sibangani Malandu v Bindura University* CCZ 7/22, in inquiring whether or not the applicant had pleaded a constitutional matter sufficiently to trigger the jurisdiction of the court, GOWORA JCC had this to say:

> "*Where a matter does not raise constitutional issues, it stands to reason that it would be incompetent and unlawful for this Court to assume jurisdiction. For this reason, litigants must demonstrate in their pleadings that the matter they intend to bring before this Court is concerned with a constitutional issue for determination, thus, bestowing jurisdiction on this Court. The respondent contends that the intended application does not raise constitutional matters for resolution by the Court and that the applicant's remedy, if any, lies in administrative law. The crisp issue before the Court, therefore, is whether the contention by the respondent is correct. If it is, the Court's jurisdiction cannot be invoked for relief as sought by the applicant." (The emphasis is mine).*

[28] In *Zimrights v Parliament of Zimbabwe and Others* CCZ 6/22 PATEL JCC had to deal with the jurisdiction of this Court under s 167 of the Constitution which, in the pleadings, had been conflated with a purported claim under s 85 (1) of the Constitution, all based on the same facts. A submission was made on behalf of the respondents that

the conflation was procedurally unacceptable and rendered the pleadings fatally defective. It was the view of the learned Judge that:

> *"By proceeding as it has done, the applicant has effectively disabled itself from properly pleading its legal standing and cause of action. It has also failed to comply with the rules governing the procedure to be followed. …….In short, by conflating two juridically distinct provisions of the Constitution, the applicant has failed to proceed in conformity with the Rules as well as the jurisdictional attributes and requirements of those two provisions."* (Again the emphasis is mine).

[29] I must point out that while the Learned Judge in the above cited case was dealing with a conflation of claims under two distinct sections of the Constitution, a principle of adjectival law in constitutional litigation can be distilled from his findings. It is this: constitutional matters must be pleaded crisply and with precision, to trigger the jurisdiction of this Court.

[30] From the decided cases and for the purposes of determining this application, two points emerge and must be made. Firstly, the procedure provided for under Rule 21 of the Constitutional Court Rules 2016 is not intended to bring before the Court decisions of lower courts for revisiting. Applications under the rule must be based on a fresh cause of action, alleging a breach of the Constitution that has not been made before not only in form but more importantly, in substance. Whereas in *casu*, the dispute between the parties has been litigated upon in the lower courts, the allegations of breach of the Constitution must not be an afterthought but must be allegations that could not have been competently made in any of the proceedings of the lower courts.

[31] Secondly, a high degree of discipline and expertise must be exercised in pleading constitutional matters. The mere tagging of constitutional provisions to the dispute between the parties without articulating clearly the interests of justice that demand the attention of this Court in the first instance is not the standard of discipline and expertise envisaged by the rules and expected by this Court. Further, conflation and consolidation of claims rob the application of the precision and particularity necessary to trigger the jurisdiction of the Court in constitutional matters.

Analysis

[30] As observed above, the application that the applicant intends to bring under s 85 (1) of the Constitution is not based on the alleged violation of a single or a few fundamental rights or freedoms. Rather, it is a consolidation of various claims. These claims are in essence a catalogue or register of dissatisfactions with the legal processes and decisions past, collected over the past nine years from the date of the termination of the applicant's employment with the first respondent, to the date of the Supreme Court decision in case number SC 351/22.

[31] By proceeding in the manner that he has, the applicant has robbed himself of the ability to plead his intended constitutional matter with the requisite precision to trigger the jurisdiction of this Court. (See *Zimrights v Parliament of Zimbabwe and Others (supra*)). Put differently, the intended application, not having been properly pleaded, is fatally defective and therefore incompetent. It follows that it cannot be in the interests of justice that direct access be granted in respect of such an application.

[32] Quite apart from being fatally defective, the intended application is also not alleging a fresh cause of action to trigger the jurisdiction of this Court in the first instance. The causes of action that he raises against the first and second respondents, for instance, are all *res judicata*, having been pronounced upon to finality by the Supreme Court. I hold this view notwithstanding that the applicant has attempted to repackage the causes of claim that he has against the respondents by attaching provisions of the Constitution to the complaints.

[33] The re-description of the complaints that the applicant has against the respondents does not trigger the jurisdiction of this Court as the applicant in essence seeks a revisiting of the processes and decisions that have gone against him in the past. The intended application is therefore an appeal in disguise.

[34] Offending the two principles that I have summarized in paragraphs [30] and [31] above, the intended application is not only improperly pleaded and fatally defective, but fails on the merits to raise a constitutional matter. In the circumstances, the jurisdiction of this Court is not triggered.

[35] The finding that I make above disposes of the application. However, in view of the applicant's status as a litigant in person, I will, not in great detail, dispose of each and every claim that he intended to make.

[36] As against the first respondent, the applicant intends to seek a declaratory order that it violated his rights to fair labour practices as enshrined in s 65 (1) of the Constitution. In oral submissions before the Court, the applicant alleged that the first respondent violated his rights by failing to give him due notice of its intention to retrench him in 2015.

[37] The facts upon which the complaint is made are not correct. As appears from the applicant's own founding affidavit, after retrenching the applicant for the first time without notice, the first respondent retraced its steps and gave the applicant due notice after the intervention of the High Court. But even assuming that the applicant is correct that he was not given due notice, failing to give an employee due notice of the termination of his or her employment is hardly a constitutional matter as envisaged by the Constitution and the rules of Court for the purposes of triggering the jurisdiction of this Court. The redress for such a breach lies in the application of laws subsidiary to the Constitution to which recourse in the first instance must be made. There is no indication on record that any such redress was sought in the appropriate court and for the appropriate remedy at law.

[38] In addition to the declaratory order that he seeks against the first respondent, the applicant also seeks an order compelling the first respondent to pay to him the sum of "US$97 247-07 plus interest at the prescribed rate of five per centum (5%) per annum reckoned from 17 April 2015 until and excluding the date of actual payment and based on a calendar year of 360 days," and damages in the sum of US$85 000-00. These are claims that arise from the termination of the applicant's employment with the first

respondent. These two claims are not constitutional matters upon which this Court can hold a view and competently determine.

[39] Against the second respondent, the applicant intends to seek a declaratory order that it undermined his rights to access information in its custody and his rights to administrative justice. He proceeds to seek a further order that the second respondent be held accountable to the administrative conduct and processes in the land.

[40] In his papers filed of record, it emerges that whilst the dispute was pending before the second respondent, the applicant demanded that it furnishes him with certain information that was in its custody. The request was not met, giving rise to the claim that it violated his right to access information as guaranteed by s 62 of the Constitution. Again, even assuming that the applicant is correct, the complaint that he raises against the second respondent in this regard does not call for the interpretation, protection or enforcement of the Constitution to redress the violation. A *mandamus* at administrative law, subsidiary to the Constitution, is one remedy amongst others that readily comes to mind. There is no indication on record that the applicant attempted to enforce his rights in this regard at any stage.

[41] Regarding the alleged breach of his rights to administrative justice, the applicant alleges that because the process before the second respondent remained un- resolved, the second respondent violated his right to administrative justice. The applicant misconstrues the content of the right. However, and in any event, even accepting as a fact that the second

respondent did not conclude the process that was before it, a constitutional remedy cannot lie against such conduct because the Supreme Court has held that the second respondent had no jurisdiction to determine the issue in the first place. It becomes of no import that the process stalled midway. It should not have commenced at all.

[42] It is therefore my finding that, assessed individually or taken in their totality, the allegations made by the applicant, together with the relief that he seeks, do not raise a constitutional matter that will engage the exclusive and specialised jurisdiction of this Court.

[43] I say this notwithstanding the fact that the applicant has purported to attack the Supreme Court decision under case no SC 351/22 as violating his rights. I say purported because the attack is nothing more than an appeal in disguise. This is so because, in his application and in oral submissions before the Court, the applicant maintained that the decision was wrong. Even assuming that the applicant is correct, the decision of the Supreme Court, being on a non-constitutional matter, is inviolate. It is protected by the principle of finality in litigation which finds expression in and is reinforced by, s 169 of the Constitution. As a consequence, this Court has no jurisdiction to review the decision.

[39] I hold the above view notwithstanding that the applicant has alleged that the decision has the effect of violating his rights to the equal protection and benefit of the law provided for under s 56 (1) and his rights to a fair trial guaranteed by s 69. In submitting as he does, the applicant seeks to place himself in the position envisaged by such

decisions of this Court as *Lytton Investment (Private) Limited v Standard Chartered and Anor* 2018 (2) ZLR 743 (CC), *Denhere v Denhere* 2019 (1) ZLR 554 (CC) and *Machine* v *The Sheriff of Zimbabwe and Others* CCZ 08/23.These authorities hold that in deciding on a non-constitutional matter, the Supreme Court may place itself in a position where it is unable to decide the matter due to a grave error in law or in procedure, making the resultant decision arbitrary. Further, the erroneous decision must have the demonstrable effect of violating one or more of the applicant's fundamental rights and freedoms.

[40] The applicant in *casu* does not meet the threshold laid out in the authorities. He simply makes the bald assertion that the decision of the Supreme Court is wrong because the court interpreted the wrong provision of the Labour Act [*Chapter 28.01*], and must therefore be vacated. The error alleged by the applicant is not the error that is envisaged by the authorities that I have referred to above. The authorities have held that the error and subsequent decision of the Supreme Court must be so arbitrary as to amount to an abdication of judiciary authority by that court.

[41] It is therefore my conclusion that the intended application does not raise a constitutional issue that will trigger the jurisdiction of this Court. It follows that it is not in the interests of justice that direct access to the Court be granted.

[42] In disposing of this matter, I hold the view that there is no justification for departing from the general position of the Court not to award costs.

[43] In the result, the following order is made:

38.1 The application is dismissed.

38.2 Each party shall bear its own costs.

Garwe JCC : I Agree.

Hlatshwayo JCC : I Agree.

Wintertons, 1st respondent's legal practitioners