REPORTABLE (10)

ROBIN VELA

v

(1) AUDITOR-GENERAL OF ZIMBABWE

(2) BDO ZIMBABWE CHARTERED ACCOUNTANTS

CONSTITUTIONAL COURT OF ZIMBABWE
MALABA CJ, GWAUNZA DCJ, GARWE JCC, MAKARAU JCC, GOWORA JCC, HLATSHWAYO JCC & PATEL JCC
HARARE: 27 SEPTEMBER 2023 & 26 JUNE 2024

L Madhuku, with *L Uriri* and *M Ndlovu*, for the appellant
T Zhuwarara, for the first respondent
T Magwaliba, for the second respondent

GARWE JCC:

[1] This is a purported appeal against the whole judgment of the Supreme Court ("the court *a quo*") setting aside a decision of the High Court which had nullified an audit report authored by the second respondent at the instance of the first respondent. The High Court had found that the second respondent was an administrative authority for purposes of the Administrative Justice Act [*Chapter 10:28*] ("the Administrative Justice Act or simply the AJA") and that the audit report it had produced was consequently reviewable. The Court further found that the report was not only biased but that the auditors who had prepared it had not applied their minds to the issues before them. It consequently made an order setting aside all aspects of the report that pertained to the appellant.

[2] Having considered the matter as a whole, I have no doubt in my mind that there is no proper "appeal" before this Court. I say so because no constitutional issue properly arose for determination before the court *a quo* and, before that, the High Court. There cannot, therefore, be an appeal requiring determination by this court. In the circumstances, the pronouncements by the Court *a quo* on the construction to be given to s 309 of the Constitution of Zimbabwe was irregular and improper. The judgment of the Court consequently stands to be set aside in the exercise of the review powers bestowed upon this Court. A trial *de novo* must therefore ensue. The reasons for this conclusion follow shortly in this judgment.

FACTUAL BACKGROUND

[3] The appellant was the Board Chairman of the National Social Security Authority ("NSSA") from 12 July 2015 to 27 March 2018. The second respondent is an accounting firm. It was contracted by the first respondent to conduct a forensic audit of the affairs of NSSA for the period 1 January 2015 to 28 February 2018. The audit report was delivered to the first respondent by the second respondent on 4 March 2019.

[4] The audit was in essence a forensic investigation into several corporate affairs of NSSA. It assessed the investments made by NSSA during the period under audit to find out, among other things, whether any related party transactions, if any, were above board. It further considered NSSA's human resources practices to establish whether executive management recruited during the period 2015 – 2017 had been recruited in terms of the

NSSA policy and laws and whether the remuneration framework had been approved by the NSSA Board and parent Ministry. It also investigated the pensioner database, with attention being paid towards the integrity of the database, in order to verify the existence of ghost pensioners and identify weaknesses in the database.

[5] Upon conclusion of the audit, the second respondent's report made a number of adverse findings. The report concluded that NSSA's investments in Metbank were not above board and that they had caused NSSA losses. In addition, it was found that the appellant was the proximate cause of an agreement between NSSA and Housing Corporation of Zimbabwe (Private) Limited, which agreement was said to have been irregularly entered into and had also caused loss to NSSA. The report also concluded that the appellant had interfered in management issues. A summary by the second respondent on its findings on NSSA's corporate governance stated that:

> "…… in a number of instances, the former Board Chairman was interfering with executive management issues that led to decisions which were not in the best interest of NSSA. He was involved in awarding an off-take housing contract worth US$304 million to HCZ without going to tender. In addition, he was also involved in the creation of a treasury bills custodial arrangement with Metbank where NSSA is now being exposed to potential financial prejudice to the tune of US$57,350,000.
>
> NSSA should seek legal counsel on how to deal with the involvement of the former Board Chairman in exposing the Authority to potential financial prejudice."

PROCEEDINGS BEFORE THE HIGH COURT

[6] Dissatisfied with the findings contained in the report, the appellant consequently filed an application in the High Court in terms of s 3(1) (a) as read together with s 4 of the Administrative Justice Act challenging the audit report. The relevant portion of the

appellant's founding affidavit described the nature of the application placed before the High Court as follows:

> "1.9. I am advised that in carrying out the forensic investigation, as a delegate of the first respondent, second respondent was by that fact using public power. The manner in which it conducted the investigation and the conclusions it arrived at is accordingly liable to judicial review at the instance of an aggrieved party of whom I am.
>
> **The nature of the application**
>
> 2.1. This is an application brought in terms of **section 3(1) (a)** as read together with **section 4 of the Administrative Justice Act [*Chapter 10:28*] (AJA).** The application remains at all times inspired by **section 68(1) of the Constitution of Zimbabwe 2013**, which I have not invoked in the first instance by reason of the twin doctrines of subsidiarity and constitutional avoidance.
>
> 2.2. It is my contention that the Audit report which I seek to impugn is without jurisdiction, irregular, unreasonable, incompetent, biased, malicious and unfair in a manner which violates **section 3(1)(a) of the AJA.**
>
> 2.3. **In the alternative** and to the extent that it becomes necessary, I seek to invoke this court's review powers as set out under ss 26 and 27 of the High Court Act as well as the common law. The grounds upon which that invocation is sought are the same as those already referred to above."
> (bold print is for emphasis)

[7] From the foregoing, it is abundantly clear that, in his application, the appellant contended that the second respondent's audit report was compiled in a manner that violated s 3(1)(a) of the AJA. Possible relief under ss 26 and 27 of the High Court Act was sought in the alternative. There is also no doubt that the application was not based on the Constitution but on subsidiary law.

[8] Both respondents opposed the application. The first respondent averred that the appellant's attempt to seek a review of the audit report was misplaced as it was neither a

decision nor proceeding of an administrative authority or board. Likewise, the second respondent raised a preliminary objection that there was no reviewable decision since no adverse action or decision had been taken against the appellant at the time of filing of the application.

[9] Having heard the parties, the High Court concluded that the second respondent had exercised administrative authority. The Court also concluded that the forensic audit that had been undertaken by the second respondent was flawed and that the report produced at the conclusion of the process was reviewable. The High Court proceeded to review the report and concluded that the investigation which had led to the report was biased and that the auditors had not applied their minds to the issues before them. Accordingly, the High Court set aside the forensic report produced by the second respondent in all the respects in which it pertained to the appellant either directly or indirectly.

PROCEEDINGS BEFORE THE COURT A QUO

[10] Both respondents appealed to the Supreme Court ("the court *a quo*") against the judgment of the High Court. Basically the complaint by the respondents was that the High Court had erred in finding that the forensic audit carried out on NSSA constituted an administrative action subject to review.

[11] The appeals by the respondents were consolidated. The court *a quo* was of the view that there was only one issue for determination which was dispositive of the appeal before it. The issue was stated to be:

> "Whether the court *a quo* (the High Court) misdirected itself in holding that the appellant (being the second respondent herein) was exercising public authority subject to judicial review when it carried out the forensic audit for and on behalf of the second respondent."

[12] The court *a quo* concluded that the second respondent was not an administrative authority and that its conduct was not subject to judicial review. It also concluded that s 2(1) of AJA excluded private entities from the definition of an administrative authority. Relying also on s 309 of the Constitution of Zimbabwe, 2013, the court *a quo* further determined that the first respondent could not have conferred administrative authority on the second respondent as this was constitutionally impermissible. It was the finding of the court *a quo* that the second respondent had merely been hired by the first respondent in order to assist in the first respondent's mandate of gathering evidence in the course of exercising its functions as a public authority.

[13] The appellant was aggrieved by the decision of the court *a quo* and consequently filed an application for leave to appeal in terms of r 32 of the Rules of this court. That application was heard by a three-member panel of this court on 14 November 2022, whereupon judgment was reserved. On 20 March 2023, judgment was handed down in the said application granting the appellant leave to appeal.

PROCEEDINGS BEFORE THIS COURT

[14] Consequent upon the grant of leave as aforesaid, the appellant filed a notice of appeal with this Court. His grounds of appeal are that:

"1.The court *a quo* erred in law and misdirected itself in not finding that by virtue of section 309 of the Constitution of Zimbabwe, a private organization such as the second respondent that carries on a special audit on behalf of, or at the request of the first respondent, exercises public authority and thereby making its acts and/or decisions subject to judicial review.

2. As an alternative to 1 above, the court *a quo's* finding that section 309 of the Constitution does not permit the 1st Respondent to delegate administrative authority to his or her private agents such as the second respondent, is an incorrect interpretation of the Constitution in that the Constitution, properly construed, permits such delegation."

[15] In his prayer, the appellant seeks an order setting aside the judgment of the Supreme Court in whole and remitting the matter to that court for a hearing *de novo* before a differently-constituted bench. No costs were sought in his notice of appeal.

[16] Subsequent to this, but prior to the hearing, the appellant filed a notice of amendment of the notice of appeal. At the hearing of this matter however Mr *Madhuku*, for the appellant, abandoned the intended application for the amendment of the grounds of appeal.

APPELLANT'S SUBMISSIONS BEFORE THIS COURT

[17] Following points *in limine* taken by both respondents that the appeal was not properly before the Court, at the commencement of the hearing, the Court requested the parties to make submissions on the question whether the decision by the court *a quo* was based on an interpretation and application of s 309 of the Constitution and, if so, whether the decision had raised a constitutional matter which could properly be the subject of an appeal to this court.

[18] In response thereto, Mr *Madhuku,* for the appellant, made two submissions. The first was that the full bench of this Court no longer had the jurisdiction to decide that question as the matter cannot properly arise at this stage. His contention was that the Court had already decided this issue when the application for leave to appeal was determined. In his view, revisiting the question would amount to this Court reviewing the earlier decision made by a panel of three Judges that granted leave to appeal. He argued that the Court was now *functus officio* as it was a requirement in terms of the law that leave should only be granted in cases where a subordinate court would have determined a constitutional matter. In his view, it is no longer permissible or appropriate for this court to revisit the question whether leave to appeal was properly granted.

[19] Secondly, Mr *Madhuku* submitted that the Supreme Court could not have decided the consolidated appeals without an interpretation of s 309 of the Constitution. The issue before both the High Court and Supreme Court was the link or connection between the Auditor-General and the auditors. The High Court had answered that question by reference to s 309 of the Constitution. In his view, rightly or wrongly, the manner in which the issue for determination was framed by the court *a quo* raised a constitutional matter. He further contended that the *ratio decidendi* of the Supreme Court was, as a matter of fact, predicated on its interpretation of s 309 of the Constitution. The observation made by the court *a quo* that the second respondent did not fit anywhere within the definition of administrative authority was *obiter*. So too were the remarks by the Court on s 9 of Audit Office Act that the section merely authorizes the Auditor-

General to hire private auditors to carry out audits and report back but does not authorize the Auditor-General to delegate his administrative authority to such auditors.

FIRST RESPONDENT'S SUBMISSIONS BEFORE THIS COURT

[20] *Per contra,* counsel for the first respondent, Mr *Zhuwarara,* submitted that the decision of the court *a quo* was based on an interpretation of s 9 of the Audit Office Act [*Chapter 22:18*] and the contractual arrangement between the Auditor-General and the second respondent. He argued that the cursory reference to s 309 of the Constitution was merely *obiter* and that no constitutional issue arose for determination before the Supreme Court. In his view, the reference to the Constitution by the court *a quo* was simply intended to disabuse the parties of the notion that the matter ought to have been looked at in terms of the Constitution. Furthermore, counsel submitted that the Constitutional Court had the power to regulate its own processes. For this reason, it was not bound by the decision of the three-member panel which had granted the appellant leave to appeal to this Court.

SECOND RESPONDENT'S SUBMISSIONS BEFORE THIS COURT

[21] Mr *Magwaliba,* for the second respondent, largely associated himself with the submissions made by counsel for the first respondent. He further submitted as follows. Firstly, that the judgment granting leave to appeal clearly indicated that it was not final and definitive on the issue of leave and that, because of such lack of clarity, the matter may have required a final consideration and pronouncement by this court. Secondly, that when the appellant approached the Court for leave, all that was required of him was to

prove a *prima facie* case. Thirdly, that the "court's hands could not be tied" on a question relating to its jurisdiction. The Court has the obligation to determine whether there is presently a constitutional matter before it and, in turn, whether there was such an issue before the Supreme Court and, before that, the High Court. He argued that the question of whether a constitutional matter arises in this Court is inseparable from the question whether there was a constitutional matter in the Supreme Court. Fourthly, that an order for leave to appeal is procedural and not substantive. The principle of *res judicata* cannot arise on the question whether the Court has jurisdiction. Nor can the Court be *functus officio* on the question of its jurisdiction. He also submitted that the remarks by the court *a quo* regarding s 309 of the Constitution were *obiter* as the remarks can be excised from the judgment and the remainder of judgment still remains rational. It is apparent that the Supreme Court made reference to s 309 of the Constitution pursuant to a superfluous submission by Mr *Mpofu,* for the appellant, but that did not transform such into a *ratio decidendi*. In his concluding submissions, he prayed that the appeal ought to fail as no constitutional matter had risen in the Supreme Court and, before that, the High Court.

ISSUE(S) ARISING FOR DETERMINATION

[22] The main issue arising for determination before this Court is whether or not there is a constitutional matter that properly arises before this court. Put differently, the Court has to resolve whether or not a constitutional matter properly exists in this matter as this is the basis on which the Court may assume appellate jurisdiction. Perforce, given that leave to appeal was granted by this Court, a connected issue is whether or not this Court, on appeal, may procedurally reassess the question whether or not there was a constitutional

matter before the Supreme Court. The existence of a constitutional matter is one of the requirements for granting leave to appeal in terms of the Constitution and our adjectival law. In the event that it is found that the Court *a quo* determined a constitutional matter, the issue that will necessarily follow is whether the Court *a quo* properly assumed jurisdiction to do so.

WHETHER OR NOT THIS COURT CAN PROPERLY DEAL WITH THE ISSUE WHETHER THERE IS A CONSTITUTIONAL MATTER BEFORE IT

[23] It is trite that the foremost consideration in an application for leave to appeal to this Court is the existence of a constitutional matter not just before the court but also before the court whose decision is sought to be impugned. The seminal authority in this regard is the decision of this Court in *The Cold Chain (Pvt) Ltd T/A Sea Harvest* v *Makoni* CCZ-8-17. At p. 3 this Court remarked:-

> "… r 32(2) of the Constitutional Court Rules makes it clear that only a litigant who is aggrieved by the decision of a subordinate court on a constitutional matter only has a right to apply for leave to appeal to the Constitutional Court"

Similar remarks to the same effect are also to be found in decisions of this court in cases such as *Bonnyview Estate (Pvt) Ltd* v *Zimbabwe Platinum Mine (Pvt) Ltd & Anor* CCZ-6-19; *Mbatha* v *National Foods (Pvt) Ltd* CCZ–6–21 at p. 6; *Chombo* v *National Prosecuting Authority and Others* CCZ–8–22 at p. 6; *Ismail* v *St John's College and Others* CCZ–19–19 at p. 7.

[24] This Court has stated in no uncertain terms that its jurisdiction cannot be activated in the absence of a constitutional matter. For example, in *Bere* v *Judicial Service Commission*

and Others CCZ–10–22, the applicant had sought to persuade the court to grant leave to appeal on the basis that the matter was of public importance, amongst other grounds. A finding had been made by this Court that there had been no constitutional matter in the High Court and that the Supreme Court had in turn dealt with the matter on a non-constitutional basis. Accordingly, the Court declined to grant leave to appeal solely on the basis that the matter was of public importance as this could:

> "open the floodgates to a multitude of cases that are of obvious public importance but which fall outside the jurisdictional remit of this court."

[25] Whether or not a constitutional matter had risen in the court *a quo* was one of the questions that arose for consideration in the application for leave to appeal to this court. Counsel for the appellant has urged the Court to hold that the question of the existence of a constitutional matter was definitively resolved in the proceedings for leave to appeal. In my considered opinion, that proposition cannot be correct. Perusal of the judgment of this court granting the appellant leave to appeal shows that a finding was in fact made that no constitutional matter had arisen before the Court *a quo.* At pp 9-10 of the judgment in *Vela* v *Auditor-General & Anor* CCZ-1-23 (the judgment in which leave to appeal was granted) the court stated thus:

> "*In casu,* it is common cause that the cause of action before the High Court was not predicated on a provision of the Constitution. It was rooted in administrative law in terms of which the applicant sought to have reviewed what he alleged was administrative conduct by the first respondent through the agency of the second respondent. Accordingly, the pleadings did not raise a constitutional matter. *Put differently, the pleadings before the High Court did not call upon that court to interpret, enforce or protect the provisions of the Constitution*. Instead, the pleadings sought to establish a basis for having the audit report by the second respondent, under contract from the first respondent, reviewed and set aside.

> Because no such matter had been pleaded before it, it stands to reason that the High Court did not decide a constitutional matter. *As is evident from its judgment, the High Court did not invoke any provisions of the Constitution in arriving at its determination on the non-constitutional matter that was before it…* The *ratio decidendi* of its judgement on the substantive issue raised in the application for review was based on the application of the principles of administrative law. …" (*Italics are for emphasis*)

[26] At page 10 of the above judgment, the Court further remarked that:

> "*From the foregoing, it follows that no constitutional matter fell for determination on appeal on the basis of the proceedings that had unfolded before the High Court and as a result of the judgment of the High Court.*
>
> *The grounds of appeal that the Supreme Court relied upon for the determination of the two appeals that were before it did not raise any constitutional matter. This is common cause.*
>
> Further, the record of the appeal proceedings does not indicate that a constitutional question arose during the appeal hearing. Had one arisen, the Supreme Court would have been obliged to invoke the provisions of s 175 (4) of the Constitution to refer the question arising for answering by this Court.
>
> *In the circumstances and in view of the fact that no constitutional matter was determined by the High Court, that no constitutional matter was the subject of appeal before the Supreme Court and that no constitutional matter arose during the appeal proceedings, the text of the Constitution should not have been interpreted by the Supreme Court. And in the ordinary course of constitutional litigation in this jurisdiction, no appeal should lie to this Court.*" (*Italics are for emphasis*)

[27] The Court was however undecided as to the implications of the Supreme Court judgment. It opined that the resort to the Constitution may have constituted a procedural irregularity ignoring, as it had done, the principles of avoidance, ripeness and subsidiarity. It considered that such errors could only be corrected by this court. The judgment expressed the view that it (the court) may well have been mistaken in its reading of the judgment of the Supreme Court and that the absence of clarity in its mind was:

> "sufficient to trigger the appellate jurisdiction of this court to clarify the correctness of the position that the Supreme Court took or ought to have taken in the matter."

It even remarked that the order granting leave was not to be interpreted as:

> "an acknowledgement or acceptance that the matter before the Supreme Court was constitutional in nature."

[28] From the foregoing, it follows that the submission by Mr *Madhuku*, that revisiting the question relating to the existence of a constitutional matter would amount to reviewing a decision by this Court, cannot factually be sustained when regard is had to the above sentiments expressed by the Court in granting leave to appeal. There can be no argument that the Court made an unmistakable finding that no constitutional matter had arisen before the court *a quo* and the High Court. Given that it is the full bench of this Court that has now asked the parties to address it on whether a constitutional matter properly arose before the court *a quo*, it cannot be said that the question amounts to a review of a decision of this Court.

[29] It must be stressed that a superior court is not bound by *dicta* made by itself in interlocutory proceedings for leave to appeal. For example, in the case of *Synohydro Zimbabwe (Pvt) Ltd* v *Townsend Enterprises (Pvt) Ltd and Others* S–27–19 at p. 6, the Supreme Court pertinently stated as follows:

> "It was contended on behalf of the first respondent that the applicant's prospects of success on appeal are not bright.
>
> In considering this factor I am aware that another court is yet to consider the same prospects of success on appeal when it determines the application for condonation of late filing of the appeal and extension of time within which to file the appeal. *I am however comforted by the fact that my findings herein are not binding on that other court*." (*Italics are for emphasis*)

[30] Proceedings for leave to appeal are essentially an exercise of a gatekeeping function by a superior court with appellate jurisdiction. The proceedings are part and parcel of the inherent jurisdiction of a court to regulate its own processes. It is for this reason that the pronouncements made by a court exercising a gatekeeping function in proceedings for leave to appeal cannot be binding on the full court that will sit to determine the appeal, should leave to appeal be granted.

[31] A court deciding the question whether or not to grant leave to appeal takes into account several considerations. Although, for present purposes, the overall consideration for granting leave to appeal was the interests of justice, the question whether or not there was a constitutional matter in the subordinate court looms large. It is one of the questions upon which the determination whether it is in the interests of justice to grant leave to appeal is made. The Court constituted to determine whether or not leave to appeal should be granted does not usurp the powers of the full court should the latter court find it necessary to revisit the existence of a constitutional matter.

[32] The issue of a constitutional matter goes to jurisdiction. Unlike the other considerations, it is an issue the court must be satisfied has been met in order for the court to assume and exercise its limited jurisdiction.

[33] Mr *Madhuku*'s understanding is that the question of the existence of a constitutional matter cannot arise in appeal proceedings because the Court, having granted leave, would

be *functus officio*. On the contrary, and as just stated, the full court must also be satisfied that it has the requisite jurisdiction to determine an appeal. The fact that a similar process of establishing jurisdiction is also carried out in the proceedings for leave to appeal does not constitute a bar to the reconsideration of the question whether or not there is presently a constitutional matter in a particular matter.

[34] For completeness, it bears emphasis that the need to comply with the procedural dictates of a constitutional nature is not a pedantic concern. On the contrary, it is at the heart of ensuring the supremacy of the Constitution. The Court must not pass upon any matter unless satisfied that a constitutional matter exists in order to trigger its jurisdiction. Were the court to assume jurisdiction in cases where no constitutional issue arises, even if leave to appeal has been granted, it would inevitably violate the very Constitution it is expected to faithfully and jealously uphold. As stated in *Mutukwa* v *National Dairy Cooperative Ltd* 1996 (1) ZLR 341 (S), a question of jurisdiction is one which a court imbued with review powers may raise *mero motu*, for parties cannot confer jurisdiction on an adjudicating authority where such jurisdiction has not been conferred on that authority by statute.

[35] There can be little doubt therefore that in coming up with a determination whether leave to appeal should be granted, the court was aware that its determination might not stand scrutiny. Its concern was with the fact that the purported but unnecessary resort to the interpretation of s 309 of Constitution remained extant and that such an aberration could only be corrected by this Court on appeal. The court was also not sure whether the

interpretation given to s 309 by the Supreme Court was intended to be its *ratio decidendi*. It further remarked that, notwithstanding the fact that all counsel involved in the application for leave to appeal appeared to be in agreement that the resort by the court *a quo* to s 309 was not necessary and irregular, there existed the distinct possibility that the full bench of this Court may understand the judgment differently. It was in light of the absence of clarity in the mind of the court that it considered it appropriate to grant leave so that this Court, sitting as a full court, can make a definite pronouncement on all these issues.

[36] In summary therefore, this Court, sitting as a full court, has the jurisdiction, in an appeal before it, re-assess, where necessary, the question whether or not there was a constitutional matter in a lower court. The Court may even do so *mero motu*. At the end of the day the Court must be satisfied, before entertaining any matter, be it an appeal or application, that it has the necessary jurisdiction to do so.

[37] *DID THE COURT A QUO DECIDE A CONSTITUTIONAL MATTER?*

This is the second issue that arises. The issue is, essentially, a jurisdictional one. Unless a constitutional issue properly arose in the court *a quo*, this Court would have no jurisdiction to entertain the present proceedings. The respondents have argued that this Court has no jurisdiction to relate to this appeal because no constitutional matter arose before the High Court and the court *a quo*. That submission was anchored on the argument that the dispositive portion of the judgment by the court *a quo* is not hinged upon an interpretation of s 309 of the Constitution. On the other hand, in his heads of

argument, the appellant insists that this Court has jurisdiction to relate to the appeal because a determination of a constitutional matter, even if irregular, would be subject to the Court's review jurisdiction in terms of the Constitutional Court Act [*Chapter 9:22*].

[38] The law regulating this Court's appellate jurisdiction is settled. Section 167(1) of the Constitution provides that:

> "(1) The Constitutional Court—
>
> (a) *is the highest court in all constitutional matters, and its decisions on those matters bind all other courts*;
>
> (b) *decides only constitutional matters* and issues connected with decisions on constitutional matters …
>
> (c) *makes the final decision whether a matter is a constitutional matter and whether an issue is connected with a decision on a constitutional matter*.
>
> (2) …… (not relevant)
> (3) …… (not relevant)
> (4) …… (not relevant)
> (5) Rules of the Constitutional Court must allow a person, when it is in the interests of justice and with or without leave of the Constitutional Court-
> (a) ……
> (b) *to appeal directly to the Constitutional Court from any other court*. (italics are for emphasis)

[39] Section 332 in turn defines a Constitutional matter as one:-

> "… in which there is an issue involving the interpretation, protection or enforcement of this Constitution."

[40] Whilst the definition of a constitutional matter does not, by itself, cause challenges, there appears to be some misapprehension among some legal practitioners and litigants as to what constitutes a constitutional matter and the circumstances in which it can

procedurally arise. Litigants often invoke provisions of the Constitution in order to resolve non-constitution disputes. The developing body of authorities coming out of this court in this respect puts the matter at rest.

[41] A constitutional matter must not merely exist in form but substantively. Mere reference to provisions of the Constitution does not by itself amount to or constitute a constitutional matter. See *Vela* v *Auditor-General & Anor, supra,* at pp. 8–9. For a constitutional matter to be passed upon in appeal proceedings, it must have been present in the court of first instance. Thus, in identifying a constitutional matter, the genesis of a matter is traced back to the court of first instance. See *Bere* v *Judicial Service Commission & Ors* CCZ-10-22 at p. 13 – 14. It is also now settled that a constitutional matter cannot arise for the first time on appeal. It must have formed part of the pleadings in the court *a quo*. More specifically in *Vela, supra,* this Court observed, at p 8 of the judgment, that:

> "… the constitutional matter must have been pleaded in the court of first instance such that the constitutional matter stands out clearly from such pleadings. *Thus, the mere reference to the provisions of the Constitution in the judgment of the lower court, either in passing or as buttressing a common law position or statutory provision, does not trigger the appellate jurisdiction of this Court.*" (*Italics are for emphasis*)

[42] In similar vein, we stated in *Bere, supra,* that:

> "In South Africa, it is settled law that a constitutional matter cannot arise for the first time on appeal when it was not available or in existence in the subordinate court. ... Similarly, the established practice of this Court is that in order to determine whether or not there was a constitutional matter before the court *a quo*, the dispute must be traced back to the court of origin, in this case, the High Court. See *Ismail's* case, *supra*, at p. 9."

[43] In *The Cold Chain* case, supra, this Court also remarked as follows at p 8 of the judgment:

> "The *mere* reference to the Constitution did not make what was said a constitutional matter. Reference by the Supreme Court to s 176 of the Constitution was an *obiter dictum*. The Constitution was referred to after the *ratio decidendi* had been arrived at and declared by the court. The effect of what the Court said in relation to s 176 of the Constitution was that its reasoning was not inconsistent with the provisions of that section. *That is different from saying the decision on the issues before the court were based on the interpretation and application of s 176 of the Constitution*." (*Italics for emphasis*)

[44] Conversely, in *Ndewere* v *President of Zimbabwe & Ors* S–13–23, the Supreme Court also pertinently observed at pp 20-21 that:

> "The absence of a reference to the Constitution does not mean that a matter is not a constitutional matter although in most constitutional matters there generally would be reference to the Constitution. See *Bere* v *Judicial Service Commission & Ors* CCZ–10–22 at p 7. As stated in the *Moyo* case *supra*, one must simply be satisfied that a matter raises questions of law, the resolution of which requires the interpretation, protection, or enforcement of the Constitution."

[45] In other words more than just a passing mention of the Constitution is required in order for a constitutional issue to be considered to have arisen. The reason for mentioning a provision of the Constitution must go beyond mere reference to the Constitution. The cause of action must inherently require the determination of questions of law whose resolution require the interpretation, protection or enforcement of the Constitution.

[46] In the present context, it is important to note that the constitutional issue that is said to have arisen is the interpretation to be given to s 309 of the Constitution. Tracing the matter to its genesis, one notes that there was indeed mention of, but no pleaded case relating to, s

309 of the Constitution before the High Court. The matter before the High Court was based purely on administrative law. In his founding affidavit, the appellant stated that the application had been brought in terms of s 3(1) (a) as read with s 4 of the Administrative Justice Act. In the alternative, the appellant sought relief under ss 26, and 27 of the High Court Act and the common law.

[47] A further analysis of the judgment of the High Court shows that it did not relate to a constitutional matter. Section 309 of the Constitution was referred to in order to show that, as a delegate of the first respondent and having been appointed to carry out a forensic investigation, the second respondent was "by that fact exercising public power" and consequently its investigative process and report was liable to judicial review in terms of the Administrative Justice Act. The references were made in order to bolster the proposition by the appellant that the judicial review it was applying for was consistent with the right to administrative justice in s 68 of the Constitution. There can be little doubt that the reference to s 309(2) of the Constitution by the High Court was simply intended to show the overall legal framework from which the powers of the first respondent are derived. It was argued that because the first respondent had lawfully delegated her audit functions to the second respondent in terms of s 309 of the Constitution, she had, by that conduct, conferred administrative authority on the second respondent rendering the report authored by the latter liable to review in terms of the Administrative Justice Act. The maxim *qui facit per alium facit per se* was said to be applicable.

[48] Before the Supreme Court, two separate appeals were filed by the respondents. The first appeal was filed under case number SC 258/20 by the second respondent. Five grounds of appeal were advanced by the second respondent. It is apparent from a reading of the grounds of appeal filed by the second respondent that they did not require the court *a quo* to pass upon the provisions of s 309 of the Constitution. The first ground of appeal attacked the finding by the High Court that the forensic audit carried out by the second respondent constituted administrative action, which could be subjected to a review by the appellant. The second, third and fourth grounds of appeal impugned the judgment of the High Court for holding that the second respondent was biased and that its auditors had not applied their minds to the issues that were before them and for concluding that the audit report was unfair against the appellant. The fifth and final ground of appeal attacked the decision of the High Court for setting aside the audit report by the second respondent in the absence of evidence demonstrating bias or incompetence or unfair treatment by the second respondent.

[49] The second appeal before the court *a quo* was filed under case number SC 285/20 by the first respondent. For her part, the first respondent advanced two grounds of appeal. Again, none of the grounds of appeal, on their face, raised a constitutional matter. The first ground of appeal by the first respondent impugned the decision of the High Court for holding that the audit carried out by the second respondent on the NSSA constituted administrative action, which could be reviewed. The second ground of appeal, though not elegantly drafted, impugned the decision of the High Court for

> "treating the process of auditing as a hearing and the resultant report as a decision warranting a review in terms of Statutory Instrument 27(1)(c) of the High Court Act [*Chapter 7:06*] (*sic*)."

[50] Since the appeals under SC 258/20 and SC 285/20 were only consolidated at the hearing, two different sets of heads of argument were filed under the two case numbers. The heads of argument filed on behalf of the second respondent in SC 258/20 distil the essence of the proceedings that were before the High Court and the court *a quo*. The court *a quo* accepted that the second respondents' heads of argument correctly captured the issues arising for determination.

[51] Beyond this, passing reference was made, in both the applicant's and respondents' heads of argument, to s 309(2)(a) of the Constitution simply to demonstrate the constitutional basis of the functions of the Auditor-General and whether he or she can delegate administrative authority. The heads of argument did not relate to the provisions of s 309 of the Constitution as having formed the basis for the resolution of the dispute between the parties.

[52] The heads of argument that were filed in the Supreme Court on behalf of the applicant (as first respondent) in SC 258/20 adopted a different approach to the issues that were before the court *a quo*. From paragraph 3.2 to paragraph 4.8 of the heads of argument, the argument advanced was that the audit by the second respondent was invalid because it was a special audit in terms of s 309(2)(b) of the Constitution, which audit could not be delegated to a private auditing firm. The reason given was that the contracting of the

second respondent by the first respondent in terms of s 9 of the Audit Act was subject to s 5(2) of the Act and s 309 of the Constitution. Section 309(2)(b) of the Constitution was interpreted as proscribing the delegation of special audits of the accounts of statutory bodies which were made at the request of the government.

[53] Those heads of argument made passing reference, in paragraph 13 thereof, to the functions of the Auditor-General in terms of s 309 of the Constitution. A further reading of the heads of argument filed in the matter shows that the first respondent principally relied on the Audit Office Act for her argument that she could delegate her functions. In her supplementary heads of argument, there was further reference to s 309 of the Constitution. However, such a reference was contextually intended to simply recall the reference by the High Court to the same provision and to demonstrate the impropriety of such reference. It was not intended to raise an argument relating to s 309 of the Constitution. Further reference to s 309 of the Constitution was made simply to emphasize the proposition that the office of the first respondent is not part of the Civil Service.

[54] The observation needs to be made that the argument advanced on behalf of the applicant in his heads of argument in SC 258/20 was not connected to the grounds of appeal filed in that case. It was also not based on the pleadings that had been placed before the Supreme Court. The argument sought to justify the judgment of the High Court on a constitutional issue raised by the applicant when it was apparent that the constitutional issue could not be sustained outside the pleadings that had been filed before that Court.

[55] Turning to the judgment of the court *a quo*, the issue for determination was identified, in para 44 of the judgment, as being:

> "whether the court *a quo* [that is the High Court] misdirected itself in holding that the appellant [that is the second respondent *in casu*] was exercising public authority subject to judicial review when it carried out the forensic audit for and on behalf of the second respondent [the first respondent herein]."

An analysis of the judgment of the court *a quo* in determining the foregoing issues reveals that its decision was based on both an interpretation of s 309 of the Constitution and the Administrative Justice Act.

[56] In paragraphs 52 and 53 of its judgment, the court *a quo* referred to the provisions of s 309 of the Constitution. The relevant portion of the judgment is reproduced in full hereunder:

> "(52) With all due respect, Mr *Mpofu*'s argument that the mere fact that the second respondent hired the appellant as its agent, conferred administrative authority on the appellant is misplaced. This is for the simple reason that s 309 of the Constitution which creates the office of Auditor General does not confer him or her with the power to confer administrative authority on anyone…"
>
> (53) It is plain that s 309 of the Constitution confers administrative authority on the second respondent and no one else. Had the law maker intended the Auditor General's agents to also wield administrative power then, it would undoubtedly have said so. Its silence means that Parliament had no intention whatsoever to confer administrative authority on second respondent's private agents."

[57] It is apparent, from the heads of argument filed by the parties that, the reference by the court *a quo* to the provisions of s 309 of the Constitution was simply intended to deal with a submission that had been made by Mr *Mpofu* on behalf of the appellant. The submission was that the Auditor-General had no authority in terms of s 309 of the

Constitution to farm out this kind of task to the second respondent. It was also his submission that, having been contracted by the Auditor-General, the second respondent had, by extension, become an administrative authority. The judgment by the court *a quo* is, therefore, consistent with the heads of argument that had been filed by the applicant. It is clear however that, in doing so, the court *a quo* made a definitive interpretation of s 309 in so far as it applied to the powers of the Auditor-General to delegate her administrative powers to private auditors, such as the second respondent, who perform audits at her behest.

[58] On a careful analysis of the judgment, therefore, there is no gainsaying that the reference to s 309 of the Constitution by the court *a quo* was not a mere reference to a provision of the Constitution. It appears that the resort to that section was also intended to exist as an additional basis for the conclusion that the first respondent cannot lawfully delegate her functions to the second respondent. For reasons that now follow such reference was wrong and unnecessary.

JUDGMENT FELL FOUL OF AVOIDANCE AND RELATED DOCTRINES

[59] The issue before the High Court and the Supreme Court was whether the second respondent was an administrative authority for purposes of the application that had been filed in terms of the Administrative Justice Act. The resort to s 309 of the Constitution in order to resolve the dispute between the parties was not only unnecessary but also irregular and fell foul of the principles of subsidiarity and constitutional avoidance.

[60] The position is settled that once an Act of Parliament which gives effect to all the rights to just administrative conduct is enacted, then s 68 of the Constitution, which makes provision for the right to administrative justice, takes a back seat. The question whether particular administrative conduct meets the requirements of the law must be determined, not in accordance with s 68 of the Constitution, but with the Act – *Zinyemba* v *Ministry of Lands* 2016 (1) ZLR 1073, 1077.

[61] Put another way, in the circumstances outlined above, the references to a provision of the Constitution would be completely unnecessary. That is because the Administrative Justice Act gives effect to s 68 of the Constitution. It is a self-contained piece of Legislation. It defines administrative action to mean any action or decision taken by an administrative authority. It, in turn, defines who an administrative authority is for purposes of the Act. In s 5 of the Act, the Act defines the factors a court may take into account in determining whether an administrative authority has failed to comply with the duties prescribed under s 3 of the Act.

[62] In these circumstances, there would be no basis for seeking the aid of the Constitution in order to interpret Ss (3) and (4) of the Act. As noted, the Act itself defines the various terms it employs. Norms of greater specificity should be relied on before resort is had to norms of greater abstraction. Expressed differently, remedies should be sought in ancillary legislation before resort is had to constitutional remedies- *Zinyemba*, *supra*, at p 8.

[63] In *Everjoy Meda v Maxwell Matsvimbo Sibanda* and *Three others* CCZ 10/16 this Court cited with approval remarks by the U.S Supreme Court in *Spector Motor Services, Inc.* v *McLaughlin, Tax Commissioner*, 323 U.S. 101, 103 (1944) that:

> "… if there is a doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not pass on questions of constitutionality … unless such adjudication is unavoidable."

And further remarks by the same Court in *Ashwander* v *Tenessee Valley Authority (TVA)* 297 U.S. 288, 345-48, (1936) that:

> "the last resort rule states that a court should 'not pass upon a constitutional question … if there is also present some other ground upon which the case may be disposed of."

[64] The doctrine of avoidance also encompasses the doctrines of ripeness and subsidiarity. In the present matter, it was unnecessary on the part of the Court *a quo* to resort to s 309 of the Constitution as the matter was clearly resolvable on the basis of the Administrative Justice Act. In the circumstances, the determination by the Court *a quo* fell foul of these principles. The court *a quo* should have resisted the invitation by the applicant's legal practitioner for it to determine the dispute after taking into account the provisions of s 309 of the Constitution. Its decision to do so was therefore irregular.

S 309 OF THE CONSTITUTION-ITS GENESIS

[65] As already noted earlier in this judgment, it was the applicant who invited the High Court and thereafter the Supreme Court to interpret s 309 of the Constitution in order to determine whether or not the second respondent was an administrative authority for purposes of the AJA. Unfortunately both the High Court and Supreme Court took the bait

and ended up interpreting s 309 of the Constitution instead of simply determining whether the second respondent was an administrative authority for purposes of the Administrative Justice Act.

[66] Perusal of the applicant's papers filed before the High Court reveals that it was the applicant who, in addressing the question of jurisdiction in the founding affidavit, made reference to s 309 of the Constitution and averred that as a delegate of the first respondent,

> "the second respondent was by that fact exercising public power"

and that its conclusions were consequently liable to judicial review at his instance. In his heads of argument filed before the High Court, he similarly stated that:

> "a contracted audit is accordingly a result of the exercise of public power in line with the maxim *qui facit per alium facit per se*."

And further that:

> "when the second respondent was conducting the audit, it was exercising the AG's powers as provided for in law"

[67] As already noted, the High Court, in its determination, fell for the bait. It considered that it was necessary:

> "to define the legal status of the second respondent vis-a-vis the audit process."

The Court then proceeded to consider the provisions of s 309 of the Constitution concomitantly with those of s 8(1) of the Audit Office Act. It then determined that:

> "upon being adopted, ownership in the recommendations shifted to repose in the first respondent."

And that:

> "once that happened, it is naive of the auditors or the Auditor-General to deny that the second respondent effectively exercised administrative power."

[68] Upon the respondents filing an appeal with the Supreme Court, raising non-constitutional issues, the applicant again re-introduced the applicability of s 309 of the Constitution in the interpretation of the Administrative Justice Act. In his heads of argument before the court *a quo* he submitted that:

> "whenever the AJA is engaged, its constitutional parentage must be considered."

And further that:

> "the duties of the AG must therefore be read in the context of section 309 … when auditors are contracted in terms of s 9 of the [Audit Office] Act, which should be made subject to Ss 5(2) of the Act [AJA] and s 309 of the Constitution."

[69] The applicant further submitted that the first respondent had no right to farm out this type of work to the second respondent. Arguing that the duties of the Auditor-General must be read in the context of s 309 of the Constitution, he averred that when Auditors (the second respondent herein) are contracted in terms of the Audit Office Act:

> "that should be made subject to ss 5(2) of the Act and s 309 of the Constitution."

And that:

> "it was outside the remit of the AG's powers for her to contract the appellant (the second respondent) other that for purposes of a special audit …"

[70] In the court a quo respondents disputed the above assertions by the applicant and submitted that the act of carrying out the audit on the part of the second respondent did not constitute an administrative decision. All that the latter had done was merely report

on its conclusions and recommendations based on its investigations. It had not caused any action to be taken against the applicant. The first respondent, in particular, submitted that whilst her action in ordering an audit of an entity constitutes an administrative action in terms of AJA, the audit itself cannot be described as an administrative action.

[71] It was in the context of the dispute relating to the interpretation of s 309 of the Constitution that the Court a *quo* found that:

> "… Mr *Mpofu*'s argument that the mere fact that the second respondent hired the appellant [the second respondent herein] as its agent conferred administrative authority on the appellant is misplaced. This is for the simple reason that s 309 of the Constitution which creates the office of Auditor-General does not confer him/her with the power to confer administrative authority on anyone …"

And further that:

> "… s 309 of the Constitution confers administrative authority on the second respondent (the first respondent herein) and no-one else … Parliament had no intention whatsoever to confer administrative authority on second respondent's private agents."

BOTH THE COURT A QUO AND THE HIGH COURT HAD NO JURISDICTION TO INVOKE S 309

[72] Proceeding on the basis that the constitutional issue relating to s 309 of the Constitution arose in the proceedings for relief under the Administrative Justice Act, the High Court would have had no jurisdiction to itself determine that question. The application before the High Court was predicated on Ss 3 and 4 of the Administrative Justice Act. A constitutional matter arising in these circumstances should more properly have been referred to this Court in terms of s 175(4) of the Constitution. Armed with the determination by this Court on the constitutional issue arising, the High Court would then

have been in a position to determine the application before it. By the same token, the court a quo should not have resorted to the interpretation of s 309 of the Constitution in order to determine the appeal before it that was predicated on Ss 3 and 4 of the AJA. It is apparent that both Courts needlessly grappled with the question whether the Auditor-General was allowed to delegate her administrative authority in order to decide whether the audit function was reviewable.

[73] In this regard, this court pertinently remarked in *Michael Nyika & Anor v Minister of Home Affairs & Others* CCZ 5/20 that:

> "(23) The position has been stressed in several decisions of this Court that in cases where a constitutional matter arises in non-constitutional proceedings before a court, that court may, *mero motu*, or on request must, refer such question to this court unless it considers the request to be frivolous and vexatious.
>
> (24) ….
>
> (25) ….
>
> (26) ….
>
> (27) The decision by the court *a quo* to deal with the question was therefore void. The order that followed thereafter was equally void and nothing could depend on it …"

[74] In the premises, the unavoidable conclusion is that no constitutional matter should have arisen for determination before the court *a quo* as the application was predicated on Ss 3 and 4 of the AJA. In the course of the proceedings the interpretation of s 309 of the Constitution became an issue. The Court had no jurisdiction to determine the question in the manner it did. If the Court *a quo* was of the view that the interpretation of s 309 of the Constitution was necessary for it to resolve the application filed under the AJA, it should

have referred the constitutional issue arising to this Court for determination. In applying s 309 of the Constitution in order to resolve the dispute between the parties that was anchored on the Administrative Justice Act, the Court *a quo* clearly fell into error.

WHETHER OR NOT THE COURT MAY EXERCISE ITS REVIEW POWERS OVER THE JUDGMENT OF THE SUPREME COURT

[75] The main reason why leave to appeal was granted was that the Supreme Court had unnecessarily and irregularly made a definitive pronouncement on the interpretation of s 309 of the Constitution, which pronouncement continues to have a binding effect on all lower courts. It was further determined that the ruling of the Supreme Court may have required revisiting by this Court with a view to either rectifying it or setting it aside completely. As already noted the main concern by this Court during the application for leave to appeal was that the determination by the Supreme Court in these circumstances should not be allowed to remain extant. In my view that concern is not without a solution taking into account the powers bestowed by law upon this Court.

[76] Section 19 of the Constitutional Court Act [*Chapter 7:22*] provides for review powers as follows:

> "**19 Review Powers**
>
> (1) Subject to this section, the Court and every Judge shall have, **in constitutional matters**, the power to review the proceedings and decisions of the Supreme Court, the High Court and all other subordinate courts, 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 Court or a Judge 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 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 Court or a Judge, and provision may be made in rules of Court, and a Judge 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 Supreme Court, the High Court or the Labour Court, as the case may be, for determination."

[77] The above provision is clear that review powers are exercisable only in constitutional matters. In the case of *Gonese* v *Minister of Finance and Economic Development* CCZ–11–23 at p. 29, para. 70, this Court emphasised that such power may be exercised at any time in constitutional matters whenever it comes to the attention of the Court, or a Judge, that an irregularity has occurred in those proceedings or in the making of any decision, notwithstanding that such decision is not the subject of an appeal or application to the Court. At para 71, the Court further expressed the sentiment that:

> "There can be little doubt this is a useful and necessary provision. In the absence of such a power, the Court, or Judges of the Court, would be utterly powerless to act, even where it comes to their attention that there has been an irregularity in the making of a decision on a constitutional matter in a lower court. Such an irregularity would remain unrectified, unless the matter becomes the subject of an appeal or review before a court, which is not always the case."

[78] In this case, the court *a quo* made pronouncements on a provision of the Constitution notwithstanding the principles of avoidance and subsidiarity and in the absence of the jurisdiction to do so. Alternatively, the constitutional issue having arisen in non-constitutional adjudication, the Court did not itself have the power to determine the issue. It was obliged to refer the matter in accordance with s 175 (4) of the Constitution. Determining the issue, as it did, was clearly a procedural irregularity.

[79] The determination by the court *a quo* predicated on its interpretation of s 309 of the Constitution, having been made irregularly and without jurisdiction, stands to be set aside. It was suggested by counsel for the respondents that the judgment of the Court *a quo* can still stand once the portion relating to s 309 of the Constitution is excised from its judgment. That submission is not tenable for the very simple reason that the interpretation accorded to s 309 of the Constitution was intended to be an integral part of the determination whether the second respondent had exercised administrative authority for the purposes of the Administrative Justice Act.

DISPOSITION

[80] Everything considered, therefore, the appeal before the Supreme Court was not predicated on a constitutional matter. It was resolvable on a non-constitutional basis. The question whether the Auditor-General had the power in terms of s 309 of the Constitution to delegate administrative authority to the second respondent, having arisen in submissions made by the applicant before the court, should have been referred to this Court and not determined by the court itself. In the circumstances, the matter stands to be struck off the roll as no appeal can properly lie to this Court on the facts of this case.

[81] On the issue costs, no basis exists for departing from the normal practice that costs are not, as a general rule, to be awarded in constitutional matters. There shall, therefore, be no order as to costs.

[82] In the result, the Court makes the following order:

(1) *The matter be and is hereby struck off the roll.*

(2) *In the exercise of the Court's powers pursuant to s 19 of the Constitutional Court Act* [*Chapter 7:22*], *the judgment of the Supreme Court in SC 61/22 be and is hereby set aside.*

(3) *The matter is remitted to the Supreme Court for a hearing de novo before a different panel of judges.*

(4) *For the avoidance of doubt, the Court shall determine the appeal before it on the non-constitutional basis upon which it was brought.*

(5) *There shall be no order as to costs.*

MALABA CJ **:** **I Agree**

GWAUNZA DCJ **:** **I Agree**

MAKARAU JCC **:** **I Agree**

GOWORA JCC **:** **I Agree**

HLATSHWAYO JCC **:** **I Agree**

PATEL JCC : I Agree

Chambati, Mataka & Makonese Attorneys, appellant's legal practitioners

Makuwaza & Magogo Attorneys, first respondents' legal practitioners

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