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PROCEDURAL ACCESS TO JUSTICE: ENHANCING ACCESS TO THE SUPERIOR COURTS OF ZIMBABWE THROUGH REFORM OF SELECTED RULES OF CIVIL PROCEDURE

By

RODGERS MATSIKIDZE

A thesis submitted in fulfilment of the requirements for the degree of

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In the School of Law at the University of the Witwatersrand

Supervisor

Associate Professor Constantine Theophilopoulos

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DECLARATION

I, Rodgers Matsikidze, declare that this thesis is my unaided work. It is submitted to fulfil the requirements of the Doctor of Philosophy (PhD) degree in the Faculty of Commerce, Law and Management at the University of the Witwatersrand, Johannesburg. I further declare that this thesis has never been submitted before for any degree or examination in any other university.

Signature: 

Rodgers Matsikidze

STUDENT 1353185

28thth August 2023

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Also, Sesedzai, Megan, Steadfast, Sharon and Adrian are not to be forgotten. More importantly, I want to thank my wife, Edith, and our children for enduring many nights when I was awake and reading huge piles of articles.

DEDICATION

To you, Mum, I wish you were still alive. You valued education and worked as a farm labourer to make me who I am today. I love you, Mum.

To my father, God called you when we were very young. Mum told us that you were a good father. I love you too.

I dedicate this piece of work to my wife, Edith. It has been difficult all these years, but God has taken us this far. Thank you for being such a true love.

ABBREVIATIONS AND ACRONYMS

ACHPR	African Charter on Human and People's Rights
ACHR	American Convention on Human Rights, 1978
BSAC	British South Africa Company
CCPD2/13	Constitutional Court Practice Directive of 2013
CCZ	Constitutional Court of Zimbabwe
CLLCA	Customary Law Local Court Act
ECHR	European Court of Human Rights
ECPHRFF	European Convention for the Protection of Human Rights and Fundamental Freedoms, 1953
FRA	European Union Agency for Fundamental Rights
ICCPR	International Convention on Civil and Political Rights
MCA	Magistrates Court Act
SADC	Southern Africa Development Community s69 (3)
SCCA	Small Claims Court Act
SI	Statutory instrument
SROIC	The Southern Rhodesia Order-in-Council
UDHR	Universal Declaration of Human Rights
USD	United States Dollar
ZLR	Zimbabwe Law Reports
ZWL	Zimbabwean Dollar
UNDP	United Nations Development Programme

US	United States
USA	United States of America
ZLR	Zimbabwe Law Reports

ABSTRACT

This thesis argues that the rules of civil procedure can enhance or inhibit access to the courts. Secondly, it argues that there is a nexus between the right of access to the court and the rules of civil procedure, in that rules of civil procedure play a critical role in providing a procedural pathway to court. Thus, in providing a mechanism for realising substantive rights, the rules of procedure become central in ensuring access to court and justice. On the other hand, this thesis argues that the rules of civil procedure governing security costs, leave to appeal and appeals, and referral of constitutional matters (herein referred to as selected rules of procedure) restrict access to court and, in turn, access to justice. This thesis argues that blanket security for costs rules restrict access to the court and can result in litigants being required to tender inhibitive security for costs. The thesis further proposes that the requirement for security for costs must be restricted only to frivolous and vexatious civil claims and appeals. In addition, it is also argued that the strict application of the rules governing appeals in the Superior Courts of Zimbabwe, which result in appeals being struck off the roll for being defective, is undesirable, and there is a need to balance the need for compliance with the rules of procedure and emphasis on unduly technical requirements which do not enhance access to justice. Thus, the thesis argues for the robust application of rules of governing appeals to ensure that appeals are largely dispensed on merits. Further, the thesis argues that the requirement for leave to appeal from the Labour Court to the Supreme Court and from the Supreme Court to the Constitutional Court is undesirable as it discriminates in favour of direct appeals from the High Court to the Constitutional Court of Zimbabwe. Moreso, the requirement for leave to appeal from the Supreme Court to the Constitutional Court restricts access to justice as it unnecessarily increases litigation costs. It is, therefore, argued that the reform of leave to appeal rules, particularly removing the requirement of leave to appeal from the Labour Court of Zimbabwe to the Supreme Court of Zimbabwe, increases access to justice and affords a litigant an equal opportunity as a litigant appealing from the High Court to the Supreme Court who does not require leave to appeal. In addition, it advocates for automatic appeals to the Constitutional Court of Zimbabwe. Furthermore, this thesis proposes widening the appeal jurisdiction of the Constitutional Court from only being restricted to hearing constitutional matters to also hearing a matter raising an arguable point of law of general public importance. In addition, this thesis argues for more direct access, particularly on constitutional issues, as an avenue to increase access to justice. Additionally, the thesis identifies the rules governing the referral of constitutional issues from the subordinate courts of the Constitutional Court as unduly

restrictive. There is, therefore, a need to simplify the referral of constitutional matters procedure to increase access to justice by referring constitutional matters to the Constitutional Court. Thus, this thesis focuses on the impact of the selected rules of civil procedure in the Superior Courts of Zimbabwe on court access by litigants, represented or unrepresented. The Superior Courts of Zimbabwe at the centre of this thesis are the High Court, the Supreme Court and the Constitutional Court. The thesis concludes that in inhibiting access to the Superior Courts of Zimbabwe, the selected rules of procedure contravene section 69(3) of the Constitution of Zimbabwe, which provides for the right of access to the court. It is evident from the comparison made in this thesis that the framing of selected rules of procedure in South Africa and Kenya enhances access to the courts and justice. Thus, the thesis proposes reform of the law and selected rules of procedure to enhance access to the Superior Courts of Zimbabwe. The reform proposal to the selected rules of civil procedure is accompanied by a draft of reformed selected rules of civil procedure and some proposed amendments to enabling Acts of Parliament and the Constitution of Zimbabwe.

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CHAPTER ONE

TOWARDS ENHANCED ACCESS TO THE SUPERIOR COURTS OF ZIMBABWE

1.1.INTRODUCTION

This thesis argues firstly that the procedural right of access to the court may be "enhanced or inhibited" by the rules of civil procedure. This, in turn, affects the constitutional right of access to justice. Secondly, this thesis critically examines the nexus between the right of access to the court, particularly the right of access to the High Court of Zimbabwe, the Supreme Court of Zimbabwe and the Constitutional Court of Zimbabwe (herein the "Superior Courts of Zimbabwe")[1] and rules of civil procedure including the specific rules of civil procedure that are the focus of this thesis, which play a critical role in providing a procedural pathway to court. As a mechanism for realising substantive rights, the rules of procedure are central in ensuring access to court and justice. The thesis critically analyses the procedural impact of specific rules of procedure governing security costs, leave to appeal, appeals and referral of constitutional issues in the Superior Courts on the procedural right of access to the court and, ultimately, access to justice. The specific rules of civil procedure that are analysed and assessed in this thesis are referred to as "selected rules" or "selected rules of civil procedure".[2]

The need for a critical examination of these selected rules of civil procedure for the Superior Courts of Zimbabwe is further reinforced because the procedural right of access to the courts is constitutionally entrenched in section 69 (3) of the Constitution of Zimbabwe, 2013 (hereinafter referred to as "the Constitution"). Furthermore, since 2013, no reform has been carried out seeking to align the selected rules of civil procedure with the provisions of s63 (3) of the Constitution to enhance access to the Superior Courts. This thesis critically analyses these rules, making a crucial comparison with the same or similar rules in the adversarial justice systems of South Africa and Kenya.[3] Kenya and South Africa share a similar colonial legal history with Zimbabwe and the same common law heritage on the rules of civil procedure. The United Kingdom is the erstwhile colonial power for all three countries. This thesis aims to

[1] The Superior Courts of Zimbabwe are the High Court of Zimbabwe, the Supreme Court of Zimbabwe and the Constitutional Court of Zimbabwe (CCZ).

[2] The selected rules of civil procedure are identified in the problem statement. Further, in Zimbabwe's civil procedure, rules are referred to as rules of civil procedure. So, in this thesis, the term used throughout is 'rules of civil procedure'.

[3] South Africa, Zimbabwe and Kenya are all former colonies of the United Kingdom. The United Kingdom consists of England, Wales and Scotland. The legal system of England and Wales have some similarities with Zimbabwe, South Africa and Kenya. Scotland has a different system and, as such, is not referred to in this study.

identify the procedural rules that inhibit access to the courts, recommend reform of these rules, and provide a new set of draft rules aligned with the Constitution to enhance access to the Superior Courts. In addition, further proposals will be made to amend sections of the relevant statutes containing rules of procedure governing appeals in the Superior Courts of Zimbabwe.

This thesis does not focus on the right of access to the court[4] in the Magistrates Court[5] of Zimbabwe for two reasons. Firstly, in my MPhil studies, I focused on the right of access to the court by examining the structure of the rules of civil procedure in the Magistrates Court.[6] Secondly, the selected rules under review are more pronounced in Superior Courts and are the main means used to access the Superior Courts. Further, in most cases, the appeals and leave to appeal rules of civil procedures are used when a litigant appeals from the Magistrates Court to the Superior Courts. Further, the principles of security costs, direct access and referral of constitutional matters are pronounced and found in every rule governing Superior Courts and are further assumed to be the rules inhibiting access to those Superior Courts.

In addition, although this thesis focuses on the rules governing the right of access to the Superior Courts, it excludes the rules governing the review and application procedure. The rationale for excluding these two procedures is that they are assumed to be fairly easier to utilise than the selected rules of civil procedure.[7] Apart from these reasons, including the application and review procedures in this study would inhibit a thorough critique of issues, generalising the discussion. The two areas (applications and reviews) are bulky and would require a separate thesis. So, this thesis specifically focuses on appeals, leave to appeal, security for costs and referral of Constitutional Court Rules to the Superior Courts of Zimbabwe.

4.1. PROBLEM STATEMENT

Although s69 of the Constitution entrenches a constitutional right of access to the courts, a set of rules of civil procedure specifically restricts procedural access to the Superior Courts of Zimbabwe. The first argument advanced in this thesis is that the rule of civil procedure requiring a plaintiff/appellant/applicant to furnish litigation security for costs without

[4] Some authors cited in this thesis refer to the concept of the right of access to the court as the "right of access to court", while others refer to it as the "right of access to the court". This thesis uses the phrase "right of access to the court" throughout.
[5] In this thesis, the "Magistrates Court" is referred to as the "Magistrates Court" as that is the wording set in the various Statutes; for example, the Magistrates Courts Act (7:10). South Africa and Kenya refers to the "Magistrates Court" as the "Magistrate's Court".
[6] R Matsikidze *The civil procedure in the Magistrates Court of Zimbabwe. A denial of right of access to the court to self-actors?* Unpublished Thesis, University of Zimbabwe (2014).
[7] Ibid.

exceptions restricts access to the Superior Courts. The security for costs rule is similarly worded and set out in Rule 75 of the High Court Rules, 2021, Rule 55 of the Supreme Court Rules, 2018, and Rule 42 of the Constitutional Court Rules. This restrictive rule means that where a litigant fails to provide security for costs, the matter is struck off the roll regardless of whether the matter has prospects of success. Therefore, access to the court is denied to a litigant who does not have the resources to pay the security for costs. There are no set exceptions to the rule providing security for costs unless the litigant is a government or municipal authority.

Secondly, appeals to the Constitutional Court may only be based on an identified constitutional issue in a particular matter. This procedural rule (see Rule 32 (2) of the Constitutional Court Rules) restricts access to the Constitutional Court. This restrictive approach to appeals is very different to the current approach adopted in other jurisdictions, such as in South Africa, where all matters, including constitutional issues, may be appealed to the Constitutional Court of South Africa provided the issue raised constitutes an arguable point of law of general public importance. Furthermore, several Zimbabwean Supreme Court and Constitutional Court judgments have held that an appeal that does not conform to the mandatory requirements of a correctly formatted "notice of appeal" is defective and thus a legal nullity.[8] In *Sarah Ndlovu & Comloc (Private) Limited v Moffat Ndlovu & Siphosethu Magonya,*[9] the Zimbabwean Supreme Court held that a notice of appeal was technically defective because of non-compliance with the mandatory provisions of Rule 29, particularly

[8] See the cases of *Dabengwa and Anor v ZEC and Others* SC-32-16, *Fungai Munyorovi v Weston Sakonda* HH-467-21, where Dube J held that a fatally defective pleading is a legal nullity. Also see *Matanhire v BP Shell Marketing Services (Pvt) Ltd* 2004 (2) ZLR147 (S), again the Supreme Court held that failure to comply with mandatory provisions of the rules renders an appeal a nullity. See also *Tamanikwa v Zimbabwe Manpower Development Fund and Anor* SC 73/17, in which the court dealt with an appeal that was fatally defective and nullity at law and made it clear that an appeal or a pleading that is fatally defective or a nullity is incurably bad, beyond repair and cannot be condoned, revived or amended. Also, see *Florence Sigulu v Minister of Lands and Rural Resettling N.O and 2 Others* HH-11-13. Korsah J in *Ngani v Mbanje and Another; Mbanje and Another v Ngani* 1987 (2) ZLR 111 at 115 relying on the dicta in *McFoy v United Africa Company Ltd* ALL ER 1169 remarked: 'If any act is in law a nullity, it is not only bad but incurably bad.' There is no need for the order of the Court to set it aside. It is automatically null and void without more ado. Though it is sometimes more convenient to do so. And every proceeding founded on it is also bad and incurably bad. It is simply invalid for failure to comply with the rules. The approach by Zimbabwean courts as Dube J in *Fungai Munyorovi v Weston Sakonda* HH-467-21, on page 7, is that where a pleading is defective and a nullity depends on the non-compliance with the rules, one cannot seek condonation of a nullity and the pleading will be liable to be struck off the roll. The *Matanhire* case seems to go further to then qualify that nullity arises from non-compliance with peremptory or mandatory rules. The Court in *Matanhire* dealing with an appeal filed outside the time ruled that 'As no valid notice of appeal was delivered within fifteen days of the date when the decision of the Labour Court was given, there was no appeal before the Court and to merely insert the relevant date in the defective notice of appeal as suggested by Mr Muskwe, without an application for an extension if the time within which to institute the appeal and for condonation of non-compliance with the Rules of Court would be grossly irregular.' So the settled position in Zimbabwean Superior Courts is that failure to comply with mandatory rules of appeal or court in general results in an appeal or pleading deemed to be a legal nullity.

[9] *Sarah Ndlovu & Comloc (Private) Limited v Moffat Ndlovu & Siphosethu Magonya* SC 133-02.

subrules (c) and (e). Rule 29 (c)-(d) requires the appellant or their legal representative to state (i) whether the whole or only part of the judgment is appealed against and (ii) the exact nature of the relief sought.[10] The Supreme Court held that the appellant had failed to state whether the whole or only part of the judgment was being appealed against and also failed to state the exact nature of the relief sought.[11] This case follows the precedent set in *Jensen v Acavalos,* [12] where Korsah JA held that "[ ] ... a notice of appeal which does not comply with the rules is fatally defective and invalid.[13] That is to say, it is a nullity. [14] It is not only bad but incurably bad, and unless the Court is prepared to grant an application for condonation of the defect and to allow a proper notice of appeal to be filed, the appeal must be struck off the roll with costs."[15] Nevertheless, despite the provision for condonation being available in terms of the Rules, in almost all cases, the Supreme Court and the Constitutional Court, instead of condoning non-compliance or allowing amendments, have struck off appeals for failure to comply with the mandatory requirements of the procedures governing appeals.[16]

Thirdly, this thesis argues that the rule of civil procedure, which requires an appellant to seek leave to appeal, may, in certain circumstances, be restrictive of access to the Superior Courts. These rules are contained in Rule 94 (8) (9) of the High Court Rules, Rule 43 of the Supreme Court Rules, Rule 32 of the Constitutional Court Rules and s4 (3) of the Constitutional Court Act. For a litigant to appeal to the Constitutional Court of Zimbabwe (CCZ), he/she must be granted leave by a Judge of the Supreme Court.[17] If the Judge of the Supreme Court denies

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[10] Ibid.
[11] Ibid.
[12] *Jensen v Acavalos* 1993 (1) ZLR 216 (S) at 220 B-D.
[13] Ibid.
[14] Ibid.
[15] Ibid.
[16] The position on when condonation for non-compliance with the rules can be granted or not is confirmed by Dube J in *Fungai Munyorovi v Weston Sakonda* HH-467-21 at page 8 where she ruled that 'Because Rule 4C and its equivalent in the new rules give the court extensive discretionary powers in the case of non-compliance with the rules, the provision was meant to be used to condone irregular steps stemming from non-compliance with the rules. Rule 4C of the High Court Rules,1971– now in new High Court Rules, 2021 cannot be used to condone fatally defective pleadings in either form or substance which are considered nullities. The court held further that it was never the intention of the legislature that Rule 4C be resorted to for purposes of condoning fatal defects or nullities and reviving the pleadings. So the rules relating to condonation are not applicable to defective pleadings or appeals, particularly those that do not comply with mandatory requirements of rules of court. See *De Jager v Diner & Anor* 1957 (3) SA 567 (A) at 574 C–D. In *Hattingh v Pienaar* 1977 (2) SA 182 (O) at 183, Klopper JP held that fatally defective compliance with the rules regarding the filing of appeals could not be condoned or amended. What should be applied is an extension of time within which to comply with the relevant rule. He further ruled, "With this view, I most respectfully agree; for if the notice of appeal is incurably bad, then, to borrow the words of Lord Denning in *McFoy v United Africa Co Ltd* [1961] 3 ALL ER 1169 (PC) at 1172, every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."
[17] Rule 43 Supreme Court Rules, 2018; Rule 32 of Constitutional Court Rules, 2016; s4 of the Constitutional Court Act of Zimbabwe (7:22).

a litigant leave to appeal, that is the end of the procedural road, as there is no appeal mechanism against the decision of a single Supreme Court judge.[18] This also applies to litigants appealing from the Labour Court to the Supreme Court. In s92F of the Labour Act (Chapter 28:01), a litigant must apply for leave to appeal before a judge of the Labour Court, and if denied, he/she would have to apply for leave to appeal before a judge of the Supreme Court. Further, if the Supreme Court or Constitutional Court judge denies the leave to appeal, the possibility of litigation for such a litigant ends.

Fourthly, this thesis argues that the rule regulating the referral of constitutional issues provided in s175 of the Constitution to the CCZ also inhibits the right of access to the CCZ (herein in this thesis, referred to as the "referral procedure"). The referral procedure rule is set out in Rule 108 (1) of the High Court Rules, Rule 71 of the Supreme Court Rules and Rule 24 of the Constitutional Court Rules. A referral can be made to the Constitutional Court in two instances. The first instance is at the discretion of the High Court. The High Court may refer a case to the CCZ where a constitutional issue has been identified, and its resolution will have a bearing on the disposition of the other relevant issues before the High Court.

The second instance concerns the mandatory requirement that a decision-maker presiding over a subordinate court must refer a matter to the CCZ, where a party to the proceedings formally requests such a referral of a constitutional issue. In this circumstance, a magistrate or judge is officially obliged to refer the matter to the Constitutional Court. The only ground on which a magistrate or judge may refuse to refer the issue is if they consider the request to be frivolous, vexatious or both. At the heart of the referral of constitutional matters procedure is the requirement that the litigant seeking to refer a constitutional issue, or the presiding judicial officer, must formulate a constitutional question for determination by the Constitutional Court. Failure to formulate a constitutional question and technical non-compliance with the rest of the mandatory referral procedures have resulted in some cases being struck off the roll as improperly referred to the Constitutional Court.[19] The principal defect in the referral process is

[18] Ibid.

[19] In *Nyagura v Ncube N.O. and Ors* CCZ 7/19, at page 8 it was ruled that, "If a constitutional matter arises in proceedings before a court, a judicial officer presiding over that court may and if so requested by a party to the proceedings must refer the matter to the Constitutional Court unless he or she considers the request is merely frivolous or vexatious." The test for referral is thus set in s175 (4) of the Constitution of Zimbabwe. However, in practice, the procedures now contained in the rules of the High Court Rules, Supreme Court Rules and Constitutional Court Rules cited under the problem statement have introduced additional procedural restrictions that seemingly were not contemplated by the framers of the Constitution of Zimbabwe. See also *Mutero and Anor v Attorney General* 2000 (2) ZLR 286 (S), where the Supreme Court ruled that it was incompetent for the court *a*

the unreasonable assumption that a litigant, whether represented or not, is knowledgeable about formulating a question on a constitutional issue. The other shortcoming in the referral process is that even if there is a relevant constitutional issue, but the referral is procedurally defective or improperly drafted, the CCZ has adopted the approach of striking such matters off the roll at the expense of dispensing substantive justice.[20]

These briefly identified procedural defects illustrate the main thesis argument that certain rules of civil procedure restrict access to the Superior Courts. Consequently, there is an urgent need to critically examine these selected rules in the context of s69 (3) of the Constitution and to redesign these selected rules for a litigant's procedural benefit, thus removing unreasonable procedural restrictions on access to the court. The intended outcome of this thesis is to (i) identify the procedural requirements of the rules of procedure that restrict access to the courts and (ii) propose specific procedural reforms to the rules of procedure in a manner that enhances access to the court. Currently, no Zimbabwean study has examined these selected rules of civil procedure with a focus on enhancing access to the court. This thesis will fill that gap in Zimbabwean procedural knowledge. It will, therefore, undertake a critical examination of these selected procedural rules by (i) critically analysing and identifying the procedural flaws in these rules and (ii) providing a new set of redesigned draft rules, which in the author's view, best allows for a litigant's reasonable and constitutionally valid access to the courts (and by association access to justice).

1.2.THE ORIGINALITY OF THE THESIS

This thesis contributes knowledge in an understudied area of the law in Zimbabwe: the impact

quo to consider the issue of frivolity or vexatiousness of a request for a referral of a constitutional matter to the court when it had already determined the question on the merits. In that matter, it was further held that once a subordinate court rendered a decision on the constitutional question, the dispute arising from the form could only be resolved by way of appeal. So referral procedure is limited to instances where the court has not issued a judgment on appeal. See the cases of *Jabulani v The State* CCZ-04-17, also see *Fredrick Mutanda v The Prosecutor General Of Zimbabwe and the Anti-Corruption Commission of Zimbabwe and the Reserve Bank of Zimbabwe and the Regional Magistrate Mr N. Mupeyiwa* NO CCZ-01-17. *Manyara v The State* CCZ 3/15, *Chihava & Ors v The Provincial Magistrate Francis Mapfumo N.O & Anor* CCZ 6/15, *Sibanda v The State* CCZ 4/17, *Mutambara v Attorney-General & Anor* CCZ 11/15, *Tom Beattie Farms (Private) Limited aka Chigwell Estate and Thomas Beattie v Ignatius Mugova and Attorney General Of Zimbabwe* CCZ-07-14, See also *Chikumbu v The State* CCZ 1/15, *Don Nyamande & Kingston Donga v Zuva Petroleum* CCZ 8/15, and also *Mwonzora & 31 Ors v The State* CCZ 9/15 and *Prosecutor-General, Zimbabwe v Telecel Zimbabwe (Pvt) Ltd* CCZ 10/15.

[20] See the following cases: *Mwonzora & 31 Ors v The State* CCZ 9/15, *Taylor-Freeme v The Senior Magistrate, Chinhoyi & Anor* CCZ 10/14,*Stander v The State* CCZ 1/16, *Fredrick Mutanda v The Prosecutor General Of Zimbabwe and the Anti-Corruption Commission of Zimbabwe* and the *Reserve Bank of Zimbabwe and the Regional Magistrate Mr N. Mupeyiwa NO* CCZ-01-17, *Sibanda v The State* CCZ 4/, *Katsande & Anor v Infrastructural Development Bank of Zimbabwe* CCZ 9/17, *Williams & Ors v The State* CCZ 14/17, *Mataishe v The Honourable Magistrate Mahwe N.O & Anor* CCZ 12/14.

of rules of civil procedure on access to the Superior Courts of Zimbabwe. It also takes an approach beyond stating the content of the rules of procedure and how the courts have interpreted them. The rules which are the focus of the study are analysed to establish whether they are compatible with the constitutional provisions on the right of access to the courts. Specific proposals on how the rules can be amended to enhance access to court are provided. No other Zimbabwean study has undertaken a substantive review of security costs, appeals, leave to appeal and referral of constitutional matters, which also focuses on the impact of these rules on the right of access to the court (and, by association, the right of access to justice).

The Law Society of Zimbabwe's *Handbook on Constitutional and Electoral Litigation in Zimbabwe: Context, Legal Framework and Institutions* (herein referred to as "the *Handbook*") has attempted to provide a clinical guide on direct and indirect access, standing, referrals and appeals to the Constitutional Court.[21] The *Handbook* is primarily a legal practitioner's guide on litigating constitutional and electoral issues in the Constitutional Court.[22] It does not examine the selected rules in the context of the right of access to the court. The *Handbook* does not cover the other Superior Courts: The High Court and the Supreme Court. The *Handbook* sets out what a practitioner must watch out for when litigating rather than critically assessing the provisions concerning *locus standi* or the right of access to the court. Furthermore, no study has been undertaken to investigate the impact of the referral procedure on access to the Superior Courts despite abundant evidence that several cases are being struck off the roll due to the technical requirements of the referral procedure.[23] The *Handbook* has attempted to begin a discussion on the referral of constitutional matters to the CCZ; however, it ends the discussion by pointing out that extensive preparations must be carried out at the referral or subordinate court level.[24] The requirements for the referral procedure are provided for in Rule 24 of the Constitutional Court Rules.[25] The referral procedure provides for the conditions, which, if not satisfied, will render the referral incompetent before the CCZ.[26]

The *Handbook* primarily focuses on the referral procedure's relevance in constitutional

[21] The Law Society of Zimbabwe *Handbook on constitutional and electoral litigation in Zimbabwe: Context, legal framework and institutions* The Law Society of Zimbabwe (2018).
[22] Ibid at 25.
[23] *Chihava and Ors v The Provincial Magistrate Francis Mapfumo N.O and Anor* CCZ 6/15, *Cold Chain (Pvt) t/a Sea Harvest v Makoni* CCZ-08-2017, see also *Chiite & 7 Ors v The Trustees of the Leonard Cheshire Homes Zimbabwe Central Trust* CC 10/17, *Prosecutor -General v Telecel Zimbabwe (Pvt) Ltd* CCZ 10/15.
[24] The Law Society of Zimbabwe op cite note 21 at 18.
[25] Ibid.
[26] Ibid.

litigation without interrogating whether the referral procedure enhances access to the court. More importantly, there is no other Zimbabwean study has dealt with (i) appeals in the Superior Courts and (ii) the strict requirements for the procedure, while (iii) there has been no analysis of why appeals to the Constitutional Court are to be limited to constitutional matters. This thesis seeks to fill that procedural knowledge gap by arguing that the current set of referral procedures is inflexible and complex, as a result inhibits access to the court.[27] This thesis also examines the leave to appeal rules in the Superior Courts. Again, there is no Zimbabwean research in this procedural area. More importantly, these selected rules have not been examined in the context of s69 (3) of the Constitution, which provides for the right of access to the court. This thesis critically examines these selected rules by conducting a comparative study of similar adversarial jurisdictions such as Kenya and South Africa (these jurisdictions have similar provisions). In other words, the principal legal theme of this thesis is to critically analyse the selected procedural rules to propose reforms to these rules and to provide a draft amended and redesigned set of rules and parts of the Acts of Parliament and Constitution of Zimbabwe, No 20 of 2013 with the principal aim of enhancing access to the court.

1.3. RESEARCH QUESTIONS

In seeking to fill the gap identified above, the questions that need to be answered in this thesis are:

1. How do procedural rules regulating security for costs, leave to appeal, referral of constitutional matters, and appeal procedures restrict the right of access to the Superior Courts of Zimbabwe?
2. How can the selected rules of procedure be reformed and redrafted to enhance access to court?

1.4. OBJECTIVES OF THE THESIS

This thesis examines selected rules of civil procedure, specifically, rules regulating security costs, leave to appeal, referral of constitutional matters and appeal procedure in the Superior Courts *viz* the right of access to the Superior Courts. It investigates the impact of the selected rules of procedure on the right of access to the court as entrenched in section 69 (3) of the Constitution. It further identifies those aspects of the selected rules that impede access to the Superior Courts, intending to propose a reformed procedural framework to improve reasonable

[27] Ibid.

court access. The thesis concludes by developing a template or draft for redesigning these rules to enhance court access. The thesis aims to establish a reasonable balance between the overriding objectives of procedural rules (to ensure order, consistency, public confidence, uniformity and the integrity of the courts) on the one hand and open and cost-effective access to the courts on the other.[28] The thesis also draws critical lessons on drafting the selected rules of civil procedure from the Superior Courts of other international jurisdictions with similar civil justice systems – particularly South Africa and Kenya.

South Africa, Kenya and Zimbabwe are former British colonies with similar constitutions.[29] These jurisdictions apply similar civil procedural rules to their respective Superior Courts, which are based on the adversarial principles of the English legal system. The South African experience of procedural reform is thus relevant to any reform of Zimbabwean rules. In addition, the experience of rule reform in Kenya – a Commonwealth jurisdiction with a similar adversarial justice system and a similar hierarchy of courts to that of Zimbabwe – is also relevant to any rule reform undertaken in Zimbabwe. Similarly, drawing some lessons from the Woolf reforms of 1998–1999 in civil procedure, which have enhanced access to the English courts, will enhance this study.[30]

1.5. THE ROLE OF CIVIL PROCEDURE AND ACCESS TO JUSTICE

The civil procedure may be described as the "mechanism to enforce rights, duties and remedies under the substantive law in litigation."[31] In other words, civil procedure law is at the service

[28] H Michael *Civil litigation and dispute resolution: Vocabulary series* Legal English Books Publishers (2013) argues that the purpose of the overriding objective is for the civil litigation and dispute resolution process to be fair, fast and inexpensive. See also *Hunker Trading Company Limited v Elf Oil Kenya Limited* 2010 eKLR.

[29] South Africa and Zimbabwe share the same common law, the Roman-Dutch law, although both countries' procedural law is primarily English. Note Kenya was a British Protectorate. The territory was administered via the British East Africa Company, like the British South Africa Company that also governed Rhodesia on behalf of the British government until 1963, when it became independent. As a result, the Kenyan legal system borrows heavily from the English legal system, just like Zimbabwe's procedural law. Hence, the English common law is a common denominator for all three African jurisdictions. It's the source country for the procedural laws applicable presently in South Africa, Zimbabwe and Kenya. This, therefore, makes a comparative aspect meaningful. See T Ojienda & L O Aloo *Researching Kenyan Law* Global Lex (2006), L Madhuku, *Introduction to law in Zimbabwe* Weaver Press (2010) and F du Bois 'Introduction: History, systems and sources' in *Introduction to the law of South Africa* (eds C G Van der Merwe & J E. Du Plessis) Kluwer International (2004) 1-54 and also E Halo & H.R. Kahn *The South African legal system and its background* Juta and Co. (1973) 1-20.

[30] Lord Woolf *Access to justice: Final Report To The Lord Chancellor on the Civil Procedure System in England and Wales* Stationery Office London (1996).

[31] C Theophilopoulos, C van Heerden & A Boraine *Fundamental principles of civil procedure* (4 ed) Lexis Nexis (2020) 1. See also K Clermont, *Civil procedure* West Academic Publishing's law School Advisory Board (2009) 1 and compare with L Madhuku op cit note 29. See also A Danilo De Santis, A Cabral, C H Kluge, E Vitorelli, E Oteiza, F D Sedlacek, J A Rojas, M V Mosmann & T T de Lucena, *Civil procedure review* (2021) 69 and also J W Glannon, *Civil procedure, examples and explanations* Aspen Publishers (2018) 201. Also, R Choudree 'Legal aid for the poor-poverty and access to justice routes to transformation' in *Access to Justice Workshop* (2002) Available at: http://www.undp.org [Accessed May 20, 2020].

of substantive law to realise it if a case arises, but without being absorbed.[32] Civil procedure impacts access to the courts. It can restrict access to the courts or increase the same. For example, Letto-Vanamo argues that:

> "The mere existence of independent and impartial courts does not alone guarantee individuals' access to justice. Courts must have the substantive and procedural capacity to handle disputes … It is commonplace for proceedings to last long while only a tiny portion of actions end in a judgment on the case's merits. The excessive duration of more minor claims makes costs exorbitant. As far as other kinds of disputes are concerned, it has led to movements aimed at promoting alternative dispute prevention and resolution models." [33]

Civil procedure is, therefore, at the heart of accessibility to courts by litigants. The structure and content of rules of civil procedure impact litigants' accessibility to courts. In other words, the rules of civil procedure must provide for access to a court and should not act as a barrier to accessing a court.[34] In general, the rules of civil procedure provide litigants and legal practitioners with (i) the avenue by which litigants institute proceedings; (ii) the choice of an appropriate court; (iii) the nature of proceedings, such as an action or application; (iv) the requisite documentation, especially the appropriate forms of pleadings; (v) matters relating to the notification and joinder of other parties to the litigation such as notices of set down; (vi) the conduct of proceedings including the right to be heard, trials, motions and enforcement of the judgment; (vii) the issuance of writs of execution and other forms of execution methods; and (viii) post-judgment remedies, appeals and reviews.[35] However, these procedures may become a procedural obstacle to litigants accessing justice in certain instances. Rules of civil procedure hinder accessing justice where the structure and content of a rule, especially how it is formatted, imposes procedural limitations on accessing the court. Whether represented or not, litigants sometimes face procedural hurdles in interpreting and using these rules. Furthermore, procedural hurdles are not removed simply because a litigant is diligent or represented. Lord Woolf (the author of the major English reforms of 1998–1999) regards the rules of procedure as purposive activities to aid the attainment of justice; therefore, the content

[32] W J Habscheid 'The fundamental principles of the law of civil procedure' (1984) 4 *Comparative and International Law of South Africa* 1-31.
[33] P Letto-Vanamo 'Access to justice: A conceptual and practical analysis with implications for justice reforms IDLO' *Voices Of Development Jurists Papers Series*, 2 (1) (2005) 19.
[34] Sternford Moyo is the current President of the International Bar Association and a senior lawyer in Zimbabwe with over thirty-five years of experience in litigation. During the Law Society of Zimbabwe Winter School on 17 July 2017, in an unpublished paper he presented, he took a hard line on the approach of judges who dismissed cases on technicalities. This discussion was once uploaded to the Law Society of Zimbabwe on 25 July 2017.
[35] Ibid.

and structure of rules must be designed to enhance access to the court and justice.[36] Some rules, even if complied with, have an outcome that would still be restricted access to the court.[37] Rules of procedure must be drafted to attain substantive justice and not hinder access to justice. Therefore, as Lord Woolf states, the overriding objective of the rules of civil procedure is to ensure that the "just, expeditious, proportionate, efficient and affordable resolution of disputes is achieved."[38] However, the content and structure of the rules of a system of civil procedure can easily impose a procedural obstacle to justice.[39]

The rules of civil procedure must be designed to enhance access to the court.[40] The rules of civil procedure are not an end in themselves but should provide an easily accessible procedural pathway to court.[41] The provision of certainty in access to the courts via rules of civil procedure is paramount in guaranteeing access to justice.[42] There is thus no access to justice without access to the court, and rules of procedure are at the heart of enabling such access.[43] Hancox J, in the Kenyan case of *Githere v Kimungu*, ruled that:

> "A court cannot conduct its business without a code of procedure. I think that the relation of rules of practice to the work of justice is intended to be that of a handmaid rather than a mistress, and the court ought not to be so far bound and tied by rules, which are, after all, only intended as general rules of procedure, as to be compelled to do what will cause injustice in the case."[44]

Thus, from the position settled in the *Githere* case above, the role of the civil procedure system

[36] J W Harris, *Legal philosophies* (2 ed) Oxford University Press (2004) 30.
[37] Texas Rules of Civil Procedure 2021 Rule 1, Objectives of the Rules. Colorado Rules of Civil Procedure 2021 Rule 25.
[38] Woolf op cit note 30, and also see H Y Levin *Civil procedure: Pleading* Langdell Press (2014).
[39] Ibid. See also Harris op cit note 36 at 30.
[40] See also the cases of *Vilikazi v Vilikazi* 1959 (1) SA 205 (T), *Hendricks v Wilcoks* 1962(1) SA 304 (South African cases).
[41] Compare with the Zimbabwean case of *Llyod Guwa & Hazel Claris Kumire v Willoughbys Investments Private Limited* SC 31/09 (Zimbabwean case).
[42] See J H Friedenthal, A R Miller, J E Sexton & H Hershkoff, *Civil procedure, cases and materials: Compact* (11 ed) West Academic Publishing (2013).
[43] R A Carp, K L Mannings, L M Homes & R Stidham, *Judicial process in America* (11 ed) SAGE (2020) 10, 223.
[44] *Githere v Kimungu 1976* EA 101(Kenyan case). The quote relied on in the case is directly extracted from C E Clark 'The handmaid of justice' (1938) 23 (3) *Washington University Law Quarterly* 297. Also see the case of *In re Coles* (1907) 1 K.B 1,4. See S J Wanjala *Substantive justice over procedural law in Kenya: Gains under The 2010 Constitutional dispensation*, Unpublished Dissertation, Strathmore University (2017), also R L Marcus, M H Redish, E F Sherman & J E Pfander, *Civil procedure: Modern approach* (7 ed), West Academic Publishing, (2018) 2.

in enabling litigants to access justice cannot be overemphasised.

1.6. SELECTED RULES AND PRINCIPLES OF CIVIL PROCEDURE THAT HAVE AN IMPACT ON ACCESS TO JUSTICE

This thesis focuses on the selected court rules identified above, which may restrict access to justice. These rules concern security costs, leave to appeal, appeals and referral of constitutional matters. Habscheid argues that access to court and the realisation of substantive law depends on procedural law.[45] Hence, access to substantive justice thus depends on procedural access to the courts. Thus, the selected rules of procedure must enhance access to the courts and justice.

1.6.1. The rule requiring security costs and its impact on access to justice

The requirement for an appellant to furnish security for costs concerns payment to the court of a fixed sum of money that the court considers appropriate to secure the respondent's costs if the appellant's action fails.[46] The rationale is that the respondent must be protected from frivolous and vexatious litigation, particularly where the financial standing of the plaintiff or applicant is questionable, thereby rendering the question of the recoverability of costs in due course a concern for the defendant.[47] Clearly, security for cost procedures can obstruct court access if not properly framed.[48] Firstly, it can hinder access to court in that a litigant can fail to raise the required amount of security, and thus, he/she cannot proceed with the litigation. Secondly, it means that a rich litigant with resources, even if the litigation is deemed frivolous or vexatious, may still have a right to access the courts as he/she can afford to pay the security for costs. Therefore, access to the courts in certain circumstances is determined by whether a litigant has financial resources. This thesis analyses the principle of security for costs regarding its relevance, particularly when weighed against its function of protecting an innocent party

[45] W J Habscheid op cit note 32. See also C Theophilopoulos et al op cit note 31.
[46] See also T Bekker 'Furnishing security for costs by an incola company - at last some legal certainty or more confusion? *Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd* (SCA)' (2017) *SALJ* 481. Further in *Fisheries Development Corporation of SA Ltd v Jorgensen and Another: Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd and Others* 1979 (3) SA 1331 (W) at 1339 E, the Court ruled that, "In the legal sense vexatious means frivolous, improper: instituted without sufficient ground, to serve solely as an annoyance to the defendant. Vexatious proceedings would also no doubt include proceedings which, although properly instituted, are continued with the sole purpose of annoying the defendant: abuse connote a misuse, an improper use, a mala fide, use for an ulterior motive."
[47] S Colbran, 'The origin of security for costs' (1993) 14 *The Queensland Lawyer* 44.
[48] See C Theophilopoulos et al op cit note 31 at 442, 445.

from vexatious litigation.[49] There is a need to redesign the provisions relating to security for costs in light of s69 (3) of the Constitution – "the right of access to the court".[50]

In certain circumstances, access to the Superior Courts of Zimbabwe and CCZ is also restricted by requiring a litigant to pay security for costs, even where the appellant and respondent are residents and domiciled within the court's jurisdiction. The Supreme Court Rules, 2018 make it mandatory for an appellant to furnish security for costs to the respondent,[51] and these procedures for security for costs are also set out in the Constitutional Court Rules.[52] While, generally, a requirement for security for costs is justified in cases involving peregrines, straw and insolvent litigants, in Zimbabwe, the rules of civil procedure governing such do not provide exceptions as in South Africa and Kenya. In South Africa, procedural amendments have been made to reduce the impact of legal costs on public interest litigation.[53] The South African Constitutional Court has had an opportunity to deal with the requirements for an order of security for costs and, where constitutional litigation is concerned, has adopted an approach aimed at minimising the adverse effects on court access costs for prospective litigants. The South African approach contrasts with the Zimbabwean position, where the stringent requirement on security for costs is still a mandatory part of the Superior Courts' rules.[54]

1.6.2. Leave to appeal and its impact on access to justice.

In Zimbabwe, for litigants to access the Supreme Court and the Constitutional Court, there are certain circumstances when a litigant is required to apply for leave (permission) of the court *a quo* or the court they seek to appeal to before instituting appeal proceedings. Application for leave to appeal must be lodged with the court and is not automatically granted. The rationale behind this rule is that not every case should find its way to the Superior Courts. There are two reasons for this rule. Firstly, some litigants may appeal merely to harass the successful party by increasing litigation costs. Secondly, there must be a finality to the litigation process; thus,

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[49] Ibid.
[50] I Currie & J De Waal *Bill Rights Handbook* (7 ed) JUTA 728. See *Shepherd v O'Neill* 2000 (2) SA 1066 (N) (South African case).
[51] Rule 46(1) of the Supreme Court Rules, 1964.
[52] Rule 42 of the Constitutional Court Rules, 2016, Statutory instrument (SI) 61 of 2016 as read with paragraph 12 of the Chief Justice's Practice Directive 1 of 2013, Supreme Court of Zimbabwe.
[53] *Thusi v Minister of Home Affairs* 2011 (2) SA 561 (KZP). See also *Shepherd* supra note 50, where the court ruled that Rule 49 (13) of the Uniform Rules of Court was unconstitutional. The rule required an appellant to furnish security for the respondent's costs of appeal unless the respondent had waived their right to demand security (South African case).
[54] Rules 37 & 38 of the Supreme Court Rules, 2018.

the requirement for leave to appeal embodies the civil procedure finality principle.[55] The rule argues that as much as leave to appeal rules are necessary where the rules of procedure are poorly drafted, as, in Zimbabwe, they may restrict access to the courts. Essentially, the purpose of the rule is to distinguish appeal cases utterly devoid of merit from those with reasonable prospects of success on appeal. In *Pichanick NO v Paterson*[56], the High Court ruled that leave to appeal can be granted if there are reasonable prospects of success on appeal. A litigant must demonstrate that his/her case has merit before being granted access to the next Superior Court.[57] Furthermore, the decision to grant or refuse leave is at the discretion of the presiding judge who awarded the final judgment. This means there is no procedural mechanism for an aggrieved litigant to obtain a second opinion from other judges when leave is denied. It is, therefore, argued that the rule of procedure requiring an appellant to seek leave to appeal before a single judge can restrict access to the Superior Courts. There is a need to examine this leave to appeal procedure in light of the right of access to the court as enshrined in s69 of the Constitution and the extent of permissible restrictions, compared with similar rules of South Africa and Kenya.[58]

1.6.3. Procedure for appeals in the Superior Courts of Zimbabwe and right of access to the court.

The appeal procedure in the Superior Courts is highly technical, and the approach by the Supreme Court has been to strike off appeals that do not comply with the technical requirements of the appeal procedure.[59] The reason is that the appeal procedure rules are drafted in peremptory terms.[60] Rules 37 and 38 of the Supreme Court Rules, 2018[61] stipulate that the notice of appeal must state the grounds of appeal and the relief being sought.[62] In addition, the notice of appeal must provide the date on which the court delivered the judgment that is being appealed against, and the appellant must indicate whether the appeal is against part of or the full judgment. In *Jensen v Acavalos*,[63] the Supreme Court held that an appeal that does not

[55] C Theophilopoulos et al op cit note 31 at 2.
[56] *Pichanick NO v Paterson* 1993 (2) ZLR 163(H).
[57] *CSD Enterprises (Pvt) Ltd v S & T Import and Export (Pvt) Ltd And Others* 1980 ZLR 238 (Waddington J) at 243.
[58] Compare with C Theophilopoulos et al op cit note 31 at 438-39, 441, 444.
[59] *Scheckem Barrister Ngazimbi v Murowa Diamons Private Limited* SC-27-2013.
[60] *Jensen* supra note 12.
[61] See the discussion of several Superior Courts of Zimbabwe judgments in note 4. Further the Supreme Court Rules, 2018 replaced the Supreme Court Rules, 1964 during writing of this thesis but no material changed in terms of the content and form of the Rules.
[62] S43 of the High Court Act.
[63] See *Jensen* supra note 12.

comply with the mandatory requirements of the appeal procedure is a nullity.[64] Several cases over time have been lost because of non-compliance with the provisions of the rules relating to appeals.[65] Hence in certain circumstances, the appeal procedure restricts the right of access to the court. Furthermore, in *Don Nyamande & Kingston Donga v Zuva Petroleum*,[66] Ziyambi JCC restrictively interpreted access to the Constitutional Court in appeal matters.[67] The judge ruled that the applicants had failed to establish any right to approach the CCZ directly through the appeal procedure.[68] The Court reasoned that the right of appeal to the Constitutional Court must exist first for a litigant to make such an appeal.[69] The ruling means that only litigants making appeals that raise constitutional issues have the right to appeal to the Constitutional Court. Therefore, in Zimbabwe, any matter not relating to a constitutional issue ends up in the Supreme Court, while in South Africa, any constitutional case and matters raising an arguable point of general public importance may end up before the Constitutional Court of South Africa.[70]

1.6.4. The referral procedure of constitutional matters to the Constitutional Court and access to justice

The CCZ is the final appellate court in constitutional matters.[71] However, in certain circumstances, a litigant may approach the CCZ not as a direct appellant but through the referral procedure. Hence the referral procedure is also available for a litigant to access the Constitutional Court. The referral procedure is provided for in section 175 (4) of the Constitution, which states:

> "If a constitutional matter arises in any proceedings before a court, the person presiding over that court may and, if so requested by any party to the proceedings, refer the matter

[64] *Matanhire v BP & Shell Marketing Services (Pvt) Ltd* 2004 (2) ZLR 147 (S). See *Church of the Province of Central Africa v Kunonga and Anor* 2008 (1) ZLR 413 (S).
[65] See note 4.
[66] *Don Nyamande & Kingston Donga v Zuva Petroleum* CCZ 8/15. This was an urgent application for a set down of appeal to the CCZ against a decision by the Superior Courts of Zimbabwe that saw over 30 000 workers being fired on notice. This was after the Supreme Court ruled that the right to terminate on notice was still part of Zimbabwean Labour Law. See Daniel Nemukuyu's "shock ruling on job termination… judgment a threat to job security, says labour expert" from the *Herald Zimbabwe* on 18 July 2015.
[67] Ibid.
[68] Ibid.
[69] Ibid
[70] Rule 32 (2) of the Constitutional Court Rules.
[71] Constitution of Zimbabwe, 2013, s167 (1) provides that "the Constitutional Court is the highest court in all constitutional matters, and its decisions on those matters bind all other courts".

to the Constitutional Court unless they consider the request is merely frivolous or vexatious."

The details of the referral procedure are provided in Rule 108 (1) of the High Court Rules, Rule 71 of the Supreme Court Rules, and Rule 24 of the Constitutional Court Rules. These specific rules offer a complex set of procedural requirements that have vexed lawyers, magistrates and judges.[72] This thesis argues that the complexity of the referral procedure to the CCZ regarding constitutional matters hinders access to the court. Case history indicates that several litigants who have tried to use the referral procedure in criminal and civil matters have failed to clear the requirement obstacles in the rules and have, for purely technical or administrative reasons, failed to be heard on the merits.[73] For example, in *Loverage Makoto v T.K Mahwe N.O and the Prosecutor General*,[74] the applicant unsuccessfully applied for direct access to the Constitutional Court, alleging that the refusal by the first respondent to refer a constitutional question to the CCZ amounted to an infringement of the right to equal protection of the law.[75] Therefore, the referral procedures require substantive reform or redesign to enhance access to the CCZ.

1.7. THE RIGHT OF ACCESS TO JUSTICE

Access to justice has been defined as comprising "three distinct but yet interdependent components".[76] The first component of substantive justice is determining rights claims for those who want a remedy.[77] The second component is the procedural aspect, which focuses on the prospects and obstacles to getting a litigant's claim into court.[78] The third component is the

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[72] The Chief Justice, Honourable Mr Justice L Malaba, The Procedure of referral of constitutional matters from a subordinate court to the Constitutional Court in terms of s175 (4) of the Constitution of Zimbabwe, A presentation at the end of the first Term 2019 Judges Symposium, Troutbeck Inn Resort, Nyanga, Zimbabwe Available at: www.jsc.org.zw. See *Nyagura v Ncube N.O and Ors* CCZ 7/19, *S v Tau* 1997 (1) ZLR 93(H) 99F.

[73] See for example *Tomana and Anor v Judicial Service Commission and Anor* HH 281/16, *Mwonzora and 31 Others v State* CCZ 9/15. Compare with *Director of Public Prosecutions Transvaal v Minister of Justice and Constitutional Development and Others* 2009 (4) SA 222 at 244B-C.

[74] *Lovemore Makoto v T.K Mahwe and the Prosecutor General* CCZ 03/20.

[75] Ibid.

[76] R Bahdi *Background paper on women's access to justice in the Middle East North Africa region* International Development Research Centre (2007) 3. See C R Albiston and R Sandefur 'Expanding the empirical study of access to justice' (2013) *Wisconsin Law Review* 102-103.

[77] R Bahdi op cit note 76 at 3, and D L Rhode 'Access to justice' (2001) 69 (5) *Fordham Law Review* 1785-1819; E R Sunderland 'The reform of civil procedure' (1923) *Law and Justice* 386 and L Hammergren *Access to justice: reflections on the concept, theory and its application to Latin American's judicial reforms* Royal Institute Elcano (2004); P McAuslan 'Making law work. Restructuring land relations in Africa' (2002) 29 *Development and Change*.

[78] C Loots 'Access to the courts and justiciability' (1998) 3 *Revision Service* 8-1 and 8-3; J Thornton 'Will the Jackson Review deliver access to justice in environmental cases (2010) *Pluto Journals* 28-31; A Allot *The limits of the law,* Butterworths (1980); A H Crawley *Helping pro se litigants to help themselves* (1996).

symbolic element of access to justice, which steps outside of doctrinal law and examines to what extent a specific legal regime upholds citizens' rights and empowerment.[79]

The definition of access to justice is best understood in the historical context of the development of access to justice debate. The access to justice debate became more pronounced in the 1960s and more robust around the 1980s[80] and was influenced by the rise of the welfare state and a growing human rights movement.[81] Cappelletti argues, "..the access to justice perspective for several decades has been the manifestation of a new approach to legal scholarship and legal reform in several countries".[82] The access to justice approach has formed a new vision repudiating the formalistic approach, which has long prevailed in most Western countries, especially Europe.[83] This formalistic approach identifies the law within the systems of norms formed by the State. However, according to Cappelletti, in theory, the access to justice movement is rooted in a fundamental criticism of legal formalisation and dogmatism and calls for better recognition of the complexity of human society.[84] However, the access to justice debate initially focused on procedural access instead of substantive justice.[85] The access to justice discussion during its initial phase focused on three 'waves' of reform: (i) legal aid and advice to the poor, (ii) class actions and (iii) public interest litigation.[86] As a result, legal aid, class actions and public interest litigation were touted as potentially transformative enhancers of access to justice.[87] However, even in many European countries and the United States of America, even in recent times, legal aid, class action and public interest litigation are partial and not a comprehensive remedy.[88] Buttressing the inadequacy of legal aid, class action and public interest litigation, Rhode argues that even[89] America has one of the least effective

[79] R Bahdi op cit note 76 at 3. See Administrators (COSCA). T.P. and L.C. of the C. of S.C: Position paper on self-representing. In USA: COSCA. (2000) 1-2. See also P Murinda, *Access to legal aid for indigent women: an analysis of the services offered by the legal aid directorate in Harare.* Unpublished Thesis, University of Zimbabwe (2008) 8.
[80] M Cappelletti (Ed) 'Access to justice and the welfare State' (1983) 81(4) *Michigan Law Review* 1006.
[81] See M Cappelletti 'Alternative dispute resolution process within the framework of the worldwide access-to-justice movement' (1993) 56 *The Modern Law Review* 282.
[82] M Cappelletti op cit note 80 at 283. See A Reppy 'Book review' 1953 (2) *The American Journal of Comparative Law* 568.
[83] Ibid and compare with R Angler 'Justice for all including the unrepresented poor: revisiting the role of the judges, mediators, and clerks' (1987) *Fordham Law Review* 67.
[84] M Cappelletti op cit note 81 at 282.
[85]Ibid at 282-283. See K A Lash, P Gee & L Zelon 'Equal access to civil justice: pursuing solutions beyond the legal profession' (1998) 17 *Yale Law Review* 489-501.
[86] M Cappelletti op cit note 80 at 1007.
[87] See J P George 'Access to justice, costs and legal aid' (2006) 54 *The American Journal of Comparative Law* 293-315.
[88] D L Rhode *Access to justice* Oxford University Press, (2004) at 3-4
[89] Ibid at 3-4; M R Anderson Access to justice and legal process: making legal institutions responsive to poor people in LCDs Institute of Developmental Studies (2003).

systems for legal assistance.[90] She further argues that American courts have failed to recognise the right to appoint counsel in civil cases, except in minimal circumstances. Hence, the argument is advanced in this thesis: that while other aspects discussed above enhance access to justice, focus on reforming selected rules of procedure increases access to justice.

Thus, this thesis focuses on analysing the selected rules of civil procedure with a view to providing litigants with effective procedural access to a court. The term "effective access" emphasises the procedural ability of a litigant to obtain a remedy rather than merely bringing proceedings before a court.[91] Thus, at the heart of procedural access to a court is the concept of effective access, which involves the entire court process up to the remedy. It is, therefore, argued that the analysis and reform of the selected rules of civil procedure are best informed by access to justice literature. However, not every component of access to justice is relevant and appropriate to this thesis.[92] The relevant literature is that which analyses and critiques procedural principles to improve procedural access to the Superior Courts of Zimbabwe.

In the case of Zimbabwe, procedural law has never been emphasised to enhance access to the court. No attempt has been made by the judiciary or the legislature to critically analyse the development or propose reform of the selected procedural rules considering Zimbabwe's socio-economic environment. This omission of analysing the development of the selected rules of procedure can be attributed to the general overlooking of the impact and simplification of reality experienced by litigants navigating the selected rules of civil procedure. Hence Cappelletti asserts that "in over-simplification of reality, the law and the legal systems are seen exclusively in their formal aspect, while their real-world components, subjects, institutions, processes and, more generally, their social context are neglected".[93] It is accepted in legal scholarship that a system of civil procedure exists in a defined social context and is largely a product of social change, among other factors, and hence the need to study the historical development of the rules of civil procedure in Zimbabwe before prescribing the reforms.[94]

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[90] D L Rhode op cit note 77 at 1786-8 and compare with C Nyamu-Musembi *The urban poor. Problems of access to human rights: Traditional justice institutions - can they be more effective* (2002) 43.
[91] F Francioni *Access to justice as a human right* Oxford University Press (2007) 1.
[92] It is important to note that this thesis does not seek to deal with all facets of access to justice and justice. Justice may also among other aspects include equity and fairness, which may, at times, dictate that a case either by an indigent person or even a rich person be thrown out even before it is heard.
[93] M Cappelletti op cit note 81 at 282 and Anon 'Human rights defined' Available at: http://www.humanrights.com/what-are-human-rights.html (2012) [Accessed March 21, 2021] and J O'Hanlon, H Sanders & A Teixeira *Access to justice or access undone* (2010).
[94] Ibid at 282.

The evolution of the Zimbabwe legal system has been primarily shaped by historical events, particularly the colonisation process.[95] There were changes in socio-economic and political structures throughout the colonisation period.[96] Colonisation introduced new social norms, values and political developments that shaped the Zimbabwean legal system.[97] Zimbabwean civil procedure was also materially influenced by these colonial social norms, values and political developments.[98] As Cappelletti points out, the socio-economic and political factors have an impact on justice institutions, processes and access to justice. Further, Cappelletti argues that the principal elements of a system of civil procedure are the 'people' within a particular jurisdiction (inclusive of their cultural, economic and social peculiarities), the 'institutions' within a state, and the 'procedures', whether criminal or civil.[99] He also highlights the importance of the institutions and processes from which the law originates.[100] The independence and effectiveness of these institutions materially shaped the form and content of the rules of law and procedural rules. Cappelletti argues that "the legal system is not seen as a separate, autonomous, autopoietic system but as an inseparable and integrative part of the more complex social system, a part that cannot be artificially isolated from economics, ethics and politics".[101] Cappelletti's contextualisation of access to justice applies to Zimbabwe in keeping with its historical, political, cultural, economic and social peculiarities.

Therefore, the right of access to the court in Zimbabwe must be examined within Cappelletti's tri-dimensional conceptualisation of law.[102] The first dimension relates to how the law reflects societal problems that then prompt the establishment of legal institutions.[103] The second dimension encompasses the legal response – mainly reflecting the norms, legal institutions and court processes that deal with societal demands.[104] The third dimension is the outcome of the legal response to societal needs. More so, as Cappelletti argues, the field of law is not only about the practice and application of legal principles to determine litigants' disputes (clearly significant in themselves) "but is also concerned with the underlying challenges and

[95] E Sithole, Access *to justice for the poor*. *A law reform proposal*, Unpublished Thesis, York University (1990) 1-23.
[96] E Sithole *Civil procedure-Zimbabwe* IEL Civil Procedure (2022) 13-18.
[97] Ibid.
[98] Ibid.
[99] M Cappelletti op cit note 81 at 283.
[100] Ibid.
[101] Ibid at 282.
[102] Ibid; B Rob 'Ethics issues regarding the concept of unbundled legal services' (1999) Available at: http://www.unbundledlaw.org. [Accessed August 25, 2016].
[103] M Cappelletti op cit note 81 at 283.
[104] Ibid

fundamental issues about the nature of legal rights and obligations".[105] Thus, there is a need for a holistic approach which, in addition to substantive law reform, also focuses on procedural law reform to increase access to justice.

In addition, as Chan argues, there is a need to resolve the underlying challenges in fulfilling those rights and obligations, and among those challenges are the procedural hurdles encountered when parties bring their matters before the court.[106] Similarly, Cappelletti says that the societal problem is the failure to realise the civil rights and liberties of the ordinary person owing to economic, organisational and procedural obstacles. Therefore, it is vital that the investigation and examination of selected rules of civil procedure are focused on enhancing access to court and, in turn, access to justice. After all, access to justice is acknowledged "as a cornerstone of human rights and a human right in itself, and access to the court is an important ancillary component of this right".[107]

1.8. RIGHT OF ACCESS TO THE COURT AS A COMPONENT OF ACCESS TO JUSTICE

There is no access to justice without access to the courts, tribunals or other fora for resolving disputes.[108] The right of access to the court "consists of a 'Hohfeldian liberty'[109] and a right to a fair hearing".[110] The right to a fair hearing guarantees access to an impartial and independent tribunal or court to redress a dispute.[111] Budlender strengthens this argument by referring to the ECHR court case of *Airey v Ireland*, where it was held that the right of access to the courts incorporates the right to present one's case effectively before a court.[112] Therefore, access to court is more than instituting a suit before a court of law; it includes the capacity to prosecute

[105] Ibid and compare with J M. Greacen 'Self-represented litigants and court and legal services responses to their needs: what we know' California Administrative Office of the Courts (2002). Available at: http://www.lri.lsc.gov. [Accessed January 10, 2019]. Also K Makamure, I Shivji & J Stewart *Report of Committee of Enquiry into the Legal Aid Clinic of the Faculty of Law* Zimbabwe (1988).
[106] G K Y Chan 'The right to access to justice, judicial discourse in Singapore and Malaysia' (2007) 2 (1) *Asian Journal of Comparative Law;* M Mark 'The strange triumph of human rights-1933-1950' (2004) *The Historical Journal* 379-398.
[107] Francioni op cit note 91. Compare with Currie & de Waal op cite note 50.
[108] V Lima & M Gomez *Access to justice: Promoting the legal system as a human right, in peace, justice and strong institutions* Springer International Publishing (2019) 1-10 defines access to justice as a fundamental principle of the rule of law. It is a fundamental right that allows individuals to use legal tools and mechanisms to protect their rights.
[109] The term 'Hohfeldian liberty' was coined after an American Jurist, Wesley Newcomb Hohfeld. In Hohfeldian's theory, liberty is defined by an absence of both a duty and a right. See Budlender op cit note 108 at 339.
[110] Geoff Budlender 'Access to courts' (2004) 121 *The Southern African Law Journal* 339.
[111] Ibid at 340.
[112] *Airey v Ireland* 1979 2 EHRR 305 (English case).

the case and obtain a remedy.[113] Budlender includes, as components of effective access to the court, the litigant's knowledge of which court to approach, an understanding of the procedural aspect and the ability to present a matter before the court.[114] This thesis argues that the selected rules of civil procedure for the Superior Courts in their current form do not provide effective access to the courts.

1.9. THE RIGHT OF ACCESS TO THE COURT UNDER THE INTERNATIONAL CONVENTIONS AND TREATIES

The right of access to the court is an international right. Article 8 of the United Nations Universal Declaration of Human Rights,1948 (UNTS No 217a (iii) hereinafter referred to as the UDHR) provides that every person has the right to effective relief by a competent national court or tribunal against infringement of the fundamental rights provided by a constitution or by law. The UDHR provisions are similar in content to those of the European Convention of Human Rights in art 6(1) and also provide for a right to a fair and public hearing within a reasonable period in civil matters by an independent and impartial dispute resolution platform.[115] Thus, art 6(1) of the European Court of Human Rights (ECHR) provides the right to effective court access, meaning that the procedural system must allow litigants to institute and execute their cases before the courts. The rules of civil procedure are, therefore, not intended to be an end in themselves but rather a mechanism that facilitates access to justice in an orderly, expeditious and effective manner. Both the United Nations International Convention on Civil and Political Rights (ICCPR)[116] and the ACHR[117] have made bold pronouncements on the centrality of access to court in realising substantive law. Article 14 of the ICCPR provides that "everyone is equal before the law and has a right to a fair hearing". At the same time, the American Convention on Human Rights (ACHR) art 24 also provides for a right "to simple and prompt recourse or any other effective recourse for protection against acts that violate their fundamental rights recognised by the constitution or laws of the state or by these conventions, even though, such violation may have been committed by persons acting

[113] Budlender op cit note 110 at 341.
[114] Ibid at 341.
[115] European Convention of Human Rights, 1950 was opened for signature in Rome on 4 November 1950 and came into force on 3 September 1953. Also see the Law Society of Upper Canada *Access to justice report of the Law Society of Upper Canada* (2008).
[116] United Nations International Convention on Civil and Political Rights, 1976 was adopted by the United Nations General Assembly on December 19, 1966, and came into force on March 23, 1976.
[117] American Convention on Human Rights known also as the Pact of San Jose was adopted in San Jose, Costa Rica on 22 November 1969 and came into effect on 18 July 1978.

in the course of their official duties".

The African Charter on Human and People's Rights (ACHPR),[118] in particular, emphasises the importance of court access to provide an effective remedy. The ACHPR in art 7 provides the right to a litigant to appeal to a competent national organ against any acts violating fundamental freedoms recognised and guaranteed by conventions, laws, regulations and customs in force. In interpreting the ACHPR, in *Antoine Bissangou v Republic of Congo*[119] (the *Bissangou case*), the African Commission on Human Rights and People's Rights ruled that it would be inconceivable for art 7(b) to provide for an appeal before the national courts for an act that violates fundamental rights without providing for the execution of judicial rulings. The African Commission further ruled that the execution of the final judgment by the tribunal or legal courts must be recognised as an integral part of the right to be heard, which is enshrined in art 7. The African Commission noted that unless a system of effective execution is available, other forms of private justice will emerge that would have undesirable consequences for public confidence and credibility in the justice system.[120] In other words, the Commission found that the lack of an effective remedy in the legal system owing to limitations in the procedure relating to the enforcement of a judgment was a violation of the right of access to the court.

The Southern Africa Development Community (SADC) Treaty also states that SADC member states are bound to act according to "the principles of human rights, democracy and the rule of law".[121] In the SADC Tribunal case of *Barry Gondo & Ors v The Republic of Zimbabwe*[122] (*Gondo* case), the rule of law was interpreted as inclusive of the fundamental human right to an effective remedy, the right of access to an independent and impartial court or tribunal and the right to a fair hearing.[123] The applicants had obtained a judgment against

[118] The African Charter on Human and People's Rights, 1981 was concluded at Nairobi, Kenya on 27 June 1981 and registered by the Organisation of African Unity (now AU) on 28 December 1988.
[119] *Antoine Bissangou v Republic of Congo* [2006] ACHPR 76.
[120] S Liebenberg & K Pillay (eds) *Socio-economic rights in South Africa: A resource book* Community Law Centre, University of the Western Cape (2000) 14.
[121] See SADC Treaty, 1992 Article 4(c) & 6(1). The SADC Treaty, 1992 was signed on 17 August 1992 in Windhoek, Republic of Namibia.
[122] *Barry Gondo & Ors v The Republic of Zimbabwe* SADCT-05-2008. The SADC tribunal was later disbanded in 2011 due to pressure from countries like Zimbabwe after the Gondo and other judgments. See L Nathan 'The disbanding of the SADC Tribunal A cautionary tale' (2013) 35 (4) *Human Rights Quarterly* 870-892. Also see A Afadameh-Adeyemi 'Case review: *Barry Gondo & 8 Others v The Republic of Zimbabwe* SADC (T) 05/2008' (2011) 1 *SADC Law Journal* 203-205.543221§
[123] *Mike Campbell (Pvt) Ltd v Republic of Zimbabwe* SADC (T) 2/2007.

the Government of Zimbabwe but could not enforce it

1.10. THE RECOGNITION OF THE RIGHT OF ACCESS TO THE COURT UNDER CONSTITUTIONS

Several countries have enshrined in their constitutions the right of access to the court, for example, South Africa and Kenya. Zimbabwe constitutionalised the right in 2013. The Constitution of Zimbabwe, 2013, provides for the right of access to the court as a human right,[124] and s69 (3) provides as follows:

> "Every person has the right of access to the courts or to some other tribunal or forum established by law for the resolution of any dispute."

In referring to the State, the Kenyan Constitution, 2010, in s48 sets out:

> "The state shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice."

Furthermore, in reference to individuals, the Kenyan Constitution, 2010, in s50(1) provided as follows:

> "Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."

The Kenyan Constitution constitutionalises the right of access to justice, and that automatically means that access to the court is also enshrined as a right. In fact, a reading of s50 of the Kenyan Constitution clearly shows that access to court is integral to the right of access to justice in Kenya. Section 159 (2) (d) of the Kenyan Constitution provides the right of access directly as follows:

> "In exercising judicial authority, the courts and tribunals shall be guided by the following principles – justice shall be administered without undue regard to procedural technicalities."

The South African Constitution has similar provisions to the Kenyan Constitution. In s34, the

[124] The right of access to the court was included in the Bill in 2013 and the courts are yet to make a ruling on the extent of its application. See also J M Macauley 'Current ethical and unauthorised practical issues relating to endeavours to assist prose litigants' (2002) 51 *Virginia Lawyer* 43 on the importance of right access to the court.

South African Constitution provides that:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

The Zimbabwean courts, unlike their counterparts in South Africa, are yet to decide on the extent of the application of the right of access to the court.[125] This thesis argues that the selected rules of procedure must enhance access to court as enshrined in s69 of the Constitution of Zimbabwe. With their present wording or formulation, the selected rules of procedure under investigation in this thesis do not advance the right as enshrined in s69 (3) of the Constitution of Zimbabwe, No 20 of 2013 and, therefore, require substantive reform. This thesis will formulate a reworded iteration/version of the selected rules to provide every litigant with an enhanced practical ability to access the court.

1.11. THE ROLE OF COURTS IN ENHANCING ACCESS TO JUSTICE

Courts are at the centre of the formal justice system. They are the levers of justice in the formal justice system. A litigant who intends to use the court system has, therefore, a need to access courts.[126] Courts must be physically and geographically accessible to enhance access to justice. Reasonable access to courts also means access to justice. The central role of the courts may also be viewed as a necessary part of an effective democracy, as access to justice is rationally tied to a just society.[127] This is so because courts protect individuals' rights and freedoms against arbitrary and unlawful interference.[128] The court must be impartial, independent, incorruptible and able to provide a remedy for meaningful justice to the parties.[129] The general populace, rich and poor, must be able to access the courts geographically and procedurally fairly.[130] Courts are, therefore, central to access to justice.[131]

In Zimbabwe, the Superior Courts are not easy to access geographically as the High Court

[125] Currie & De Waal op cite note 50 at 714 and also M Galanter & J K Krishnan 'Bread for the poor: Access to justice and the rights of the needy in India (2004) 55 *Hastings Law Journal* 789.
[126] A Ngulube 'The role of the judiciary in safeguarding and ensuring access to criminal justice: The case of Zambia' Paper presented at a Judicial Colloquium entitled *Working Towards Just, Peaceful and Inclusive Societies: Promoting Rule of Law and Equal Access to Justice*, Twangale Park Hotel Lusaka, 21-22 April 2016 Available at www.southernafricalitigationcentre.org [Accessed on 14 June 2020]
[127] Pia Letto-Venamo op cite note 33 at 4.
[128] Ibid.
[129] Ibid.
[130] G Connellan 'Access to justice' (2001) 13(3) *Legaldate* 5-8.
[131] L M Friedman & R V Percival 'A tale of two courts: Litigation in San Benito counties' (1973) 8 *Law & Society Review* 217-340.

of Zimbabwe is physically situated only in cities or towns in five out of ten provinces: Harare (main High Court seat), Bulawayo, Mutare, Gweru, Chinhoyi and Masvingo seat. Other provinces remain without a High Court seat, although the High Court of Zimbabwe is one court whose jurisdiction covers the whole country regardless of where the courthouse is situated. In those provinces, litigants must travel to the nearest courthouse to access the High Court. This geographical access problem is further compounded by the selected rules of civil procedure, which are restrictive and have never been the subject of reform. This thesis suggests a redesigned set of rules to enhance access to the Superior Courts and access to justice.

1.12. THE ROLE OF THE STATE IN ENSURING ACCESS TO JUSTICE

Although courts are key enablers of access to justice, the courts exist in a political and socio-economic space that the State usually controls. Thus, the State has a dynamic role in ensuring access to justice. The State is the policy maker, and it passes laws that ensure that access to justice is enhanced or fails to do so. However, not every State can positively influence access to justice.[132] An autocratic State would not be able to improve access to justice because it, in most cases, does not want to be accountable to its citizens.[133] Therefore, an authoritarian State may not be interested in enhancing access to justice because it would undermine its existence.[134] An authoritarian State may even use restrictive rules of procedure as an instrument of repression.[135] To ensure enhanced access to justice, a State must uphold the rule of law.[136] In essence, the judiciary must operate independently of the executive.[137] Furthermore, the State must be willing to be bound by court judgments and ensure that it provides mechanisms for enforcing judgments. There cannot be justice where a State does not uphold the rule of law. Even the reform of substantive and procedural law depends on whether a State is committed to funding the process and enacting the regulations resulting from the proposed law reform.[138]

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[132] P H Solomon 'Courts and judges in authoritarian regimes' (2007) 60 *World Politics* 122-145.
[133] H L Root and K May 'Judicial systems and authoritarian transitions' (2006) 45 *The Pakistan Development Review* 1301-1321.
[134] F F Shen-Bayh, *Autocratic courts in Africa*, Unpublished Thesis, University of California (2018) 1-4.
[135] Ibid 37.
[136] G Helmke Courts under constraints: Judges, generals and presidents in Argentina Cambridge University Press (2005).
[137] J Ramseyer 'The puzzling independence of courts: A comparative approach' (1994) (2) *The Journal of Legal Studies* 721-747.
[138] G Barron *The World Bank and rule of law reforms* Working Paper Series, Development Studies Institute (2005) 20-26.

1.13. THE ROLE OF JUDICIAL INTERPRETATION OF RULES OF CIVIL PROCEDURE IN ENHANCING ACCESS TO COURT

Rules of procedure play a central role in access to the courts. Rules of procedure may be a barrier to access to the court and justice. However, some rules may enhance access to the court. Specific rules in the Superior Courts of Zimbabwe allow for condonation or indulgences for failure to comply with the rules. These are Rule 7 (a) of the High Court Rules, Rule 4 of the Supreme Court Rules, 2018 and Rule 5 of the Constitutional Court Rules.[139] These Rules allow a reasonable divergence from the strict application of rules and allow a judge discretionary power to grant condonation where there is non-compliance. However, courts sometimes do not make a liberal interpretation of the rules in applying rules.[140] In *Biguzzi v Rank Leisure,*[141] Lord Woolf held that the overriding objective of the rules (the primary purpose of rules) is to enable the courts to determine cases fairly without being tied down by procedural technicalities. Lord Woolf described the approach of striking out proceedings as extreme and not justified.[142] Prior to the introduction of the principle known as the 'Oxygen Principle',[143] Lord Woolf noted that the courts have usually taken draconian steps such as striking out proceedings for want of compliance with the rules of court, which has led to an increase in the cost of litigation and wasted judicial time and resources – as many cases may later be reinstated before the courts through condonation.[144]

1.14. METHODOLOGY

The thesis is based on desktop research of legal literature relevant to:

(i) Access to the courts and justice.

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[139] Rule 7 (a) of the High Court Rules, 2021. Similarly worded are Rule 4 of the SCR and Rule 5 of Constitutional Court Rules.

[140] J D Pinsler 'The effect of non-compliance with rules of procedure: A survey of recent cases' (1993) July 1993 *Singapore Journal of Legal Studies* 187-197. See H S Douglas and M Lici *Rules of civil procedure chapters, General matters Rule 2-Non-compliance with the Rules, 2021* CanLIIDocs (1984).

[141] *Biguzzi v Bank Leisure PLC* 1999/0700/2 1 WLR 1926 (Supreme Court of Judicature, England).

[142] Ibid and New Hampshire Bar Association 1999. 'Unbundled services: assisting the prose litigant; practical ethics' N H Bar Association Ethics Committee Available at: *http://www.nhbar.org* [Accessed April 19, 2018].

[143] The 'Oxygen Principle' was developed in the case of *British Oxygen v Board of Trade* [1971] AC 610, a UK case. The court in the British Oxygen case ruled that justice must be administered without undue regard to procedural technicalities. Hence this principle is regarded as 'Oxygen' emanating from this case law. C Hilson 'Policies, the non-fetter principle and the principle of substantive legitimate expectations: Between a rock and a hard place?' (2006) 11 *Judicial Review* 289-293 and D Stott & A Felix *Principles of administrative law* Cavendish Publishing Limited (1997) 13, 81. Compared with the case of *Burmah Oil v Lord Advocate* [1965] ALLER 348 (English case) and also De Smith, *Woolf and Jowell's principles of judicial review* Sweet & Maxwell (1999) 643-645.

[144] Woolf op cite note 30.

(ii) A critical analysis of the selected rules of procedure.

(iii) A comparative study of similar rules of procedure in South Africa and Kenya.

The research in this thesis is based on primary and secondary sources of civil procedural data. The primary sources include the Zimbabwean Constitution, 2013; the High Court Act (7:06); the Supreme Court Act (7:13); the Constitutional Court Act (7:22); the High Court Rules, 2021; the Supreme Court Rules, 2018; and the Constitutional Court Rules, 2016. Secondary sources on access to justice, access to court and civil procedure were used – mainly textbooks, journal articles, online resources, theses and newspaper articles. Where relevant, the information analysed was compared with the content of selected rules in other jurisdictions, such as South Africa and Kenya, which have similar common laws and rules of civil procedure. This research relied heavily on primary and secondary legal sources such as statutes (Acts of Parliament and Regulations), relevant cases and secondary writings. There are no written material sources in Zimbabwe on the impact of the selected rules of civil procedure on access to the courts. No study in Zimbabwe has examined the selected rules *viz* the right of access to the Superior Courts of Zimbabwe.

Whilst writing this thesis, the Minister of Justice enacted several changes in the Zimbabwean structure and content of rules. Initially, the Constitutional Court had no rules, and the new rules were promulgated in 2016 (the Constitutional Court Rules, 2016). Secondly, the Supreme Court Rules, 1964 were repealed and substituted by new rules – the Supreme Court Rules, 2018. Thirdly, when concluding and finalising this thesis, the High Court Rules, 1971 were repealed and substituted with the High Court Rules, 2021. Fourthly, the Constitutional Court Act came into force. However, the content of the High Court Rules, 2021 and the Supreme Court Rules, 2018 remained unchanged; mostly, the rules were rearranged. The Constitutional Court Act further narrows and restricts the right of access to the CCZ. These recent developments illustrate how important it is to critically analyse the right of access to the Superior Courts of Zimbabwe in relation to the selected rules of civil procedure.

1.15. LIMITATIONS

A limitation of this research is that there are very few articles on selected rules of procedure.[145] Scholars such as Sithole highlight the procedural hurdles as one inhibitor of access to justice

[145] W Oslen 'Triangulation in social research: Qualitative and quantitative methods can really be mixed' in *Developments in sociology* Causeway Press (2004); C Robson *Real world research* (3 ed) Wiley (2011) generally.

without explicitly identifying the rules that need reform.[146]

1.16. THE STRUCTURE OF THE THESIS

The thesis contains six chapters. Chapter 1 introduces the theoretical foundations of access to justice and courts, the problem statement and the research questions. It also briefly sets the literature review for the thesis: defining the role of civil procedure, internationalisation of the right of access to the court and access to justice. Furthermore, it sets the problematic rules of procedure that restrict access to the courts. In addition, it examines the role of courts and the State in enhancing access to the courts. It briefly explains why reference will be made to a comparative analysis of foreign legal systems with rules that ensure access to justice. Chapter 2 presents the study's theoretical foundations; it focuses on conceptualising the right of access to the court and its recognition, particularly in South Africa, Kenya and Zimbabwe. Chapter 3 concerns the historical aspects of courts in Zimbabwe and the development of the selected rules of civil procedure, critically examining the current court structure.

Chapter 4 discusses the selected rules of procedure that limit access to justice. Furthermore, Chapter 4 justifies the need to reform the selected rules. Chapter 5 compares the selected rules of procedure: leave to appeal, appeals and security cost procedures of Zimbabwe, South Africa and Kenya. Chapter 6 sets out the conclusions and recommendations of the thesis, including a redesigned draft of the selected rules.

1.17. CONCLUSION

This chapter demonstrated that the right to access justice is related to the right to access the courts. The right of access to the court is a procedural component of access to justice. Furthermore, access to justice and the courts are rights recognised in international law and have been entrenched in many constitutions. Rules of civil procedure also have an impact on access to the courts. The rules of civil procedure may restrict access to the court. In this chapter, selected rules were identified that restrict the right of access to the court. In addition, it was argued that the State and courts have a role to play in enhancing access to the courts. However, the selected rules require reform.

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[146] Sithole op cit note 133; Asian Development Bank Law and policy reform at the Asian Development Bank; S Golub & M McQuay 'Legal empowerment: Advancing good governance and poverty reduction' in *Access to justice* (eds R Messick & L Beardsley Eds) World Bank Empowerment Retreat (2000) 1-4. See C Dawson *Practical research methods* How to Books Ltd (2002) generally.

CHAPTER TWO

THE DEVELOPMENT AND RECOGNITION OF THE RIGHT OF ACCESS TO THE COURT AND JUSTICE IN ZIMBABWE

2.1. INTRODUCTION

This chapter critically analyses the development and recognition of the right of access to the court and justice and its interpretation in various adversarial jurisdictions. The discussion is narrowed to analyse the right of access to the court and justice in Zimbabwe and its recognition. Furthermore, a critical analysis is made of the impact of rules of procedure on litigants' right to access the courts and justice in a general context. This chapter thus provides the relevant theoretical framework justifying the need to reform the selected rules of civil procedure to enhance access to the Superior Courts of Zimbabwe.

2.2. ACCESS TO JUSTICE AND ITS COMPONENTS

Access to justice has been defined as the ability of litigants to seek and find legal solutions or relief through formal or informal justice institutions.[1] Informal institutions include arbitration, mediation, tribunals and other linked *fora*, while traditional or formal institutions include customary and formal law courts. Some essential elements of the access to justice concept are normative legal protection, legal awareness, legal aid and counsel, adjudication, enforcement, civil society oversight and individual access to the courts.[2] These essential elements are critical enablers in accessing justice but are not the focus of this thesis.

Behind the concept of access to justice lies the need to ensure equal access for all litigants seeking justice in court. Equal access means that all individuals can reach formal and informal institutions.[3] Access to justice, among other aspects, also focuses on removing the barriers that

[1] See United States Institute of Peace 'Access to justice' Available at: www.usip.org [Accessed October 11, 2021] at para 7.8.1.

[2] See United Nations Development Programme 'Access to justice practice note' Available at: www.usip.org (2004) [Accessed October 11, 2017] and also L Schetzer, J Mullins & R Buonamano 'Access to justice and legal needs, a project to identify legal needs, pathways and barriers for disadvantaged people in NSW' Background paper Available at: www.lawfoundation.net.au (2002) [Accessed March 7, 2017]. It is important to note that this thesis is not delving into defining the concept of justice. The concept of justice is a broad concept, which deals with, among other issues, equity and fairness, which may at times dictate that a case either by an indigent person or even a rich person be thrown out even before it is heard. See OECD 'Open society justice initiatives and better policies for better lives: Workshop on understanding effective access to justice' Available at: www.oecd.org (3-4 November 2016) [Accessed June 2, 2017].

[3] See G R Nicho 'Judicial abdication and equal access to the civil justice system' (2010) 60 (2) *Case Western Reserve Law Review* 333 and also United Nations Development Programme 'Access to justice, practice note' op cit note 2.

prevent litigants and potential litigants from accessing justice;[4] thus, recognising the right of access to the court as a component of access to justice. This recognition of access to court as a right gained ground in the late 1970s under the influence of Cappelletti.[5] Cappelletti's first approach to access to justice reform initiatives was to push for enhancing legal aid to the indigent plaintiff.[6] This resulted in improved access to legal assistance. Thus, the right to access justice is a primary right with a fundamental role in the administration of justice.[7] In European inquisitorial systems, through the research carried out by European Union Agency for Fundamental Rights (FRA), access to justice is regarded as a right with multiple core components; for example, adequate access to an independent dispute resolution platform linked to other issues such as the availability of legal and sufficient remedies.[8] The FRA further holds that the right to access justice obliges States to protect each individual's right to access a court or an alternative dispute resolution platform to obtain redress if it is found that the individual's rights have been infringed.[9] The FRA further understands access to justice as an enabling right that helps litigants enforce other collateral rights.[10]

The FRA's definition of access to justice is further reinforced by Schmitt, who argues that access to justice has certain similarities with other related human rights, such as the right to a remedy and the right to a fair trial.[11] Likewise, in the European human rights system, the European Convention on Human Rights acknowledged the right of access to justice as a fundamental part of the right to a fair trial governed by art 6 of the ECHR.[12] As Schmitt observes, in other human rights systems, such as the European one, distinct legal requirements

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[4] R Gargarella 'Too far removed from the people. Access to justice for the poor: The Case of Latin America' Available at: www.ucl.ac.uk [Accessed 11 January 2018]. See also 'United Nations Development Programme 'Access to justice, practice note' op cit note 2.

[5] E Hurter 'Access to justice: to dream the impossible dream?' (2011) 44 (3) *The Comparative and International Law Journal of Southern Africa* 410.

[6] Ibid at 410 and A S Tsanga *Taking law to the people, gender, law reform and community legal education in Zimbabwe* Weaver Press (1996) and *A S Tsanga Taking law to the people, gender, law reform and community legal education in Zimbabwe* Weaver Press (2003).

[7] P Schmitt *Access to Justice, and international organisations. The case of individual victims of human rights violations* Leuven Global Governance, Edward Elgar Publishing (2017) 91.

[8] European Union Agency for Fundamental Rights, *Access to justice in Europe: an overview of challenges and opportunists*, Fundamental Rights Agency of the European Union, (2011) generally.

[9] European Union Agency for Fundamental Rights, *Handbook on European law relating to access to justice,* European Union Agency for Fundamental Rights and Council of Europe (2016) 16.

[10] Ibid at 16.

[11] Schmitt op cit note 7 at 91 and A Moyo, 'Standing, access to justice and human rights in Zimbabwe' in *Selected aspects of the Zimbabwean Constitution and The Declaration of Rights* (ed A Moyo) Raoul Wallenberg Institute (2019) 208-209.

[12] European Convention on Human Rights, 1970. See also Schmitt op cit note 7 at 92. Compare with R Clayton & H Tomlison *Human Rights Law* (2 ed) Oxford University Press (2000) 589-590 and also the case of *S v Sonday and Anor*, 1995 (1) SA 497 (C) at 507C (South African case).

govern both the right of access to justice and the right to a remedy. [13]

Access to justice is commonly associated with legal aid institutions and the indigent litigant, including measures such as free legal advice, limits on legal fees, waivers of court fees and legal assurance for individuals encountering financial difficulties.[14] However, there has been a significant shift from that characterisation of access to justice to one that includes the right of access to the court – mainly procedural and substantive access. Therefore, access to justice is also concerned with procedural access. Franciosi argues that "access to justice is employed to signify the possibility for the individual to bring a claim before a court and have a court adjudicate over it".[15] However, in the broader sense, as Franciosi observes, it also includes the ability to access a remedy; the result of civil litigation is a legal remedy. Schmitt's conclusion seems to be that the right of access to justice and the right to an effective remedy are closely related but are not one right.[16]

Francioni, however, further notes that access to justice is concerned with providing legal aid for the indigent[17] and that judicial remedies without legal assistance would be accessible only to those with the financial resources necessary to meet the often-prohibitive cost of lawyers and the administration of justice.[18] However, the provision of legal aid is very limited even in developed countries and nearly non-existent in Africa and Zimbabwe. Thus, legal aid cannot sufficiently address the access to justice needs in Zimbabwe and Africa. Hence there is a need for other mechanisms to enhance access to justice. Thus, Schmitt argues, access to justice must also include other dispute settlement mechanisms, such as arbitral tribunals, national human rights institutions, equality courts and ombudsman institutions, which enhance access to justice. [19]

In his conclusion on the nature and extent of the right of access to justice, Schmitt submits that the right of access to justice must be distinguished from the right to a remedy, which focuses on the procedural aspect. At the same time, the latter emphasises the substantive result

[13] Schmitt op cit note 7 at 94.
[14] Ibid at 92.
[15] Ibid at 92.
[16] See Article 25 of ACHR. See *Garcia Lucero et al v Chite* 1 ACHHR, 28 August 2013, Series C No. 267, para 182. See the case of the Constitutional Court decision in the matter of *Aguirre Roca v Peru* No 35/98, 31 January 2008, Senex c No. 71, para 90 p 94 (Chile case)
[17] F Francioni *Access to justice as a human right* Oxford University Press (2007) 1.
[18] Ibid at 1.
[19] Schmitt op cit note 7 at 92.

of the proceedings.[20] Schmitt submits further that the right to an effective remedy is applicable only later than the right of access to justice, which is then seen as the right to bring the claim before a dispute settlement platform.[21] His assertion is reinforced in the case of *Golder v the United Kingdom,*[22] where the ECHR held that the right of access to the court formed an inherent component of the right to a fair trial enshrined in art 9 (1) of the ECHR.[23]

The same approach to interpreting the right to an effective remedy and the right to a fair trial was taken in *Airey v Ireland*[24] (ECHR), where the court held that the right of access to the court must provide an adequate remedy. Thus, the requirement for an effective remedy inevitably introduces the link with the principles of due process of law and the right to a fair trial. It inherently includes the execution of judicial decisions.[25] The right to access justice suggests access to obtaining the realisation of justice. This inevitably involves co-existing parent rights, such as the right to bring an effective remedy and obtain a fair trial.[26]

The most critical observation made by Schmitt is that the right of access to justice has achieved the status of international customary law, which binds all subjects of international law, including states and international organisations.[27] Shelton weighs in further, arguing that the right of access to justice constitutes the right to an effective remedy, and he contends that the obligation to provide effective remedies is essential to international human rights law.[28] Hence, access to court is a component of access to justice and may be defined as a 'Hohfeldian liberty,' which includes a guarantee of an independent court or tribunal, the right to a fair hearing and an effective remedy.[29] Under the Hohfeldian categorisation, a right means that a particular individual is legally safeguarded from interference by another person or against another person's withholding of assistance concerning a specific individual's project.[30] For example, Budlender[31] argues that a law restricting access to the courts is inconsistent with the

[20] Schmitt op cit note 7 at 95.
[21] Ibid.
[22] *Golder v The United Kingdom* (1976) 1 EHRR 524. The United Kingdom cases are referred to for three reasons. Firstly, the civil procedure in Zimbabwe is largely English; secondly, in the United Kingdom, there have been a number of reforms around the civil procedure for example, Lord Woolf and Jackson's reform proposals. Lastly, the United Kingdom is the former colonial master of Zimbabwe.
[23] Schmitt op cit note 7 at 96.
[24] *Airey v Ireland* 1979 2 EHRR 305.
[25] Schmitt op cit note 7 at 96.
[26] Ibid.
[27] Schmitt op cit note 7 at 97.
[28] D Shelton Remedies in international human rights law Oxford Academic (2006) 8.
[29] G Budlender 'Access to courts' (2004) 121 *The Southern African Law Journal* 339.
[30] Ibid 339 and compare with the Prescription Act (08:11), See the case of *Zimasco Private Limited v SAN HE Mining Private Limited* HH-654-15 (Zimbabwean case).
[31] Ibid.

South African Constitution because it inhibits access to justice.[32] In criminal matters, he also points out that specific laws limiting an accused's procedural ability to communicate with his/her attorney are unreasonable deviations from the Constitution of South Africa.[33] Thus, in practice, the State is responsible for fully realising the right to court access. Thus, the state ensures that courts are independent and accessible.

The independence of courts is essential to reasonable access to court and dispensation of justice.[34] However, the ECHR, in the English case of *Airey v Ireland* (the *Airey* case), ruled that the independence of the court alone is not adequate without regarding the issue of the affected party or claimant being able to bring their case before the court effectively.[35] Access to court is more than the mere provision of physical court structures; it includes the ability of a litigant to place their matter before a competent court.

When placing a matter before the court, a litigant must utilise rules of civil procedure.[36] Access to court means more than the legal right to bring a claim before a court. In most instances, the litigant, without legal representation, cannot obtain an effective remedy.[37] The necessary skills to achieve court access, commence the case and present it to court are requisite; these skills are beyond the capability of Zimbabweans and ordinary people in other African countries.[38] It is argued in this thesis that the solution, particularly in Zimbabwe, lies in the reform of the selected rules of civil procedure, which are discussed in the next chapters.

2.3.THE RIGHT OF ACCESS TO THE COURT AS A HUMAN RIGHT

The right of access to the court has gained recognition internationally. Many international

[32] Ibid.
[33] Ibid. See also H M Weissman, Y Mcgee, O Mohamed, S Sajadi, S Sawyer, M Stratton, J Wolfe & D M Weissman *A basic human right: Meaningful access to legal representation, The Human Rights Policy Seminar*, University of North Carolina School of Law, (2015) 5.
[34] G Budlender op cit note 29.
[35] See the case of *Airey v Ireland* (1979) 2 EHRR 305 (English case).
[36] R Matsikidze, The civil procedure in the Magistrates Courts of Zimbabwe. A denial of justice to self actors? Unpublished Thesis, University of Zimbabwe (2014).
[37] Y A Vawda 'Access to justice: From legal representation to promotion of equality and social justice – addressing the legal isolation of the poor' (2005) 26 *Obiter* at 235 and also R McMahon 'Access to Justice for all' (2010) (69) 1 *The American Journal of Economics and Sociology* 206, who argues that without counsel one is left with questionable access and undoubtedly not meaningful access to justice.
[38] G Budlender op cit note 29 at 341. See M Cappelletti, G Bryant & Nicolo Trocker 'Access to justice, variations and continuity of a world-wide movement' (1982) 46 *Journal of Comparative and International Private Law* 664-707. In addition, see R Moorhead & P Pleasence 'Access to justice after universalism: Introduction' (2003) (30) 1 *Journal of Law and Society* 8.

instruments recognise the right of access to the court.[39] The universal recognition of this access right makes it indispensable in any legal system. Access to court has been accepted as a human right in various international instruments, such as the UDHR,[40], which addresses access to justice and the court.[41] The UDHR calls for equal treatment before the law, the cornerstone of economic and social development. Hence, the law must provide equal opportunities and access to the protection of rights across all economic strata.

In addition, the right of access to the court and justice is embodied in art 8 of the UDHR, which provides as follows:

> "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or law."

Article 8 of the UDHR entrenches a critical aspect of the rule of law: there must be access to the court and a remedy to a claim. Whether represented or not, litigants require a remedy at the end of the litigation. This is why rules of procedure that fail to provide an effective remedy infringe on this critical right. The right of access to the court is expanded to include the right to an effective remedy. Thus, the court procedures must provide an adequate remedy at the end of the litigation process, whether through an action or an application procedure. The right of access to the court includes the ability to execute judgments against the debtors, private individuals, legal persons or state institutions.

Substantive law is to no purpose if litigants do not realise the obligations and rights embodied therein, and the failure to access courts may result in the litigants resorting to self-help. The International Covenant on Economic, Social and Cultural Rights, 1966 is another international legal instrument that buttresses the importance of this right.[42] Article 3 of the International Covenant on Economic, Social and Cultural Rights provides that the states must "ensure the equal right of men and women to the enjoyment of all economic, social and cultural

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[39] See art 2 of the International Covenant on Civil and Political Rights adopted and opened for signature, ratification, and accession by General Assembly resolution 2200A (XXI) of 16th December 1966, entry into force on 23 March 1976. See also article 25 of the European Convention on Human Rights came into force on 21 September 1970.

[40] United Nations Universal Declaration of Human Rights, 1948 (UDHR).

[41] See www.ichrp.org. Website comments on art 7 of the UDHR, 1948 and Nicholas Capaldi 'The meaning of equality' Available at: www.media.hoover.org/ files/documents [Accessed February 12, 2018]. Compare with J Baker *Arguing for equality*, Verso Publications, (1987) 5. Also, art 7 of UDHR provides for equal protection before the law without discrimination.

[42] The International Covenant on Economic, Social and Cultural Rights, 1966.

rights outlined in the present Covenant".

The ability of litigants to enjoy all the economic, social and cultural rights depends on their ability to bring their claims before the courts since rights, as provided in statutes, are meaningless if not procedurally realised. This means that the realisation of substantive rights – civic, political, economic, social, cultural or environmental – depends on the litigant's right to access the court. Hence, although traditionally, the right of access to the court has been categorised as procedural; its characteristics have evolved in modern jurisprudence with its classification as a human and constitutional right, which has transformed it into a dual right, both a substantive and a requirement for there to be procedural fairness.

The substantive aspect of the right of access to the court is based on the fact that it is claimable, just like the right to vote. Secondly, it can be demanded like any other substantive right. Thirdly, its absence can trigger international and civic society (non-governmental organisation) scrutiny in the same way as when there is a violation of any other substantive right. It is not a right that one would find in court. It is enjoyed whether one decides to go to court or not. Hence, its importance cannot be overemphasised. It is the other side of substantive rights.

The ICCPR[43] in art 2 (3) provides that States must ensure that there is an effective remedy to any violation or potential violation of rights and freedoms and that the State should develop the possibilities of judicial remedy and ensure that state institutions enforce such remedies when granted.

The ICCPR focuses on an important procedural component of the right of access to the court: an effective remedy. It is recognised that once rights or freedoms have been infringed, it is not sufficient to have a remedy – there must be an effective remedy.[44] In *Gondo*,[45] it was held that the absence of an effective remedy for litigants who obtained a judgment but could not enjoy the remedy or relief therein amounts to them having no redress. In other words, the judgment creditor is put in the same position he or she was in before approaching the court.[46] The litigant who has not come to a court after an alleged violation of their rights and the one

[43] International Covenant on Civil and Political Rights (ICCPR), 1966.
[44] See M Kuijer 'Effective remedies as a fundamental right' Seminar on Human Rights and Access to Justice in The European Union, *Escuela Espanola & Europena Judicial Training Network* (28-29 April 2014) 1-20.
[45] *Barry Gondo & Ors v The Republic of Zimbabwe* SADCT-05-2008
[46] M Reneman 'Access to an effective remedy in European Asylum Procedures' (2008) 1(1) *Amsterdam Law Forum* 65-98.

who has approached the court after the breach would be in the same position, as both have no remedy. Article 2 (3) (b) of the ICCPR provides the requirements of the claim for a remedy, which includes access to the formal courts – providing a primary forum for an effective remedy.

However, access to court remains one of the avenues among several alternatives that can effectively improve access to justice. These alternatives are administrative and legislative authorities and informal institutions comprising private mediation, arbitration and med-arbitration processes, which should be included in the legal system to provide an effective remedy. As stated in ICCPR art 3 (c), the final component of an effective remedy is that competent authorities must enforce such remedies. Furthermore, only some people will likely satisfy the judgment debt without being compelled to pay. There are many instances when legitimate judgment execution processes must be applied even against state actors to realise rights. However, the authorities enforcing those rights must be legitimate and expertly equipped with adequate skills and resources.

The American Declaration of the Rights and Duties of Man[47] provides for the equality of persons before the law in art II. This entails that the legal instruments in domestic law should provide and facilitate equal access to the court. There can be no equality before the law without equal access to courts, and equality before the law cannot be achieved without enabling access to courts. Enjoyment of rights is anchored on access to court, without which any rights – civic, political or economic – are only theoretically accessible. In art XVIII of the American Declaration, it is further provided that every person has the right to petition the courts to ensure respect for his/her legal rights, and there must be a simple, brief procedure whereby the courts safeguard litigants from acts of authority that prejudice or violate any of their fundamental constitutional rights. Article XVIII illustrates the importance of a simple and brief procedure to ensure that litigants or persons who wish to approach the courts can do so without hindrances. Hence, the right of access to the courts dates to 1948 and was then clearly a human right that enabled access to other human rights.

Furthermore, the ACHR, 1978[48] protects the right of access to the court. Article 8 of the ACHR provides the right to a fair hearing within a reasonable time before a competent, independent, impartial tribunal established by law to determine civil rights and obligations. In

[47] American Declaration of the Rights and Duties of Man, 1948. The declaration was adopted by the Ninth International Conference of American States on 2 May 1948 at Bogota in Colombia.
[48] The convention, signed at San Jose, Lesta on 22 November 1969, came into force on 18 July 1978 and is also known as the Pact of San Jose.

this context, the right to a hearing presupposes access to court, and the ACHR provides the further critical element of a hearing with due guarantees. In addition, the ACHR art 24 buttresses this by providing for equality before the law without discrimination. The ACHR art 25, para 2, is more explicit concerning the protection of the right of access to the court and provides for:

> "…everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognised by the constitution or laws of the state concerned or by the ACHR even though such violation may have been committed by persons acting in the course of their official duties."[49]

In addition, the ACHR art 25, para 2, provides that "every person claiming a remedy their rights would be determined by the competent authority provided for by the state's legal system and which offers a judicial remedy enforced by competent authorities".[50] The rules of procedure of a legal system should provide for a prompt, effective and meaningful judicial recourse. The rules, as further elaborated in the ACHR art 25, para 2, also provide for the enforcement of judicial remedies.

The European Convention for the Protection of Human Rights and Fundamental Freedoms, 1953 (ECPHRFF)[51] contains provisions for the right of court access. The ECPHRFF is similar to the ACHR. Article 6 provides for the adjudication of civil rights and obligations through a fair and public hearing, within a reasonable time, by an independent and impartial tribunal constituted by law. These international instruments clearly show that the right of access to the court is deeply rooted in the history of human rights.[52]

In Europe, in the *Golder* case[53] in 1975, the ECHR had to resolve a point of fundamental importance concerning whether art 6[54] provides for the way legal proceedings must be conducted or, in addition, for the right of access to the courts. It held that,[55] in line with the

[49] Article 25 (1) of ACHR.
[50] Article 25 (2) of ACHR.
[51] European Convention for the Protection of Human Rights and Fundamentals Freedom, 1953. The convention was signed in Rome in November 1950, and it entered into force as per Article 66 on 3 September 1953.
[52] A H Robertson & J G Merrills *Human rights in Europe: A study of the European Convention on Human Rights* Manchester University Press (1963) 85. See also S Ludwig *Human rights and history, past and present*, Vol 232, Oxford Academic, (2016) 279-310.
[53] *Golder v The United Kingdom European Court of Human Rights*, Application no 4451/70, judgment handed down on 21 February 1975.
[54] K Boyle 'The European experience: The European Convention On Human Rights' (2009) 40 *VUWLR* 167-173.
[55] Robertson and Merrills op cit note 52 at 86.

preamble to the Convention and the statutes of the Council of Europe concerning civil matters, there can be no rule of law without the possibility of access to the courts.[56] In the *Golder* case, it was ruled that the principle that a civil claim should be capable of submission for adjudication and judgment is a widely recognised principle of law. The same applies to the principle of international law, which forbids the denial of justice.[57] In *Golder*, it was concluded that art 6 (1) of the ECPHRFF must be read in light of the previously discussed principles; therefore, the right of access to the courts constitutes an element inherent in the right stated by art 6 (1).[58]

The European Court on Human Rights' decision in the *Golder* case that art 6 (1) of the ECPHRFF confers a right of access to the courts ranks as one of its most important judgments because, apart from its immediate consequences, it proved the scope of expanding the European Convention's protection through an imaginative interpretation of its terms. The right of access to the court is the anchor of the rule of law. There is no rule of law without access to the court.

Another important case that concretises the importance of the right of access to the court is *Airey v Ireland*, followed by the *Golder* case.[59] Mrs Airey, in the matter, argued that the UK's denial of her right of access to the court violated ECHR art 6, 8, 13 and 14 as the State failed to provide a procedural framework that allowed the applicant to prosecute her matter as a violation of the right of access to the court.[60] The ECHR then ruled that the State's failure to ensure that the applicant had meaningful access to court to enable her to obtain a judicial separation was a breach of art 6 (1).[61]

In the *Airey* case, the United Kingdom had argued that the applicant enjoyed access to the High Court as Mrs Airey could go before that court with or without legal representation. The European Court, however, ruled that the European Convention on Human Rights is intended to safeguard rights that are not "theoretical or illusory but practical and effective, and especially the right of access to the courts, which has a prominent place in a democratic society".[62] The

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[56] Ibid at 87.
[57] *Airey v Ireland* (1979) 2 EHRR 305.
[58] Robertson and Merrills op cit note 52 at 87; J Cavallaro & S E Brewer 'The virtue of following the role of inter-American litigation in campaigns for social justice' (2008) 8 *SUR-International Journal on Human Rights* 85-194.
[59] *Airey v Ireland* op cit note 57 at 305.
[60] Ibid.
[61] I Pernice 'The right to effective judicial protection and remedies in the EU' in *The Court of Justice and the Construction of Europe: Analysis and perspectives on sixty years of case law* (La Cour de Justice et la Construction de l'Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence) (eds Judge A Rosas, Judge E Levits & Advocate general Y Bot) Springer (2012) 381-395 and S L Buhai 'Access to justice for unrepresented litigants: a comparative perspective'(2009) 979 *Loyola of Los Angeles Law Review* 42.
[62] See also C Loots 'Access to the courts and justiciability'(1998) 3 *Revision Service* 1-8

Court ruled that it was critical to ascertain whether Airey's appearance before the High Court without legal representation did not affect her capacity to present her case fully.[63] Therefore, it is not enough to argue the existence of the right to appear before the court without representation. The inquiry goes beyond that to the critical question of whether such an appearance would effectively result in a litigant getting justice. In *Airey*, the Court concluded that from the above facts, the procedural inaccessibility denied the applicant an effective right of access to the court. Hence, it also did not constitute a domestic remedy whose use was required by art 26 of the European Convention.

Furthermore, access to the courts is a right central to the realisation of substantive rights, as the *Airey* case demonstrates; however, it also has limitations, in particular, that the right to take one's case to court is not the same as a right to approach the court while by-passing prerequisite administrative or other non-judicial procedures.[64] Robertson and Merrills argue that the right of access to the court should be thought of more as a guarantee of final judicial control than as a right of instant access.[65] This view may have been superseded by recognising access to the court as a constitutional right.[66] The right of access is central – even to the subsistence of a democratic system. The rule of law, the right of access to the court and democracy are linked. This is even in regional human rights instruments; the right of access is enshrined. For example, the Declaration of the Basic Rights of Asian People and Governments, 1983, provides that every State must enforce and protect its people's fundamental liberties and rights.[67] This includes the right of access to the court.

Furthermore, the ACHPR[68] has a more technically elaborated right of access to the court and provides in art 7 for the right to "an appeal to competent national organs against acts violating a person's fundamental rights as recognised and guaranteed by conventions, law, regulations and customs in force". The essence of the right to access court cannot be

[63] See also M Kuijer 'The right to a fair trial: Effective remedy for excessive lengthy proceedings' Articles 6 and 13 ECHR EJTN Seminar, (28 February 2013) 1-13 Available at: www.ejtn.eu (2013) [Accessed February 10, 2018].
[64] Robertson and Merrills op cit note 52 at 87.
[65] Robertson and Merrills op cit note 52 at 87. See also *Malone v United Kingdom* (1984) 7 EHRR 14 and compare with *TP and KM v United Kingdom* (2002) 34 EHRR 2 at 107 (English case)
[66] C R Andrews 'A right of access to court under the Petition Clause of the First Amendment: Defining the right' (1999) 60 *Ohio State Law Journal* 558-691.
[67] This declaration was unanimously adopted by the first General Assembly of the Regional Council on Human Rights in Asia at Jakarta on 9 December 1983 and presented to the Asian Secretariat on the same day.
[68] The African Charter on Human and People's Rights, 1986 was drawn up by the Eighteen Assembly of the Heads of State and Government of the Organisation of Africa Unity on 17 June 1981 and came into force on 21 October 1986.

overemphasised. It is the cornerstone of any democratic society that seeks to develop itself fully. Therefore, some countries have included the right in their municipal laws, and others have constitutionally enshrined it – as will be discussed further below.

It is further accepted that even in ensuring non-discrimination, access to court is critical. The Convention on the Elimination of all forms of Racial Discrimination Against Women, 1979[69] buttresses this right by providing in art 5 (a) that:

> "State parties undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the right to equal treatment before the tribunal and all other administrative organs."

Therefore, the right of access to the court also includes protection against discrimination when it comes to benefiting from the law, which in turn includes access to a court of law.

Furthermore, the system of procedural law, particularly the selected rules of civil procedure, may precipitate inequality in patriarchal societies where men have resources. Women may not be able to challenge the status quo in those circumstances. Firstly, women would be unable to challenge men because of resource constraints. Secondly, meaningful access to court for them would only be possible if they were represented; many are not because of a lack of resources. Thus, the right to access the court is for everyone – including women, children and the marginalised.

Realising and protecting rights is practical only if the legal system does not disadvantage those who want access. The right of access to the court considers indigenous, tribal and minority interests. The Indigenous and Tribal People's Convention No 6, 169, adopted by the International Labour Organization in 1989, provides in art 7 (1): "Indigenous people have the right to decide their own goals, including the process of development, concerning their beliefs, institutions, and spiritual well-being and to exercise to control over their economic and cultural development, as well as being involved in programming for national and regional development which affects them." It is clear that the legal system is part of a society's institutions, and access to the court must be available to all represented or not represented.

[69] Convention on the Elimination of all forms of Discrimination Against Women, 1979 and F Viljoen *International human rights law in Africa* (3 ed) Oxford University Press (2015) 120 and M Cappelletti 'Dispute resolution. Civil justices and its alternatives'(1993) 56 (3) *Modern Law Review* 56.

The right of access to the court is indispensable in realising human rights and development. For this reason, it is now globally recognised and enshrined in the constitutions of many countries.[70] Therefore, it is a primary theme in this thesis. There is no meaningful justice without access to the courts. This implies that Zimbabwe must expand its right of access to the court by ensuring its rules of civil procedure enhance access to the court. The right of access to the court is a yardstick of how firmly established democracy is within a particular country.

2.4.THE RECOGNITION OF THE RIGHT OF ACCESS TO THE COURT

There is a growing trend towards recognising the right of access to the court. Globally, many countries, for example, Mozambique and South Africa, which are neighbours of Zimbabwe,[71] have embraced the need to include the right to access court as a constitutional right and to offer a litigant the opportunity to raise constitutional issues relating to whether rules of civil procedure or part thereof violate their right of access to the court. Some other countries in Africa have constitutionalised this right. In South Africa, this right is constitutionally secured in Chapter 2-Bill of Rights,[72] and court rules must provide that access. For example, in *Thint Holdings (Southern Africa) (Pty) Ltd*,[73] the Constitutional Court ruled that although s34 guarantees that persons whose rights have been infringed are not barred through procedural and other obstacles from getting a remedy from the courts, s34 cannot be interpreted to grant standing to persons who allege violations of their rights but who have previously received a full and proper hearing in another court.[74] The State, in realising the right to access the courts and other tribunals or fora, must allow for their proper functioning and the protection of *bona*

[70] See Chapter 2 s64 (1) (h) of the Constitution of Lesotho. See also the Constitution of the Republic of Namibia, Chap 3, art 10 – All persons shall be equal before the law; art 12 (a).

[71] The Constitution of Mozambique, in art 62, Access to Courts, provides: "The State shall guarantee that citizens have access to the courts and that persons charged with a crime have the right to defence, legal assistance, and aid." And in art 70, Right of Recourse to the Courts as follows: "Every citizen shall have the right of recourse to the courts against acts that violate their rights and interests recognised by the Constitution and the laws."
This right has similar content to that enshrined in s69 (3) of the Constitution of Zimbabwe. The Angolan Constitution in art 23 (1) provides that "everyone shall be equal under the Constitution and by law". Article 29 (1) is more elaborate and provides the "right of access to the law, and courts, to safeguard their rights and interests and also provides that justice cannot be denied to anyone due to a lack of financial means". Thus the Constitution of Angola, in mandatory terms, provides access to the law and the courts. More importantly, it provides legal aid to those who cannot afford legal costs. What remains to be ascertained is whether, in practice, the state ensures that the right is realised. Nearer home, the Constitution of Botswana in s "where any person institutes proceedings for such a dispute (civil) determination before such a court or other adjudicating authority, the case must be given a fair hearing within a reasonable time." Botswana is thus silent on the right of access to the court. However, in s41 (1) and 41 (2) of the Constitution of Malawi, the right of access to the court is provided expressly.

[72] See South Africa's Bill of Rights, Available at: www.saha.org.za [Accessed March 14, 2019].

[73] *Thint Holdings (Southern Africa) (Pty) Ltd v National Director of Public Prosecutions: Zuma v National Director of Public Prosecutions* 2009 (1) SA 1 (CC) (South African case).

[74] I M Rautenbach & Malherbe-Rautenbach *Constitutional Law* LexisNexis, (2018) 451 and compare with J Fowkes 'How to open the doors of the court-Lessons on access to justice from Indian PIL' (2011) 27 *SAJHR* 438.

fide litigants. The State is also responsible for providing the legislative frameworks, procedures, institutions (such as courts) and infrastructure to enable the execution of court orders.[75] This entails that the State must ensure that the rules of civil procedure are there to allow access to the court. In addition, the State is responsible for ensuring that its citizenry gets an effective remedy.

The Constitution of Zimbabwe, No 20 of 2013 in s69 (3) provides as follows:

> "Every person has the right of access to the courts, or some other tribunal or forum established by law to resolve any dispute."

The Constitution of Zimbabwe, No 20 of 2013 provides a focused provision on the right of access to the courts, tribunals or fora established by law to resolve disputes.[76] There is no limitation on this right save the general restrictions imposed in s86 of the Constitution of Zimbabwe.[77] The right to court access includes the right to a fair hearing. [78]

As explained earlier, the right is similar to s34 of the Constitution of South Africa, which provides that:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

Budlender has interpreted this right of access to the court and a fair hearing to include factors such as the significance of the case for the party concerned, the intricacies of the issues, the capacity of the party to represent themselves effectively, the risk of procedural faults if a party is not represented and the possible inequality of arms if the other party is likely to be represented.[79]

Another example may be taken from the Constitution of Kenya, 2010, which enshrines the right of access to the court in s48, which provides:

> "The State shall ensure access to justice for all persons, and if any fee is required, it shall be

[75] Ibid at 453.
[76] Section 69 (3) of the Constitution of Zimbabwe.
[77] G Budlender op cit note 29 at 344.
[78] In the Zimbabwean case of *Bruce Irving Watson v The State* SC-17-2006, the Supreme Court held that the right to a fair trial was limited to criminal matters.
[79] G Budlender op cit note 29 at 344.

reasonable and not impede access to justice."

Furthermore, s50 (2) of the same Constitution provides that:

> "Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."

Sections 48 and 50 (2) must be read together with s159 of the Constitution of Kenya, 2010, which provides that:

> "In exercising judicial authority, the courts and tribunals shall be guided by the following principles-
> b. justice shall not be delayed;
> d. justice shall be administered without undue regard to procedural technicalities; and
> e. ……..."

These provisions of s48 of the Constitution of Kenya, 2010 explicitly include the right of access to justice. The wording of s48 of the Constitution of Kenya, 2010 further consists of the right to access the court. In addition, and similarly worded to s34 of the South African Constitution, is s50 of the Constitution of Kenya, 2010, which also provides for the right of access to the court. Thus, two provisions in the Kenyan Constitution emphasise the right of access to the court. The Kenyan Constitution clarifies that procedural technicalities must not be unduly regarded in dispensing justice. This means that the rules of procedure should not unduly restrict access to the court.

Although it is not a country under comparison in detail, it is critical to consider briefly the legal framework providing for the right of access to the court in the United Kingdom, the colonial master for South Africa, Zimbabwe and Kenya. In the United Kingdom,[80] the right of access to the court is also statutorily defined. In the United Kingdom, human rights are enshrined in the Human Rights Act of 1998. In art 6 (1), it is provided:

> "In determining his civil rights and obligations or any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial

[80] In this thesis, the legal system of the United Kingdom is used or referred to as that of England because it is similar to Zimbabwe, South Africa and Kenya. Further, it should be noted that England does not have a written constitution.

tribunal established by law."

Article 6 protects a litigant's right to a fair trial and ensures that a litigant has access to the courts. It also gives one the right to bring a civil case before the courts. The common law of the United Kingdom recognised the right of access to justice and the courts as fundamental rights.[81] In *R v Secretary for the Home Department ex p Leech*,[82] Steyn LJ held at 210A that: "It is the principle of our law that every citizen has a right of unimpeded access to a court". This was further fortified in *R v Lord Chancellor exp Witham*[83] when Laws J held that the common law affords special protection to the right of access to a court as a constitutional right.

The case of *Campbell and Fell v the United Kingdom*[84] involved prisoners charged with disciplinary offences allegedly participating in a sit-in, who were denied their request to consult a solicitor. The prisoners were later allowed to consult with their solicitor in the vicinity and hearing distance of a prison officer. The ECHR found that the absence of privileged communication between the attorney and the client violated the right of access to the court. Further, the Supreme Court in *Unison v R*[85] held that the constitutional right of access to the courts is inherent in the rule of law.[86]

In the *Unison* case, it was held further that the importance to society of the right of access to the courts was not restricted to cases in which the courts decided questions of general importance. The Supreme Court ruled that litigants and juristic persons needed to know, on the one hand, that they would be able to enforce their rights and, on the other hand, that they could be sued if they did not fulfil their contractual obligations. The Supreme Court held that it was that knowledge which underpinned everyday economic and social relations. The Supreme Court further made an important pronouncement that the judicial enforcement of the law was not always necessary and that resolving disputes through other alternative dispute resolution is vital.[87] Clearly, Zimbabwe, South Africa and Kenya have constitutionalised the right of access

[81] *Scott v Scott* [1913] AC 417, *Dimes v Propritors of Grand Junction Canal* (1852) 3 HL case 759.
[82] *R v Lord Chancellor expp Witham* (No2) (1994) QB 198
[83] *Campbell & Fell v United Kingdom* [1998] QB 575
[84] *Campbell & Fell v United Kingdom* Application No 8342/95, Judgment of 28 June 1984 European Court of Human Rights Decision (Other jurisdiction).
[85] *R Unison (on application of) v Lord* Chancellor (2017) UKSC51 (United Kingdom case).
[86] See the cases of *Donoghue v Stevenson* [1932] AC 562; *Dumfries and Galloway Council v North* [2013] UKSC45 (United Kingdom case). And also V Bhandari *Law in theory v Law in action: Impediments to access to justice* National Law School of India University (2010).
[87] See also H Genn *Judging civil justice* Cambridge University Press (2010) 46 where Genn quotes a letter by Lord Gardiner who said, "In English Law, the right of access to the courts has long been recognised. The central

to the courts.

Apart from Zimbabwe, South Africa, Kenya and the United Kingdom, there are numerous constitutions and statutes of European and American countries that have incorporated the right of access to the court.[88] The right of access to the court has also been embraced in the United States of America. In the United States of America, the recognition of the right of court access under the First Amendment for more than 25 years has made it a constitutional right.[89] Although the First Amendment does not expressly provide for the right of access to the court, the courts have interpreted the provision widely to include such a right.[90] In *Marbury v Madison,* it was held that a person whose right would have been injured is entitled to a remedy in court.[91] This right of access to court can be traced to cases such as *California Motor Transport v Trucking Unlimited*, where the court ruled that the right of access to the courts is an integral part of the right to petition.[92] Thus, in the United States of America, the right of access to the court is constitutionally enshrined, and the judiciary has been establishing the same in the legal landscape.

Thus the right of access to the court involves the application of rules of procedure in presenting a case liberally and with the choice of a court to approach. [93] In this regard, the right of access to the court protects the interests of bearers of the right in disputes to which legal rules can be applied.[94] The essence of improved access to court is to guarantee a systematic

idea is expressed in chapter 40 of the Magna Carta of 1215 - *Nulli vendemus, nulla negabimus aut differemus rectum aut justician* meaning that 'we will sell to no man, we will not deny or defer to any man either Justice or Right." See *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26. (United Kingdom case).

[88] A Gray 'Constitutional right of access to courts in Australia: the case of prisoners' (2015) 24 *Journal of Judicial Administration* 263-264. See Australian Centre for Justice Innovation and the Australasian Institute of Judicial Administration 'Access to justice-Taking the next Steps' Symposium held on 26 June 2015 at Monash University Available at www.fedcourt.gov.au [Accessed March 10, 2018]. See also S Rares 'Is access to justice a right or a service?' Available at: www.fedcourt.gov.au [Accessed February 11, 2018].

[89] It is important also to include America, as one of the leading democracies, in how they have constitutionalised the right of access to the court even if the United States of America is not being used as a comparator. See also N Andrew 'Fundamental principles of civil procedure: Order out of chaos' in *Civil litigation in a globalising world* (eds X E Kramer and C H van Rhee) TMC Asser Press (2012) 23 and also C R Andrews 'A right of access to court under the petition clause of the First Amendment: Defining the Right' (1999) (60) *Ohio State Law Journal* 557-691 and L Bhansali *Access to justice,* presented at Elements of judicial reform course on legal and judicial reform: Core course on legal and judicial reform, held January 11-14, 2005.

[90] Andrews op cit note 89 generally.

[91] *Marbury v Madison* 5 U.S (1803) 137 (American case).

[92] *California Motor Transport v Trucking Unlimited* 404 U.S 508 (1972) (American case).

[93] See 'Fiji access to justice project' United Nations Development Programme in the Pacific-UNDP Pacific Office, Available at: www.pacific.undp.org [Accessed July 16, 2017]; United Nations Development Programme 'Increasing access to justice for marginalised people' (September 2008-December 2017) UNDP, Available at: www.in.undp.org [Accessed February 02, 2018].

[94] Rautenbach op cit note 74 at 451.

application of legal rules to the litigants' dispute and discourage litigants from self-help.[95] The courts often state that the central purpose of this right is to provide effect to the principle that self-help is not permissible.[96] In addition, the right of access to the court also safeguards the right to meaningful assistance in all processes,[97] and the right of access to the court applies to all disputes that can be resolved by applying the law.[98]

In the Zimbabwean procedural context, the interpretation and extent of the meaning of the right of access to the court can be determined by a comparative analysis of the South African and Kenyan experiences.[99] There is no doubt that the Kenyan Constitution is progressive and expressly removes unreasonable procedural limitations that hinder the right of access to the court. The issue of procedural technicalities is thus a constitutional issue in Kenya. A litigant can raise a constitutional point if a party seeks to raise the question of procedural technicalities as opposed to the current practice of striking off cases in the Superior Courts of Zimbabwe because of failure to follow procedure or failure to pay security costs.[100]

On the other hand, in Australia and the UK, the right of access to the court is safeguarded through judicial pronouncements, and in countries such as Zimbabwe, Kenya and South Africa, the right of access to the courts is constitutionally enshrined.

2.5. RULES OF CIVIL PROCEDURE AS ENHANCERS IN THE REALISATION OF THE RIGHT OF ACCESS TO THE COURT

Rules of civil procedure are fundamental as they provide the mechanism for litigants to realise their rights through civil litigation.[101] Rules of civil procedure are supposed to provide the necessary framework in which substantive law is activated, and rights and obligations are realised and fulfilled, respectively, in courts of law. Rules of procedure provide for the systematic and uniform treatment of all civil cases that come through the courts and guarantee

[95] A B Badawi 'Self help and the rules of engagement' (2012) 29 *Yale Journal on Regulations* 1-45.
[96] Rautenbach op cit note 74 at 451.
[97] Ibid; and also D Kaersvang 'Equality courts in South Africa: Legal access for the poor' 2008 The Africa Issue Spring *The Journal of the International Institute* 1-2.
[98] Rautenbach op cit note 74 at 451.
[99] Section 159(2) of the Kenyan Constitution, 2010.
[100] *Scheckem Barrister Ngazimbi Murowa Diamond* (Pvt) Ltd SC 27/2013, where an appeal was struck off for being a legal nullity due to failure to comply with provisions of s92F of the Labour Act (28:01). Also see *Holt v Brook* 1959(3) 803; *Jensen v Acavalos* 1993 (1) ZLR 216 (S); *Matanhire v BP & Shell Marketing Services (Pvt) Ltd* 2004 (2) ZLR 147 (S).
[101] E Hurter op cit note 5 at 408. See also J O' Hare & K Browne *Civil litigation* (13 ed) Thomson Sweet & Maxwell (2002) 24. In addition P Baxi 'Access to justice and rule of law: The cunning of judicial reform in India' (2008) 2 (2) *Indian Journal of Human Development* 2 and also E Sithole *Civil procedure. Supplement* (2006) 39.

judicial competence and independence.[102] A judge, in disposing of a matter, is guided by procedural steps that are consistent and applied uniformly. Every judge must comply with the procedural requirements to make a substantive decision.[103] Rules of procedure ensure judicial impartiality; thus, there can be no unjustifiable departure from applying the procedural rules consistently and uniformly.[104] Several factors can shift the balance of fair trial outcomes between litigants, including political affiliation, financial status and societal relations; hence rules of civil procedure offer procedural equality in those circumstances.[105]

The rules of civil procedure entrench the right to be heard and provide the opportunity for another party to reply.[106] Most rules of procedure, save for the *ex parte* procedure, guarantee the right to be heard in court. Both the action and application procedures have clauses allowing justice to be dispensed in public – as justice ought to be seen to be done.[107] In most cases, all applications and action proceedings are held in open court, save for interlocutory procedures.[108] In other words, it is a requirement in the adversarial civil procedure system for hearings to be heard in public.[109] Public hearings give confidence to the public, leading to the saying, "Justice ought not only to be done but ought to be seen to be done."[110] Exceptions exist, particularly

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[102] President of Constitutional Court of the Republic of Latvia – A Lavins 'The role of Constitutional Courts in strengthening the independence of the Judicial Power: Latvian Experience' XX Yerevan International Conference – Theme: The Role of the Constitutional Courts in Strengthening the Independence of the Judicial Power: Doctrinal Approaches and Contemporary Challenges, Yerevan, Armenia, (8-10 October 2015) 2, Available at: www.satv.tiesa.gov.lv [Accessed August, 21 2017].

[103] Z Hinson and D Hubbard 'Access to justice in Namibia: Proposal for improving access to courts. Access to Justice as a Human Right,' Paper No 1, *Legal Assistance Centre* (2012). and N Andrew 'Fundamental principles of civil procedure: Order out of chaos' in *Civil litigation in a globalising world* (eds X E Kramer and C H van Rhee) TMC Asser Press (2012) 1 at 23. See also L Chiduza & P N Makiwane 'Strengthening locus standi in human rights litigation in Zimbabwe: An analysis of the provisions of the Zimbabwean New Constitution' (2016) 19 *Potchefstroom Electronic Law Journal,* and also Y Sinai 'The religious perspective of the Judge's role in Talmudic Law' 25 *J.L & Religion* 357.

[104] Compare with Rule 4 of the Supreme Court Rules, 2018, Rule 4C of the High Court Rules, 2021 and Rule 5(1) of the Constitutional Court Rules, 2016

[105] N Andrew op cit note 103 at 23 and Free Legal Aid Centres, 'Access to justice: A right or privilege, A blueprint for civil legal aid in Ireland' *A FLAC Report*, July (2005) 9.

[106] N Kuckes 'Civil due process, criminal due process ' (2006) 25 (1), *Yale Law and Policy Review* 8 and N Andrew op cit note 103 at 23 and also E M Schneider 'The responsibility of states to provide legal aid in Bejing' Legal Aid Conferences, China and United Nations Development Programme, Access to Justice Practice Note (2004). United Nations Office on Drugs and Crime, Access to Justice: Legal Defence and Legal Aid (2006).

[107] See 'Access to court proceedings', Available at: www.rcfp.org. [Accessed May 21, 2017] and also 'Attending Hearings', Available at: www.supremecourt.gov.sg. [Accessed February 12, 2018. And also J P Sheldon 'Rethinking the rules of evidentiary admissibility in non-jury trials. American Judicature Society', (2001) Available at: http://www.ajas.org/prose/pdfs/Sheldon.pdf [Accessed October 20, 2018].

[108] See Courts and Adjudicating Authorities Publicities Restrictions Act (7:04), Zimbabwe and also C D Sidoti *Rural people's access to human rights* International Council for Human Rights Policy (2003).

[109] See OSCE Rule of Law Department *Access to court decisions, A legal analysis of relevant international and national provisions*, OSCE Rule of Law Department, September (2008) 3 and N Andrew op cit note 103 at 23. Also relevant are Article 14 of the ICCPR, Article 6 of the European Convention on Human Rights, 1969 and Article 10 of the UDHR,1948.

[110] See *R v Sussex Justices, ex parte McCarthy* (1924) 1 KB 256. (English case)

with interlocutory proceedings, which may be held in judges' chambers.[111] Interlocutory applications are reasonably used to deal with intermediary issues and other largely procedural matters.[112] One of the essential principles enshrined in the rules of civil procedure is the obligation on the part of a judge to hand down a well-reasoned decision.[113] Every judgment must be subjected to reasonably objective analysis[114] based on the principles of the law.

The prescribed procedural stages ensure prompt and enhanced justice in contrast to arbitrary proceedings, where the sentiments and perspectives of individuals dictate the pace of a civil case.[115] The above procedural principles enshrined in civil procedure justify the retention of rules of civil procedure in resolving civil disputes. Therefore, rules of procedure are needed that do not become an end in themselves and do not hinder the realisation of the right of access to the court. People bring their disputes before the courts for resolution on substantive matters for the realisation of actual justice.

The rules are also designed to protect parties' duty to avoid vexatious and frivolous pleading and abuse of the court process. Normally, this is done through provision on security costs and other procedural costs.[116] The rules of procedure also specify the role of a judge in adducing evidence and how and when to call experts to testify.[117] Recently, the judiciary's role in managing judicial proceedings has become topical. Some rules have been amended to bring in the component of judicial case management.[118]

Rules of civil procedure also provide for sanctions against default and non-compliance.[119] In some instances, parties to proceedings may decide on a settlement or halt the proceedings,

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[111] N Andrew op cit note 103 at 23. See further M Cappelletti (general ed) 'Promising institutions' in *Access to justice*, Vol II Sijthoff and Noordhoff-Alphenaanderrijn Dott A Giufre Editore-Milan (1978).
[112] See Community Legal Information Centre 'What kinds of applications may be made to court before the commencement of a trial?' Community Legal Information Centre, Available at: www.clic.org.hk [Accessed October 10, 2017].
[113] See M Weinberg 'Adequate, sufficient and excessive reasons' Judicial College of Victoria, (4 March 2014) 1 Available at: www.austlii.edu.au [Accessed August 25, 2017] and also N Andrew op cit note 103 at 23 and E Sithole *Access to justice for the poor in Zimbabwe: a law reform proposa.* York University (1991).
[114] V S Mani *International adjudication: Procedural aspects, developments in international law* Brill (1980) 33 para 4.4, where he argues that the right of the parties to a reasoned judgment is recognised in the international procedure for several reasons.
[115] N Andrew op cit note 103 at 23 and E Sithole M Oeslschig & G Feltoe *A guide to civil procedure in the Magistrates Courts* Legal Resources Foundation (1994) 1-2.
[116] See Rule 75 of the High Court Rules, 2021
[117] US Courts 'Rules of Civil Procedure: Rules governing civil procedure in the circuit courts' Missouri Courts-Judicial Branch of Government' Available at: www.uscourts.mo.gov [Accessed February 21, 2018]. See Rule 48 of the High Court Rules, 2021.
[118] C Sage, T Wright & C Morris *Case management: A study of the Federal Court's individual docket system* Law and Justice Foundation of New South Wales (2002). See also Rule 86 of the High Court Rules, 2021.
[119] See for example Rules 22-24 of High Court Rules, 2021, which provides for default judgments.

and these choices are allowed through modern rules of civil procedure.[120] The right to an oral hearing is an inherent and indispensable part of civil procedure, particularly in an adversarial system.[121] Rules of civil procedure must have provisions for proportionality in the use of sanctions. In terms of obligations, the rules of civil procedure provide for the parties' duty to act fairly and promote efficient and speedy proceedings. For example, there are rules of procedure that allow parties to apply for dismissal of matters to avoid clogging the courts with matters that have no merit.[122] Rules of civil procedure impose a duty on parties to cooperate; for example, on the discovery of documents, where parties get to discover what is in another party's possession, thus avoiding trial by ambush.[123] The rules of civil procedure also provide for judicial encouragement of settlement of disputes through arbitration, mediation and conciliation.[124] Also, the management of civil procedure provides a final hearing before the adjudicators and the judiciary officers, the legal responsibility for correctly applying the law.[125]

Rules of civil procedure further provide for the computation and allocation of costs and for the finality of judicial decisions and the provision of appeal mechanisms.[126] Thus, rules of civil procedure encompass the procedural means of effective enforcement. Even the parameters of international judicial cooperation between countries are entrenched within the civil procedure.[127] Clearly, the rules of civil procedure are critical for any well-balanced adversarial

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[120] See Rule 75 of the High Court Rules, 2021, and see CPR-Rules and Directions, Part 38, Discontinuance, Rule 38.1-7 and also Part 36-Offers to Settle, Rules 36.1-30 Available at: www.justice.gov.uk [Accessed February 20, 2018].

[121] L Ellison (ed) 'Orality and the right to a fair trial' in *The adversarial process and the vulnerable witness* Oxford University Press (2012) 65.

[122] See also Rule 31 of the High Court Rules, 2021 and N Andrew op cit note 103 at 23.

[123] Rule 47 of the High Court Rules, 2021 and E Fahey & Z Tao 'The pre-trial discovery process in civil cases: A comparison of evidence discovery between China and United States' (2014) 37(2) *Boston College International and Comparative Law Review*, 281-282.

[124] See Go Legal 'Court annexed Mediation Rules of the Magistrates Court' Go Legal, Available at: www.golegal.co.za [Accessed January 13, 2015]. Further, see N Andrew op cit note 103 at 23 and also The Mississippi Bar 'Court annexed Mediation Rules for Civil Litigation: The Mississippi Bar' Available at: https://www.msbar.org [Accessed January 01, 2016].

[125] C Siyuan 'The judiciary duty to give reasoned decisions: *Thong Ah Fat v Public Prosecutor*' (2011) *SGCA* 65 and N Andrew op cit note 103 at 23. See also Chartered Insurance Institute 'Practice note: Duty to give reasons' Available at: www.cii.co.uk [Accessed August 10, 2017] and L Beck 'The Constitutional duty to give reasons for judicial decisions' (2017) 40 (3) *University of New South Wales Law Journal (Advance*1).

[126] D Y Curan 'Problems of finality of judgments for purposes of appeal in Missouri' (1979) 44 (4) *Missouri Law Review* 727-728 and also C M Crick 'The final judgment as a basis for appeal' (1932) 41*Yale Law Review Journal* 539. See N Andrew op cit note 103 at 23. Compare with the article The University of Chicago Law 'Temporal aspects of the finality of judgments. The significance of Federal Rule 60(b)' Available at: www.chicagounbound.uchicago.edu [Accessed September 02, 2017]. See also A A P Bruhl 'When is finality… final? Rehearing and resurrection in the Supreme Court' (2011) *The Journal of Appellate Practice and Process* 2 and also D M Kelly 'Federal Rule 60(B): Finality of civil judgments v self correction by District Court of Judicial Error of Law' (1968) 43 (1) *Notre Dame Law Review* 98.

[127] European Judicial Training Network *Handbook-English For Judicial Cooperation in Civil Matters* (2016) 16

system. However, there is a need for reasonable balance and a measured application of procedures to achieve procedural fairness and the goal of access to justice.

Uzelac sums up the importance of civil procedure as "… it defines cases that can be brought under the ambit of civil justice, and also provides a balance between individual's private rights and public interest protection, and balance between arriving at a well-reasoned judgment and concluding a hearing within a reasonable time".[128] He further argues that rules of civil procedure help determine complex matters and provides a balance between legal formalism and a fair decision. Finally, rules of civil procedure provide precedence on how to deal with cases of similar nature.[129]

The importance of rules of civil procedure, as defined by Uzelac and other authors, cannot be overemphasised. In addition, Uzelac argues that the goal of the rules of civil justice must be to satisfy the wishes of the public. The issue for analysis in this thesis is whether the selected rules of procedure restrict access to court in the context of the principles of rationality, proportionality and balance.[130]

Rules of civil procedure "in their purest form focus on the enforcement of the challenged rights of individuals and affords a forum to potential litigants to avoid resorting to self-help".[131] This is because self-help undermines the legal legitimacy of the courts; hence, the need for a system that guides potential litigants to easy access to the courts to resolve their disputes.[132] Reasonable access provided by the rules of civil procedure serves that purpose.

Effective and efficient rules of civil procedure effectively enhance access to the court. A rigid and archaic rule of civil procedure and/or the interpretation thereof closes the door of the courts to intended beneficiaries – the litigants.[133] Clearly, rules of procedure play a pivotal role

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Available at: www.ejtn.eu [Accessed January 14, 2017] and also N Andrew op cit note 103 at 23 and article European Union 'Civil Justice' Available at: www.ec.europa.eu [Accessed August 21, 2017].

[128] A Uzelac (ed) Goals of civil justice and civil procedure in contemporary judiciary systems Springer (2014) 3-5

[129] Ibid at 3-5.

[130] Compare with G Skinner, R McCorquodale and O De Schutter The third pillar-Access to judicial remedies for human rights violations by transnational business, ICAR, CORE and ECCJ (2013) 54.

[131] A Uzelac op cit note 128 at 3-7. Liberal States for example German and the United Kingdom unlike the socialists states; for example, Russians believed that parties should resolve their disputes on their own with minimum intervention of the state. and compare with *Kenya Bus Service Ltd & Anor v Minister of Transport & Two Ors* [2012] eKLR. (a Kenyan case) and also C A Olieveira 'Mauro Capelletti and the Brazilian procedural law' (2005) 1 (22) *Revista da Faculdade de Direito*.

[132] B Hough 'Self-representing litigants in family law: The response of California's Courts' (2010) 1 (15) *California Law Review Circuit* 15.

[133] Rubenstein 'Civil Procedure outline' (Fall 2012) 1 Available at: www.org.law.harvard.edu [Accessed May 10, 2017] and A Uzelac op cit note 128 at 3.

in enhancing access to justice. How the rules of procedure are crafted and interpreted may hinder or increase access to justice.

In Zimbabwe, as demonstrated in Chapters 3 and 4, the rules governing appeals, leave to appeal, security costs and referral of constitutional matters in the Superior Courts affect the right of access to the court. Therefore, there is a need for equilibrium to be provided through the optimum use and measured interpretation of rules of civil procedure in civil litigation. Generally accepted principles govern the style, form, and order of rules of civil procedure. In Zimbabwe, all the Superior Courts have their own set(s) of rules and forms.[134] There is a need to analyse the rules governing appeals, leave to appeal, security costs and referral of constitutional matters and develop a reformed set of the selected rules that seeks to enhance access to the Superior Courts of Zimbabwe. The reform of the selected rules of procedure must retain the essential principles entrenching the rationale of civil procedure. A copy-and-paste approach to reforming rules of civil procedure would not work in Zimbabwe, as that would amount to an imposition of rules of procedure from another jurisdiction – without considering the efficacy of doing so. Uzelac argues that any effective reform of civil procedure rules should focus on a shared objective or objectives.[135] Considering the importance of civil justice rules in the economic emancipation of marginalised citizens, it is, therefore, important to advocate reform that enhances access to court – particularly the reform of the selected rules of civil procedure. Klement and Neeman[136] further argue that the most successful reforms of rules of civil procedure have been premised on goals. For example, Lord Woolf's reforms of English civil procedure in the 1990s were anchored on the overriding objective of civil justice,[137] as was the Franz Klein reform on the social function of the rules of civil procedure.[138]

Thus, the purpose of both substantive and procedural law is to enable every person to access justice. Reform should, therefore, also be directed at the selected rules of procedure. Justice

[134] The High Court of Zimbabwe, the Supreme Court of Zimbabwe and the CCZ are the superior courts of Zimbabwe.
[135] M Kariuki & F Kariuki 'ADR, access to justice and development in Kenya' Available at: https://www.strathmore.edu [Accessed January 10, 2018].
[136] A Klement and Z Neeman 'Civil justice reform: A mechanism design framework' (2008) *JITE* 164 and A Uzelac op cit note 128 at 6.
[137] The Lord Woolf Report focused on removing barriers that hindered access to courts, and one of the key findings was that the costs of the suit could be a hindrance in accessing the courts.
[138] M Stevcek and T Gabris 'The recast civil procedure and legacy of Franz Klein in the Slovak Republic' (2020) 8 (2) *European Journal of Transformation Studies* 106. Franz Klein was the author of Austrian Civil Procedure. See M Cappelletti 'Social and political aspects of civil procedure: Reforms and trends in Western and Eastern Europe' (1971) (69) 5 *Michigan Law Review* 847-886. C H Van Rhee 'Civil procedure beyond national borders' (2018) 1 (1) *Access to Justice in Eastern Europe* 15-34.

can only be accessed if the fundamental elements of the system – for example, civil procedure – allow access to the court.

In Zimbabwe, a significant effort has been devoted to enhancing access to criminal justice, which, as a result, has improved in comparison with civil justice[139] despite the considerable reform of civil justice globally. The Constitution of Zimbabwe, 2013 elevated environmental, family, shelter, and labour rights to constitutional rights.[140] These rights are acknowledged as of equal importance to civil and political rights, and it is assumed that their realisation should be equally attainable. The only way the indigent and marginalised can legally enter a civil dispute with the rich and privileged is through enhanced access to civil justice. It is argued in this thesis that political and civic rights are meaningless for a society that cannot access the courts due to procedural technicalities when the civil procedure is the cornerstone to the realisation of substantive civil law.

2.6. SUPERIOR COURTS AND PROCEDURAL ACCESSIBILITY

The courts, including the Superior Courts of Zimbabwe, must be procedurally accessible.[141] The Superior Courts have a vital role in advancing the rights of the poor and marginalised as they are the courts with inherent and final jurisdiction in all civil matters. In addition, as courts of appeal, the Superior Courts have been viewed as the interpreters of the law with a dispute resolution role.[142] The other functions of the appeal courts are to guarantee a uniformity of approach to the administration of justice throughout the country and enunciate and harmonise the law conclusively.'[143]

Another critical responsibility of the appeal courts is to ensure that justice is delivered expeditiously, as litigants require an effective and judicious remedy.[144] The Superior Courts have jurisdiction to hear appeals. In Zimbabwe, in some cases, a litigant must apply for leave

[139] O R Ferreira & D *A Shirk Criminal procedure reform in Mexico, 2008-2016: The final countdown to implementation* University of San Diego (2015).
[140] Bill of Rights, Constitution of Zimbabwe, 2013.
[141] J D Lawson, 'Technicalities in procedure, civil and criminal' (1911) 1 (1) *Journal of Criminal Law and Criminology* 63. Also I Richardson 'The courts and access to justice' (2000) 31 *Victoria University of Wellington Law Review* 163.
[142] J K Barry '*State v Barnes*-Procedural technicalities or justice?'(1972) 32 (2) *Louisiana Law Review* 360-367, and see J Murkens & R Masterman 'The new constitutional role of the judiciary' 2014 *LSE Law* 3-4. Compare with A Roberts 'Comparative international law? The role of national courts in creating and enforcing international law' (2011) 60 I*nternational and Comparative Law Quarterly* 57-92.
[143] I Richardson op cite note 141.
[144] See a paper written by Hon Lady Justice Constance K Byamugisha, Justice of the Court of Appeal of Uganda titled 'Administering justice without undue regard to the technicalities' and also I Richardson op cit note 141 at 166. See Lawson op cit note 141 at 83-4.

to appeal if the decision of the High Court aggrieves them and intend to appeal to the Supreme Court. The application is made before a High Court judge. The same procedure applies in the Labour Court, which deals exclusively with labour matters and where the application for leave to appeal is made before a Labour Court judge. The judge in both the Labour Court and the High Court has the power to dismiss the application if they believe it has no merits,[145] thus preventing access to the hearing of the case on merits by a fully constituted Supreme Court bench.[146] There is no procedure for appeal against this judicial dismissal. The right to appeal to a Superior Court may be of little value in the absence of reasonable access to the court. [147] Hence, access to these Superior Courts must be simple and available to every litigant who intends to approach the court. The litigants must get a remedy at the end of their case.[148]

Furthermore, requesting security costs from the appellant without reasonable exceptions has an equal effect of restricting access to the court. The same applies to the requirement for an appeal to comply strictly with the rules of procedure as if the merits of the appeal depend on the form of the notice of appeal. In addition, restricting appeals from the Supreme Court to the CCZ for constitutional issues only is an unjustified restriction and hinders access to the court.

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[145] See the Zimbabwean case of *Mendson Mjulumba Mpofu v National Social Security* SC574/14.

[146] The Supreme Court bench comprises three judges presiding over a matter in most cases, but sometimes, five judges may preside over an appeal matter.

[147] I Richardson op cit note 141 at 170. See also Judge Christina Inglis 'Effective representation in The Employment Court. A perspective from The Bench' 2 Available at: www. employment court. govt.nz [Accessed January 13, 2016], and the case of *Transmission & Diesels Ltd v Matheson* (2002) 1 ERNZ 22 (CA) at 28. Compared with the case of *Miranda v Arizona* 384 U.S 436 (1996).

[148] *The Barry Gondo v The Republic of Zimbabwe* SADCT-05-2008 case demonstrates the impact of failure to obtain an effective remedy by litigants in civil matters. The applicants were persons affected by violence inflicted upon them by the Zimbabwe Republic Police and the National Army of the Republic of Zimbabwe (the respondent) during the pre-election period in Zimbabwe. The applicants instituted summons against the Government of Zimbabwe in several courts in Zimbabwe, obtained a judgment in their favour, and were awarded damages in various sums ranging from ZWL 8 552.50 to ZWL 5,650 000. The awards for damages were coupled with an order for interest and costs in favour of each applicant. The Government of Zimbabwe did not satisfy the judgment, and the applicants did not obtain practical relief after exhausting the municipal remedies. The domestic laws of Zimbabwe have no procedure for attaching government property. The applicants then had recourse to the Southern Africa Development Community [SADC] Tribunal, before which they argued that the Government of the Republic of Zimbabwe had violated art 4 (c) and 6 (i) of the SADC Treaty by failure to guarantee that effective remedies were obtainable for them, and failure to act by the principles of human rights. The applicants further argued that the Government had forgotten or neglected to implement measures that gave effect to the principles of human rights provided for in the Treaty. In addition, the applicants wanted the court to declare that Zimbabwe, as a respondent, was in breach of the SADC Treaty by not complying with the orders of its courts. They argued that failing to comply with the court orders made the domestic civil justice system meaningless. The SADC Tribunal ruled that the Government of Zimbabwe had violated art 4 (c) and 6 (i) of the SADC Treaty in that it had infringed various fundamental human rights, namely, "the right to an effective remedy, the right to have access to an independent and impartial court or tribunal and the right to a fair hearing". The applicants obtained favourable judgments but could not enforce the same or enjoy successful litigation results. The applicants' rights were breached, but they had no access to effective redress. The SADC Tribunal ruled that the concept of the rule of law "comprise at least four fundamental rights, namely the right to an effective remedy, the right to an independent and impartial court, the right to a fair hearing before being deprived of a right, interest or legitimate expectation, and the right to equality and equal protection before the law".

If one examines the layers of rules governing the referral of constitutional matters to the Superior Courts, particularly the CCZ, the reasonable inference is that the present Zimbabwean set of referral and appeal rules are restrictive of the right of access to this court.

The structure, content and form of rules of civil procedure must ensure that all litigants who intend to access the Superior Courts do so promptly and without undue restrictions. It is critical to provide every litigant with the opportunity for proper and just adjudication of their cause, free from the limits of unreasonable technicalities. The rules of civil procedure must not be applied inflexibly to outweigh substantial justice. Once the rules of procedure enhance and improve reasonable access to the court, a litigant's access to justice is substantially improved, resulting in a fair judicial outcome.

2.7. CONCLUSION

The right of access to the court is embedded in procedural rights and is the cog needed to unlock other substantive rights. Globally, it has been recognised as a constitutional human right. There is no doubt about its importance and significant role in delivering justice. It is not simply a matter of symbolically stating the right of access to the court in the Constitution. The rules of civil procedure must enable the realisation of this right of access to the court. In Zimbabwe, the right of access to the court and its relationship with the rules of the civil procedure is yet to be interrogated; thus, this study focuses on selected rules of civil procedure restricting access to the Zimbabwean Superior Courts. This thesis concentrates on the selected rules that compel litigants to provide security costs, a leave to appeal procedure without appeal recourse, an appeal procedure that requires mathematical precision in compliance and a highly technical constitutional referral procedure to the CCZ that needs examination on whether they restrict or enhance access to the court.

It is apparent that the right of access to a Zimbabwean court is not only limited to the physical availability of courthouses or dispute resolution platforms but is also concerned with the procedural accessibility of courts and the provision of a fair judicial remedy. Furthermore, the right of access to the court is a component of the right to access to justice. The right of access to the court is internationally recognised and has been constitutionalised in many countries. In addition, the rules of civil procedure affect the right of access to the court. The rules of procedure generally are meant to help access the Zimbabwean courts. However, in some instances, the rules of civil procedure are complex and highly technical, restricting litigants from accessing the courts. Therefore, the rules of Zimbabwean procedure must be

restructured to enhance access to the court. There is no meaningful access to the court without reasonable rules facilitating such access to the court.

CHAPTER THREE

HISTORICAL BACKGROUND OF SELECTED RULES THAT RESTRICT ACCESS TO THE SUPERIOR COURTS OF ZIMBABWE

3.1.INTRODUCTION

This chapter critically analyses the development of the rules of civil procedure, specifically the selected rules governing security costs, appeal and leave to appeal, and referral of constitutional matter procedures (selected rules) in the Superior Courts of colonial Zimbabwe – from the colonial era to 1979.[1] The chapter also critically analyses how those selected rules historically affected the right of access to the Superior Courts. A critical examination is done on the rules that enhanced and inhibited access to the Superior Courts from the beginning and during colonisation up to Zimbabwe's independence. This chapter notes the important lessons from the historical analysis, which are key to reforming the selected rules of procedure that have been in force since (1980) independence.

3.2. SYNOPSIS OF PRE-COLONIAL COURT STRUCTURE AND CIVIL PROCEDURE

The Zimbabwean legal system was exclusively a customary law throughout the pre-colonial era. The customary law courts' structure included the village court, the headman and the chief's court.[2] At the bottom of the customary court hierarchy was the village court. The village court was presided over by a village head appointed by the local chief of the clan or sub-clan.[3] Its territorial jurisdiction was limited to a particular village. The village head's jurisdiction regarding the cause of action covered criminal and civil cases. Next up in the hierarchy of the customary courts was the headman's court, which was presided over by a headman.[4] The headmen's court served as both a court of the first instance and an appellate court.[5] Its territorial jurisdiction covered more than one village, and it could include several villages. The headman's court had jurisdiction over criminal and civil matters. The apex court was the chief's or king's

[1] The rules under examination are referred to collectively as selected rules. Further, the colonial period is from September 1890 to December 1979. Zimbabwe obtained its independence on 18 April 1980.
[2] E Sithole, *Towards a theory and practice of access to civil justice for the poor in Zimbabwe: Law and dispute resolution in a pluralistic society*, Unpublished Thesis, University of Toronto (1997) 2-11.
[3] A Ladley 'Changing the courts in Zimbabwe: The Customary Law and Primary Courts Act' (1982) (26) 2 *Journal of African Law* 95-114. Ellen Sithole op cit note 2 at 2-11.
[4] Ibid
[5] T W Bennet 'Conflict of laws: The application of Customary Law and the Common Law in Zimbabwe (1981) (30) (1) *The International Comparative Law Quarterly* 59-103. Also, Sithole op cit note 2 at 2-11.

court, depending on the State. For example, in the Ndebele Kingdom, the apex court was headed by the king – while in the Shona Kingdom, the apex court was the chief's court.[6] A right of appeal was provided from the lowest court to the apex court in both kingdoms.[7] However, not much is documented on the content of the rules governing the appeal procedure.[8] However, scholars agree that the rules of procedures for the Shona and Ndebele, in general, were procedurally uncomplicated at every level from the inception of the matter up to the appellate stage.[9] It is uncertain whether those appeal rules provided access to all litigants right through to the chief or king.[10] Furthermore, there is no discussion of the content of the rules of appeal in those customary law courts.[11] More importantly, rules for leave to appeal, security costs and referral of constitutional matters did not exist in this type of pre-colonial legal system.[12] Hence, the leave to appeal, security costs and referral procedures were not part of the pre-colonial justice system.[13] Those selected rules of civil procedure only emerged during the colonial period. Hence, the focus of this study is not a pre-colonial civil just system but the pre-colonial justice system when the selected rules of procedure emerged. However, as discussed in the preceding paragraph, a brief outline of the pre-colonial civil justice system is important as it provides the key background to why the Rhodesian legal system became a dual system. Before the foreign legal system, there was the customary law civil justice system.

3.3. THE DAWN OF A NEW LEGAL AND GOVERNANCE SYSTEM: SOUTHERN RHODESIA ORDER-IN-COUNCIL, 1898

The customary law civil justice system ended with the dawn of colonisation in 1891. Zimbabwe became a British Colony. The Colony was governed and administered by the British South Africa Company (hereinafter "BSAC").[14]The BSAC, through the Southern Rhodesia Order-in-

[6] R Loewenson & M Gelfand 'Customary law cases in two Shona chieftainships' (1979) (12) (2) *Nada: The Southern Rhodesia Natives Affairs Department Annual* 130-136. Also Sithole op cite note 2 at 2-11. See also J M Gombe *The Shona idiom* Mercury Press (1995) 1-12; J H F Holleman *Shona customary law* Oxford University (1952).
[7] See also Gombe op cit note 6; Holleman op cit note 6; B Goldin & M Gelfand *African law and custom in Rhodesia* Juta and Company (1975).
[8] Ibid 1-12.
[9] Ibid.
[10] T W Bennett 'African court system in Rhodesia: An appraisal' (1975) 15 *Rhodesia Law Journal* 133-151.
[11] Gombe cit op note 6.
[12] Ibid.
[13] See *Hansard,* 28 January 1969, col 626, the intention of Government in proposing the African Law and Tribal Courts Bill. *Kufakwedu v Mandizwidza* 1936 S.R.N 69, *Mafinde v Mashamu* 1948 S.R.N 433.
[14] Rhodesia was now governed through the Southern Rhodesia Order-in-Council, 1898, granted by Her Majesty Queen Victoria at Balmoral Court on 20 October 1898. In terms of the Foreign Jurisdiction Act, 1890, the Queen issued the Order in Council to cover territories in Southern Africa. The The Southern Rhodesia Order in Council introduced a dual legal system made of what was known as the general law and customary law system.

Council (SROIC), established key institutions linked to the administration of justice, although they had other functions.[15] These included other institutions, the police and the judiciary, and they appointed native administrators. There was an Executive Council composed of the Resident Commissioner[16] and Administrators and at least four members appointed by the BSAC with the approval of Her Majesty the Queen of the United Kingdom.[17] The second arm of the Rhodesia colony[18] was the Legislative Council.[19] The Legislative Council consisted of the Administrator or Administrators, the Resident Commissioner and nine members, of whom the BSAC appointed five.[20] The Administrator was equivalent to a Prime Minister in running the affairs of Rhodesia. The Administrator oversaw the political, legislative and judicial affairs of Rhodesia. Registered voters elected four Council members. However, the nominated members carried more weight than the elected representatives.[21] The other arm of the Rhodesia colony was the judiciary.[22] The judiciary comprised of the formal/European and local courts with appeal structures under the judiciary.

Of particular importance was that the judicial system had strong links with the Colony's executive and parliament. The judiciary system was not independent of the executive.[23] However, on the other hand, the native administrators had quasi-judicial functions while being responsible for administration.[24] They were appeal courts in native civil justice that linked the formal and the customary law court systems.[25] The judiciary was thus established to further the interest of the white settlers and not the indigenous persons, but it ended up catering for the indigenous populace on appeal. Even matters between indigenous private parties ended on appeal in the Superior Courts of Rhodesia

3.4.THE EMERGENCE OF A DUAL LEGAL SYSTEM AND THE DEVELOPMENT OF CIVIL PROCEDURE RULES IN ZIMBABWE

The pre-colonial customary courts' structure was transformed in 1891 when present-day Zimbabwe became a British colony. The British introduced a foreign legal system that

[15] Ibid.
[16] Resident Commissioner was now a new title for an equivalent of the High Commissioner.
[17] Ibid, s13 (1) of the SROIC, 1898.
[18] Colony means Rhodesia.
[19] See s17 (1) of the SROIC, 1898.
[20] Ibid.
[21] See s17 (2) of the SROIC, 1898.
[22] See s49 (1) of the SROIC, 1898.
[23] Bennett op cit note 10 at 133.
[24] Ibid.
[25] Ibid.

superseded the customary law system. Accordingly, the new foreign legal system changed the court structure and civil procedure in Southern Rhodesia (Zimbabwe). The foreign legal system was established by the SROIC in 1898. The SROIC was a substantive and procedural rule book for all courts established in Rhodesia. It was the principal legislation governing the Colony.

The 1898 Order-in-Council and Ordinances provided a dual court structure. The customary courts applied indigenous law, while the formal European court structure applied common and statute law. Southern Rhodesia thus adopted a dual legal system, applying customary and European law (general or formal law).[26] The SROIC, 1898 introduced a system of courts labelled the general law courts, which was unique to Southern Rhodesia.[27] The common law (general law) for Rhodesia became:

> "The law applied at the Colony of Cape of Good Hope in South Africa as it existed on the 10th day of June 1891 save for where the law had been modified by Order-in-Council, Proclamations, Regulations or Ordinance applicable at the effective date of the Order-in-Council."[28]

The Proclamation of 1891 and the SROIC have materially influenced the legal system of Zimbabwe.[29] The SROIC remains the bedrock of procedural (civil procedure included) and substantive law in Zimbabwe. Since 1891, the law applicable in Zimbabwe is the law that was in force at the Colony of the Cape of Good Hope on 10 June 1891. The law applicable at the Cape of Good Hope Colony had substantive and procedural components, including the selected rules. The substantive law was Roman-Dutch common law, and the procedural law was English law as subsequently modified by statute.[30] The applicable law for cases where only Europeans were disputants was a modified form of Roman-Dutch law.[31]

Hence, from 1891, Zimbabwe had a dual legal system. In civil justice, there is recognition of the existence of customary and general law systems. However, the difference identified in this chapter is that the customary law system has no written rules of procedure governing

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[26] See s49(1) of the SROIC, 1898. See Sithole op cit note 2 at 34.
[27] See the SROIC, 1898 Available at: www.rhodesia.me.uk [Accessed on August 10, 2016].
[28] Ibid.
[29] B Dube, 'Roman-Dutch and English Common Law: The Indispensable Law in Zimbabwe' (2014) 4 (v) *Afro Asian Journal of Social Sciences* 1-8.
[30] Ibid at 8.
[31] In Zimbabwe, the statute law and common law is referred to as the general law, and customary law is referred to as customary law. Courts that apply general law are referred to as formal courts while the courts that apply customary law are referred to as local courts or customary law courts. See also C Himonga and Fatimata Diallo, 'Decolonisation and teaching law in Africa with special reference to living Customary Law' (2017) (20) *P.E.R* 5.

appeals. In fact, there are no rules governing leave to appeal or referral of constitutional matters or security for costs under customary law. So, the concepts of leave to appeal, referral of constitutional matters and security for costs are alien to the indigenous civil justice system.

3.5. THE COURT STRUCTURE AND DEVELOPMENT OF SELECTED CIVIL PROCEDURE RULES FROM 1891 TO 1921

The court structure and development of civil procedure rules became more pronounced in 1898 when the SROIC, 1898 replaced the Proclamation of 1891. The Proclamation of 1891 was largely a governance statute that codified Rhodesia's colonisation and set out the structure of the governance institutions in Rhodesia. The proclamation had none of the selected rules. The SROIC contained the law, the courts' structure, and the rules of procedure applicable to Rhodesia. Section 50 of the SROIC, 1898, as with similar previous ordinances and proclamations, provided for the application of customary law by the High Court in matters involving indigenous unless the indigenous (customary) law was contrary to European notions of morality and justice. The reason was that the indigenous system of customary law was not written down and was unfamiliar to white settlers. Under the SROIC again, the white settlers adopted Roman-Dutch law as the common law of Southern Rhodesia.[32] The customary law was renamed "native law". It was applicable through a restructured traditional court system called the "African Customary Courts".[33] A headman was the first rung of the system, followed by a chief who reported directly to a Native Commissioner who presided over matters as an appellate court. [34] In contrast, the formal European court structure had the Magistrates Court at the bottom, followed by the High Court and, at the apex, the Appellate Division (technically then the Supreme Court for Southern Rhodesia). There were different appellate arrangements over different periods, culminating in the establishment of the "Supreme Court for Southern Rhodesia", an Appellate Division within the High Court. These courts had civil and criminal jurisdiction as follows: the Magistrates Courts had jurisdiction in the provinces in which they were situated. In contrast, the High Court and Supreme Court had jurisdiction over the entire colony.

Under the SROIC, to enhance the full application of customary law in a dual legal system, the BSAC established a system of "native administration" and "native justice" (native was a

[32] Ibid at 8 and also Robert J Ross *The History of Cape of Good Hope and the World Economy* 1652-1835 (1989).
[33] B Goldin & M Gelfand op cit note 7.
[34] Ibid.

term then used to refer to the indigenous people). In s 79 (1) of the SROIC, the Administrator[35] appointed officers for native affairs (Native Commissioners and Assistant Native Commissioners).[36] The Native Commissioners had jurisdiction equivalent to that of magistrates. The Native Regulations regulated disputes among the indigenous population annexed to the SROIC, 1898. The Administrator had political power and authority over all indigenous people.[37] The Administrator, in turn, appointed chiefs to preside over the tribes or sections of tribes. Previously, the chiefs were appointed according to traditional rites and procedures. The chief reported to the Native Commissioner or Assistant Native Commissioner.[38] The headman also reported to the chief.[39] The chief could be removed from a Reserve area[40] along with his family and property if the Administrator recommended it to the High Commissioner.[41] The Native Commissioner controlled the indigenous people through their tribal chiefs and headmen.[42] In other words, the British employed indirect rule to govern their colonies.[43]

The Secretary for Native Affairs,[44] an appointee of the Administrator, was the principal executive officer for native affairs. In s 11(2) of SROIC, he was responsible for receiving written and verbal petitions from the natives. In addition, the Administrator was an adjudicator who prescribed remedies for civil claims and protected injured parties. In terms of disputes concerning chieftainship or succession, the Native Commissioner would investigate and submit a report to the Administrator.[45] Furthermore, a Native Commissioner could be appointed a Special Justice of Peace[46] with the approval of the High Commissioner.[47] The Native Commissioner had powers and jurisdiction to preside over disputes in the same manner as the

[35] An Administrator was equivalent to a Prime Minister; he was more like a head of government and reported to High Commissioner who was equivalent to a President.
[36] See s79 (2) of the SROIC, 1898.
[37] Section 1 of the Native Regulations, 1898. A Native Commissioner was an equivalent of a provincial governor in charge of a province. However, apart from political power, the Native Commissioners had a judicial function equivalent to that of a Magistrate. Further, in this thesis, the term native is used because most literature and statute law refers to it as such. However, natives are the indigenous people.
[38] Section 4 (1) of the Native Regulations, 1898.
[39] Section 4 (1-5) of the Native Regulations, 1898.
[40] A Reserve area was land designated for indigenous populations to settle after being moved from their settlements.
[41] Section 1 (3) of the Native Regulations, 1898.
[42] Section 11 (9) of the Native Regulations, 1898.
[43] Section 1 (5) of the Native Regulations, 1898.
[44] The Secretary for Native Affairs was equivalent to a Minister.
[45] Section 11 (3) of the Native Regulations, 1898.
[46] A Special Justice of Peace was an equivalent to a Magistrate. He had powers to preside over legal matters.
[47] Section 11 (6) of the Native Regulations, 1898.

Special Justice of the Peace of the Cape Colony.[48] Essentially, the indigenous justice system as established was not purely indigenous but included white settlers, and individuals.

Further, a Special Justice of the Peace could be appointed as a magistrate or an assistant magistrate.[49] In civil justice, the Special Justice of the Peace was clothed with jurisdiction similar to that of a Magistrate in Southern Rhodesia.[50] The Native Commissioners had messengers[51] to assist them in executing their administrative and judiciary duties.[52] Furthermore, their role included allocating land, pastures and grazing lands and dispute resolution relating to the flow and distribution of the water of streams and channels.[53] However, an indigenous could bring a case before a Magistrate or a Special Justice of the Peace.[54] The Magistrates and the Special Justice of Peace were under the BSAC's control.[55] Civil appeals against the Special Justice of the Peace decision were made to the High Court as if the case had been brought before the District Magistrates Court in the first instance.[56] This again disadvantaged indigenous people as they were not conversant with the formal judicial system. They were also not conversant with the legal principles or the procedures.

The principal procedural problem of the indigenous legal system was its vaguely defined link to the formal European courts. Thus, the indigenous people usually ended up abandoning their cases on appeal.[57] Consequently, the indigenous persons were procedurally inhibited from bringing their matters before these courts. The colonisation of Africa produced various systems of legal pluralism, in which European and African courts existed side by side, save when it related to appeals from the indigenous legal systems.[58] In Rhodesia, the legal system has generally been informed by the legal systems adopted in other British colonies. Still, during development, an unusually complicated and intertwined legal system emerged.[59]

An indigenous litigant in Rhodesia could bring a civil case in one of four separate courts, with the possibility of appealing to one of the three different courts of appeal, and this appeal

[48] Ibid.
[49] Ibid.
[50] Section 11 (7) of the Native Regulations, 1898.
[51] A messenger was equivalent to a messenger of court.
[52] Section 3 (1) of the Native Regulations, 1898.
[53] Section 11 (11) of the Native Regulations, 1898.
[54] Section 11 (7) of the Native Regulations, 1898.
[55] Ibid.
[56] Section 11 (8) of the Native Regulations, 1898.
[57] Bennet op cit note 10 at 133-151.
[58] Ibid.
[59] Ibid.

process was complex and confusing.[60] First, an indigenous litigant could appeal from the Magistrates Court to the Appellate Division.[61] Secondly, an appeal could be noted from the High Court to the Appellate Division.[62] Thirdly, an appeal could be noted from the District Commissioner's Courts to the Court of Appeal for African Civil cases and from there to the Appellate Division.[63] Fourthly, any appeal could lie from the Tribal Courts to the Tribal Appeal Court.[64] The white settlers designed these appeal procedures without the input of the indigenous people. The indigenous people were not even educated in procedural law.[65] In fact, there were no indigenous lawyers at this point.[66] Further, some of the difficulties inherent in that system were the dual administrative and judicial roles of district commissioners and chiefs and the different approaches to African law questions in different courts.[67] The lack of a formal doctrine of precedents, forum shopping by plaintiffs and any sustained development process further aggravated these challenges.[68]

The appeal system was complex.[69] Thus, the appeal procedures beginning from the pre-colonial era were already complex. The reason was that the Europeans introduced their laws, which applied to them.[70] Disputes between Europeans were determined in courts staffed by Europeans, run according to the procedures used in the home country.[71] The indigenous African courts and litigants could not be expected to understand the intricacies of European law, nor could the Europeans be expected to submit their disputes to an alien system.[72] During the colonial period, European law was kept as a self-contained system related to disputes between colonial settlers.[73] The dual legal system ensured that Europeans used the law they conversed with while the indigenous population used the indigenous laws, which they were knowledgeable about.[74] Thus, the dual legal system embedded the complex appeal processes

[60] Ibid.
[61] Ibid.
[62] Ibid.
[63] Ibid.
[64] Ibid at 145.
[65] Ibid at 145.
[66] Ibid at 145.
[67] Ibid
[68] Ibid.
[69] Ibid at 151.
[70] Ibid.
[71] Ibid.
[72] Ibid.
[73] Ibid.
[74] Ibid at 134.

in the formal European system.[75] Hence the complexities of the appeal procedure have historical roots.

3.6. RULES GOVERNING APPEALS, LEAVE TO APPEAL, SECURITY FOR COSTS AND REFERRAL OF CONSTITUTIONAL MATTERS FROM 1891 TO 1923

The SROIC, 1898, embodied the rules of criminal and civil procedure. It was the procedural rule book. More importantly, the SROIC contained the selected rules of procedure governing the Superior Courts then. Before 1900, the SROIC provided the High Court of Southern Rhodesia as the highest court in the Colony. It was a court of record.[76] It had full jurisdiction over all civil and criminal matters, all persons and all matters in the Colony.[77] The High Court could hear customary law matters, though limited. [78] In addition, even though the judges were obliged to consider indigenous law and custom and preside over native matters as an appeal court, they had no intimate knowledge or understanding of customary law.[79]

Section 50 of the SROIC, 1989, allowed the magistrates or judges to be assisted by an indigenous assessor. However, the judgment was then written and handed down by the judge or magistrate alone.[80] The appeal procedure used in the general courts was English civil – as in many British colonies.[81] The rules for the Courts were made by the Courts. [82] The current rule-making process in Zimbabwe emanates from the SROIC, 1898. The rule-making process thus made appeals rules a complete product of the judges of the Superior Courts. However, the judges of Superior Courts were among the many users of the Rules of Court. Indigenous persons, settlers and legal practitioners were excluded or represented in the rule-making process. Thus, the legal landscape compelled the indigenous litigants to use a foreign civil

[75] Robinson 'The administration of African Customary law' (1949) (1) *Journal of African Administration* 162-175 at158. See also Holleman *Chief, Council and Commissioner*, Chapter 1. Also, Howan *Report on Native Courts for Southern Rhodesia* (1952) para 27.
[76] See s49 (1) of the SROIC, 1898.
[77] Ibid.
[78] Ibid. Mostly the application of the customary in the High Court occurred when a matter based on customary was brought on appeal from the Magistrates Court. This means that in hearing the matter decided based on customary law, the High Court was bound to apply the customary law.
[79] In *Masvingo Rural District Council v Chikwenya and Ors* 2000 (1) ZLR 13, the High Court took issues with the mixture of procedures by a litigant and warned the magistrate who erred that the Magistrates Court was not a village court. (Zimbabwean case).
[80] Ibid.
[81] Section 50 of the SROIC, 1898.
[82] See also s57 of the SROIC, 1898. General courts were the courts applying the Roman-Dutch Law. See s56 (1) of the High Court Act (7:06) and s34 (1) of the Supreme Court Rules, 2018.

appeal procedural law in which they did not participate in its drafting.

However, under the SROIC and other subsequent ordinances and Acts of Parliament discussed herein, rules governing civil procedure became more pronounced, particularly the selected rules of civil procedure, namely, appeal rules, leave to appeal rules, security for costs rules and referral of constitutional matters rules. Applying these selected rules in civil matters became more pronounced from 1891 to 1923.

3.6.1. Appeals and leave to appeal in the High Court and the Supreme Court of Rhodesia: 1891 to 1923

Initially, before 1894, Matabeleland and Mashonaland formed the two major territorial lands of today's Zimbabwe. The promulgation of the Matabeleland Order-in-Council, 1894, resulted in all the records and proceedings passed by the High Court of Matabeleland and the Magistrates Court transferred to the courts established under the SROIC, 1898. SROIC effectively combined the two, Matabeleland and Mashonaland, to be one country. Hence, all Ndebele and Shona tribes were now under the jurisdiction of the SROIC. Under the SROIC, 1898, if appeals were from the Magistrates Courts, they would have to be made to the High Court. The appeal procedure was the same as the one allowed in the Rhodesian Colony concerning appeals from the Magistrates Court. The appeals from the Magistrates Court and against the Peace of Justice were thus made to the High Court of Rhodesia. Section 49 of the SROIC provided as follows:

> "49 (1) There shall be a Court of Record, styled the High Court of Southern Rhodesia, with full jurisdiction, civil and criminal, over all persons and all matters within Southern Rhodesia, subject to the provisions from now on with regard to native law or custom.
>
> (2) The law to be administered by the High Court and by Magistrates Courts hereinafter mentioned shall, so far as not inapplicable, be the same as the law in force in the Colony on the 10th July 1891 as aforesaid."

The High Court was thus the first Superior Court in Rhodesia and had original and appellate jurisdiction over all civil, criminal or customary law matters. The procedure for appeals from the High Court to the Supreme Court was thus provided under sections 58 and 59 of SROIC, 1989. In civil matters, when the value of the subject matter or the amount claimed exceeds 100 Pounds, an appeal from the High Court would lie to the Supreme Court.[83] However, the

[83] Section 58 (1) of the SROIC, 1898.

High Court had to decide first whether the amount or value in dispute exceeded the amount or value of 100 Pounds.[84] The High Court, before making such a decision, had to state a case in writing for the opinion of the Supreme Court.[85] Hence, in deciding whether the intended appeal was to be made to the Supreme Court, it would do so in accordance with the opinion of the Supreme Court. Further, an appeal was supposed to be lodged within the prescribed times.[86] In addition, where the procedure in the Supreme Court had lacunae, the general procedure rules governing High Court in the SROIC were applicable.[87] Moreso, an appeal from the order of the Supreme Court was to be made to Her Majesty in Council, and the procedure and time frame for filing the same was the same as an appeal to the Supreme Court. However, it must be noted that the Her Majesty in Council was Queen Elizabeth II in England.[88] Hence geographically, it was near impossible to appeal to Her Majesty in Council in the United Kingdom as that required financial resources to pursue such an appeal.

The SIROIC, 1898, provided for leave to appeal in civil matters. If the litigant's case was not within the class of matters where an appeal was allowed under the SIROIC, he/she was required to apply to a judge of the High Court for leave to appeal.[89] This means that the right of appeal was not automatic in civil cases.[90] Thus, the right of access to the court on appeal was limited. More importantly, the application for leave to appeal was made before a single judge of the High Court. There was no appeal mechanism when there was a refusal of the application for leave to appeal by a judge. The judge had sole discretion to grant or refuse to grant the application. [91] There was no defined test regarding a judge's decision to grant or refuse leave. Further, a judge could grant leave on part or whole judgment or order being sought to be appealed against, provided the amount in dispute or value exceeded 100 Pounds.[92]

It is clear from these provisions that in civil matters when the amount or value in a civil dispute exceeded 100 Pounds, the appeal was to be made from the High Court to the Supreme Court.[93] There was no appeal to the Supreme Court if the monetary value was less than 100 Pounds. The right of appeal was thus limited to a monetary value. Therefore, even if a

[84] Section 58 (5) of the SROIC, 1898.
[85]Ibid.
[86] Section 58 (2) of the SROIC, 1898.
[87] Section 58 (3) of the SROIC, 1898.
[88] Section 58 (4) of the SROIC, 1898.
[89] Section 59 (1) of the SROIC, 1898.
[90] Ibid.
[91] Section 59 (2) of the SROIC, 1898.
[92] Section 59 (3) of the SROIC, 1898.
[93] Section 58 of the SROIC, 1898.

party was aggrieved, they had no recourse concerning any claim less than the stipulated value. Further leave was required for a litigant to appeal for matters not in the class allowed for an appeal to the Supreme Court; it was not automatic. More importantly, the jurisdiction of the Supreme Court on appeal was exercisable only after the legislature of the Colony had passed a resolution and after assent by the High Commissioner.[94] At this point, however, the Supreme Court was situated in South Africa. Hence, the indigenous populations' access to the Supreme Court was restricted procedurally and territorially.

In terms of s58 (2) of the SROIC, if a procedural aspect was not provided for in the rules on appeal procedure to the Supreme Court, the appeal procedure was regarded to be the same as the ordinary procedure for the court: a quo's appeal procedure. Thus, in essence, on appeal, a litigant, whether represented or not, was supposed to be acquainted with the rules of the High Court in the case of a lacuna in the rules governing the appellate court. A litigant thus had to know the High Court and Supreme Court rules of appeal procedure to launch a successful appeal to the Supreme Court.

Furthermore, under s59 (1) of SROIC, a litigant instituting a civil cause or other civil proceedings in the High Court of Southern Rhodesia, which was not provided for in the Rules, required leave to appeal to the Supreme Court. This also narrowed access to the Supreme Court.[95] The practice of obtaining leave to approach the Supreme Court evolved under the SROIC. The judge to whom the application was made had the discretion to grant or refuse leave to appeal against all or part of the judgment or order. The danger of this concept – still applied currently – is that one judge had the power to refuse a litigant access to a full bench. There was no avenue for a further appeal after that judicial refusal. The rationale of this approach was the presumption that a judge exercised his/her discretion judicially and correctly in refusing to grant the leave to appeal to the litigants with cases without merit.[96] The appeal process was thus restricted due to the requirement for leave to appeal. An appeal against the judgment of the Supreme Court was made to Her Majesty in Council in the same way as an appeal from a judgment of the Supreme Court in its ordinary jurisdiction.[97] The appellate procedure would end with Her Majesty in Council. Therefore, the appellant would be obliged to lodge their papers in England, and many indigenous litigants had no such capacity. This,

[94] Ibid.
[95] Section 59 (1) of the SROIC, 1898.
[96] Compare with the reasoning in the United Kingdom case of *R (Goring-On-Thames Parish Council) v South Oxfordshire Council and Another* [2018] EWCA Civ 860.
[97] Section 58 (3) of the SROIC, 1898.

therefore, limited the right of access to the final appeal authority, Her Majesty the Queen of the United Kingdom, Queen Elizabeth II.

The appeal jurisdiction conferred by the SROIC, 1898 upon the Supreme Court could not be exercised until the Legislature of the Rhodesia Colony – by resolution or otherwise – had expressed its assent. Thus, access to the Supreme Court also depended on whether the Legislature of the Colony exercised its consent. Furthermore, the High Commissioner was obliged to communicate such assent to the High Court for it to be effective. Hence, without assent, there was no appeal. The SROIC provided for the jurisdiction and the procedure to be followed by the courts in dealing with civil disputes.

3.6.2. Requirement of security for costs and access to the High Court of Rhodesia: 1891 to 1923

Another important development was the introduction of the security for costs rules in 1912. Before 1912, there was no requirement for security for costs. After the introduction of the rule of security of costs in 1912, litigants who intended to appeal or institute proceedings in the High Court were required to ensure that they paid the security costs or apply for an exemption to the High Court. Section 8 of Ordinance No 7 of 1912[98] provided that a defendant could request security for costs if the plaintiff has no visible means of paying the defendant's costs if the plaintiff loses the case.[99] The High Court could then make an order requiring the plaintiff to give full security for costs to the satisfaction of the Master of the High Court.[100] If the plaintiff failed to furnish the security costs, the action or application could be remitted for trial in the Magistrates Court.[101]

This rule restricted access to the High Court on appeal if security costs were not raised. In the event of failure to raise security, the matter was heard and determined in the Magistrates Court as if it had been commenced therein. This meant that if a litigant could not raise security or had not been exempted by the High Court, their matter could not find its way to the High Court of Rhodesia. Hence, failure to provide security was a barrier to access to the High Court, although, to some extent, it was not an unreasonable barrier as the matter could still be heard

[98] Section 8 of Ordinance No 7 of 1911, published on 2 January 1912.
[99] Ibid.
[100] Ibid.
[101] Ibid.

in the Magistrates Court.

3.7.THE DEVELOPMENT OF THE SELECTED RULES UNDER VARIOUS CONSTITUTIONS AND ACCESS TO THE SUPERIOR COURTS: 1923 to 1979

The general law remained Roman-Dutch law and statute law.[102] Statutes were passed, including the High Court Act (Chapter 8).[103] The 1923 constitutional dispensation enshrined the right to be heard and the right of access to the court. The subsequent Constitution of Southern Rhodesia (Rhodesia and Nyasaland Federation) No 2314 of 1961[104] in s63 (8) also similarly provided as follows:

> "Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial and where proceedings for such determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time."

In addition, the Southern Rhodesia/The Zimbabwean Constitution Order, 1979, in s18 (9) provides:

> "Every person is entitled to be afforded a fair hearing within a reasonable time by an independent and impartial court or other adjudicating authority established by law in the determination of the existence or extent of his civil rights or obligations." (Underlined for emphasis).

Under the constitutional dispensation, the colonial government recognised the right of access to the court, including the appellate courts, although not explicitly as in the current s69 (3) of the Constitution of Zimbabwe, 2013.[105] More importantly, the colonial constitutional provisions cited above extended to the interpretation rules governing access to the Superior

[102] Constitution for Rhodesia No 54 of 1969 provided that:
"70 Subject to the provisions of any law relating to the application of African customary law, the law to be administered by the High Court shall be the law in force in the Colony of the Cape of Good Hope on the tenth day of June 1891, as modified by subsequent legislation having in Rhodesia the force of law."
Also see s56 of the Constitution of Southern Rhodesia (Rhodesia and Nyasaland Federation) No 2314 of 1961,
"Subject to the provisions of any law for the time being in force in Southern Rhodesia relating to the application of customary law, the law to be administered by the High Court and any courts in Southern Rhodesia subordinate to the High Court shall be the law in force in the Colony of the Cape of Good Hope on the tenth day of June 1891, as modified by subsequent legislation having in Rhodesia the force of law."
[103] High Court Act (Chapter 8)
[104] Around 1961, Zimbabwe and Zambia were joined as one federation of Rhodesia and Nyasaland but after 1965, the Federation was dissolved.
[105] This refers to the period from 1923 when constitutions were introduced in Rhodesia until 1979

Courts of Rhodesia.[106] This argument can be reinforced by examining the procedures in the High Court of Rhodesia and the Court of Appeal and access on appeal to Her Majesty the Queen of the United Kingdom.

3.7.1. The Courts' structure under the Constitutional Order: 1923 to 1964

The Courts' structure established under the SROIC was adopted in full under the 1923 Southern Rhodesia Constitution,[107] which marked the transfer of the governance of the Rhodesian Colony from the BSAC's rule to the colonial administration – as essentially established by the local white settlers.[108] The 1923 Constitution ushered in three distinct arms of the State: the executive, legislature and judiciary.[109] The formal/European court structure was extended to include a distinct (standalone) Supreme Court above the High Court of Rhodesia.

The High Court of Southern Rhodesia was clothed with full civil and criminal jurisdiction over all matters in the Rhodesian Colony.[110] The High Court consisted of judges appointed by the Governor,[111] who also appointed a Chief Justice. The High Court had jurisdiction to determine all questions, matters and things arising in hearing such as civil cases.[112]

The Administration of Justice (Appeals) Chapter 10 sets out procedure[113] for appeals from decisions of the High Court in civil and criminal matters. Appeals against the decision of the High Court were made to the Appellate Division of the Supreme Court of the Union of South

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[106] See *Chitiyo v Hlupani* 1940 S.R.N 155 and also *Imwadzawo v Manondo* 1948 S.R.N 431.
[107] See ss69 and 49 of the Southern Rhodesia-Order-in Council of 1898.
[108] Southern Rhodesia underwent various constitutional changes: 1923, 1961, 1965, 1969 and 1979. See R L Maddex *Constitutions of the world* (3 ed) Routledge (2014). See s48 of the Constitution of Southern Rhodesia.
[109] G Manyatera & C M Fombad 'An assessment of the Judicial Service Commission in Zimbabwe's new Constitution' (2014) 47 (1) *The Comparative and International Law Journal of Southern Africa,* 89-108.
[110] Section 62 (1) of the Constitution for Rhodesia No 54 of 1969.
[111] Governor was a new title for the High Commissioner. So, a Governor was an equivalent of a President.
[112] The Constitution for Rhodesia No 54 of 1969 provides that:
"62 (1) The judiciary authority of Rhodesia shall be vested in a High Court, to be known as the High Court of Rhodesia.
(2) The High Court of Rhodesia shall consist of such Divisions and shall have such jurisdiction as may be prescribed by a law of the Legislature."
Section 50 (1) of the Constitution of Southern Rhodesia (Rhodesia and Nyasaland Federation) No 2314 of 1961, which provided that:
"There shall be a High Court in and for Southern Rhodesia, which shall be a court of record with full jurisdiction, civil and criminal, over all persons and all matters within Southern Rhodesia."
See also s 79 (1): "There shall be a High Court of Zimbabwe which shall consist of –
The Appellate Division of the High Court; and
The General Division of the High Court."
Section 80 (1): "The Appellate Division shall be a superior court of record and shall have such jurisdiction and powers as maybe conferred upon it by or under this Constitution or any act of Parliament."
[113] Administration of Justice (Appeals) Chapter 10.

Africa (hereinafter "the Court of Appeal"). This meant that on appeal, litigants had to file their appeals extra-territorial to South Africa's Supreme Court. Furthermore, no appeal could be made from any decision of the High Court where the parties had lodged with the said court an agreement in writing, signed by themselves or their attorneys or agents, that the decision of the High Court was final.

The rules of appeal, security costs, and leave to appeal developed under the Order-in-Council in 1898 remained in use until the 1961 Rhodesia Constitution was promulgated. After 1961, several amendments were introduced to the appeal, leave to appeal and security costs rules.

3.7.2. The referral of constitutional matters procedure to the Supreme Court of Rhodesia: 1961 to 1964

The referral of constitutional matters procedure emanated from the 1961 Rhodesia Constitution. Notable amendments related to the referral of constitutional matters procedures included establishing the Constitutional Council[114] and entrenching procedural rights under the Bill of Rights.[115] Further, the referral of constitutional matters procedure was contained in the Appendix (an equivalent of a Bill of Rights). There were also other procedural rights enshrined in the Appendix. For example, Appendix 2, s 7 (8) and s 7 (9) of the 1961 Rhodesia Constitution enshrined the principles of natural justice in civil proceedings, which included impartiality, fairness, timeously held trials, public access to hearings and public pronouncement of judgments.[116] However, more importantly, Appendix 2 s 7 (15)[117] provided access to the High Court in three ways if there were allegations of infringement of the Bill of Rights. Firstly, in the event of violating the Bill of Rights, a party injured had a right to apply directly to the High Court for a remedy. Secondly, a party could refer a constitutional issue before any court to the High Court for redress. Thirdly, by way of appeal, a party could approach the High Court for redress on any issue raised and argue about the alleged Bill of Rights violations in any other order or judgment made by a court subordinate to the High Court. The access was not restricted

[114] Section 50 of the Constitution of Southern Rhodesia. See also the High Court Practice and Procedure Act [Chapter 9] of 1939.
[115] In terms of s50 of the Constitution of Southern Rhodesia, the Constitutional Council was responsible for scrutiny of bills and SIs (regulations) and reports to parliament on whether they were *intra vires* against the constitution. The constitutional council ascertained whether or not the bills and SIs were infringing on the Bill of Rights.
[116] Section 7 (9) of Appendix 2 of the Constitution of Southern Rhodesia.
[117] Appendix 2. The Declaration of Rights of Constitution of Southern Rhodesia. This Bill of Rights was carried into the 1965 and 1979 Constitutions of Rhodesia and 1980 Constitution of Zimbabwe.

in those constitutional appeals to the High Court.

Hence the referral procedure was basically a referral by application of a constitutional issue, and there were no specific and particular requirements for the application save the fact that the application was supposed to raise a constitutional issue. Clearly, this procedure was meant to ensure that in the case of an alleged violation of the Appendix, a speedy procedure was availed to an aggrieved litigant. The purpose was to increase access to the superior courts whenever a constitutional issue arose.

3.7.3. Appeals and leave to appeal and access to the High Court of Rhodesia under Government Notices, No 1932, Order No XXX

The Government Notices, No. 1932, Order No. XXX provided the appeal procedure to the High Court of Rhodesia. The first step to initiate an appeal process involved a request by the appellant for a written judgment from the clerk of court within seven days from the date of judgment.[118] The written judgment was supposed to show the facts proved and the reasons for the judgment.[119] The appellant was required to pay a fee of one Pound. The written judgment became part of the record. [120] These provisions are word for word as the current wording of the provisions of Order 31, Rule 2 of the Magistrates Court (Civil) Rules, 2019.[121] The dies induciae for noting an appeal was twenty-one days from the date of judgment, similar to the current dies induciae in noting an appeal from the Magistrates Court to the High Court.[122] The time frame of twenty-one days has been widely used as the dies induciae on appeals in Zimbabwe. No litigant or case law has raised the time as unduly restrictive to noting an appeal.

Further, the rules governing an appeal from the Magistrates Court provided that an appellant should give the respondent security for the respondent's costs in the sum of 20 Pounds.[123] The current rules governing appeals from the Magistrates to the High Court also provided ZWL (Zimbabwean Dollar) 100 as security for the respondent's costs.[124] It is clear that the requirement for security costs was compulsory, and there was a mandatory fixed sum of security for costs.[125] However, in the colonial era, 20 Pounds was a huge sum; if one is to

[118] Section (1) (1) of Government Notices, No. 1932, Order No. XXX.
[119] Section (1) (1) (a) (b) of Government Notices, No. 1932, Order No. XXX.
[120] Section (1) (1) of Government Notices, No. 1932, Order No. XXX.
[121] Order 31, Rule 2 of the Magistrates Court (Civil) Rules, 2019.
[122] Order 31, Rule 1 of the Magistrates Court (Civil) Rules, 2019.
[123] Section (2) (2) of Government Notices, No. 1932, Order No. XXX.
[124] Ibid.
[125] Ibid.

consider that for an appeal against an amount of 100 Pounds, one was entitled to a right of appeal from the High Court to the Supreme Court.[126] More importantly, the respondent had a right to a cross-appeal.[127]

The rules governing appeal also provided that for an appeal to be valid, the appeal should state whether the whole or part only of the judgment or order was being appealed against, and secondly, if part only, then what part.[128] Also, the grounds of appeal must be clearly and specifically stated. These requirements are the same as those in Order 31, Rules 2 and 3 of the Magistrates Court (Civil) Rules. Furthermore, upon delivery of a notice of appeal by the appellant, the magistrate was required again, within seven days, to deliver to the clerk of the court a statement in writing showing (so far as may be necessary, having regard to any written judgment already delivered by him) the facts he found to be proved, the grounds upon which he arrived at any finding of fact specified in the notice of appeal as appealed against, and his reasons for any ruling of law or for the admission or rejection of any evidence so specified as appealed against.[129]

These provisions limited the right of access to the High Court in three ways. Firstly, a litigant had to pay a fee to get reasons for the judgment. Secondly, the litigant had to pay a hefty security fee of 20 Pounds to be allowed to file an appeal, which many could not afford. Thirdly, it was mandatory to state whether the judgment being appealed was wholly or partly appealed against, and the grounds also needed to state concisely and precisely. An appeal that failed to comply with such requirements was a legal nullity.[130] These were requirements that most indigenous litigants were not conversant with.[131]

3.7.4. The Courts' structure and right of appeal to the General and Appellate Division of the High of Rhodesia: 1961 to 1979

The 1961 and 1964 Southern Rhodesian Constitutions increased the jurisdiction of the High Court. Section 50 of the Southern Rhodesia Constitution of 1964 provided for two divisions of the High Court: the General Division and the Appellate Division. The Appellate Division was the Superior Court of record and only adjudicated appeal matters. The General Division of the

[126] Ibid.
[127] Section (3) of Government Notices, No. 1932, Order No. XXX.
[128] Section (4) of Government Notices, No. 1932, Order No. XXX.
[129] Ibid.
[130] See the case of *R v Emerson* 1957 R&N 743 (SR) at 748D-E. Also compare with Privy Council, *Stella Madzimbamuto v Desmond William Lardner-Burke and Fredrick Phillip* [1968] 3 W.L.R 1229.
[131] Sithole op cit note 1 generally.

High Court was composed of the Judge President and other judges as appointed. The Chief Justice and the judges of appeal were not allowed to preside in the General Division of the High Court unless the Judge President authorised them to do so. The 1964 Constitution provided for the Chief Justice as the head of the judiciary of Southern Rhodesia and head of the Appellate Division. Further, in s 50 (2), the 1964 Constitution provided for a Judge President of the High Court who was the head of the General Division. The Judge President would head the Appellate Division when the Chief Justice was absent.

The General Division of the High Court was a Superior Court of record endowed with full jurisdiction (civil and criminal) over all persons and all subject matters as a court of first instance and appeals court in Southern Rhodesia.[132] Thus, the indigenous and European court systems were procedurally unified, and a litigant would appeal to the High Court if their matter were within the court's jurisdiction. As with previous constitutions, the appeals were made to the Appellate Division of the High Court. The 1964 Constitution provided that the legislature could provide a right of appeal to Her Majesty in Council, the Queen of the United Kingdom, from a determination of the Appellate Division of the High Court in cases or class of cases so prescribed. This changed the previous position in the SROIC, 1898, where all appeals emanated from the General Division to Her Majesty.[133] However, Her Majesty in Council had powers to grant leave under special circumstances to any litigant to approach her Court directly from any division of the High Court.[134] Furthermore, section 71 of the 1964 Constitution narrowed the grounds of appeal to the point of law, excluding frivolous and vexatious issues when an appeal was made to Her Majesty in Council.[135] These procedural restrictions meant restricted access to these Superior Courts of Rhodesia.

Further, in 1964, a comprehensive High Court Act, in addition to the Constitution, was enacted, which provided for the jurisdiction and powers of the High Court.[136] The 1964 High Court Act contained the Appellate and General Division procedures. In the Appellate Division, an appeal was heard by no fewer than three judges but could be heard by more judges after consultation with the Judge President and the Chief Justice.[137] This was done to lessen the possibility of errors when determining a matter. These were some of the positive practices that

[132] Section 53 (3) of the Southern Rhodesian Constitution Amendment No 13 of 1964.
[133] Section 56 F of the Southern Rhodesian Constitution Amendment No 13 of 1964.
[134] Section 56 G of the Southern Rhodesian Constitution Amendment No 13 of 1964.
[135] Section 71 (5) of the Southern Rhodesian Constitution Amendment No 13 of 1964.
[136] See the preamble to the High Court Act No 22 of 1964.
[137] Section 3 (i) A & B of the High Court Act No 22 of 1964.

enhanced access to the court. For instance, the practice of a matter to be heard by two or three judges is a procedure that enhances access to justice. In addition, where a difficult question of law arose, additional judges would be included to hear the matter; this was a progressive appeal procedure.[138] The decision of the Appellate or General Division was based on the majority judicial consensus, and if a deadlock of opinion occurred, another judge would be consulted.[139] Where a judge had presided over a matter in the General Division, he or she could not be an appellate judge.[140] The rationale is that such a judge would have exercised their mind before. These procedures enhanced access to justice and increased the margin of error elimination.

The High Court Act No 22 of 1964, Part C, dealt with civil appeals, and the terms of s 25 provided a two-tier appeals process. One could appeal directly from the Magistrates Court to the General Division or the Appellate Division to the Supreme Court.[141] Significantly, s 47 of the High Court Act No 22 of 1964 provided that all the proceedings in any division of the High Court would be held in open court, and the official language used was English. English was not one of the indigenous languages; thus a barrier to access to justice for indigenous persons.[142] The right to be represented and to have an audience was limited to the personal appearance of a person or his representation by an advocate in court.[143] The self-representing litigant had inadequate skills to conduct their hearing, and most litigants lacked sufficient resources to hire an advocate. Section 51 of the High Court Act 1964 empowered the Chief Justice and the Judge President to formulate further procedural rules.[144]

After 1964, the Appellate Division and the Supreme Court developed robust rules of procedure governing the appeal procedure, called the Rules of the Appellate Division of the High Court, Government Notice No 380 of 1964. These mirrored the current Supreme Court Rules. The Rules of the Supreme Court, 1964, were the rules that were used to govern the Appellate Division. They were initially known as the Rules of the Appellate Division of the High Court (Amendment) Rules, 1964, No 1, and several other amendments brought them to

[138] Section 3 (i) B (ii) of the High Court Act No 22 of 1964.
[139] Section 4 of the High Court Act No 22 of 1964.
[140] Section 5 of the High Court Act No 22 of 1964.
[141] Section 26 (1) of the High Court Act No 22 of 1964. Compare with current section 43 of the High Court Act (7:06).
[142] K R A Robinson 'Iron Age sites in the Zambezi Valley, and on the escarpment in the Sipolilo District, Southern Rhodesia (1965) 1 (27) *Arnoldia* 1-12.
[143] See s48 of the High Court Act No 22 of 1964.
[144] Section 51 of the High Court Act No 22 of 1964.

their current form.[145] The Rules of the Supreme Court, 1964 dealt with appeals from the High Court and the Magistrates Court but did not cater to other legal fora where litigants could access justice.

Further, after 1969, the appeal procedure was governed by a Court Practice and Procedure Act (Chapter 9).[146] An appeal from the High Court had to be directed to the Appeal Court (High Court Appellate Division).[147] More importantly, such an appeal could be made from any judgment or order of the High Court that was final or definitive, either in form or in effect, or when the amount or value in dispute exceeded 100 Pounds excluding costs.[148] An appeal could be made to the Appellate Division from any judgment or order made by the High Court on appeal from an inferior court if the Court of Appeal granted special leave to appeal.[149] Further, an appeal could be made from any judgment or order not stated above, provided the Court or judge who gave such judgment or made such order granted special leave to appeal.[150] The judgment on costs was that it was not appealable.

Further, the High Court had powers to order the stay of execution or execution pending appeal. The appeal to the Supreme Court did not automatically suspend the decision appealed against, but rather, the suspension of execution or execution was a matter of discretion of the High Court.[151] However, where an execution was made, the respondent to the appeal was

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[145] See RAD (Amendment) Rules, 1969, No 2, RGN 738/69; See RAD (Amendment) Rules, 1971, No 3, RGN 82/71; RAD (Amendment) Rules, 1974, No 4, RGN 738/69; RAD (Amendment) Rules, 1969, No 2, RGN 172/74; RAD (Amendment) Rules, 1975, No 5, RGN 421/75; RAD (Amendment) Rules, 1975 correcting RGN 472/75; RAD (Amendment) Rules, 1977, No 6, RGN 141/77; RAD (Amendment) Rules, 1979, No 7, SI 504/79. Substantively, after 1980, there were few amendments that did not change the materiality and substance of the Rules, which is why they were referred to as Rules of the Supreme Court, 1964, until they were renamed the Supreme Court Rules, 2018 in 2018. The only major change was the alteration of the term Appellate Division to Supreme Court. From 1983 to 2000, there were amendments to the Rules, but those did not change the form and substance of the Rules. See RAD (Amendment) Rules, 1981, No 8, SI278/81; Rules of the Supreme Court (Amendment) Rules, 1983, (No 9) SI 215/81; Rules of the Supreme Court (Amendment) Rules, 1983, (No 9) SI 215/81; Rules of the Supreme Court (Amendment) Rules, 1984, (No 10) SI 396/84; Rules of the Supreme Court (Amendment) Rules, 1991, (No 11) SI 170/91; Rules of the Supreme Court (Amendment) Rules, 1992, (No 12) SI 14/92; Rules of the Supreme Court (Amendment) Rules, 1992, (No 13) SI 99/92; Rules of the Supreme Court (Amendment) Rules, 1994, (No 14) SI 98/94; Rules of the Supreme Court (Amendment) Rules, 2000, (No 15) SI 78/2000.

[146] Section 1 of the Court Practice and Procedure Act (Chapter 9]. See also the Constitution for Rhodesia No 54 of 1969, s 92 Second Schedule, which provided that:

"Every person is entitled to the protection of the law and to be afforded a fair hearing within a reasonable time by an independent and impartial court or other adjudicating authority established by law in the determination of his civil rights and obligations or any criminal charge brought against him."

[147] Section 1 (a) of the Court Practice and Procedure Act (Chapter 9].

[148] Section 1 (b) of the Court Practice and Procedure Act (Chapter 9].

[149] Section 1 (c) of the Court Practice and Procedure Act (Chapter 9].

[150] Section 1 (d) of the Court Practice and Procedure Act (Chapter 9].

[151] Ibid.

ordered to pay sufficient security for the due enforcement of the judgment. However, under the current rules, the appeal suspends the execution of the judgment.[152] The appeal procedure under s1 (a) of the Court Practice and Procedure Act, as discussed above, is still the same as from the High Court to the Supreme Court.

These provisions of the rules governing appeal meant that the judgment must have been final and definitive for a litigant to appeal to the Court of Appeal. This is still the current practice in Zimbabwe. Secondly, leave must have been granted by the Judge of the High Court. In some circumstances, the litigant would require special leave to be granted, particularly when the contested issue was related to costs. Thirdly, the High Court could order the execution of the judgment even if appealed. For the judgment not to be executed, a litigant had to pay security for costs. These aspects narrowed court access for litigants. Only those litigants with definitive and final judgments had the right of access to the Appeals Court (Appellate Division). Secondly, those who would have succeeded in obtaining leave had the right of access. More importantly, there was no right to appeal against the refusal of leave or special leave. Furthermore, even if a litigant failed to raise security for costs, it meant the execution of the judgment would proceed, thus making the whole appeal process a *brutum fulmen.*

No appeals were from the Court of Appeal to Her Majesty the Queen of the United Kingdom. However, Her Majesty had powers to grant special leave to appeal from the Court of Appeal to Her Majesty's Order-in-Council. This means that Her Majesty, at her discretion, could grant leave to appeal to a litigant. The problem with this appeal procedure is that it rested entirely on a political institution whose discretion was not entirely judicial and depended on political motivation.[153]

3.7.5. The requirements for a valid notice of appeal: 1964 to 1979

From 1964, major changes to the appeal procedure were related to appeals. Rule 29 (1) of the Rules of the Appellate Division of the High Court No 380 of 1964 provided that every civil appeal be instituted as a notice of appeal signed by the appellant or his legal representative. The notice of appeal was supposed to contain: the date on which and the court by which the judgment appealed was given;[154] if leave to appeal was required and granted, the date of such

[152] Ibid.
[153] T Eckhoff 'The relationship between judicial and political branches of government' In *Sociology of the Judicial Process* Springer 14-23.
[154] Rule 29 (1) (a) of the Rules of the Appellate Division of the High Court No 380 of 1964.

grant;[155]whether the whole or part only of the judgment was being appealed against;[156] the grounds of appeal precisely and briefly stated;[157]the exact nature of the relief which was sought;[158] and the address for service of the appellant or attorney.[159] The notice of appeal was to be served on the Registrar, the Registrar of the General Division, and the respondent.[160]

The requirements of Rule 29 (1) of the Rules of the Appellate Division were mandatory, and these rules are also currently in force in Zimbabwe. Rule 29 of the Rules of the Appellate Division made it mandatory that an appeal should state the date on which leave was granted if required and the date on which the judgment being appealed against was given. In addition, Rule 29 of Rules of the Appellate Division, 1964, required a litigant to state whether the appeal was for a part or full judgment. The grounds of appeal had to conform with Rule 32 of the Rules of the Appellate Division (which shall be discussed below). More importantly, the litigant was supposed to be specific about what relief he or she required from the court. Under Rule 30 of Rules of the Appellate Division, it was mandatory for a litigant to comply with the timelines or dies induciae. Where leave to appeal was not required, the appeal was to be noted and served to the respondent within twenty-one days from the date of judgment appealed against, similar to current rules set out in Chapter 4.[161] If leave was required, the appeal was to be noted and served within fourteen days from the date of granting of leave to appeal.[162] Thus, Rule 30 specifically prescribed the timelines for when a litigant must file a notice of appeal if leave to appeal had been granted. The timelines in Rule 30 are the same as the current Rules governing appeals from the High Court to the Supreme Court. Rule 29 required the grounds of appeal to be set concisely like the current Rules governing appeal procedure in the High Court and the Supreme Court.[163] Further, Rule 41 of the Rules of the Appellate Division of the High Court No 380 of 1964 allowed, upon application by notice of motion or upon oral application by counsel during any hearing, amendment of the grounds of appeal or any pleadings or other document. A litigant was allowed to apply orally or in writing for such an amendment to a notice to be considered.

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[155] Rule 29 (1) (b) of the Rules of the Appellate Division of the High Court No 380 of 1964.
[156] Rule 29 (1) (c) of the Rules of the Appellate Division of the High Court No 380 of 1964.
[157] Rule 29 (1) (d) of the Rules of the Appellate Division of the High Court No 380 of 1964.
[158] Rule 29 (1) (e) of the Rules of the Appellate Division of the High Court No 380 of 1964.
[159] Rule 29 (1) (f) of the Rules of the Appellate Division of the High Court No 380 of 1964.
[160] Rule 29 (2) of the Rules of the Appellate Division of the High Court No 380 of 1964.
[161] Rule 30 (a) of the Rules of the Appellate Division of the High Court No 380 of 1964.
[162] Rule 30 (b) of the Rules of the Appellate Division of the High Court No 380 of 1964.
[163] Rhodesia: Judgment of Appellate Division of the High Court in *Ndlovu and Others v The Queen (Constitutional Position of Rhodesia)* AD 138/1968.

This rule was carried forward to the current rules of governing appeals in the Supreme Court of Zimbabwe, the Supreme Court Rules, 2018. This rule is positive as it allowed access then and allows access now, in theory, to the Superior Courts, in that an appellant could invoke it and still have his/her appeal though defective, given a further lease of life through amendment. This rule could increase accessibility to the Appellate Division if there were a defect in an appeal; an appeal amendment could be made instead of dismissing the same. However, in many instances, despite the advantage of using this rule, the Appellate Division, just like the current Supreme Court, ruled that such an appeal was defective.[164]

Further, under the same rules governing notice to appeal carried over to post-colonial Zimbabwe before the amendment in 2018, in the case of *Church of the Province of Central Africa v Kunonga & Anor* 2008 (1) ZLR 413 (S) at 418, the Supreme Court dealt with the effect of a notice of appeal, not in compliance with the mandatory requirements, which are exact to the ones contained in the Appellate Division Rules, 1964. The Supreme Court ruled that:

> "….. a distinction must be made between those matters where the notice of appeal is invalid because of failure to comply with the provisions of the statutes, such as section 43 of the High Court Act, and a situation where a notice of appeal is invalid because of failure to comply with the rules of the Supreme Court. Where a notice of appeal does not comply with the provisions of the Act of Parliament, the court has no discretion in the matter, and the defect is incurable. In a situation like that, it is open to the Court, and indeed a judge of the Supreme Court, to order that the appeal is a nullity and is incurably defective."

This approach set in the *Church of the Central Africa* case is the current Supreme Court of Zimbabwe's fall-back approach, where a notice of appeal does not comply with the mandatory requirements of the rules of civil procedure.[165] The strict interpretation of the rules governing notice of appeal thus unduly restricted the right of access to the Supreme Court of Zimbabwe. Historically, the mandatory requirements restricted access to the court. It would be grossly unreasonable to dismiss a matter for stating a wrong date of judgment when the same judgment is attached.[166] Hence some requirements stated as mandatory are essentially technical and not substantive. For example, whether a litigant is appealing part or the whole judgment must not result in an appeal being dismissed but amended.[167] The mandatory requirements stated in the

[164] *Jensen v Acavalos* 1993 (1) ZLR 216 (S), *Matanhire v BP & Shell Marketing Services (Pvt) Ltd* 2004 (2) ZLR 147(S).
[165] *Holt v Brook* 1959 (3) SA 803.
[166] *Jensen* supra note 164 and also *Matanhire* supra note 167.
[167] Ibid.

appeal rules of the High Court and the Appellate Division emphasised the technical requirements and not the substance of the appeal. [168]

On the other hand, the appeals to the High Court (General Division) Rules, 1971 were made under Order 25 and the Magistrates Court (Civil) Rules, 1971. The requirements governing the appeals were the same as those from the High Court General Division to the High Court Appellate Division.[169] On a positive note, Order 25 of the High Court (General Division) Rules, 1971 provided the timelines by which an appeal could be filed and prosecuted. The appeal was supposed to be heard within eight weeks.[170] This was intended to ensure no undue delay in the execution of appeals. These rules enhanced access to the court by ensuring that matters were heard expeditiously.

Another positive aspect was that both the Rules of the Appellate Division of the High Court No 380 and High Court Rules, 1971 under Rule 4 provided that:

> "Subject to the provisions of subsection (4) of section 21 of the Act, the Chief Justice, Judge President, or the court may direct a departure from these rules in any way where this is required in the interests of justice and, additionally or may give such directions in matters of practice or procedure as may appear to him or it to be just and expedient."

This rule is in almost every current Rule book of the Superior Courts of Zimbabwe.[171] The purpose of the rule is to ensure that a departure from the rules could be made in the best interests of justice. It allows flexibility to judge where interests of justice demand departure from the rule of procedure. Hence the appeal rules are substantially the same as the current rules of procedure, and some of the aspects enhance access to the court while others inhibit it.

In 1975, there was the enactment of the High Court (Appellate Division) (Miscellaneous Appeals and References) Rules, 1975. The High Court Rules, 1975, provided for the filing of a notice of appeal from tribunals; the condonation and extension of time to file an appeal; the contents of an appeal; the requirement for a record of proceedings; the procedure for a stated case; and the procedure for a hearing.[172] The High Court Rules, 1975 became the Supreme

[168] Ibid.
[169] Ibid.
[170] Rule 1 and 2, Order 25 of the High Court (General Division) Rules, 1971.
[171] See Rule 5 of the Supreme Court Rules, 2018; Rule 5 of the High Court Rules, 2021; and Rule 5 of the Constitutional Court Rules, 2016.
[172] High Court (Appellate Division) (Miscellaneous Appeals and References) Rules, 1975, RGN No 449 of 1975, Rules 4-7.

Court (Miscellaneous Appeals and References) Rules, 1975, and later the Supreme Court Rules, 2018.

Although amended several times, the current rules' substance, structure, form and content resemble the rules of civil procedure in Rhodesia. It is argued that the rules of the appeal procedure, leave to appeal, security costs and referral of constitutional matters in Zimbabwe have not been reformed as required and thus materially restrict access to the court – as discussed in Chapter Four.[173]

3.7.6. Application for leave to appeal to the Superior Courts: 1964 to 1979

The concept of leave to appeal has been part of the colonial criminal justice system. Rule 31 (1) provides that an applicant can file leave to appeal or an extension of time to file an appeal. The leave to appeal was commenced by a notice of motion signed by the applicant or his legal representative and was accompanied by a copy of the judgment against which it was sought.[174] An application for leave to appeal for it to be granted must set out the date the General Division refused leave to appeal.[175] The application for leave to appeal must attach a notice of appeal, a copy of the proceedings before the General Division when leave to appeal was refused, and the judgment, if any. A document setting out any information which is relied upon as affecting the granting leave to appeal, with any facts alleged certified by an affidavit.[176] The application for leave to appeal must demonstrate that there are prospects of success.[177]

Furthermore, in Rhodesia, the application for leave to appeal was required to be served on the Registrar and the other opposing party.[178] The respondent was required to file a notice of opposition within three days of being served an application for leave to appeal. The applicant was entitled to a reply within three days of receipt of notices of opposition.[179] The Registrar was required to notify the parties of the hearing date.[180] The judge had the discretion to hear the application for leave to appeal and the appeal questions together.[181] Once the leave to appeal application had been granted, the appeal was deemed to have been instituted in terms of the

[173] Furthermore, the independence of Zimbabwe in 1980 resulted in a power transfer from the White Rhodesian government to Black Zimbabweans, but this did not bring about the transformation of the judicial system.
[174] Rule 31 (1) of the Rules of the Appellate Division of the High Court No 380 of 1964.
[175] Rule 31 (2) of the Rules of the Appellate Division of the High Court No 380 of 1964.
[176] Rule 31 (3) of the Rules of the Appellate Division of the High Court No 380 of 1964.
[177] Ibid.
[178] Rule 31 (4) of the Rules of the Appellate Division of the High Court No 380 of 1964.
[179] Rule 31 (5) of the Rules of the Appellate Division of the High Court No 380 of 1964.
[180] Rule 31 (6) of the Rules of the Appellate Division of the High Court No 380 of 1964.
[181] Rule 31 (7) of the Rules of the Appellate Division of the High Court No 380 of 1964.

rules.[182] Once the judgment was out, the Registrar would notify the parties. This is still the legal position currently.[183]

Under Rule 262-269, Order 34 of High Court (General Division) Rules, 1971, the application for leave to appeal was to be made orally immediately after the judgment had been passed. Normally the oral leave to appeal was required in interlocutory applications or judgments.[184] The applicant's grounds for leave to appeal were required to be recorded as part of the record. The judge who presided at the trial had the power to grant or refuse the application as she/he thought fit.[185] If an application for leave to appeal was not made orally, it was to be a written application filed within twelve days of the hearing date.[186] Where the application was made in writing, it was mandatory to state why it was not made orally.[187] The written application included the proposed grounds of appeal and grounds under which it was contended that leave to appeal should be granted.[188] Under the rules, the application for leave in the High Court was heard as a chamber application. [189] Further, Rule 269 provided that if two or more judges sat together for the hearing of the matter in which leave to appeal is applied, then both or all such judges shall hear the application if they are available. If one of them considered that leave to appeal should be granted, such leave was granted. The rules for leave to appeal were designed for criminal appeals but were also applied to civil appeals. The rules allowed two judges to preside over an application for leave, contrary to the current practice where a single judge presides over an application for leave. This increased access to justice to some extent. There was no recourse against the refusal to grant such leave to appeal.

3.7.7. The referral procedure of constitutional matters to the Supreme Court: 1964 to 1979

The referral of constitutional matters to the Supreme Court was further carried forward in s24 (1) of the Southern Rhodesia/The Zimbabwean Constitution Order, 1979. Section 24 (1) of the

[182] Rule 31 (8) of the Rules of the Appellate Division of the High Court No 380 of 1964.
[183] Rule 31 (9) of the Rules of the Appellate Division of the High Court No 380 of 1964.
[184] Rule 262, Order 34 of High Court (General Division) Rules, 1971. In cases in which leave to appeal is necessary with respect to a judgment of the court given in such proceedings as described in subparagraph (ii) of paragraph (c) and in paragraph (d) of subsection (1) of section 26 of the High Court Act 1964, the provisions of rules 262 to 268 apply to an application for leave and to an application for condonation as if for the words 'Attorney General' there were substituted the word 'respondent'.
[185] Rule 263, Order 34 of High Court (General Division) Rules, 1971.
[186] Ibid.
[187] Ibid.
[188] Ibid.
[189] Rule 264, Order 34 of High Court (General Division) Rules, 1971.

Southern Rhodesia/The Zimbabwean Constitution Order, 1979 provided that if any person alleged that the Declaration of Rights (Bill of Rights) has been, is being or is likely to be contravened concerning him/her, then without prejudice to any other action concerning the same matter which is lawfully available, that person could apply to the Appellate Division for redress.[190] In addition, if in any proceedings in the General Division or any court subordinate to the General Division, a question arose as to the contravention of the Declaration of Rights, the person presiding in that court could, and if so requested by any party to the proceedings, refer the question to the Appellate Division.[191] However, the judicial officer would not refer if, in her/his opinion, raising the question was merely frivolous or vexatious.[192] If a referral of a constitutional matter was not made to the Appellate Division, that did not prejudice a party to his or her right to appeal to the same Court. [193] Further, in the hearing of the referral applications, the right to be heard in that the Appellate Division was limited as the Court could determine such a referral without hearing parties. Further, the Appellate Division could even determine whether it was frivolous or vexatious. [194] Hence the approach to referral is the same as discussed in Chapter 4 of the current procedures. The referral procedure is similarly structured to the one discussed in Chapter 4. Again, the appeals of the Appellate Division could decline to exercise its powers if it was satisfied that adequate means of redress for the alleged contravention were available to the person concerned under the Constitution or any other law.[195]

A litigant thus had a right to refer a constitutional issue or question to the High Court Appellate Division. The litigant was not affected procedurally, as the procedure to refer to a constitutional issue was through the ordinary application procedure. The High Court Rules 1971 were applicable when a litigant intended to file such a constitutional referral. At this time, no special procedure is currently provided in the Rules of Superior Courts (discussed in Chapter Four). The only inhibiting factor was the onus to prove that there was a constitutional issue intended to be referred. If a matter was vexatious, frivolous, or both, the High Court or any court thereof was required to decline the referral.

[190] Section 24 (1) of the Southern Rhodesia/The Zimbabwean Constitution Order, 1979.
[191] Section 24 (2) of the Southern Rhodesia/The Zimbabwean Constitution Order, 1979.
[192] Section 24 (3) (a) of the Southern Rhodesia/The Zimbabwean Constitution Order, 1979.
[193] Section 24 (3) (b) of the Southern Rhodesia/The Zimbabwean Constitution Order, 1979.
[194] Ibid.
[195] Section 24 (3) (c) of the Southern Rhodesia/The Zimbabwean Constitution Order, 1979.

3.7.8. Security for costs on appeal to the Appellate Division: 1964 to 1979

As discussed, the provisions governing the concept of security for costs were enacted under the SROIC and continued to be applied during the colonial era. Furthermore, s46 (1) of the Rules of the Appellate Division of the High Court No 380 of 1964 provided that the judgment appealed could be carried into execution by the order of the court appealed from. However, the security for the costs of the appeal was determined by the High Court or any other Court from which the appeal was being made.[196] In addition, where the execution of a judgment was suspended pending an appeal, and the respondent had not waived his/her right to security, the appellant, before lodging with a Registrar copy of the record, was required to enter sufficient security for the respondent's cost of the appeal.[197] However, where the parties could not agree on the amount or nature of the security to be provided, the Registrar determined the matter.[198] Further, on application at the appellant's costs and for a good cause shown, the Judge President could exempt the appellant wholly or partly from giving security for costs. In addition, no security was required to be furnished by the Government of Southern Rhodesia, a municipal or city council, or a town management board.[199]

Order 4 Rule 32 of the High Court Rules, 1971, provided that the Registrar had powers to fix the nature of the security and the amount thereof with leave to either party to appeal against his/her decision to the court. Hence by 1971, there was already a requirement for security costs for those litigants who intended to appeal to the Appellate Division. However, a litigant could appeal against the decision of the Registrar of the High Court. The requirement for security costs thus limited the right of access under this Rule. The requirement of security for costs applied to all litigants intending to appeal. There were no exceptions; the rich and the poor were all required to furnish security costs—this affected access to the Appellate Court.

These provisions of the rules, particularly Rule 46 (1), effectively provided for the requirement for security costs where an appeal was filed and execution carried out as per the direction of the High Court. The security costs in those circumstances were payable by the appellant, who wanted to file an appeal. Thus, where the court ordered execution, the right of appeal was subject to payment of security costs. Rule 46 (2) further required payment of security costs by the appellant where the respondent had not waived such. This meant that the

[196] Rule 46 (1) of the Rules of the Appellate Division of the High Court No 380 of 1964.
[197] Rule 46 (2) of the Rules of the Appellate Division of the High Court No 380 of 1964.
[198] Ibid.
[199] Rule 46 (4) of the Rules of the Appellate Division of the High Court No 380 of 1964.

appellant had no access to the Appellate Court without payment of security costs. In addition, Rule 46 (3) provided an exemption to pay security costs if determined by the Judge President on good cause shown if the appellant made such an application. The grounds which met the criteria for a good cause were not stated in the Act or Rules. Rule 46 (4) exempted the Government of Southern Rhodesia, a municipal or city council, or a town management board from paying security costs. The rationale behind this exemption was that these were non-legal persons who had the means to pay legal fees. This unreasonably limited the litigants' access to the courts based on whether the litigant had the means to pay the costs if an adverse judgment was given against them. The security for costs rules and same provisions are still in the rule books governing superior courts, as stated in Chapter 1.[200]

3.8. CONCLUSION

In conclusion, the colonial court structure and the selected rules of procedure have been developing since 1898. Before the colonial era, the court structure and the applicable procedural law were based on customary law, from the onset of the colonisation of Zimbabwe, that is, from 1891, the legal system became a dual legal system. The customary and general law systems co-existed. Each legal system had distinct procedures in that the customary law remained formal without written rules, while the formal European courts had written complex rules. Initially, the court structure was linked to the administrative structures of the British South Africa Company, and from 1923 the court structure under the 1923–1979 constitutional dispensation was linked to the judiciary system in England. In addition, it is apparent that the rules governing security for costs, appeals, leave to appeal and referral of constitutional matters rules developed during the colonial era.

During these periods, some aspects of the rules governing appeals, leave to appeal, referral of constitutional matters and security costs rules were modified. Other aspects remain restrictive access to the appellate courts, particularly for indigenous persons. The reason why the rules were restrictive can be attributed to the fact that they were never designed for the indigenous litigants but for the white settlers who were conversant with the language and content of the rules. The indigenous litigants became users of the mainstream formal/general courts by default through the appeal process. The indigenous litigants thus had to litigate in the formal courts and apply the selected rules of procedure. Thus, rules governing security costs, appeals, leave to appeal, referral of constitutional matters and security for costs rules, as

[200] See Chapter 1 under the statement of problem generally.

discussed, had aspects that hindered and enhanced court access. The appeal, leave to appeal, security for costs and referral of constitutional court matters rules were adopted after 1980 in the new Zimbabwe and were used in the courts until 2015. After that, an attempt to reform them was made through the Judicial Service Commission, but it did not introduce a materially reasonable amendment to the selected rules of procedure to increase access to justice.

CHAPTER 4

THE COURTS' STRUCTURE AND SELECTED RULES OF CIVIL PROCEDURE IN THE SUPERIOR COURTS OF ZIMBABWE

4.1.INTRODUCTION

This chapter provides a detailed analysis of the existing rules of civil procedure (selected rules of civil procedure) governing appeals, leave to appeal, referral of the constitutional issues and security for costs in the context of procedural accessibility to the Superior Courts of Zimbabwe. The selected rules of civil procedure are analysed within the context of the present Zimbabwean court structure. Hence, a brief critical outline of the court's structure is also made. Further, the selected rules of civil procedure are analysed in the context of the right of access to the court as entrenched in s 69 (3) of the Constitution of Zimbabwe. This critical analysis focuses on those aspects of the selected rules of civil procedure that reasonably increase access or unreasonably restrict access to the High Court, Supreme Court and Constitutional Court (Superior Courts of Zimbabwe).

4.2. THE COURT'S STRUCTURE IN ZIMBABWE

After independence (post-1980), Zimbabwe adopted a dual court system consisting of customary and general law courts developed during the pre-colonial era with significant modifications to the court structure. Despite the considerable modification to the colonial court structure, essential colonial features are still embedded in the current structure.[1] The existing court structure consists of both customary and general courts. The customary courts are made up of the Primary Court and the Community Court. On the other hand, general courts are comprised of lower and superior courts. The lower courts include the Small Claims Court, Specialised Courts and the Magistrates Court, while the superior courts are the High Court, Supreme Court and Constitutional Court. These courts are discussed in detail in this chapter.

4.2.1. The customary law courts' structure

The customary courts (also in statutes referred to as local courts) consist of a Primary Court and a Community Court.[2] These customary courts apply customary law only and are not courts

[1] Compare with Chapter 3 discussion on court structure.
[2] The Act of Parliament that establishes customary courts also referred to as local courts is the Customary Law and Local Courts Act (07:05). In these footnotes, the Customary Law and Local Courts Act will be abbreviated to CLLCA.

of record. The first level of the customary law courts is the Primary Court, followed by the Community Court.[3] These customary courts are presided over by a headman and a chief, respectively.[4] The Minister of Justice demarcates the jurisdiction of the customary courts. The jurisdiction of the Primary Court and the Community Court is mainly provided for in the Customary Law and Local Courts Act.[5] The Primary Court's jurisdiction is confined to a village.

In contrast, the Community Court's jurisdiction is confined to a few villages under a particular chieftainship. The customary courts differ in their jurisdiction in two perspectives. Firstly, the Primary Court has a lesser monetary jurisdiction than the Community Court. Secondly, the Primary Court has jurisdiction over a particular village, whereas the Community Court has jurisdiction over persons from various villages.[6] If a litigant is unhappy with the substantive judgment of a matter in a Primary Court, he/she can appeal to the Community Court. A litigant can further appeal from the Community Court to the Magistrates Court.[7] If the litigant intends to challenge procedural irregularities resulting from a decision-making process, he/she can directly apply for review from the Primary Court to the Magistrates Court.

The customary courts have no prescribed procedure for both review and appeal. The procedure in these customary/local courts is the same in that, be it review or appeal procedure, there are no specific procedural requirements the litigants must satisfy to lodge an appeal or review. In review matters, the focus is on the decision-making process and the conduct of individuals, while on appeal, the focus is on the substantive or merits of the case.[8] The customary courts are informal, simple and flexible, and witnesses are subpoenaed at any stage. Further, in the customary courts, the Minister of Justice appoints assessors to assist the

[3] Section 10 of the CLLCA (07:05).
[4] Ibid.
[5] Ibid. See also K Makamure 'A comparative study of comrades' courts under socialist legal systems: Zimbabwe's village courts' (1985) 3 (1-2) *Zimbabwe Law Review* 3.
[6] The common law of Zimbabwe is Roman-Dutch law. See L Madhuku, *Introduction to law in Zimbabwe* Weaver Press (2010) 18, 20. On application in Zimbabwe, see the case of *Hama v NRZ* 1996 (1) ZLR 664 (S). See further, s89 of Constitution of Zimbabwe, 1980.
[7] See also B Goldin & M Gelfand *African law and custom in Rhodesia* Juta and Company (1975) who provide an insight into the holistic civil or customary procedure prevailing within the *Shona* and Ndebele states. See J F Holleman *Chief, council, and commissioner: Some problems of Government in Rhodesia* Cambridge University Press (1969) for a discussion of the roles of chiefs and commissioners in Rhodesia. M F C Bourdillon *A note on Shona Court procedures* Cambridge University Press (1974) details how the various *Shona* tribal procedures provided for all types of dispute resolution. See R G Howman *Report on Native Courts for Southern Rhodesia* NADA (The Southern Rhodesia Native Affairs Department-Livingstone Institute 29 (1952) 26-42; J F Holleman *Hera Court Procedure* Oxford University (1952). See Sections 23, 24 and 25 (1) of the Customary Law and Local Courts Act.
[8] K. Godfrey, 'Irregularity in the High Court: Appeal or Review' (1972) *The Rhodesian Law Journal* 240-246.

presiding officer in dispensing justice. Customary Courts have powers to grant orders ranging from specific performance to orders for damages or any other orders that help achieve justice. The Messenger[9] of the Magistrates Court executes the orders of the customary courts. Before the current Zimbabwe Constitution, legal practitioners were not allowed to appear in a local court on behalf of a litigant.[10] However, by constitutionally entrenching the right to a legal practitioner of choice, a litigant may be represented by a legal practitioner of choice.[11] Hence, this increases access to the customary courts. Further, subject to the Courts and Adjudicating Authorities Publicities Restrictions Act,[12] all cases in customary courts are heard in open court.[13]

The flexibility and informality in those courts make them more accessible to the poor and the rich. The procedural model of these courts can be adapted to provide an integrated justice system that serves the indigenous people. There is no requirement for leave to appeal or strict requirements on what constitutes an acceptable form of notice appeal to the Community Court or the Magistrates Court. Thus, appeals from the customary courts are easier and less technical than appeals from the Magistrates Court to the High Court or the Constitutional Court. However, as previously explained, the right of access to the customary law courts is limited to cases whose cause of action is wholly customary law. Finally, while based on the right of appeal, there are no procedural hurdles to the application of selected rules of civil procedure in customary courts. Hence in appeals in customary courts, the right to appeal is generally procedurally unrestricted. The only restriction is that an appeal can be made only on substantive issues which are purely customary law.

4.2.2. The Small Claims Court

The Small Claims Court is, in terms of hierarchy, above the customary courts and not linked to the chain of hierarchy of the customary courts. It focuses on small claims defined in the Small Claims Court Act (SCCA). The Small Claims Court is not a court of record,[14] although, in terms of section 4 (2) of the SCCA, a judgment must be recorded and signed by the presiding

[9] The Messenger of court's duties are the same as the Sherriff of the High Court of South Africa.
[10] Section 20 (2) of the CLLCA (7:05).
[11] Section 69 (4) of the Constitution of Zimbabwe.
[12] Courts and Adjudicating Authorities Publicities Restrictions Act (7:04).
[13] Section 20 of the CLLCA (7:05).
[14] Section 4 (1) of the Small Claims Court Act (SCCA) (7:12).

officer.[15] The Small Claims Court hears matters[16] in the province where it is territorially situated. The primary purpose of the design of the procedure in a Small Claims Court is to ensure that minor matters of value less than USD 1000 (United States Dollars) are dispensed quickly and at minimum cost. The Small Claims Court has a very simplified procedure.

There are proforma pleading forms for litigants to fill in when commencing an action or defending the same. The parties are allowed to adduce evidence orally or in writing and to cross-examine each other's witnesses. The presiding officer[17] has statutorily defined power to ascertain facts in the proceedings. The presiding officer can call any party or person to give evidence and cross-examine any person or witness. This makes the presiding officer not merely an umpire but also an active participant in the proceedings. The procedure in the Small Claims Court is similar to the South African Small Claims Court, which is inquisitorial.[18] Parties are allowed to introduce their witnesses, and the presiding officer can limit the evidence if he/she believes the relevant evidence led is sufficient. This is unlike the role of a magistrate or a judge. The judgment given by the Small Claims Court is final and cannot be appealed against unless the High Court reviews it.[19] The right to appeal is thus non-existent in the Small Claims Court. Therefore, if litigants decide to use the Small Claims Court, they automatically lose their right to appeal to any court, the Superior Courts included.

The plaintiff is entitled to enforce its judgment where the defendant has not settled the judgment debt. The plaintiff can apply to the Magistrate or Clerk of Court, who issues a writ of execution against property,[20] and the plaintiff may also apply for a garnishee order.[21] The most striking feature of the Small Claims Court is its simple and flexible procedure, which is meant to allow access to court by any litigant. As argued before, the limitation of the Small Claims Court Act is that it does not allow for appeal, thus limiting the right of access to the Magistrates Court. However, the principle of simplicity enshrined in the Small Claims Court rules of civil procedure should be extended to the Superior Courts. Given that reasonable procedural limitations are sometimes necessary, there is no good reason for an overly complex system of rules of procedure for the Magistrates Court or the Superior Courts simply because the claim exceeds a specific monetary value or is outside the Small Claims Court's jurisdiction

[15] Section 4 (2) of the SCCA (7:12).
[16] The term matters in Zimbabwe is widely used to mean a legal case filed or instituted in a court of law.
[17] In South Africa, the presiding officer is known as a commissioner.
[18] Small Claims Court Act of 1984.
[19] See Section 30 of the SCCA (7:12).
[20] See Section 28 of SCCA (7:12).
[21] See Section 28 of SCCA (7:12).

because of statutory provisions.[22]

Hence, in Small Claims Courts, there is no right to appeal. Further, there is no requirement of mandatory requirements for a valid notice of appeal, security for costs, leave to appeal or referral of constitutional matters procedure. The cases that commence in Small Claims Courts are instituted and end therein. While litigants litigating in the Small Claims Court enjoy simplicity and flexibility, they do not enjoy the right to appeal as litigants in the Magistrates Court and Superior Courts of Zimbabwe.

4.2.3. The Magistrates Court

The Magistrates Court is up the hierarchy of formal courts from the Small Claims Court. The Magistrates Courts are classified into two broad categories: criminal and civil. They are governed by the Magistrates Court Act (7:10) and the Magistrates Court (Civil) Rules, 1980. A Magistrates Court is presided over by a magistrate,[23] and it is a court of record.[24] The Magistrates Court Act further provides that the proceedings in all cases should be in the English language and heard in open court.[25] However, the exception is that if a matter is to be heard according to customary law, the proceedings may be done in any other language as consented to by the parties and the presiding magistrate. The rationale for this differentiation is not provided, and this language rule was carried over from the colonial era. There is no reason why all the proceedings should not be recorded in an indigenous language.[26] Section 5 (2) (b) of the Magistrates Court Act provides that the records of the proceedings of the court shall be kept in the English language. This, however, is not the main issue under discussion in this context.

The court processes in the Magistrates Courts are served by a Messenger of Court, an independent contractor entitled to levy fees that some litigants find exorbitant.[27] The

[22] R Matsikidze, *The civil procedure in the Magistrates Courts of Zimbabwe. A denial of justice to self actors?* Unpublished Thesis, University of Zimbabwe (2014).
[23] Section 6 of the Magistrates Court Act (MCA) (7:10).
[24] Section 5 of the MCA (7:10).
[25] Ibid.
[26] K J Malan 'Observations on the use of official languages for the recording of court proceedings' (2009) (1) *TSAR* 1. See also H J Lubbe, *The right to language in court: A language right or a communication right?* Unpublished thesis, University of the Free State. See also s6 (1) of the MCA, No. 32 of 1944, which provides that "Either of the official languages may be used at any stage of the proceedings in any court and the evidence shall be recorded in the language so used." See also I Currie, 'Official languages' in *Constitutional law in South Africa* (eds M Chaskalson, J Kentridge, J Klaaren) Juta (1998) 37.1-37.15. And also J M Hlophe 'Official languages and the courts' (2000) 117 (4) *South African Law Journal* 690-696.
[27] In terms of s11 of the MCA (07:10), it has jurisdiction where the right of occupation of any such house, land or premises is in dispute between the parties, such right does not exceed such amount as may be prescribed in rules in clear value to the occupier.

Magistrates Court has jurisdiction concerning all causes of action and persons residing in the province, provided the subject matter does not exceed the monetary jurisdiction of, currently, three million ZWL – save for those causes of action that are reserved for the High Court.[28] The court has a complex set of rules of procedure taught only at law school.[29] Every litigant is subjected to the same rules of civil procedure whether represented or not,[30] although most self-representing litigants will fail to access justice.[31] This clearly shows the gravity of the challenge in accessing justice for unrepresented and represented litigants in the Superior Courts.[32] All appeals and reviews from the Magistrates Court are made to the High Court. The appeals to the High Court are governed by Order 31 of the Magistrates Court Rules, 2019, which has rules of civil procedure governing appeals that are discussed later in this chapter. In addition, a referral and an appeal on a constitutional matter can be lodged to the Constitutional Court, as discussed later in this chapter.

4.2.4. Specialised courts (Labour Court and the Administrative Court)

In the structure of the courts, between the High Court and the Magistrates Court, specialised courts hear cases in the fields of law considered by Parliament to require a specialised skill, mostly for expediency and to ensure the accuracy of judgments. The specialist courts deal with specific fields of law.[33] In Zimbabwe, the specialised courts are the Labour Court and the Administrative Court, among others. The Labour Court and Administrative Court do not have the inherent jurisdiction granted to the High Court, but their jurisdiction is set out in the statute. The two specialised courts are below the High Court but not above the Magistrates Court.

The Labour Court is governed by its own set of simplified rules, which even self-representing litigants can use.[34] An appeal from this court is made to the Supreme Court, but only on a question of law. This Court is rendered accessible through its technically simple rules. The establishment of the Labour Court and its simplified rules indicates the need for simple rules of procedure. However, procedural complexity arises when appeals are made to the Supreme Court of Zimbabwe. The appellant is required to seek leave to appeal first from

[28] Ibid.
[29] R Matsikidze op cit note 22 at 114.
[30] See generally, the Magistrates Court (Civil) Rules, 1980.
[31] R Matsikidze op cit note 22 at 114 generally on findings.
[32] Ibid.
[33] The specialised courts deal with specific legal issues as provided in the enabling legislation. For example, the Labour Court deals with labour matters, the Administrative Court with administrative issues and the Fiscal Court with tax issues.
[34] See Labour Court of Zimbabwe Rules, 2017 in general.

one judge of the Labour Court and then, if denied, to make another new application to a Supreme Court Judge and, if this is denied, that is the end of the litigation process.[35] There is also a requirement for security costs. The appeal process and the requirement for security costs are discussed in detail later in this chapter.

The second specialised court is the Administrative Court. The primary purpose of the Administrative Court is to hear appeals and reviews for administrative decisions.[36] It has uncomplicated rules, and its judges are more inquisitorial than the adversarial judges in the High Court or Supreme Court. Procedural access to this court is easier than even the Magistrates Court, which provides insight into how simple rules of procedure facilitate access to justice – corroborating the importance of procedural simplicity in drafting rules of civil procedure.[37] An application for relief in this court is filed with the Registrar of the Administrative Court, who will then place it before a judge for a hearing.[38] In hearing the cases before it, the Administrative Court is not strictly bound by the rules of procedure. [39] A person may appear in court or be represented by a legal practitioner.[40] Thus, a party may also be assisted by a friend or another person who is not a legal practitioner, which is not allowed in a conventional court.[41] The Administrative Court is very informal and accessible and has basic rules of procedure designed for unrepresented litigants. An appeal from the Administrative Court lies to the Supreme Court of Zimbabwe.[42] No leave is required for appeals to the Supreme Court unless the appeal is against an interlocutory judgment.[43]

Significantly, the appeal rules of procedure in the Labour and Administrative Courts are procedurally simplified and curtailed; in most cases, litigants navigate them easily. The rationale behind the simplicity of the rules in these courts is to ensure they are accessible to an unrepresented litigant. The rationale is that labour and administrative law are extremely important branches that drive the economy and governance.[44] Hence the need to ensure

[35] See s92 F of the Labour Act (28:01).
[36] See Water Act [Chapter 20:22].
[37] Section 9 of the Administrative Court (Miscellaneous Appeals) Rules, 1980.
[38] Section 11 of the Administrative Court (Miscellaneous Appeals) Rules, 1980.
[39] Ibid.
[40] Ibid.
[41] Ibid.
[42] Administrative Court Act (07:02) s19 "Appeal from decision of Court-(1) Subject to subsection (2) and except as otherwise provided in any other enactment, any person who is dissatisfied with any decision of the Court may lodge an appeal with the Supreme Court within the period of twenty-one days immediately following the announcement by the Court of such decision."
[43] Ibid.
[44] T G Kasuso 'The protection of individual labour rights in Zimbabwe' (2021) 21 *African Human Rights Law*

accessibility by all general members of society needing court access. The fact that the Labour and Administrative Courts' appeal procedures are simplified and abridged supports the argument that the dispensation of justice is not found in the complexity of the rules of civil procedure. These rules should be facilitating procedures and not an end in themselves.

For a litigant appealing to the Labour and Administrative Court, there is no requirement for security for costs. Further, the requirements for a valid notice of appeal are simple, and even self-representing litigants can file appeals in Labour and Administrative Court. In addition, no referral rules are provided for the referral of constitutional matters to the Constitutional Court.

4.2.5. The structure of the High Court of Zimbabwe

The High Court is the first court in the hierarchy of the Zimbabwean Superior Court.[45] It has exclusive original civil jurisdiction over all persons and matters within the territorial boundaries of Zimbabwe.[46] The High Court has unlimited monetary jurisdiction and enjoys inherent jurisdiction. This means that the High Court is deemed to have jurisdiction unless prohibited by law.[47] The jurisdiction of the High Court is superior to that of any other subordinate court because all other courts can only exercise the jurisdiction explicitly granted by the permitting statute. In its unlimited jurisdiction, the High Court can hear any matters that a Magistrates Court can hear. Litigants are allowed to litigate in the High Court even though, in such matters, a litigant could have instituted the proceedings in the Magistrates Court. The dilemma is that the litigant is likely to pay costs on a higher scale if unsuccessful or get reduced costs if successful. The High Court is an appellate court in civil cases from lower courts and some specialised courts[48] and hears review applications of proceedings from all inferior courts and tribunals.[49] In terms of s171 of the Zimbabwean Constitution, the High Court has jurisdiction to decide constitutional matters, except those that only the Constitutional Court is empowered to decide.[50]

Journal 552-572, and also T G Kasuso & G Manyatera 'The right to reasons for administrative action in Zimbabwe' (2021) (36) 2 *Southern African Public Law*.

[45] See T Mukuhlani 'Zimbabwe's Government of National Unity: Successes and challenges in restoring peace and order' (2014) 2 *Journal of Power, Politics & Governance* 170-180. See also the Constitution of Zimbabwe Amendment 19 of 2008.

[46] Section 13 of the High Court Act (7:06), Zimbabwe.

[47] Section 176 of the Constitution of Zimbabwe.

[48] See s40 of the MCA.

[49] See s26 of the High Court Act. It is important to note that a review is not concerned with the merits of the decision but with the decision-making process.

[50] See also s175 of the Constitution of Zimbabwe.

The Zimbabwean Constitution further indicates that an Act of Parliament will provide for the exercise of jurisdiction by the High Court and its powers to make rules.[51] The Constitution allows the High Court to delegate some of its powers to the Registrar.[52] The High Court has a rule book, the High Court Rules, 2021. The current rule book is a reviewed High Court Rules, 1971. A committee of High Court judges led the process for the intended reform of this rule book. The selected rules of civil procedure relevant to this thesis have not been revised or amended, particularly security for costs, appeals and leave to appeal rules. Instead, the revised rule book (High Court Rules, 2021) introduced an additional layer of complex rules referred to as the referral procedure in the High Court, discussed below.

4.2.6. The Supreme Court of Zimbabwe

The Supreme Court is the apex court of appeal, and its bench consists of three judges.[53] The bench[54] may also be constituted by two judges when hearing an appeal from any court other than the High Court, but subject to the Chief Justice giving directions.[55] In complex matters, the presiding judge may request an appeal to be heard by more than three judges.[56] In hearing an appeal, the Supreme Court may also deal with review issues as it has concurrent review jurisdiction.[57] An appeal may be made to the Supreme Court if a statute so provides. Appeals from the High Court are made to the Supreme Court.[58] The right to appeal is limited where an appeal from the High Court is based on a judgment obtained with the party's consent.[59] An appeal cannot be made against such a decision.

Furthermore, an appeal may be made against an interlocutory judgment if the effect of such an interim judgment is final. Cases in the Supreme Court are determined primarily on record, all proceedings are strictly formal, and English is the official language. In addition, the right of the audience is limited to self-actors and legal practitioners. The current requirements for a valid notice of appeal are the same as in the Rules of the Supreme Court, 1964. Thus, the reform of the Supreme Court Rules still needs to address the fundamentals, as later discussed in detail, focusing on the selected rules of civil procedure. The proposed reform must aim to modernise

[51] See s171 of the Constitution of Zimbabwe.
[52] Ibid.
[53] Section 3 of the Supreme Court Act (7:13), Zimbabwe.
[54] Bench means the judge constituted to hear a matter.
[55] Section 3 op cit note 53.
[56] Ibid.
[57] Section 25 of Supreme Court Act (7:03), Zimbabwe.
[58] Section 43 of the High Court Act (Zimbabwe).
[59] Ibid.

the rules, make them simpler, and relate them to indigenous persons' social and economic environment. Some of the provisions governing appeals, leave to appeal, security costs and the referral of constitutional procedure remain restrictive – as set out in this chapter.

4.2.7. The Constitutional Court of Zimbabwe

The CCZ is constituted in terms of s166 of the Zimbabwean Constitution and comprises the Chief Justice and five judges. If a judicial vacancy arises, it may be filled by appointing acting judges from retirement or the High Court, provided that the acting judges in question have not been previously involved in the matter before the Constitutional Court. In s166(3) of the Zimbabwean Constitution, the Constitutional Court has jurisdiction to hear cases of infringement of fundamental human rights or freedoms (as provided in Chapter 4 of the Constitution) or matters concerning the election of a president or vice president. These cases require a hearing before a full bench of the Constitutional Court. In addition, the Constitutional Court has jurisdiction to hear other constitutional matters with any three judges in attendance. If the issues are procedural or interlocutory in nature, those can be heard by one or more judges of the Court. Regarding s167 of the Constitution of Zimbabwe, the Constitutional Court is the apex court in constitutional matters, and its decisions are binding on all other courts. Further, the Constitutional Court has the final say on any constitutional issue.

The Constitutional Court also has broader powers to advise on the constitutionality of a proposed Bill, provided the Bill has been referred to the Court in terms of its rules. In addition, the Constitutional Court presides over disputes about the election of the President of Zimbabwe. The Court can also pass a judgment on whether a person is qualified to hold the office of vice president. The Constitutional Court has powers to decide whether the Parliament or the president has not fulfilled a constitutional obligation or to make a final judgment on whether an Act of Parliament or the conduct of the President or Parliament is constitutional. The Constitutional Court also confirms any order of constitutional invalidity as determined by another court.[60] The Constitutional Court has the power to make its own rules. In s176 of the Zimbabwean Constitution, the Constitutional Court has inherent powers to safeguard and control its process and modify the common law or customary law, considering the interests of

[60] Section 167 (3) of the Constitution of Zimbabwe.

justice and the Constitution.

4.3. SELECTED RULES THAT LIMIT ACCESS TO SUPERIOR COURTS IN ZIMBABWE

The general law courts, the Magistrates Court, the High Court, the Supreme Court and the Constitutional Court have distinct and separate procedures.[61] The Magistrates Court Act and the Magistrates Court (Civil) Rules 2020 set the civil procedure for the Magistrates Court in civil matters.[62] In the High Court, the rules of civil procedure are provided under the High Court Act[63] and the High Court Rules, 2021 (which came into effect on 26 July 2021). The Supreme Court civil procedure is provided for by the Supreme Court Act[64] and the Supreme Court Rules, 2018. The Chief Justice, as the head of all courts in Zimbabwe, has powers to issue practice directives for all the courts.

The Constitutional Court, from its inception in 2013 to around 10 June 2016,[65] had no rules of procedure. It relied on a practice directive that provided some framework for litigants to bring their cases directly or indirectly to the Constitutional Court through the Constitutional Court Practice Directive No 2 of 2013 (CCPD2/13).[66] The judges and litigants had to resort to the guidance provided under the CCPD2/13 and the rules of procedure for the Supreme Court of Zimbabwe to bring their matters to the CCZ. However, the Constitutional Court's procedure is now embodied in Constitutional Court Rules, 2016 and the Constitutional Court Act.[67]

Selected rules of civil procedure are extracted from these statutes and Rule books and discussed. The focus is on appeal, leave to appeal, security for costs and referral of constitutional matters rules.

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[61] Legislation that sets the civil procedure includes the Constitution of Zimbabwe Amendment 20 of 2013; High Court Act (07:06) Act 29 of 1981; Supreme Court Act (7:13) Act 28 of 1981; Magistrates Court (7:10) Act 26 of 1981; Rules of the Supreme Court, 1964; Supreme Court (Miscellaneous Appeals and References) Rules, 1975; High Court Rules, 1971, Magistrates Court (Civil) Rules, 1980.

[62] The Magistrates Court has criminal, civil and customary law jurisdiction, and it currently has civil jurisdiction of USD 10 000 in civil matters and three million ZWL only. See ss 4-8 of the MCA.

[63] Act 29 of 1981. See ss 3-12 of High Court Act, 29 of 1981; ss 13-42 of High Court Act, 29 of 1981, and ss 43-46 of High Court Act, 29 of 1981. The High Court Rules were enacted through RGN 1047 of 1971 and subsequently amended by a few SIs − the latest being SI 80 of 2000.

[64] Supreme Court Act (7:13) Act 28 of 1981 and see also ss 3-35 of Supreme Court Act 29 of 1981.

[65] The rules were gazetted on 10 June 2016 in the *Government Gazette*. See also *The Herald* Zimbabwe of June 14, 2016, article headed 'Specific rules for Concourt set out.'

[66] See also s169 (1) of the Constitution of Zimbabwe.

[67] SI 61 of 2016 or Constitutional Court Rules.

4.4. THE IMPORTANCE OF ACCESS TO THE SUPERIOR COURTS ON APPEAL

The Superior Courts in Zimbabwe have two functions. Firstly, the Superior Courts are courts of the first instance in certain matters. For example, the High Court is a court of first instance in all civil matters; save for those matters, it is specifically excluded from exercising its jurisdiction by a statute. Similarly, the Constitutional Court is a court of the first instance in constitutional matters where a statute and rules provide that litigants have direct access. The Supreme Court is mainly an appellate court.

Secondly, the Superior Courts are appellate courts. Hence litigants institute proceedings in the Superior Courts as appeals. Access to the Superior Courts of Zimbabwe is vital, and every aggrieved litigant who intends to take their matter on appeal must be able to do so without procedural hindrances.[68] In Zimbabwe, the Superior Courts consist of the High Court, the Supreme Court and the Constitutional Court. Appeals to these Superior Courts are from the Magistrates Court and specialised courts. Appeals from specialised courts, inter alia, the Labour Court and the Administrative courts, are made to the Supreme Court, while appeals from the Magistrates Court are made to the High Court. The Magistrates Court rules of civil procedure grant a litigant aggrieved by decisions of the Magistrates Court the right to appeal to the High Court of Zimbabwe.[69] Further, litigants have a right of appeal from the High Court to the Supreme Court and a further appeal from the Supreme Court to the Constitutional Court, although this further right of appeal is strictly limited to specific constitutional issues.

Hence litigants can be parties to proceedings in Superior Courts as appellants or respondents.[70] In the appeal process, some appeal stages require an appellant to furnish security for costs, while others require the appellant to be granted leave to appeal. Further, in some instances, litigants may refer constitutional matters to the Constitutional Court.

4.5. LEAVE TO APPEAL AND APPEAL RULES IN THE HIGH COURT

Appeals to the High Court may be from the Magistrates Court or any other court as provided by the statute. A litigant aggrieved by a decision of a Magistrates Court has a right to appeal to

[68] A S. Ellerson 'The right to appeal and appellate procedural reform' (1991) (19) 2 *Columbia Law Review* 373-404.
[69] C B Robertson 'The right to appeal' (2013) 91 *North Carolina Law Review* 1219.
[70] J E Lobsenz 'A constitutional right to an appeal: Guarding against unacceptable risks of erroneous conviction' (1985) 8 University *of Puget Sound Law Review* 375. See also P D Marshall 'A comparative analysis of the right to appeal' (2011) (22) *Duke Journal of Comparative and International Law* 46.

the High Court as provided for under the appeal rules. In Order 31 of the Magistrates Court (Civil) Rules, an appeal against the decision of the Magistrates Court must be noted within twenty-one days from the date of judgment.[71] The time frame in which a litigant may appeal of twenty-one days is a standard timeline for all appeals in Zimbabwe. The period is sufficient to allow a litigant enough time to file their appeal without being hasty.

The appeal is noted by delivery of the notice, and unless exempted by the court of appeal, the appellant is required to furnish security for the respondent's costs of appeal.[72] The security for costs amount set in the rules is 100 ZWL.[73] The court clerk may accept a written undertaking from the appellant to pay for the costs to prepare the record.[74] Where a cross-appeal is noted, it must be by delivery of notice within seven days after the service of the notice of appeal to the respondent.[75] There are, however, mandatory requirements for that notice to be valid. The mandatory requirements are that an appellant must state whether the whole or part only of the judgment or order is appealed against.[76] The grounds of appeal must be concise and clear and based on the findings of the fact or rulings of the law appealed against.[77] The appellant must state the nature of the relief sought.[78] The appellant must state the date of judgment and the name of the court against whose judgment the appeal is noted.[79]

The mandatory requirements for a valid notice of appeal restrict access to the High Court. The High Court has interpreted Order 33 R (1) and (2) of the Magistrates Court (Civil) Rules strictly and rigidly. In *Sibanda,*[80] the High Court dealing with an appeal from the Magistrates Court that did not comply with the rules held that a notice of appeal must rigidly adhere to the Rules; otherwise, it is a nullity. The appellant's appeal in *Sibanda* did not state the grounds of appeal concisely when noting an appeal. The appeal was thus dismissed. Therefore, many cases are being dismissed for non-compliance with Order 33R (1) and (2) provisions, and the rules governing the mandatory requirements for a valid notice of appeal cannot be amended. While it is accepted that litigants must ensure their notices of appeal comply with the rules, inevitably, there are material drafting errors, and there should be room to amend the grounds of appeal

[71] Order 33, Rule 1 (1) of the Magistrates Court (Civil) Rules, 2019.
[72] Order 33, Rule 1 (2) (a) of the Magistrates Court (Civil) Rules, 2019.
[73] Order 33, Rule1 (2) (a) (b) (i) of the Magistrates Court (Civil) Rules, 2019.
[74] Ibid.
[75] Ibid.
[76] Order 33 op cit note 71.
[77] Order 33, Rule 1 (2) (b) of the Magistrates Court (Civil) Rules, 2019.
[78] Order 33, Rule 1 (2) (c) of the Magistrates Court (Civil) Rules, 2019.
[79] Order 33, Rule 1 (2) (d) of the Magistrates Court (Civil) Rules, 2019.
[80] *Sibanda* 2001 (2) ZLR 514 (H).

than declaring the same to be a legal nullity. The rationale is that once an appeal has been struck off or dismissed, the appellant is required to apply for condonation, and then, if granted, the appeal is filed again. This limits the right of access to the High Court or unduly delays the resolution of matters, further increasing the cost of appeal litigation unduly.

The leave to appeal in the High Court is at the presiding judge's discretion. Generally, when an appeal is noted from the Magistrate Court to the High Court, there is no need for leave to appeal. Section 40 of the Magistrates Court Act[81] allows an appellant to appeal without leave to appeal against any judgment of the Magistrates Court except for an interim order of the Magistrates Court. This rule of procedure enhances access to the High Court on appeal without undue restriction. Further, an appellant would only be required to apply for leave where they seek to appeal against an order of costs.[82] Hence, the circumstances where leave to appeal is required are reasonable and do not restrict access to the High Court on appeal. Hence, generally, the right of access to the High Court on appeal is unrestricted. The issue of leave to appeal is thus limited to these limited scenarios. This, in turn, reduces the cost of litigation and increases access to justice.

4.6. LEAVE TO APPEAL AND APPEAL RULES IN THE SUPREME COURT

Appeals to the Supreme Court are from the High Court and specialised courts, as provided in various statutes. The appeals from the High Court are made to the Supreme Court.[83] The appeal requirements are set in Rule 37 of the Supreme Court Rules. Firstly, it must be noted that Rule 37 of the Supreme Court Rules is worded almost the same as Rule 29 of the Rules of the Appellate Division of the High Court No 380 of 1964[84]. This clearly shows that the current appeal rules are a replica of the pre-colonial appeal rules. Further, Rule 37 of the Supreme Court Rules, every civil appeal must be instituted in the form of a notice of appeal signed by the appellant or his or her legal practitioner.[85] Further Rule 37 of the Supreme Court Rules provides that for an appeal to be valid, it must state the date and the court by which the judgment

[81] Magistrates Court Act (7:10).
[82] See s40 (2) (b) of the Magistrates Court Act (7:10).
[83] Rule 37 of the Supreme Court Rules, 2019. See also *Chinganga v Shava and 2 Others* SC-12-2.
[84] See discussion on Rule 29 of the Rules of the Appellate Division of the High Court No 380 of 1964 in Chapter 3
[85] Ibid.

appealed against was given.[86] In addition, if leave to appeal or condonation and extension of time to appeal was granted, the date of such grant.[87]

Moreso, the appellant must state whether the whole or part only and, if so, which part of the judgment is appealed against.[88] The grounds of appeal must comply with Rule 44 of the Supreme Court Rules, which requires the grounds of appeal to be precise and brief.[89] In *Yunus Ahmed v Docking Station Safaris,* the Supreme Court held that a composite application that seeks condonation and leave to appeal would be properly before the Court if it had not been for the material defect and irredeemable grounds of appeal embodied in the draft notice of appeal. Resultantly, a fatally defective notice of appeal, mainly if the grounds of appeal are defective, renders the present application nullity.[90]

This position is also stated in *Bindura Municipality v Mugogo*,[91]where it was held that a material defect appeal could not be reinstated and was struck off the roll. The court further ruled that a materially defective appeal with improperly drafted grounds of appeal rendered such an appeal a nullity. The above legal positions are reinforced in *Sambaza v Al Shams Global BVI Limited,*[92] where the Court dealt with the appeal, which in its prayer did not state the exact relief being sought. The Supreme Court held that an appeal to the Supreme Court must comply with Rule 29, which is mandatory and must be complied with. [93] The Court went further to rule that a notice of appeal that does not comply with this Rule 29 is fatally defective and cannot be amended; there will be nothing to amend, as a nullity cannot be amended.[94] Again, these rules governing notice of appeal emphasise compliance with the form of a notice of appeal and not the substance; basically, whether the notice of appeal raises grounds for appeal, which has prospects of success.

Further to the above, the appellant must state the exact relief sought.[95] In *Mudyavanhu v Saruchera & Others,*[96] the Supreme Court ruled in a matter dealing with the interpretation of

[86] Rule 37 (1) (a) of the Supreme Court Rules, 2019.
[87] Rule 37 (1) (b) of the Supreme Court Rules, 2019.
[88] Rule 37 (1) (c) of the Supreme Court Rules, 2019.
[89] Rule 37 (1) (d) as read with R44 of the Supreme Court Rules, 2019.
[90] *Yunus Ahmed v Docking Station Safaris* SC70/18. See also *Zimbabwe Anti-Corruption Commission v Gibson Mangwiro and Christopher Chisango* SC 11/22. Also, *Afritrade International Ltd v Zimbabwe Revenue Authority* SC3/21.
[91] *Bindura Municipality v Mugogo* 2015(2) ZLR 237 (S).
[92] *Sambaza v Al Shams Global VI Limited* SC 3/18.
[93] Ibid.
[94] Ibid.
[95] Rule 37 (1) (e) of the Supreme Court Rules, 2019.
[96] *Mudyavanhu v Saruchera & Others* SC 75/17.

Rule 29 (1) (e) of the Rules of the Supreme Court, 1965 (which is similar to the current Rule 37 of Supreme Court Rules), held that Rule 29 (1) (e) was specific in its language and required the relief sought to be exact and competent so that the court is left in no doubt as to what exactly the appellant seeks.[97] Thus, the appeals are struck off the roll for failure to comply with those requirements, irrespective of whether the grounds of appeal had merits.[98] This approach is rigid as a rule and ignores the provisions of s22 of the Supreme Court Act, which gives the Supreme Court wide discretionary powers in relation to reliefs it may grant.[99] In s22 (a) of the Supreme Court Act, the Court has powers to confirm, vary, amend, set aside judgment appealed against or give such judgment it deems proper. In other words, the Supreme Court may abandon what a litigant seeks, substitute the relief being sought and grant its relief. Thus, the rationale for rigidity in compliance with Rule 37 falls away.

Further, the address for service of the appellant or his or her legal practitioner must be given. Rule 38 further requires an appeal to be filed and served on the Registrar and the respondent.[100] If the appeal is not served, it is regarded as abandoned and is deemed to have been dismissed.[101] This Rule assists in ensuring that the appeals are speedily prosecuted.[102] In Rule 38(1), the appeal must be filed within 15 days of the date of judgment appealed against, and if leave is required, within ten days after the leave has been granted.[103] This Rule also further increases the efficiency in the prosecution of the appeal in that, after the set timelines, a successful litigant can proceed to execute the judgment.

Further, in Rule 41, the Supreme Court has the power upon a written or oral application to impose such terms or amend the grounds of appeal as it may be necessary for furthering the interests of justice.[104] This progressive rule enhances access to court and justice but has yet to be applied. The reason being the Supreme Court apparently prefers the *Jensen v Acavalos* approach. The approach by the Supreme Court, as in *Jensen v Acavalos*,[105] has been to regard

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[97] *Sambaza* supra note 92.
[98] *Jensen v Acavalos* 1993 (1) ZLR 216 (S). In *Freezewell Refrigeration Services (Private) Limited v Bard Real Estate (Private) Limited* SC 61-03, the Supreme Court, in explaining the effect of the mandatory provisions of r 29 (1), quoted the case of *Talbert v Yeoman Products (Private) Limited* SC-111-99 where Muchechetere JA held that a notice of appeal which does not comply with the provisions of r 29 (1) was null and void.
[99] Section 22 of the Supreme Court Act (7:13).
[100] Rule 37 (3) of the Supreme Court Rules, 2019.
[101] Rule 37 (3) (b) of the Supreme Court Rules, 2019.
[102] Rule 37 (3) op cite note 95.
[103] Rule 38 (1) (a) (b) of the Supreme Court Rules, 2019.
[104] Rule 42 of the Supreme Court Rules, 2019. The concept of interests of justice is extensively discussed by H Lovat 'Delineating the interests of justice' (2007) 35 (2) *Denver Journal Of International Law and Policy* 275-286.
[105] 1993 (1) ZLR 216.

any appeal that does not comply with the mandatory requirements in Rules 37 and 38 of the Supreme Court Rules as a legal nullity.[106] In many cases, including *HB Farming Estate (Pty) Ltd and Anor v Legal and General Assurance Society Ltd,*[107]the defective appeal has been held to be a legal nullity if it does not comply with even one of the mandatory requirements for a valid appeal. However, it is argued in this thesis that, for example, where the date of judgment being appealed is not correct, that must not render an appeal a legal nullity, considering that such judgment would ordinarily be attached to the notice of appeal. Further, failure to indicate the parts of the judgment being appealed must not render an appeal a legal nullity; instead, the appellant must be allowed to amend such and tender wasted costs if the amendment then occasions a postponement.

Similarly, the Supreme Court Rules have provisions on appeal from other specialised courts, for example, the Labour Court. In Rule 59 of the Supreme Court Rules, the requirements for a valid appeal from other courts are the same as those of the appeals from the Magistrates Court to the High Court. The approach adopted is the same in interpreting the above provisions to mean that an appeal that does not comply with the mandatory requirements stated in Rule 59 of the Supreme Court Rules is a legal nullity[108]. It is clear that the said mandatory requirements can be amended, and an appeal can be saved. However, the approach of the Supreme Court in such matters is as in *Jensen v Acavalos*, does not allow for the same.[109]

In *Tendai Bonde v National Foods Limited, Lovejoy Nyandoro and Chipo Nheta,*[110] Guvava J determining an application for leave to appeal from a judgment of the Labour Court to the Supreme Court, ruled on the interpretation of the appeal rules governing appeals from the Labour Court to the Supreme Court, which are the same as those governing from the High Court to the Supreme Court.[111] The application for leave to appeal had a draft notice of appeal. The draft notice of appeal had two prayers. The first prayer was that the Court order the applicant to file his notice of review to the Labour Court within ten days and for the application to be heard before a different judge. Concerning the prayer, the Supreme Court held that if it

[106] Rule 37 and 38 provides that an appeal must state the date of the judgment being sought to be appealed, whether the appeal is against the whole or part of the judgment, the grounds of appeal in brief and precise form. See *Bishop Elson Madoda Jakazi, The Board of Trustees Anglican Diocese of Manicaland v The Anglican Church of the Province of Central Africa, Reverend Joseph Chipudhla, and Right Reverend Ralph Peter Hatendi* SC-10-13. Also, *de Kuszba-Drowski et Uxor v Steel NO* 1996 ZLR 60.
[107] *HB Farming Estate (Pty) Ltd and Anor v Legal and General Assurance Society Ltd* 1981 (3) SA 129 (T).
[108] *Jensen* supra note 98.
[109] Ibid.
[110] *Tendai Bonde v National Foods Limited, Lovejoy Nyandoro and Chipo Nheta* SC 11/21.
[111] See Rule 60 of the Supreme Court Rules, 2018.

were to grant the prayer as requested by the applicant on appeal, it would mean that he would have a right of audience before the Labour Court to make a fresh application for review. The Court noted that the Applicant would have twenty-one days to make his application for review per Rule 20 (1) of the Labour Court Rules, 2017, which is contrary to the ten-day time limit he prayed for. Secondly, the applicant's alternative prayer was for the Supreme Court to make an order "as appear (*sic*) to it necessary in the justice of the case." The Supreme Court ruled that the second prayer by the applicant failed to meet the threshold of the mandatory rule, which provides that the exact nature of the relief sought must be given. The Supreme Court held that it could not draft a relief for the applicant; rather, the applicant was supposed to inform the Court of the redress he sought. In finality, the Supreme Court ruled that the reliefs sought in the draft notice of appeal rendered the notice of appeal fatally defective. In addition, the Supreme Court went on further to rule that another defect was that the applicant's grounds of appeal were not clear and concise and did not raise questions of law. The Supreme Court pointed out that reading the applicant's eight grounds of appeal showed that they were difficult to understand. The Supreme Court further held that Rule 44 (1) provides that grounds of appeal must be clear and concise.

Clearly, the Superior Court's approach has been to strictly interpret the provisions above governing the appeal procedure. This approach has its pros and cons. First, on the positive, litigants must file pleadings that have been well drafted especially represented litigants. This saves the Court's time sifting through a poorly drafted appeal or grounds of appeal. However, negative, immaterial technical issues, such as draft prayers for relief and wrong judgment dates, must not hinder a litigant's access to the court on appeal. The Supreme Court consistently applied the Rules strictly and rigidly even before the new Supreme Court Rules came into effect. The strict and rigid approach had been the same. This means that reforming the rules is the only recourse to avert the rigid application of rules governing notice of appeal. The focus is to allow a notice of appeal to be amended where, for example, the prayer is defective, or the appeal has some grounds that can be salvaged.[112] The Superior Courts' approach is clear; their role is to interpret the law and not make it; hence the need to amend the rules. The mandatory requirements, as said before, fall within the parameters of those issues that can be cured by an award of costs, postponements or adjournment rather than striking off the appeal.

Generally, appeals from the High Court do not require leave to appeal unless they are an

[112] *Chikura and Another v Al Sham's Global BVI Limited* SC-17-2007.

appeal against an interlocutory order. Section 43 (2) (d) of the High Court Act [Cap 7:06] provides that no appeal shall be made from an interlocutory order or interlocutory judgment made or given by a judge of the High Court without the leave of that judge or if that has been refused, without the leave of a judge of the Supreme Court. However, there are exceptions to this position. Where the interlocutory order is granted, leave to appeal is not required if the liberty or custody of minors is concerned.[113] Also, no leave to appeal is required when an interdict is granted or refused.[114] Finally, in the case of an order on a special case stated under any law relating to arbitration, leave is not required.[115]

These provisions remove the need for a blanket leave application for appeals from the High Court to the Supreme Court. The leave is required only in the very limited circumstances stated above. These provisions enhance access to court in two ways. Firstly, there is no cumbersome process of applying for leave to appeal in all cases, save for the above-stated cases. Secondly, excluding the requirement for leave to appeal in most civil cases and limiting leave to appeal to a few categories greatly reduces litigation costs, enhancing access to the High Court.

Hence the applications for leave to appeal to the Supreme Court arises in three instances. Firstly, if one is required to seek leave from the High Court and if leave is denied. Secondly, if one seeks to appeal against a decision of the Labour Court, such leave to appeal is denied. Thirdly, if one seeks to appeal against the decision of the Supreme Court on a constitutional issue to the Constitutional Court. Hence, two procedural avenues are available for a litigant who requires leave to appeal from and to the Supreme Court.

When a litigant is denied leave by the High Court of Zimbabwe in circumstances which require leave under s43 (2) (d) of the High Court Act, they can resort to Rule 43 of the Supreme Court Rules. In Rule 43 (1) of the Supreme Court Rules, an application for leave to appeal to the Supreme Court is signed by the applicant or his or her legal practitioner and shall be accompanied by a copy of the judgment against which it is sought to appeal. In Rule 43 (2), the application for leave to appeal shall set the date the High Court refused to grant leave. In terms of Rule 43 (2) of the Supreme Court Rules, again, it is a requirement that a notice of appeal is attached with specific grounds of the appeal, a copy of the proceedings before the High Court when leave to appeal was refused, together with the judgment.[116] The application

[113] Section 43 (2) (d) of the High Court Act [Cap 7:06]
[114] Ibid.
[115] Ibid.
[116] Rule 43 (2) of the Supreme Court Rules.

for leave to appeal must attach an affidavit setting out any facts that are relied upon as affecting the granting of leave to appeal. A judge has the discretion to grant the leave or to refuse the same.[117] If leave to appeal is granted, the appeal shall be deemed to have been instituted per the notice of appeal filed in the application on the date leave is granted unless the judge otherwise orders. If leave is required and has been refused by the High Court, the appellant must apply for the leave to appeal in the Supreme Court within ten working days. [118] The application for leave to appeal is heard by one judge of the High Court, and if not granted by a judge of the Supreme Court, there is no appeal procedure thereafter to the Constitutional Court. This means that a single judge of the High Court or Supreme Court can deny the right of access to the Supreme Court on appeal. This is an undesirable practice, as it is unjustifiable to deny the appellant/applicant an opportunity to benefit from the opinions of other judges.

The leave to appeal is also required when one appeals from the Labour Court to the Supreme Court. In Rule 60 (2) of the Supreme Court Rules, it is provided that an appeal from a decision of the Labour Court in terms of s92 F of the Labour Act [Chapter 28:01] is delivered and filed with a Registrar within 15 days[119] from the grant of leave to appeal by the Labour Court or, where such leave is refused, within 15 days from the grant of leave by a judge.[120] Further, where the Labour Court refuses leave to appeal, the applicant applies for leave to appeal to a judge of the Supreme Court within ten days of the refusal to grant leave.[121]

It is clear from these Rules that the leave to appeal application is first heard by a judge who presided over the matter unless that judge is no longer available to dispose of the matter. Secondly, if the refusal is made by the judge of the Labour Court or the High Court, one can make another application for leave to the Judge of the Supreme Court. Once the judge of the Supreme Court refuses to grant leave, that is the end of the litigation process. There is no appeal mechanism to the full bench of the High Court, Labour Court, Supreme Court or Constitutional Court. Thus, the litigants' right to access the Superior Courts is restricted.

In the *Bonde* case *supra*, it is clear that an application for leave to appeal is not a mere asking.[122] Still, all the mandatory requirements as set in the rules of civil procedure must be

[117] Ibid.
[118] Rule 38 (2) of the Supreme Court Rules, 2019.
[119] Where the days are simply written 15 days or seven days etc., those are court days or working days.
[120] Rule 60 (2) of the Constitutional Court Rules, 2016.
[121] Ibid.
[122] *Bonde* case supra note 110.

fulfilled for the application to be granted.[123] The applicant must comply with the rules of procedure and demonstrate that there are prospects of success in the intended appeal. In conclusion, leave to appeal in the High Court is only required when a litigant seeks to appeal against interlocutory and interim relief judgments from the High Court. In contrast, the Labour Court's final or interlocutory judgements requires a litigant to apply for leave to appeal. There is no justification for such a distinction. The irony is that labour disputes tend to involve poor workers on the other side. Yet, they must pay mandatory extra costs for the mandatory leave to appeal application while litigants appealing from the High Court enjoy free access to the Supreme Court.

4.7. LEAVE TO APPEAL AND APPEAL RULES IN THE CONSTITUTIONAL COURT

The right of access to the Constitutional Court on appeal is restricted in four ways; firstly, the matter to be appealed must be a constitutional case. Secondly, there is segregation and unjust discrimination in the hearing of constitutional matters, in that in some cases, one judge hears some cases, while in some cases, three judges and sometimes five or more judges. Thirdly, for a litigant to appeal, he/she must apply for leave to appeal, a subject of discussion in another section. Fourthly, the strict requirements for a valid notice of appeal. The access to the Constitutional Court, including on appeal, is founded on the provisions of the Constitution, the Constitutional Court Act, 2021 and the Constitutional Court Rules, 2016. The right of access to the Constitutional Court is thus limited to a litigant with a constitutional dispute and those matters provided for within the ambit of the Constitutional Court.[124] The Constitutional Court is the final court determining constitutional matters, and its judgments bind other courts.[125] The Constitutional Court determines only constitutional issues and matters on decisions on constitutional matters.[126] The Constitutional Court has the power to make a final decision on whether a matter is a constitutional matter or whether an issue pertains to a decision on a constitutional matter.[127] This means that the Constitutional Court only deals with final appeal

[123] Ibid.
[124] See s167 of the Constitution of Zimbabwe. Compare with s167 of the Constitution of South Africa. See also J Kriegler 'The Constitutional Court of South Africa' (2003) 36 (2) *Cornell International Law Journal* 361.
[125] Section 167(1) of the Constitution of Zimbabwe, *Kaunda and Others v President of the Republic of South Africa and Others* 2005 (4) SA 235 (CC) (South African case).
[126] See references and applications under s131 (8) (b) and paragraph 9 (2) of the Fifth Schedule of the Constitution of Zimbabwe. See s166 of the South African Constitution compared with Colombia's Constitution of 1991 with Amendments through 2005, art 239-242.
[127] Section 167 (1) (c) of the Constitution of Zimbabwe, *King and Others v Attorneys' Fidelity Fund Board of Control and Another* 2006 (1) SA 474 para 23 (South African case).

decisions on the Constitution and Bill of Human Rights. Appeals to the Constitutional Court are only on constitutional issues.

This was further buttressed in the *Don Nyamande & Kingstone Donga v Zuva Petroleum* case.[128] The case was a watershed case where thousands of employees were terminated on three months' notice; following the Supreme Court ruling, an employer under s12 (4) of the Labour Act (28:01) had a right to terminate employees on three months' notice for no cause. The case attracted outcry, and later, an emergency bill was fast-tracked in Parliament to stop what became known as the *Zuva* massacre. The applicants intended to appeal against the decision of the Supreme Court. Still, their application for leave to appeal was declined because the intended appeal to file with the Constitutional Court had no grounds to raise a constitutional matter.

The Constitutional Court held that the applicants needed to establish the right to approach the Constitutional Court by appeal.[129] Further, the Court ruled that s167 (5) of the Zimbabwean Constitution[130] relates to rules of procedure regulating the manner of approach to this court on appeal from the lower courts and that it does not confer a right to appeal to the Constitutional Court to a litigant with a right of appeal.[131] The position settled in the *Zuva* case is that the litigant must look elsewhere in the Constitution, which applies where a court has made an order of constitutional invalidity of any law.[132] Also, the right of appeal may only arise when the Supreme Court decides on a constitutional matter.[133] Hence Ziyambi JCC, in determining the application for leave to appeal, went further to rule that the applicants had not alleged that s175 (3) applies in their case.[134] The Supreme Court had not found a constitutional issue, and thus no appeal could be made against its decision.[135] Thus, an appeal filed without establishing the right of appeal is a nullity as it conflicts with the provisions of s169 (1) of the Constitution.[136]

The *Zuva* case judgment means that the Supreme Court must identify a constitutional issue

[128] *Don Nyamande and Kingstone Donga v Zuva Petroleum* CCZ 62/15.
[129] Ibid.
[130] Section 167 (5) of the Constitution of Zimbabwe, No 20 of 2013 provides that there should be rules for the Constitutional Court that must allow a person when it is in the interests of justice and with or without leave to appeal, (i) to bring a constitutional matter directly to the Constitutional Court, (ii) to appeal directly to the Constitutional Court and (ii) to appear as a friend of the court.
[131] *Don Nyamande* supra note 128.
[132] Ibid.
[133] Ibid.
[134] Section 175 (3) of the Constitution of Zimbabwe, No 20 of 2013 provides for powers of the courts in constitutional matters and the provision for litigants to appeal directly to the Constitutional Court.
[135] *Don Nyamande* supra note 128.
[136] Section 169 (1) of the Constitution of Zimbabwe, No 20 of 2013 provides that the Supreme Court is a final court of appeal.

for one to be able to appeal against such. Two restrictions to the right of access to the Constitutional Court arise. Firstly, even if the matter has a constitutional issue, as in the *Zuva* case (which had the issue of s65 (1) of the Constitution, which provides for the right to fair labour standards of which termination on notice violates this right), the applicant for leave to appeal would not be granted as the Supreme Court had not identified a constitutional issue. Secondly, even if, as in the *Zuva* case, the termination issue was of an arguable point of law of general public importance, there was no right of appeal for a non-constitutional issue. Hence a litigant who intends to appeal to the Constitutional Court must appeal on a constitutional issue. The appeal must, therefore, strictly be on a constitutional matter.

Further in its jurisdiction, the Constitutional Court may advise on the constitutionality of proposed legislation if requested in terms of the Constitution.[137] The Constitutional Court is empowered to confirm an order of constitutional invalidity made by other subordinate courts before that order is executed.[138] The Constitutional Court has powers to hear matters relating to alleged violations of fundamental human rights or freedoms enshrined in the Constitution of Zimbabwe.[139] The Constitutional Court also hears matters of the election to the office of president and disputes the suitability of a person to hold the office of vice president.[140] The Constitutional Court also has powers to determine whether Parliament or the president has not fulfilled a constitutional obligation.[141]

The Constitutional Court has the power to decide on the constitutionality of an Act of Parliament or the President's or Parliament's conduct.[142] Other constitutional disputes that do not relate to the infringement of human rights or the election of a president or vice president must be heard by at least three judges of the Court.[143] This provision needs to be revised in that there is no justification for reducing the number of judges at the apex of justice when dealing with other constitutional matters.[144] Thus, access to this court on appeal is inhibited by the differentiation of the number of judges hearing different constitutional matters. There is a need,

[137] Section 167 (2) (a) of the Constitution of Zimbabwe, No 20 of 2013, and also *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (2) SA 14 (CC) para 25 (South African case).
[138] Section 167 (3) of the Constitution of Zimbabwe.
[139] Ibid.
[140] Section 167 (2) (b) of the Constitution of Zimbabwe, No 20 of 2013, and see the decision of the *Minister of Home Affairs v Liebenberg* 2002 (1) SA 33 (CC) (South African case).
[141] Section 167 (2) d of the Constitution of Zimbabwe.
[142] Section 167 (3) of the Constitution of Zimbabwe.
[143] Section 166 (3) of the Constitution of Zimbabwe.
[144] Ibid.

therefore, for all the judges to hear a constitutional matter (as a full bench) irrespective of the specie of the constitutional matter before the court.

The other issue restricting access to the Constitutional Court is the mandatory requirements of a valid notice of appeal. The requirements of the valid notice of appeal are the same as those of the High Court to the Supreme Court.[145] A notice of appeal is supposed to be signed by the appellant or his or her legal practitioner.[146] Further, the notice of appeal must state the date and the court by which the judgment appealed against was given.[147] If leave to appeal was granted, then the date of such grant.[148] In addition, whether the whole or part only of the judgment is appealed against; and, if part only, which part of the judgment is appealed against.[149] In addition, the grounds of appeal must be clear.[150] The relief sought must be set out clearly.[151] A notice of appeal that does not comply with the mandatory requirements has again, in the Constitutional Court, been held to be a legal nullity and cannot be amended.[152] The Supreme Court, High Court and Constitutional Court's approach has been the same in interpreting the rules governing the requirements for a valid notice of appeal.[153]

Unlike the appeals to the High Court and to the Supreme Court, where generally, civil appeals do not require leave, all appeals to the Constitutional Court require the granting of leave to appeal. Rule 32 (1) of the Constitutional Court Rules, 2016, provides that a litigant who is aggrieved by the decision of a court of a subordinate court on a constitutional matter can apply for leave to appeal to the Constitutional Court. It is clear that leave can only be granted where a litigant shows that there is a constitutional issue that needs resolution on appeal. So, the Constitutional Court is closed to any other litigant on all other matters. Further, a litigant who wishes to appeal must file an application for leave to appeal within fifteen days of the decision with the Registrar and serve a copy of the application on the other parties to the case in question, citing them as respondents. An application for leave to appeal may be summarily dealt with without hearing oral or written arguments other than those contained in the application.[154] The Chief Justice has the power to order that the application for leave to

[145] Rule 37 of the Supreme Court Rules, 2018.
[146] Rule 33 (1) of the Constitutional Court Rules, 2016
[147] Rule 33 (2) (a) of the Constitutional Court Rules, 2016.
[148] Rule 33 (2) (b) of the Constitutional Court Rules, 2016.
[149] Rule 33 (2) (c) of the Constitutional Court Rules, 2016.
[150] Rule 33 (2) (d) of the Constitutional Court Rules, 2016.
[151] Rule 33 (2) (e) of the Constitutional Court Rules, 2016.
[152] *Fredrick Mabamba v Chitungwiza Municipality* CCZ 1/2019.
[153] Rule 32 (10) of the Constitutional Court Rules, 2016.
[154] Rule 32 (10) of the Constitutional Court Rules, 2016.

appeal be set down for argument and, or direct, that the heads of argument of the parties deal not only with the question of whether the application for leave to appeal should be granted but also with the merits of the dispute.[155] The application for leave to appeal may be heard by a judge of the Supreme Court in chambers. This means the granting of leave to appeal in the Supreme Court to a litigant on whether their matter has prospects of success is in the hands of a single judge. However, if leave is denied, the aggrieved litigant must seek to leave to appeal a decision of the Supreme Court judgment from the Constitutional Court. A judge hears the matter with the concurrence of two other judges. The other judges are not part of the application for hearing, but they must read through the judgment and endorse or advise otherwise.[156] This means that two judges not present in a hearing are decision makers, which is unfair to litigants who would have submitted before a single judge.

Further, an application for leave to appeal or an appeal from the Supreme Court to the Constitutional Court does not suspend the decision being appealed against unless the Constitutional Court orders otherwise.[157] The Chief Justice has wider powers and discretion on how the application for leave is supposed to be determined.[158] This also applies where the leave of the Court is required in terms of the rules to bring a matter directly to the Court or to appeal directly to the Court from any other court or to appear as an *amicus curiae* of the Court; a Judge may hear the matter in chambers or by such number of Judges as the Chief Justice may direct.[159] The leave to appeal requirements thus limit the right of access to the Constitutional Court.

4.8. PROCEDURAL ACCESSIBILITY OF THE SUPERIOR COURTS ON APPEAL

As discussed in the sections above, in most instances, the Superior Courts, that is, the High Court, Supreme Court and Constitutional Court, adopt a strict approach to interpreting the rules governing the validity of a notice of appeal. The current position is that appellants must comply with the court's mandatory appeal rules when filing a notice of appeal. In many instances, the Superior Courts have avoided hearing appeal cases if the appeal did not meet all the material and non-material requirements set for a valid notice of appeal, deeming the notice of appeal a

[155] Ibid.
[156] Rule 32 (12) of the Constitutional Court Rules, 2016.
[157] Section 6 of the Constitutional Court Act.
[158] Section 4 of the Constitutional Court Act.
[159] Ibid.

legal nullity.[160] Once the Supreme Court or the Constitutional Court Rules that an appeal is a legal nullity, the appeal is dismissed or struck off the roll with costs.[161] Thus, the Supreme Court and the Constitutional Court have taken a strict approach that an appeal must state the date of judgment, the name of the judge *a quo*, whether the judgement is being appealed in full or part and the nature of the relief being sought, as well as the grounds of appeal must be succinct and precise, otherwise the appeal will be struck off the roll with costs.[162] Several cases have followed the *Jensen* case, for example, in *Ndlovu and Another v Ndlovu and Another*,[163] where Malaba JA (as he was then)[164] adopted the same approach. It is clear from these decided cases that the restricted interpretation and application of rules governing notice of appeal by courts can narrow or expand the court's right to access, hence the need to amend the rules governing the validity of a notice of appeal and provide some flexibility on aspects like the draft prayer, issues regarding citation of wrong dates and severing the appeal where some grounds of appeal are severable. Focusing on the Constitutional Court, the appeal procedure restricts the right of access to it. Firstly, it restricts access by limiting the right of appeal to litigants where a Constitutional Court has determined a constitutional issue. Secondly, it does not allow appeals on matters that raise issues of general public importance. Thirdly, in some instances, not all judges (full bench) of the Constitutional Court hear other specie of constitutional matters. As discussed in Chapter 5, the rules governing the appeal procedure need to be reformed, considering what other jurisdictions like South Africa and Kenya have done.

4.9. RESTRICTED ACCESS TO THE SUPERIOR COURTS DUE TO THE LEAVE TO APPEAL REQUIREMENTS

The discussion on leave to appeal in various Superior Courts demonstrates that the requirement for leave to appeal in Zimbabwe restricts access to the Superior Courts, particularly in appeals from the High Court to the Supreme Court and from the Supreme Court to the Constitutional Court. The requirement for leave to appeal generally must be limited to an interlocutory order, especially when a litigant appeals from the Supreme Court to the Constitutional Court, just as a litigant appeal from the High Court to the Supreme Court or from the Magistrates Court to

[160] Compare with J D Pinsler 'The effect of non-compliance with The Rules of Procedure: A survey of recent cases' (1993) *Singapore Journal of Legal Studies* 187-197.
[161] J Alder 'Appeals and nullity' (1975) 8 (5) *The Modern Law Review* 573-577.
[162] *Mcfoy v United Africa United Africa Co Ltd* [1961] 3 ALL ER 1169 at 11721 (English Case).
[163] *Ndlovu and Another v Ndlovu and Another* SC 133/02 (Zimbabwean case).
[164] *Zimbabwe Platinum Mines (Private) Limited v Marko Phuti* SC 85-15, and compare with *Standard Chartered Bank v Chinyemba* 2004 (2) ZLR 197 (S) (Zimbabwean case).

the High Court. More importantly, leave to appeal applications must be heard by more than one judge unless there is an appeal procedure where more than two judges would sit as an appellate court to decide an appeal against the refusal of the leave. In addition, there must be direct appeals to the Constitutional Court on constitutional issues and issues of general public importance contrary to the current approach by the Constitutional Court wherein their focus is only on constitutional issues. The provisions governing appeals from the Magistrates Court to the High Court, as discussed, have limited circumstances where leave is required, thus increasing access to the Superior Courts. There is no justification for having a blanket requirement for leave to appeal for litigants intending to access the Superior Courts on appeal.

4.10. REQUIREMENT FOR SECURITY FOR COSTS IN THE HIGH COURT

The requirement for security for costs is still part of Zimbabwean law and is enshrined in all sets of court rules dealing with appeals to the High Court, Supreme Court or the Constitutional Court. The Magistrates Court Rules provide that the appellant is required to furnish security for the respondent's costs of appeal.[165] The amount set in the rules is ZWL100.[166] The court clerk may accept a written undertaking from the appellant to pay for the record's preparation costs.[167] It is apparent from these rules that an appellant must pay costs when appealing from the Magistrates Court to the High Court. This is undesirable because if the plaintiff and the defendant are *incolas*, there is no risk that costs would not be met unless the other party is not a person of means. Thus, the requirement of security for costs on noting an appeal from the Magistrates Court to the High Court has no exceptions as set in the Magistrates Court Rules. The requirement for security for costs does not consider whether one is a person of no means or whether their intended appeal is frivolous or vexatious. The security for costs is a blanket requirement. A blanket requirement for security for costs thus limits the right of access to the High Court.

The requirement for security for costs in the Magistrates Court Rules is further reinforced by the provisions of Rule 75 of the High Court Rules, which also requires the appellant to furnish security for costs.[168] It is apparent from Rule 75 (1) of the High Court Rules that an appellant who sues a respondent in the High Court, on appeal, may be requested to furnish security for costs. A close reading of Rule 75 (1) of the High Court Rules also indicates that

[165] Order 33, Rule 1 (2) (a) of the Magistrates Court (Civil) Rules, 2019.
[166] Order 33, Rule 1 (2) (a) (b) (i) of the Magistrates Court (Civil) Rules, 2019.
[167] Ibid.
[168] High Court of Zimbabwe Rules, SI 202 of 2021.

the plaintiff or a defendant may request security costs if they file a counter-claim. This means that a plaintiff can file a claim, or an appellant can file an appeal and still request the defendant or appellant to pay costs if they seek to contest the appeal, summons or application filed in the High Court. Rule 75 (1) of the High Court Rules is broad and covers all types of matters brought before the High Court. Rule 75 (2) of the High Court Rules then puts beyond doubt that once security costs have been requested, the party who would have been requested to pay the security has to pay. If the quantum of security is the only contested issue, then the Registrar must determine the same. Further, once the requesting party has asked for security for costs and has delivered a notice containing reasons and the amount thereof, costs must be paid unless contested. Rule 75 does state the basis for when security costs may be waived or exempted.

The Registrar's decision, as contained in Rule 75(2), is final and not appealable. Rule 75 (3) of the High Court Rules seems to give a right to a litigant to contest his or her liability to give security for costs. The application to ensure that security for costs is paid is made by the other party seeking security for costs. The right to contest for security for costs arises in two instances: firstly, where a party from whom security for costs is demanded contests his or her liability or secondly if he or she fails or refuses to furnish security in the amount demanded or fixed by the Registrar. If any of these scenarios arise, the litigant requesting security for costs has the right to apply to a judge or court for an order that such security must be given and that the proceedings stay until such an order is complied with. Again, the application to a judge requesting that security for costs is paid or proceedings be stayed is available to a requesting party where a party refuses or fails to furnish security in the amount demanded or fixed by the Registrar. In terms of Rule 75 (4) of the High Court Rules, if security is not given within a reasonable time on the application, the judge may dismiss any proceedings instituted or strike out any pleadings filed by the party in default or make such other order which ensures justice is met.

In Rule 75 (5) of the High Court Rules, security costs are only payable in the amount and manner either agreed by parties or directed by the Registrar. However, the High Court has the discretion to order otherwise. However, the position remains that security for costs is a requirement and, if asked for, must be furnished.

Further, the Registrar has powers to increase the quantum of security required if he or she is satisfied (whatever that means) that the amount of security for costs originally furnished

needs to be increased.[169] These powers can only be exercised if an application is made by a party seeking such an increase.[170] The only exception is that only a person receiving legal aid from a statutorily established board is not compelled to give security for costs unless the court directs otherwise.[171] This means the court has the discretion even to order a person receiving legal aid to furnish security for costs. More importantly, the rule only recognises legal aid from a statutory board. This means if a litigant is represented by non-governmental organisations and in forma pauperis lawyers providing legal aid, he or she is required to furnish security costs.

There is no doubt that Rule 75 of the High Court Rules is too broad and unnecessarily and unjustly restricts access to the High Court by technically providing a one-size-fits-all provision for security for costs. Therefore, as discussed later, there is a need to redefine the circumstances upon which the security costs may be requested.

4.11. SECURITY FOR COSTS IN THE SUPREME COURT

In the Supreme Court, there are three instances upon which security costs are required. Firstly, security for costs is requested when an appeal is noted from the High Court.[172] Secondly, security for costs is requested where an appeal is from any other court.[173] Thirdly, security for costs may be requested where a litigant wishes to execute a judgment pending an appeal.[174] Concerning the execution of a judgment pending an appeal, the request for costs is covered under Rule 55 of the Supreme Court Rules.[175] Where an appeal is made to the Supreme Court and the court from which an appeal is then made grants authority for the execution of the judgment pending appeal, the question of security costs is determined by that court and not the Supreme Court.[176] Rule 55 (2), however, provides that where execution of a judgment is suspended pending an appeal and the respondent is yet to waive their right to security for costs, the appellant is required to furnish the Registrar with sufficient security for costs.

However, where parties have differing views on the amount or nature of the security to be furnished, the Registrar, in terms of Rule 55 (2) (i) of the Supreme Court Rules, has powers to

[169] Ibid.
[170] Ibid.
[171] Ibid.
[172] Rule 55 (2) of the Supreme Court Rules, 2018.
[173] Ibid.
[174] Rule 55 (1) of the Supreme Court Rules, 2018.
[175] Ibid cite op note 172.
[176] Rule 55 (1) op cit note 174.

determine the amount or nature of security if one appellant applies for such determination. In addition, Rule 55 (2) (ii) of the Supreme Court Rules allows the Registrar to fix the timelines in which security must be furnished. Unlike the High Court Rules, the Supreme Court Rules allow an appellant to apply for exemption wholly or partly from giving security for costs under Rule 55 (2) of the Supreme Court Rules. The basis for such a request needs to be stated in the rules. No case has been determined under the current rules of civil procedure governing security for costs to determine the requirements for an appellant to succeed in an application for security for costs. The test for one to be exempted from furnishing security for costs is that an appellant must show a good cause. However, no case law has defined what a good cause is. However, this rule is restrictive in that the application for exemption is made to a judge at the respondent's cost who is seeking to be absolved from paying security costs. There is an undue cost burden on the respondent.

It is discriminatory or unjustifiable because the government, municipal, city council or town management board is not required to pay security for costs, while individual litigants are required. This contradicts s56 (1) of the Constitution, which provides that all persons are equal before the law and have the right to equal protection and benefit of the law. These provisions discriminate and do not provide equal protection and benefit before the law.

Rule 55 (5) of the Supreme Court Rules even specifies the timelines wherein the appellant is required to pay security for costs, which is, in essence, one month or per period set by the Registrar. The appellant in Rule 55 (6) of the Supreme Court Rules must furnish security for costs, as failure to do so within the specified time results in the appeal being deemed abandoned and dismissed. This rule on time limits to pay security for costs has not set exemptions on individuals but provides a blanket rule and only exempts state actors. This means natural and artificial personas, excluding the stated state institutions, must pay security costs irrespective of the fact that they are *incolas*. Rule 55 of the Supreme Court Rules makes it mandatory for a party to pay security costs were requested and for the Registrar to fix such costs. However, there are limited circumstances under Rule 55 of the Supreme Court Rules, 2018, where a judge may exempt a litigant from paying security costs. Rule 55 of the Supreme Court Rules, 2018 also exempts the Government of Zimbabwe, a municipal or city council, or a town management board.

The other aspect that restricts the appellant's right of access to the Supreme Court is that once an appeal is deemed abandoned, it is not deemed struck off from the roll (where one can

apply for reinstatement) but dismissed. This means it cannot be resuscitated even if the appellant raises the security for costs fixed or requested by the respondent.

4.12. SECURITY FOR COSTS IN THE CONSTITUTIONAL COURT

The security for costs is also required under Rule 42 of the Constitutional Court Rules. In Rule 42 (1), security costs are required in two instances: firstly, when the respondent requires the applicant or appellant to furnish such security costs. Secondly, when the appellant or applicant has applied or appealed directly to the Court. So, the requirement for security for costs is broad and does not provide for exemptions except for the Government of Zimbabwe, a municipal, a city council, or a town management board as set in Rule 42 (2) of the Constitutional Court Rules. Similar to the Supreme Court, where security for costs is required, those must be furnished within one month of filing a notice of appeal. In Rule 42 (3), the Registrar has powers to fix the nature of the security and the amount, but either party has a right to apply to a judge in chambers to review the Registrar's decision. The application for review depends on the nature or amount of security and not on whether to pay the security for costs. This section's wording differs from the one governing the High Court. Rule 42 (5) of the Constitutional Court Rules slightly differs from Rule 55 (6) of the Supreme Court Rules in that if a party fails to pay security costs, the other party may apply to a judge in chambers for dismissal of the application or appeal. There is no requirement for the application to be made on notice. Rule 55 (6) of the Supreme Court Rules provides that if an appellant fails to pay security for costs, the appeal is automatically deemed abandoned or dismissed. Yet the Constitutional Court requires an application for dismissal for failure to pay security costs. Further, it is not automatic for the Constitutional Court Judge to dismiss the matter but can make an order they deem fit.

The overall position is that the requirement for security costs is broad and is a restriction for litigants accessing the Constitutional Court. There is a need for security costs to be narrowed to *peregrinus* litigants or litigants with vexatious or frivolous claims. More importantly, a respondent requiring security for costs from an appellant must demonstrate that the appeal is hopeless and is meant to harass them.

4.13. RESTRICTED ACCESS TO THE SUPERIOR COURTS DUE TO THE REQUIREMENT FOR SECURITY FOR COSTS

The request for security costs is a procedural rule based on practice and is not drawn from

substantive law.[177] Initially, the rule as per the South African case of *Saker and Co Ltd v Grainger*[178] was limited to a non-resident plaintiff who did not own immovable property in South Africa to furnish security for the costs of legal proceedings. In Zimbabwe, the rule applies even to *incola* litigants and has restricted access to the court.

It is clear that the requirement for security for costs is still part of Zimbabwean law. This requirement influences the right of access to the Superior Courts. The Supreme Court and the Constitutional Court have rules that provide for security for costs, and the appellant can invoke those rules if they decide to call the respondent to furnish such costs. If a litigant cannot furnish security for costs, their case is dismissed. However, there is provision for that litigant to apply to a judge in chambers for an exemption. The weakness of the current rules governing security for costs is that they generally do not provide an exemption to *incola* litigants save for the government, municipal and local authorities, just as in the colonial era, discussed in Chapter 3. How a litigant qualifies to be exempted from furnishing security for costs is not provided for in the rules. There has yet to be a case precedent to deal with the requirements for that application. Who qualifies to be exempted is also not stated in the rules.

However, it is conspicuous in the Supreme Court and the Constitutional Court that the government and local authorities or municipalities are exempted from paying security costs. The rationale is that state bodies or organs are always considered to have financial resources. Still, that is unjustified discrimination. The exemption of the government and local authorities or municipalities violates s56 of the Constitution, which seeks to promote equal treatment of litigants before the law. There is no good reason to discriminate based on haves and have-nots. More often, those who do not have resources are the ones who require the protection of the courts.

4.14. REFERRAL OF CONSTITUTIONAL MATTERS TO THE CONSTITUTIONAL COURT.

The other selected rule of civil procedure under discussion is the referral of constitutional matters from other courts to the Constitutional Court. In addition to the appeal procedure, direct access and upon granting of leave for direct access, a litigant can access the Constitutional

[177] C Theophilopoulos, C.M Heerden & A Boraine *Fundamental principles of civil procedure* (3 ed) Lexis Nexis (2015) 273.
[178] *Saker and Co Ltd v Grainger* 1937 AD 223.

Court by way of referral to the Constitutional Court.[179] The referral procedure is also complex in that a litigant must read the provisions of s175 together with the Rules and understand the court procedure which they intend to motivate to refer the matter to the Constitutional Court.[180] Constitutional matters may arise in the proceedings of a lower court. Referrals of such matters can be made in two ways. Firstly, the court or judicial officer may request the parties to refer the submissions on the constitutional issue or question to be referred for determination, stating the specific constitutional issue he or she considers should be resolved by the court. Secondly, either party may apply to the presiding judicial officer for referral of the constitutional dispute to the Constitutional Court for determination. Either referral shall be made using Form CCZ 4 and is accompanied by a copy of the record of proceedings and affidavits or statements from the parties, setting out the arguments they seek to make before the court.[181] The procedure is quite complex. There have been several cases, as demonstrated herein, where the Constitutional Court struck off the referred matters merely because the referral was incorrectly done.[182] While the referral may seem to be an avenue available to litigants from lower courts to refer a matter to the Constitutional Court, the Constitutional Court has taken a strict line of interpretation on how a litigant can approach it through this procedure, thus narrowing the right of access to this court. While referral seemingly is a promising procedure to enhance access to the Constitutional Court in its form, it restricts access.[183]

The courts subordinate to the Constitutional Court have the discretion to refer matters to the Constitutional Court. Such discretion must always be exercised with full consideration of the interests of justice and principles stipulated in s85 of the Constitution.[184] In *Isoquant Investments (Private) Limited t/a ZIMOCO v Memory Darikwa,* the Constitutional Court ruled

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[179] Section 175 (4) of the Constitution of Zimbabwe.
[180] *Isoquant Investments (Private) Limited t/a ZIMOCO v Memory Darikwa* CCZ 6/20 (Zimbabwean case). See also *Uthukela District Municipality and Others v President of the Republic of South Africa and Others* 2003 (1) SA 678.
[181] Rule 24 of the Constitutional Court Rules, 2016.
[182] S v Tau 1997 (1) ZLR 93 (H) at 99F; see also *Chiite & 7 Ors v The Trustees of The Leonard Cheshire Homes Zimbabwe Central Trust* CCZ 10/17; *Sister Berry (Nee Ncube) and Anor v The Chief Immigration Officer & Anor* 2016 (1) ZLR 38 (CC); *Cold Chain (Pvt) Limited T/A Sea Harvest v Makoni* SC 8/17; *Taylor-Freeme v The Senior Magistrate, Chinhoyi and Anor* 2014 (2) ZLR 498 (CC); *Chihava and Ors v Principal Magistrate and Anor* 2015 (2) ZLR 31 (CC). Furthermore, see *Mushapaidze v St. Annes Hospital and Ors* CCZ 18/17; *Tomana and Anor v Judicial Service Commission and Anor* HH 281/16; *S v Banga* 1995 (2) ZLR297; *Makaza and Anor and S v Gumbo and Anor* CCZ 16/17, *Martin v A-G and Anor* 1993 (1) ZLR 153(S). Compare with *Western Assurance Co v Caldwell's Trustee* 1918 AD 262 at p 271; *Corderoy v Union Government* 1918 AD 512 at p 517; *Wood NO v Edwards 1*968 (2) RLR 212 at 213A-F; *Fisheries Development Corporation v Jorgensen and Anor* 1979 (3) SA 1331 at 1339 E-F; *Martin v Attorney General and Anor* 1993 (1) ZLR 153 (S).
[183]A Moyo *Selected aspects of the 2013 Zimbabwean Constitution and the Declaration of Rights* Pyramid Publications (2019) 236-7.
[184] Ibid 236.

that the referral procedure must comply strictly with the provisions of s175 of the Constitution.[185] Such an approach is undesirable as there is a need to avoid unreasonable restrictions on the administration of justice due to procedural technicalities.[186] The correct application of the referral procedure is exactly the opposite of what the Constitutional Court applies in cases brought before it. The Constitutional Court has not distinguished between material compliance and non-material compliance. There is no case law to that effect. The Constitutional Court has been rigid and strict in applying the referral procedure.[187] The problem with the referral system is that not all lower courts appreciate how to dispose of constitutional issues. The issues of experience and competence at a lower level may 'kill' very good constitutional matters before the apex court determines them.

This challenge also has been noted in the South African Constitutional Court referral system. Rautenbach notes that, in South Africa, for automatic referrals by other courts in terms of the interim Constitution between 1995 and 1998, there were 35 cases referred to the Constitutional Court.[188] He notes that out of the 35 referrals made between 1995 and the end of 1998, the Constitutional Court refused to hear the merits of the cases, six in 1996 and one in 1997.[189] As in South Africa, the referral of cases to the Constitutional Court has not been an easy avenue in Zimbabwe from a procedural aspect.[190] The Constitutional Court has taken a very strict interpretation as to what constitutes a proper referral. The approach is restrictive of access to the court. The court should be guided by the question of whether there is a constitutional issue or not. Litigants are not interested in the form but the substance of their matter. Resolution of the dispute is why litigants would frequent the courts.

Hence, the referral procedure is relevant but must be simplified and benefit litigants in such a way that where a constitutional issue is raised, the court should refer it automatically to the Constitutional Court. The Constitutional Court must decide whether, indeed, a constitutional matter arises.[191] It is argued in this thesis that a case should be disposed of not merely because

[185] *Zimoco supra* note 180. Compare with the cases of *Re Appleton French and Scrafton Ltd* [1905] 1 ChD 749 at 753, *Mundy v The Butterley Co Ltd* [1932] 2 ChD 227 at 233.
[186] Ibid 236.
[187] See *S v Ndlovu* 2007 (1) ZLR 66 (Zimbabwean case).
[188] I M Rautenbach 'Constitutional Court 1995-2012: How did the cases reach the court, why did the court refuse to consider some of them, and how often did the court invalidate laws and actions?' (2013) 16 (4) P.E.R 46- 93.
[189] *S v Bequinot* 1997 (2) SA 887 (CC) (South African case).
[190] Moyo op cite note 183 at 237.
[191] Ibid.

the procedure has not been followed but because no constitutional issues arise.

Now all rules of procedure for the Magistrates Court, High Court, Supreme Court and Constitutional Court provide referral of constitutional matters to the Constitutional Court. In Rule 108 of the High Court Rules,[192] it is provided that where the court or a judge wishes to refer a matter to the Constitutional Court on its own initiative in terms of s175 (4) of the Constitution, the judge must request the parties to make submissions on the constitutional issue or question to be referred for determination.[193] Further, the applicant or appellant must state the specific constitutional issue or question the court considers should be resolved by the Constitutional Court.[194] Furthermore, if the court or a judge is requested by a party to the proceedings to refer the matter to the Constitutional Court, the applicant or appellant must refer the matter to the Constitutional Court.[195] The referral must be in form CCZ 4 and be accompanied by a copy of the record of proceedings and of affidavits of statements from parties setting out arguments the applicant or appellant seek to make before the Constitutional Court.[196] In circumstances involving factual issues, the court or judge seized with the matters must hear evidence from the parties and determine the factual issues.[197] However, the parties must prepare a statement of agreed facts where there are no disputes.[198] The record of proceedings must contain the evidence led by both sides and, where applicable, specific findings of fact by the court or judge and the issue or question for determination by the Constitutional Court.[199] In addition, where the statement of agreed facts is furnished, it shall suffice for the statement to be incorporated on the record in place of the evidence and specific findings of fact.[200] The court or judge must direct the Registrar to prepare and transmit the record so prepared to the Constitutional Court within fourteen days of the date of such direction.[201] However, before transmission, the Registrar must ensure that the record is correct and contains an appropriate draft order.[202]

Furthermore, where the court or a judge declares any law constitutionally invalid, the

[192] Rule 108 (1) of the High Court Rules, 2021.
[193] Rule 108 (1) (a) of the High Court Rules, 2021.
[194] Rule 108 (1) (b) of the High Court Rules, 2021.
[195] Rule 108 (2) of the High Court Rules, 2021.
[196] Rule 108 (3) of the High Court Rules, 2021.
[197] Ibid.
[198] Rule 108 (4) of the High Court Rules, 2021.
[199] Ibid.
[200] Rule 108 (5) of the High Court Rules, 2021.
[201] Rule 108 (6) of the High Court Rules, 2021.
[202] Ibid.

Registrar must comply with the provisions of Rule 31 (1) of the Constitutional Court Rules, 2016.[203] Moreso, a party who intends to appeal against the decision of the court or judge on a constitutional matter must comply with the procedure in Part V of the Constitutional Court Rules, 2016. The above provisions have been applied strictly to the extent that it is very difficult to have a referral matter to the Constitutional Court. However, they are identical to those of the Supreme Court. Rule 71 of the Supreme Court Rules is identical to Rule 108 of the High Court Rules save that it then sets a test of determining whether to refer a Constitutional matter. In Rule 71 (2), it is provided that where the court or a judge is requested by a party to the proceedings to refer the matter to the Constitutional Court, and it or the applicant or appellant is satisfied that the request is not frivolous or vexatious.

Rule 24 of the Constitutional Court Rules, 2016 is word-for-word similar to Rule 71 of the Supreme Court rules on the referral provisions. The only addition not found in the Magistrates Court Rules, High Court Rules, and the Supreme Court Rules, but found in the Constitutional Court Rules is that the Registrar of the Constitutional Court, once the Registrar receives the referral, the Registrar must call for filing of heads and irrespective of whether the parties or either of the parties fails to file the heads of arguments the Registrar must set the matter down for hearing.[204]

The referral procedure has yet to record successful referrals in civil cases, as most cases have failed due to procedural irregularities. In *Nyagura v Ncube N.O and Ors* CCZ 7/19, the Constitutional Court, before dismissing the matter, held that the presiding person must address his or her mind to the factors set in the Rules that answer the question of whether the request to refer the matter to the Court was frivolous or vexatious and whether the determination by the Court is necessary for the proceedings before him or her. The Constitutional Court held further that the purpose of the exercise of the jurisdiction of a subordinate court under s175 (4) of the Constitution is to protect the process against frivolous or vexatious litigation. In *Francis Mazarura v The Commissioner General Zimbabwe Republic Police*, despite the Attorney General consenting to referral, the Constitutional Court dismissed the application because, in a referral matter, a judge could not refer a matter simply because the parties had consented.[205] However, Malaba CJ did attempt to positively interpret the referral rules after realising that

[203] Rule 108 (7) of the High Court Rules, 2021.
[204] Rule 24 (8) of the Constitutional Court Rules, 2016.
[205] The author was a legal practitioner representing the Applicant in *Francis Mazarura v The Commissioner General & Anor*

most cases[206] were being dismissed on technicalities. In a presentation titled 'The Procedure of Referral of Constitutional Matters from a subordinate court to the Constitutional Court in Terms of Section 175(4) of the Constitution',[207] the judges submitted that there must be a request from the party and that request must be premised on the existence of a constitutional issue. The constitutional issue raised must dispose of the matter. A referring judicial officer is required to decide whether the request is not frivolous or vexatious and, if not so, refer the matter to the Constitutional Court.

4.15. RESTRICTED ACCESS TO THE CONSTITUTIONAL COURT DUE TO THE REQUIREMENTS OF THE REFERRAL PROCEDURE

The emphasis in the referral procedure is on compliance with the requirements of the procedure.[208] However, as pointed out in practice, few cases are heard on merits after being referred, as they suffer multiple setbacks. The requirements of these rules governing referrals restrict access to the Constitutional Court. They need to consider that only some judiciary officers have procedural and constitutional law expertise. Therefore, the referral procedure must be simplified.[209]

The referral procedure is complex, and in civil cases, only a few cases are prosecuted on merits. Thus, there is a need to compare with other jurisdictions. The current referral process, rather than dealing with the substance of the matter, limits procedural access to the Constitutional Court. The cases being brought before the Constitutional Court through the referral procedure are being determined on whether they comply with the 'bolts and nuts' of procedure as opposed to the case's merits.

4.16. RESTRICTED JURISDICTION OF THE CONSTITUTIONAL COURT

Access to the Constitutional Court in non-appeal cases is indirect. Direct access is limited to very few types of constitutional matters. In Rule 21 of the Constitutional Court Rules, the Court can hear direct appeals in terms of s175 (3) of the Constitution against an order concerning constitutional validity or invalidity confirmation of an order of constitutional invalidity made

[206] *Meda v Sibanda* CCZ 10/16. See also *Tsvangirai v Mugabe & Anor* 2006 (1) ZLR 148; *Magurure and 63 Ors v Cargo Carriers International Hauliers (Pvt) Ltd* CCZ 15/16. In addition, *Sister Berry (Nee Ncube) and Anor v The Chief Immigration Officer & Anor* 2016 ZLR 38 (CC).
[207] Chief Justice Luke Malaba, 'The procedure of referral of constitutional matters from a subordinate court to the constitutional court in terms of Section 175(4) of The Constitution of Zimbabwe', A Presentation at *the End of The First term 2019 Judges'* Symposium, Troutbeck Inn Resort, Nyanga, 05 April 2019.
[208] Ibid. See pages 3 to 20 where it lists the requirements for a referral.
[209] Ibid.

by other subordinate courts before that order is executed.[210] The Constitutional Court, through direct access, hears matters of the election of the office of president or vice president and disputes concerning the suitability of a person to hold the office of vice president.[211] The Constitutional Court, in addition, can be accessed directly in cases where an issue arises on whether the Parliament or the President has not fulfilled a constitutional obligation.[212] The Constitutional Court has the power to decide on the constitutionality of an Act of Parliament or the conduct of the President or Parliament. [213] It can also hear directly matters of referrals from a court of lesser jurisdiction and where an individual's liberty is at stake.[214] Importantly also, it can hear direct challenges to the validity of a State of Public Emergency or an extension of a State of Public Emergency. [215]

In Zimbabwe, a litigant must seek leave for direct access in constitutional matters over which other courts have jurisdiction.[216] A litigant must apply for direct access before they are given a day in the Constitutional Court.[217] The application for direct access is provided in terms of s167 (5) of the Constitution as read with Rule 21 of the Constitutional Court Rules. If a party decides to approach the court as the court of the first instance in a case, then an application for direct access must first be made. Such an application must be supported by an affidavit stating the facts on which the applicant's belief justifies direct access to the Constitutional Court. The application must be filed with the Registrar and then served on parties, whether direct or substantial. The application must set out the grounds on which it is argued that it is in the interests of justice that an order for direct access is granted.[218] In addition, the application must state the nature of the relief prayed for and the grounds on which such relief is based. More importantly, the applicant must state whether the court can hear the matter without adducing oral evidence or with oral evidence being adduced.[219] Further, the applicant must attach a draft of the substantive application he or she seeks to file with the court to the application for direct

[210] Section 167 (3) of the Constitution of Zimbabwe, No 20 of 2013.
[211] Section 167 (2) (b) of the Constitution of Zimbabwe, No 20 of 2013 and see the decision of the *Minister of Home Affairs v Liebenberg* 2002 (1) SA 33 (CC) (South African case).
[212] Section 167 (2) d of the Constitution of Zimbabwe, No 20 of 2013.
[213] Section 167 (3) of the Constitution of Zimbabwe, No 20 of 2013.
[214] Rule 21 (1) of the Constitutional Court Rules, 2016.
[215] Ibid.
[216] All courts in terms of s175 of the Constitution of Zimbabwe, No 20 of 2013 can hear constitutional matters not preserved for the Constitutional Court.
[217] Rule 21 of the Constitutional Court Rules, 2016.
[218] In *Brundage v Estate of Carambio* 195 N.J (2008) 575, the court held that 'interest of justice' means that a court is satisfied that a decision needs to be made. See also *Williams and Anor v Msipa and Ors* 2010 ZLR 552 (Zimbabwean case).
[219] Rule 21 of the Constitutional Court Rules, 2016.

access.[220] An application for direct access can be determined on papers filed and in chambers without a judge hearing oral or written arguments. In determining an application for direct access, the judge considers the following elements: firstly, whether there are prospects of success if direct access is granted; secondly, whether the applicant has any other remedy available to him or her and whether there are disputes of fact in the matter.[221]

In *Lytton Investments (Private) Limited v Standard Chartered Bank Zimbabwe Limited and Attorney General of Zimbabwe,*[222] the Constitutional Court ruled on whether a litigant had a right under s85 (1) of the Constitution to petition the Court for an appropriate remedy, alleging infringement of a fundamental right or freedom by a decision of the Supreme Court in a case that is not a constitutional matter. The question arose in the context that s169 (1) of the Zimbabwean Constitution, as read together with s26 of the Supreme Court Act (7:13), provides that a decision of the Supreme Court on a non-constitutional matter is final and non-appealable.[223] Thus, the application for direct access was a preliminary procedure seeking approval to institute the main claim in the Constitutional Court as the court of the first instance.[224] The Constitutional Court held that the decision of the Supreme Court in proceedings involving issues that are not constitutional matters might be challenged on the ground that it has infringed a fundamental right or freedom provided in the Constitution.[225] The Constitutional Court further held that a party has a right under s85 (1) of the Constitution to petition the Court for appropriate remedy on the allegations brought forward, as there is a constitutional obligation on the Supreme Court as a public body exercising public authority to act constitutionally.[226] The Constitutional Court further held that the constitutional obligation to protect fundamental rights and freedoms binds the Supreme Court in exercising judicial power in a case involving a non-constitutional matter.[227] In narrowing its jurisdiction, the Constitutional Court held that the constitutional jurisdiction aims to guarantee the supremacy of the Constitution, the rule of law and the protection of the fundamental human rights and freedoms, among other values and principles set out in s3 of the Constitution.[228] The Court

[220] Ibid.
[221] The requirements for a court application are generally the same as those of the court application in the High Court of Zimbabwe, save that in addition to the general requirements for a court application, there will be additional requirements in applications for direct access.
[222] *Lytton Investments (Pvt) Ltd v Standard Chartered Bank Zimbabwe Limited and Attorney General of Zimbabwe* CCZ 11/18 (Zimbabwean case).
[223] Ibid.
[224] Ibid.
[225] Ibid.
[226] Ibid.
[227] Ibid.
[228] Ibid. See also *Martin v Attorney-General* 1993 (1) ZLR 153(S) (Zimbabwean case).

went on to define what a constitutional matter is.[229] The Constitutional Court defined a constitutional matter as one that involves an issue, the determination of which requires the interpretation, protection or enforcement of the Constitution.[230] Further, the Constitutional Court held that the only restrictive condition to the exercise of the right to approach the court for remedy of a violation of one's right, apart from issues of *locus standi*, was that one would have to satisfy the admissibility requirements under Rule 21 of the Constitutional Court Rules to get direct access to the Court.[231] Rule 21 of the Constitutional Court Rules provides that direct access to the Court in terms of the procedure prescribed under s85 of the Constitution should be with the leave of the court or judge.[232] The key determinant factor for a litigant to access the Court, according to the *Lytton* case, is that they must demonstrate that direct access is in the interests of justice.[233] However, in the *Lyton* case, Malaba CJ, in defending the restrictive provisions of Rule 21, held that the purpose of the admissibility requirements prescribed under Rule 21 (3) and Rule 21 (8) is to ensure that only well-founded challenges to the constitutional validity of decisions of the Supreme Court in cases involving non-constitutional matters are brought to the Court.[234] The Court further held that recognising the remedy under s85 of the Constitution against Supreme Court judgments in cases involving non-constitutional matters does not open the floodgates to cases alleging infringement of fundamental rights or freedoms by the Supreme Court.[235]

The Court further held that the rule requiring leave for direct access guarantees that the power of constitutional review is applied by the Court in reviewable cases only.[236] However, the Constitutional Court held that the obligation of the Court to protect and enforce the Constitution includes the duty to give effect to remedies designed for the protection and enforcement of fundamental human rights and freedoms.[237] The Constitutional Court further held that s85 (1) of the Constitution, 2013, deliberately narrowed the category of potential litigants to those who alleged that a fundamental human right or freedom enshrined in Chapter IV had been, was being or was likely to be infringed.[238] The key requirements, according to

[229] Ibid.
[230] Ibid.
[231] Ibid and Mat*amisa v Mutare City Council (Attorney-General Interviewing)* 1998 (2) ZLR 439 (Zimbabwean case).
[232] *Lytton* supra note 222 and *Catholic Commission for Justice and Peace v Attorney-General and Ors* 1993 (1) ZLR 242 (Zimbabwean case).
[233] *Williams* supra note 218
[234] Ibid, *Prosecutor General Zimbabwe v Telcel Zimbabwe (Pvt) Ltd* 2015 (2) ZLR 422 and *Meda v Sibanda and Ors* 2016 (2) ZLR 232 para 236 (Zimbabwean case).
[235] *Lytton* supra note 222.
[236] Ibid.
[237] Ibid.
[238] Ibid.

the Constitutional Court, were that the applicant must show that direct access would be in the interests of justice and that there was a real likelihood of the Constitutional Court finding that the Supreme Court violated the applicant's human right to judicial protection since the review of a decision of the Supreme Court in a case involving a non-constitutional matter is grounded on the principle of loss of rights in such proceedings, because the court failed to act in terms of the law, thereby making an irrational decision. In conclusion, the Constitutional Court held that a decision of the Supreme Court on a non-constitutional matter was part of the litigation process and final irrespective that it was wrong. The approach by the Constitutional Court is clear that even if the judgment of the Supreme Court is wrong at law, where there are no allegations of breach of one's fundamental rights by the Supreme Court, there is no right of appeal or direct access to the Constitutional Court.

Hence as discussed in the *Lytton* case, for matters flowing from Chapter 4 of the Constitution, which is the Bill of Human Rights, a litigant will still be required to apply for direct access to the CCZ before a single judge. Hence the right of access to the Constitutional Court is not automatic unless it is for certain specific matters. This means that if a single judge in the chambers believes that a litigant's matter cannot be granted direct access, that is the end of the road for that litigant. The litigant would have to look for a court to determine their matter. There are two problematic aspects to the concept of indirect access. Firstly, the main problem is that it increases costs unnecessarily for a litigant. When a litigant applies for direct access, they are not yet before the court, and if granted the right of access, a litigant will then have to file the substantive application before the Constitutional Court. The second problem is that there is no certainty that the application will be granted if a litigant applies for direct access.

In the matter of *Prosecutor General, Zimbabwe v Telcel Zimbabwe (Pvt),*[239] the Constitutional Court held further that s85 of the Constitution does not provide to a litigant a right of direct access to the Constitutional Court and that direct applications to the Constitutional Court are in terms of those constitutional provisions that confer such a right. The exact position was reached in the case of *Chihava and Ors v Principal Magistrate and Anor* when the Constitutional Court held that a constitutional issue that arises during proceedings in a lower court must be brought to the Constitutional Court through a referral in terms of s175 (4) of the Constitution and that it is only when a lower court improperly refuses to refer a matter in terms of s175 (4) that an unsuccessful applicant is entitled to approach the

[239] *Prosecutor General, Zimbabwe* supra note 234.

Constitutional Court directly in terms of s85 (1) of the Constitution.[240] These Constitutional Court's interpretation of the rules governing direct access have narrowed the right to direct access. Hence, a litigant can apply directly to be heard by the Constitutional Court only in some constitutional matters. Even though the Constitutional Court is meant to preside over only constitutional matters, not every constitutional matter is initiated in the Constitutional Court as litigants are compelled to initiate their proceedings even though dealing with constitutional matters in the subordinate courts.

The reason behind using indirect access is that the direct access mechanism is an exceptional procedure. Further, it is generally accepted in scholarship that decisions are likely to be correct if many courts are called to decide on the correctness of the judgment of a court a quo.[241] More importantly, it is argued that if the Constitutional Court is clogged with all matters, its capacity to refine and develop the law will be compromised.[242] However, these arguments should be looked at again while considering the right of access to the court. More importantly, the Constitutional Court has more judges and more experienced ones. The constitutional court judgments, in most cases, would be final, bringing to finality the resolution of a dispute. It is argued in this thesis that litigants must be granted a choice on the right of access in matters that emanate from the Bill of Rights. It must be the litigant's choice to institute constitutional proceedings in other courts, not the Constitutional Court, and not because of procedural limitation, as currently obtained in Zimbabwe.

4.17. CONCLUSION

The rules of procedure governing the requirements for a valid notice of appeal have been interpreted strictly by the Superior Courts resulting in many cases being dismissed on procedural technicalities. It is, therefore, necessary that rules reform be made to ensure that the provisions of those rules ensure a degree of flexibility and that adherence to technical provisions is removed flexibly, thus increasing access to courts. In addition, the rules governing leave to appeal are restrictive in that, in general, the need for leave to appeal must be limited only to appeal against interlocutory orders and orders of costs rather than for every judgment. Also, the practice of a single judge determining an application for leave to appeal hinders access to the next superior court in the hierarchy of Superior Courts. There is no appeal mechanism if

[240] *Chihava and Ors v Principal Magistrate and Anor* 2015 ZLR 31. (Zimbabwean case).
[241] Moyo op cit note 183. See the case of *S v Zuma* 1995 (2) SA 642 (CC), *S v Prinsloo* 1996 (2) SA 464 (South African cases).
[242] Moyo op cit note 183.

a judge hearing the matter refuses to grant leave to appeal. Though there is a provision that if a litigant is refused leave to appeal by a judge of the Labour Court or High Court, a litigant or applicant can still apply to the Supreme Court; however, there is still the same challenge of one judge presiding over the application again at the Supreme Court level. Litigants must have access to the next Superior Court without unreasonable technical procedural obstacles. Moreso, the requirement for leave to appeal to the Constitutional is unduly restrictive, especially because a litigant requires proof of a constitutional issue for leave to be granted. Appeals from the Supreme Court be automatic and unfettered.

Concerning security costs, at every appeal stage, security for costs is required irrespective of the fact that the requested litigants may be an *incola*. The rules governing security costs must be reformed to ensure that there is no blanket request for security for costs and that the requirement of security for costs is limited to exceptional circumstances. Finally, the referral procedure rules also restrict the right of access to the Constitutional Court. The requirements are so technical that the referral procedure must be redrafted to a simpler format and easier to follow. The rules of leave to appeal, appeals, security for costs and referral of constitutional issues must be redrafted to enhance access to the courts and justice. The current state of those rules calls for reform, as suggested in Chapter 5, when the comparison is made with other jurisdictions, such as South Africa and Kenya.

CHAPTER FIVE

COMPARATIVE OVERVIEW: REFLECTING ON THE EXPERIENCES OF SOUTH AFRICA AND KENYA

5.1. INTRODUCTION

This chapter presents a critical comparative analysis of the rules of civil procedure governing leave to appeal, appeals, security for costs and referral of constitutional matters (herein referred to as selected rules of civil procedure or selected rules) for the Superior Courts of South Africa and Kenya (herein referred to as selected countries) and Zimbabwe. The comparison is made by focusing on how the South African and Kenyan selected rules of civil procedure either enhance or restrict access to the Superior Courts. Further critical analysis is made on those aspects or principles of the selected rules of civil procedure of South African and Kenyan Superior Courts that may be adopted to enhance access to the Superior Courts of Zimbabwe. Further, the relevance of the selected countries for comparison is briefly discussed. This chapter aims to draw lessons for Zimbabwe that can be used in reforming rules of civil procedure governing appeals, leave to appeal, security for costs and the referral procedure of constitutional matters to the Superior Courts of Zimbabwe outlined and analysed in Chapter 4. The comparison relates to aspects or principles deemed restrictive of access to the Superior Courts of Zimbabwe.[1] The identified principles or aspects are examined in the context of rules of civil procedure in selected countries.

5.2. THE COURT STRUCTURE IN SOUTH AFRICA

In this comparative chapter, South Africa is one of the selected countries. This is because Zimbabwe and South Africa are Roman-Dutch and common law jurisdictions with similar court structures.[2] The source of the civil procedure for Zimbabwe and South Africa is English law modified by statute.[3] The apex court in South Africa is the Constitutional Court, which is similar to the CCZ, followed down the hierarchy by the Supreme Court of Appeal, which is again at the same level as the Zimbabwean Supreme Court and further down the hierarchy, the High Court of South Africa, which has nine divisions.[4] The High Court of South Africa is a court of the first instance and hears appeals from subordinate courts. It is at the same level as

[1] See the discussion on all selected rules of civil procedure in Chapter 4.
[2] F du Bois (ed) *Wille's principles of South African law* (9 ed) Juta (2007) 1-15.
[3] H H Hahlo & E Khan, The South African legal system and its background Juta and Co (1968).
[4] L Madhuku *Introduction to Zimbabwe law* Weaver Press (2010) 1-21.

the Zimbabwean High Court.[5] Further, are the specialised courts, consisting of the Lands Claim Court, Labour Appeals Court and Competition Appeal Court.[6] Similarly, Zimbabwe also has specialised courts, namely the Labour Court and Administrative Court, among others.[7] At the bottom of the hierarchy is the Magistrates Court, the same as the Zimbabwean set-up where the Magistrates Court is below the High Court.[8]

The South African Constitutional Court was established in 1994.[9] The Court's judicial officers comprise the Chief Justice, the Deputy Chief Justice and nine other judges.[10] The South African Constitutional Court has jurisdiction to preside over constitutional matters, and any other matter provided a litigant is granted leave to appeal and if the matter raises a constitutional issue or an arguable point of law of public importance.[11] This is different to the CCZ, whose jurisdiction is confined to constitutional issues only. Further, like the CCZ, the South African Constitutional Court is a court of first instance in selected constitutional matters and a final appellate court on constitutional matters. More importantly, at least eight judges in South Africa hear matters brought before the Court.[12] The number of judges constituting a full bench of the Constitutional Court is similar to Zimbabwe Superior Courts save on the allocation of judges hearing a constitutional matter, which is discussed later in detail.[13]

Below the Constitutional Court, there is the Supreme Court of Appeal, a successor of the Appellate Division of the Supreme Court of South Africa, which was first established in 1910.[14] During the colonial era, the Supreme Court of South Africa was the appeal court for Rhodesia (Zimbabwe) until 1910.[15] The South African Supreme Court of Appeal has a President, Deputy President and many judges as determined in the Superior Courts Act.[16] This is not the same as in Zimbabwe, where the Chief Justice and the Deputy Chief Justice are the head of the Constitutional Court and the Supreme Court.[17] The South African Supreme Court of Appeal is

[5] Section 167 of the Constitution of South Africa, 1996 and s167 of the Constitution of Zimbabwe.
[6] Sections 168 & 169 of the Constitution of South Africa, 1996 and www.judiciary.org.za website.
[7] Section 89 of the Labour Act (28:01).
[8] Section 170 of the Constitution of South Africa, 1996 and www.judiciary.org.za website.
[9] L Mathebe 'The Constitutional Court of South Africa: Thoughts on its 25 year long legacy of judicial activism' (2021) (56) 1 *Journal of Asian and African Studies* 18-33.
[9] Section 167 (1) (2) of the Constitution of South Africa
[10] Ibid and www.judiciary.org.za website.
[11] Section 167 (3)-(7) of the Constitution of South Africa, 1996 and www.judiciary.org.za website.
[12] Section 167 (2) of the Constitution of South Africa, 1996 and www.judiciary.org.za website.
[13] Section 166 (1) of the Constitution of Zimbabwe, No 20 of 2013 compare with Section 167 (1) (2) of the Constitution of South Africa.
[14] Compare with Chapter 3 discussion on appeals to Supreme Court of South Africa.
[15] In Chapter 3, a discussion is made on the appeals being made to the High Court of South Africa.
[16] Section 167 of the Constitution of South Africa, 1996 and the Superior Courts Act No 10 of 2013.
[17] Section 163 (2) of the Constitution of Zimbabwe.

an appeal court that hears all appeals from the High Court, Land Claims Court and Electoral Court.[18] It does not have jurisdiction over appeals from the South African Labour Appeals Court and the Competition Appeals Court, which are made to the Constitutional Court.[19] The similarity with the Zimbabwean Supreme Court is that it is an appellate court. However, unlike the South African Supreme Court of Appeal, the Zimbabwean Supreme Court also hears appeals from specialised courts.

In the hierarchy, below the Supreme Court of Appeal is the High Court of South Africa.[20] The South African High Court is made up of divisions determined under the Superior Courts Act.[21] Each division is headed by a Judge President and one or more Deputy Judge Presidents.[22] The South African High Court has many judges for each division.[23] Further, the High Court of South Africa has inherent jurisdiction to hear matters as provided by the Superior Courts Act, similar to how jurisdiction is conferred to the High Court of Zimbabwe.[24] Another notable difference from Zimbabwe is that a High Court of South Africa has jurisdiction over a province or defined area. In contrast, the High Court of Zimbabwe has full jurisdiction over the whole of Zimbabwe and has no divisions but rather seats for each province.[25] Further, in Zimbabwe, there is only a Judge President for the whole High Court and its various seats.

The South African specialised courts of similar status to the Zimbabwean courts are the Electoral Court, which adjudicates electoral disputes; the Labour Court, which adjudicates labour disputes; and the Labour Appeals Court, which hears appeals from the Labour Court.[26] On the lower end of the hierarchy of courts, the Magistrates Courts in South Africa are at the same level hierarchically as the Zimbabwean Magistrates Court.[27] The South African court structure is comparable with the Zimbabwean court structure. The Zimbabwean civil procedure is heavily influenced by South African civil procedure, and most textbooks prescribed in

[18] See the www.judiciary.org.za website.
[19] Ibid.
[20] Section 169 of the Constitution of South Africa.
[21] Section 169 (2) of the Constitution of South Africa, 1996 and the Superior Courts Act No 10 of 2013.
[22] Ibid.
[23] See 169 (3) of the Constitution of South Africa.
[24] Ibid. Also compare with s171 (1) of the Constitution of Zimbabwe.
[25] Compare section 169 (3) of the Constitution of South Africa, 1996 with s171 (1) of the Constitution of Zimbabwe.
[26] Section 172 of the Constitution of South Africa, 1996 and compare with s172, 173 & 174 of the Constitution of Zimbabwe.
[27] Section 167 (2) of the Constitution of South Africa, 1996 and the www.judiciary.org.za website.

Zimbabwean law schools are authored in South Africa.[28]

5.3. THE KENYAN COURT STRUCTURE

The Superior Courts of Kenya are the Supreme Court of Kenya, the Court of Appeal and the High Court. The Supreme Court of Kenya is the apex court in Kenya.[29] The Kenyan Supreme Court is equivalent to the Zimbabwean and South African Constitutional Courts. The Kenyan Supreme Court is presided over by a Chief Justice with a Deputy Chief Justice deputising similarly to the Zimbabwean Supreme Court.[30] There are also five or more other judges of the Supreme Court, just as in Zimbabwe.[31] The Kenyan Supreme Court has exclusive original jurisdiction to hear and determine disputes relating to the election of the President, similar to the jurisdiction of the CCZ.[32] The Kenyan Supreme Court hears specific appeals from the Court of Appeal, the same as the South African and CCZ's hearing appeals from the Supreme Court of Appeal and Supreme Court, respectively.[33] Further, the Kenyan Supreme Court has powers to issue advisory opinions at the national government's request and the request of any state organ or any county government in any cases involving the interpretation or application of the Constitution and in matters of general public importance.[34] The Zimbabwean and South African Constitutional Courts also have a similar role.[35]

The Kenyan Supreme Court, and the Zimbabwean and South African Constitutional Courts have procedural powers to make their own court rules.[36] Similarly to Kenya, which has its Supreme Court Act, the CCZ has the Constitutional Court Act, which further provides for the exercise of its jurisdiction.[37] The Supreme Court of Kenya, the South African Constitutional Court and the CCZ have appellate jurisdiction in constitutional matters and are, in essence, the final appeal courts on constitutional matters. Thus, in terms of appellate jurisdiction, the Kenyan Supreme Court, the South African Constitutional Court and the CCZ are comparable.

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[28] The major textbooks; for example, C Theophilopoulos et al Fundamental principles of civil procedure (4 ed) Lexis Nexis, (2015); A C Cilliers, C Loots & H C Nel Herbstein and Van Winsen: *The civil practice of the High Courts and the Supreme Court of Appeals of South Africa* (5 ed) Juta (2009) are prescribed in Zimbabwean law schools.
[29] Article 163 of the Constitution of Kenya, 2010.
[30] Article 163 (1) of the Constitution of Kenya, 2010.
[31] Article 163 (2) (b) (c) of the Constitution of Kenya, 2010.
[32] Article 163 (3) of the Constitution of Kenya, 2010 and s167 (2) (b) (c) of the Constitution of Zimbabwe.
[33] Ibid.
[34] Ibid.
[35] Ibid.
[36] This is similar to the Constitutional and Supreme Court of Zimbabwe.
[37] Article 163 (9) of the Constitution of Kenya, 2010.

Further down the hierarchy is the Court of Appeal, established under art 164 of the Kenyan Constitution as a Superior Court.[38] The Court of Appeal has jurisdiction and powers concerning appeals from the High Court or other courts as provided by art 164 of the Kenyan Constitution.[39] The Court of Appeal has at least twelve judges, as provided in the Appellate Jurisdiction Act.[40] The President of the Court of Appeal is elected by the judges of the Court of Appeal from among themselves.[41] The Court of Appeals hears appeals from the High Court and any other tribunal provided in the Civil Procedure Act and the Appellate Jurisdiction Act.[42] The Court of Appeal exercises such jurisdiction and powers as established by the Appellate Jurisdiction Act of 1977.[43] Further, the Court of Appeal has the same jurisdiction as the Zimbabwean Supreme Court and the South African Supreme Court of Appeal.[44] The Court of Appeal is also governed by its court rules, the Court of Appeal Rules, similar to the Supreme Court of Zimbabwe and the Supreme Court of Appeal of South Africa, governed by Supreme Court Rules and the Supreme Court of South Africa.

Below the Court of Appeal, down the hierarchy, is the Kenyan High Court.[45] The Kenyan High Court has unlimited original jurisdiction in all civil and criminal matters.[46] It has additional powers that may be conferred on it by the Constitution and Civil Procedure Act[47] The Kenyan High Court further hears all cases without regard to a physical territory or the subject matter in dispute.[48] In civil cases, it has the jurisdiction to try a claim for the smallest amount without regard to the origin of the claim.[49]Additionally, it has jurisdiction to determine the question of whether fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened and has powers to hear an appeal from a decision of a tribunal or court appointed under the Constitution of Kenya to consider the removal of a person from office and powers to hear any question respecting the interpretation of the Constitution.[50] The jurisdiction of the Kenyan High Court in civil and constitutional matters is defined in the same terms as the

[38] Article 165 (1) of the Constitution of Kenya, 2010.
[39] Article 164 (3) of the Constitution of Kenya, 2010.
[40] Article 164 (1) (a) of the Constitution of Kenya, 2010 and Appellate Jurisdiction Act Chapter 9.
[41] Article 164 (2) of the Constitution of Kenya, 2010.
[42] Article 164 (3) op cit note 41.
[43] Article 164 93 (b) of the Constitution of Kenya, 2010.
[44] Compare with s168 (3) of the Constitution of South Africa and s 168 (1) of the Constitution of Zimbabwe.
[45] Article 165 of the Constitution of Kenya, 2010.
[46] Ibid.
[47] Ibid and Civil Procedure Act Chapter 21 of 2010.
[48] Article 165 (3) of the Constitution of Kenya, 2010.
[49] Ibid.
[50] Compare art 165 (3) of the Constitution of Kenya, 2010 with s171 of the Constitution of Zimbabwe.

Zimbabwean and South African High Courts.[51]

In Kenya, specialist courts are jurisdictionally similar to those in Zimbabwe and South Africa. For example, the Employment and Relations Court (a labour court) and the Environment and Land Court (an environmental court) are established under art 162 (2) of the Constitution of Kenya, 2010. The lower courts consist of the Magistrates Court.[52] It is a subordinate court established under the Constitution and the Magistrates Court Act.[53] Its principal officers are the Chief Magistrate, Senior Principal Magistrate, Principal Magistrate, Senior Resident Magistrate and Resident Magistrate. This Magistrate Court has limited[54] original jurisdiction in both criminal and civil matters.[55] Thus, the Kenyan Magistrates Court's jurisdiction is similar to the Zimbabwean and South African structures save for the different hierarchical levels of the magistrates.[56] Other courts are unique to Kenya – the Khadis' courts, the Court Martial and tribunals as may be established under the Kenyan Constitution.[57] Thus Zimbabwe, South Africa and Kenya share the same lower and Superior court structure – from the Magistrates Court to the Supreme Court.[58] The court structure of Kenya is thus comparable to Zimbabwe and South Africa's court structures. England is the source of these three countries' procedural law, which heavily influenced the procedural law of the countries under comparison. They share the same common law in procedural law.

5.4. LEAVE TO APPEAL RULES AND ACCESS TO THE SUPERIOR COURTS OF KENYA, SOUTH AFRICA, AND ZIMBABWE

The general principles governing leave to appeal are established in the Constitution, Parliament Acts and rules of civil procedure governing the Superior Courts of Zimbabwe, Kenya and South Africa. The selected principles presented below relating to leave to appeal restrict access to the Zimbabwean Superior Courts, as discussed in Chapter 4. The restrictive principles or aspects of the selected rules of civil procedure are improved by critically discussing them in comparison with similar aspects of South African and Kenyan selected rules of civil procedure.

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[51] Article165 op cite note 47.
[52] Article 169 (1) of the Constitution of Kenya, 2010.
[53] Ibid.
[54] Limited original jurisdiction means that the court can only hear matters provided in the Magistrates Court Act.
[55] Ibid.
[56] Magistrates Court Act (7:10), Zimbabwe.
[57] Kadhi courts are a court system in Kenya that enforce limited rights of inheritance, family and succession for Muslims. The Court Martial hears cases involving people serving in the Military.
[58] S F. Joireman 'The evolution of the Common Law: Legal development in Kenya and India' (2006) 44 (2) *Commonwealth and Comparative Politics* 190-210.

The specific principles or aspects of the rules of leave to appeal under examination are (i) the general requirements for leave to appeal, (ii) extending the right of appeal to the Constitutional Court on matters of public importance, (iii) the test employed in considering whether or not to grant leave to appeal, (iv) the compulsory requirement to apply for leave to appeal from the Supreme Court to the CCZ, (v) extending the right of automatic appeal from the Labour Court of Zimbabwe to the Supreme Court of Zimbabwe, (vi) the appeal process against refusal of leave to appeal to and in the Superior Courts, (vii) and the number of judges presiding over an application for leave to appeal at different court levels and (viii) the provision for the right of appeal to the full bench of the High Court against a decision of a single High Court judge among other principles or aspects.

5.4.1. Legislating the requirements for leave to appeal in the Statutes and Rules governing leave to appeal in Superior Courts

In Zimbabwe, there are no legislated requirements for leave to appeal to the Superior Courts, which a litigant must fulfil for an application for leave to appeal to be granted. In fact, the Zimbabwean Superior Courts' test on whether to grant or not to grant leave to appeal depends on the precedent of previous judgments of the Superior Courts. In the *locus classicus* case of *Pichanick NO v Paterson,*[59] Smith J held that leave to appeal would be granted when there is a reasonable prospect of success, the amount in dispute is not trifling, and the matter is of substantial importance to one or both of the parties concerned.[60] Smith J further held that in considering an application for leave to appeal, the court must consider where the balance of convenience lies and such balance of convenience has been regarded as decisive in certain cases.[61] On the contrary, in South Africa, in terms of s17 of the Superior Courts Act,[62] leave to appeal may only be granted where: (i) the appeal would have reasonable prospects of success, (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration and; (iii) if the decision sought to be appealed

[59] *Pichanick NO v Paterson* 1993 (2) ZLR 163 (H) (Zimbabwe case).
[60] Ibid supra.
[61] Ibid. See also *Mahomed v Ghoogaree* 1943 NPD 349*, Gerst v Swede* 1948 (4) SA 205 (N) and *Palmer v Goldberg* 1961 (3) SA 692 (N), which seems to be a South African case Smith J relied on. In Palmer's case, supra at 699A, Henochsberg J held that it is undoubted that the balance of convenience, which is included the desirability of avoiding unnecessary litigation, is always of importance on the question of whether leave should be given to appeal against an interlocutory order. See also *Rood v Broderick Properties Ltd* 1962 (2) SA 434 (T) at 435C-D, where Roberts AJ, in applying the general tests in connection with leave to appeal, ruled that it is common cause that the amount of the dispute must not be trifling. The matter must be of substantial importance to both parties, and the case has reasonable prospects of success. *See R v D Baloi* 1949 (1) SA 523 (A) at 525.
[62] Section 17(1) of the Superior Courts Act No 10 of 2013, South Africa.

against is not trivial issues and the appeal would lead to a just and prompt resolution of the real issues between the parties.[63] In South Africa, the judge or judges who grant such leave against a decision of a judge of a division sitting as a court of first instance may refer the matter for `the decision, in which case, they must direct that the appeal be heard by the Supreme Court of Appeal.[64] The Supreme Court of Appeal has powers to vary any judgment of a Division on issues of leave on its own accord or application, unlike the Supreme Court of Zimbabwe, where excess restrictive rules governing the leave to appeal restrict the Supreme Court from exercising its powers if there is an application.

On the other hand, Kenya also has a similar provision under ss15 and 16 of the Supreme Court Act.[65] As provided in s16 of the Kenyan Supreme Court Act, the test for granting leave to appeal is the court must be satisfied that it is in the best interests of justice for the Court to hear and determine the proposed appeal. The Supreme Court Act (7:13) further sets the parameters for applying the 'interests of justice test'.[66] For the Supreme Court to address leave to appeal, the appeal must involve a matter of public importance, or a substantial miscarriage of justice may have occurred or may occur unless the appeal is heard.[67] The South African test on whether to grant leave is not part of Zimbabwean law on leave to appeal. The Zimbabwean Rules and Acts of Parliament do not have provisions that set the considerations for granting leave. There is only reliance on case law or precedent, which does not bring certainty as to which issues to address when drafting an application for leave to appeal.[68]

More importantly, the power of the Superior Courts of South Africa to grant leave to appeal is comprehensive and provided for in statute – contrary to the provisions of the Zimbabwean rules governing leave to appeal.[69] In s17 (4) of the Superior Courts Act,[70] the powers of the Superior Courts in granting leave to appeal are not limited by the fact that the matter in dispute is incapable of being valued in monetary terms. However, the powers of the South African Superior Courts are then subjected to the provisions of any other law, which specifically limits them, or grants or limits any right of appeal.[71] The Superior Courts of South Africa also have

[63] Sections 17 (6) and 17 (1) of the Superior Courts Act No 10 of 2013 (South Africa).
[64] Ibid.
[65] Sections 15 and 16 of the Supreme Court Act No 7 of 2011 (Kenya).
[66] Section 16(1) of the Supreme Court Act No 7 of 2011.
[67] Section 16(2) of the Supreme Court Act No 7 of 2011.
[68] N N Pugh 'The structure and role of appeal in Civil Law systems'(1975) 35 (5) *Louisiana Law Review* 1163-1202.
[69] See Rule 62 (2) of the Constitutional Court Rules, 2016 (Zimbabwe).
[70] Sections 17 (4) and 17 (1) of the Superior Courts Act No 10 of 2013 (South Africa).
[71] Section 17(4) of the Section 17(1) of the Superior Courts Act No 10 of 2013, South Africa.

the power to grant any leave to appeal subject to conditions, such as limiting the issues on appeal or ordering the appellant to pay the costs of the appeal.

It is apparent from this discussion that the South African rules governing leave to appeal offer more considerations when granting leave to appeal by Superior Courts compared to Zimbabwe and Kenya. The South African rules on consideration to be made in granting leave brings certainty to the test to be employed in granting leave to appeal. Thus, it is proposed to reform the rules of procedure governing the principles or requirements to be considered by the Superior Courts when granting leave to appeal. The reform of the current provisions must broaden the factors the Superior Courts must consider in granting leave to appeal.

5.4.2. The general requirement for leave to appeal to access the Zimbabwean Constitutional Court: Lessons from South Africa and Kenyan Supreme Court

In Zimbabwe, appeals to the High Court from the Magistrates Court do not require leave to appeal.[72] This also applies to appeals from the High Court to the Supreme Court unless an appeal is for an order of costs, interlocutory orders, or orders for directions or any of the matters specified under s43 of the High Court Act.[73] However, from the Zimbabwean Supreme Court to the Constitutional Court, for an appellant to file an appeal, he/she is required to apply for leave.[74] Further, the intended appeal must be on a constitutional issue determined by the Zimbabwean Supreme Court. Hence while access from the Zimbabwean Magistrates Court to the High Court and from High Court to Supreme Court on appeal is not restricted by the leave to appeal requirement, access on appeal from the Supreme Court to the Constitutional Court is restricted.[75]

There is, therefore, a justification for enhancing litigants' access to the Constitutional Court from the Supreme Court on appeal by removing the requirement for compulsory leave to appeal or limiting the requirement for leave to appeal to a certain category of constitutional cases. The CCZ Rules provide a general or blanket requirement for leave to appeal from the Supreme Court to the Constitutional Court.[76] The compulsory requirement for leave to appeal from the Zimbabwean Supreme Court to the Constitutional Court mirrors the South African position. In

[72] Section 31 and 32 of the High Court Act (7:06).
[73] Section 43 of the High Court Act (7:06).
[74] Rule 32 of the Constitutional Court Rules, 2016
[75] Ibid.
[76] Ibid.

South Africa, for an appellant to appeal from the Supreme Court of Appeal to the Constitutional Court, he/she must apply for leave to appeal to access the court.[77] In South Africa, a litigant aggrieved by a decision of the Supreme Court of Appeal on constitutional matters or on a matter that raises issues of public importance is required to be granted leave first by the Supreme Court of Appeal or the Constitutional Court before noting an appeal to the Constitutional Court.[78] This approach is similar to Zimbabwe.

In South Africa, several judgments have been handed down concerning the leave to appeal to the Constitutional Court.[79] In *Nehawu v University of Cape Town*, the Constitutional Court of South Africa held that the applicant must show that there are reasonable prospects that the Constitutional Court will reverse or materially alter the judgment if permission to bring the appeal is given.[80] This means that apart from establishing a constitutional issue or that the issue subject to appeal is of general public importance, a South African litigant intending to appeal to the Constitutional Court is also required to show that there are prospects of success. The South African approach is the same as that of Zimbabwe.[81] While in Zimbabwe and South Africa, the provisions for leave to appeal from the Supreme Court and Supreme Court of Appeal, respectively, to the Constitutional Court have close similarities, appeals from the Kenyan Court of Appeal to the Supreme Court do not wholesomely require leave to appeal.

The Kenyan Superior Courts' rules of procedure provide leave to appeal, just as in Zimbabwe. In s15 (1) of the Supreme Court of Kenya Act, appeals to the Supreme Court require the leave of the court.[82] The exception is in respect of appeals from the Court of Appeal concerning matters relating to the interpretation or application of the Constitution.[83] This means that for a litigant to appeal to the Kenyan Supreme Court, leave is required for all matters except those specified in the rules, especially concerning the interpretation or application of the Constitution. It is argued that concerning matters on the interpretation or application of the Constitution, Zimbabwe must adopt the Kenyan approach, which enhances access to the Supreme Court, an equivalent of the Zimbabwean and South African Constitutional Court. It

[77] Rules 19 and 18 of the South African Constitutional Court Rules.
[78] Ibid.
[79] *Van Zyl v Sten* [2022] ZAGPPHC 302. See also *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555; *MEC for Health, Eastern Cape v Mkhita and Another* [2016] ZASCA 176 para 16-18; *Four-Wheel Drive Accessory Distributors CC v Rattan NO* 2019 (3) SA 451 (SCA) para 34.
[80] *Nehawu v University of Cape Town* (2000) 7 BLLR 903 (LC).
[81] *Ferreira v Levin NO and Others* 1996 1 SA 984 (CC); *Vryenhoek and Others v Powell NO and Others* 1996 (2) SA 621 (CC). Compare with *van Heerden v Crownright and Others* 1985 (2) SA 342 (T).
[82] Section 15A of the Supreme Court Act No 7 of 2011 (Kenya).
[83] Ibid.

is submitted that litigants who intend to note an appeal from the Supreme Court to the Constitutional Court raising issues of interpretation or application of the Constitution must not be subjected to the requirement for leave to appeal as in Kenya.[84]A litigant in Kenya intending to appeal from the Kenyan Court of Appeal to the Supreme Court on matters of interpretation or application of the Constitution does not require leave to appeal. Such an approach will significantly increase access to the Constitutional Court. No prejudice or procedural technicality will result in removing the leave requirement on appeal to the CCZ.

These Zimbabwean and South African leave to appeal provisions demonstrate that the requirement for leave to appeal is all-inclusive for all intended appeals from the Supreme Court to the Constitutional Court in Zimbabwe. The requirement for leave to appeal thus restricts access to the CCZ, contrary to Kenya's position where leave to appeal is required only in non-constitutional cases and exempted in cases relating to the interpretation and application of the Constitution. There is an automatic right of appeal in matters relating to the interpretation and application of the Constitution in Kenya. In any event, s167 (5) of the Zimbabwean Constitution provides that the rules of the Constitutional Court must allow a litigant, when it is in the interest of justice and with or without leave of the Constitutional Court, to bring a constitutional matter directly or to appeal directly to the Constitutional Court from any other court. Thus, the Zimbabwean Constitution provides the scope to do without the leave to appeal provisions on appeal. The Zimbabwean Constitution does not necessitate that all cases on appeal from the Constitutional Court must require leave to appeal. However, Rule 32 of the CCZ Rules restricts access to the Constitutional Court. Rule 32 (2) of the CCZ Rules provides that a litigant aggrieved by the decision of a subordinate court on a constitutional matter only and who wishes to appeal against it must, within fifteen working days of the decision, file with the Registrar of the Constitutional Court an application for leave to appeal. Rule 32 (2) of the Constitutional Court Rules does not provide for an exception to specific categories of constitutional cases to be excluded on the requirement for leave to appeal. The requirement for leave to appeal thus restricts access to the Constitutional Court, yet s167 (5) of the Zimbabwean Constitution does not make it mandatory for leave to appeal. It is proposed to reform Rule 32 (2) of Constitutional Court Rules to allow the right to an automatic appeal. There is also a need to insert a section in the Constitutional Court Act governing leave to appeal to provide an

[84] See Rule 21 of the Supreme Court Rules, 2016 (Zimbabwe). See *Moyo v Sergeant Chacha & Ors* CCZ 19/17 at p15 of the cyclostyled judgement where it was ruled that the import of the definition of 'constitutional matter' is that the Constitutional Court would be generally concerned with determining matters raising questions of law, the resolution of which require the interpretation, protection or enforcement of the Constitution.

automatic right of appeal in matters relating to the Constitution's interpretation and application. That would indeed increase access to the Constitutional Court on appeal. Thus, the proposed new rules ensure the same accessibility to the CCZ as that of the Kenyan Supreme Court and the South African Constitutional Court.

5.4.3. Extending the right of automatic appeal to appeals from the Labour Court to the Supreme Court of Zimbabwe.

The other limitation on access to the Superior Courts of Zimbabwe is the requirement for leave to appeal on matters from the Labour Court (a specialised court), which is literary 'the poor people's court'.[85] The workers and employers litigate in the Labour Court, and leave is required when an appeal is made to the Supreme Court.[86] Section 92F of the Labour Act requires a party seeking to appeal from any decision of the Labour Court on a question of law to seek from a judge who made the decision or, in his/her absence, any other judge leave to appeal.[87] If the Labour Court judge refuses to grant leave to appeal, the applicant may seek leave to appeal from the judge of the Supreme Court.[88] The requirement is further fortified in Rule 43 of the Zimbabwean Labour Court Rules, which provides 21 working days as the *dies induciae* to file a leave to appeal application before the Labour Court.[89] This rule is further supplemented by Rule 60(2) of the Supreme Court Rules, which provides that an appeal from a decision of the Labour Court on an application for leave is supposed to be filed within 15 working days from the grant of leave to appeal by the Labour Court or where such leave is refused, within 15 working days from the refusal of leave by a judge. The rule further provides that where the Labour Court refuses to grant the leave to appeal, the applicant must apply for leave to appeal to a judge within ten days of the refusal to grant leave.[90] In Kenya, as provided in s3 of the Appellate Jurisdiction Act, [91] appeals from the Labour Court lie with the Court of Appeals, and there is no requirement for leave to appeal. Under Rule 30 of the South African Labour Court Rules, if one wants to appeal to the Labour Appeal Court, a party must apply for leave to appeal.[92] The Labour Appeal Court is a superior court and final court of appeal in labour

[85] Currently some workers in Zimbabwe earn wages ranging from ZWL 54 800, which is the equivalent of USD 55 per month. See www.thehumancapitalhub.com.
[86] Section 92F (2) of the Labour Act (28:01).
[87] Ibid.
[88] Section 92F (3) of the Labour Act (28:01).
[89] Labour Court Rules, 2017, Statutory Instrument 150 of 2017.
[90] Rule 60 of the Supreme Court Rules, 2018.
[91] Appellate Jurisdiction Act (Chapter 9) No 12 of 2012.
[92] Rule 30 of the Rules for the Conduct of Proceedings in the Labour Court, GoN 1665, made under the Labour

matters. There is no appeal that lies against any decision, judgment or order given by the Labour Appeals Court in respect of an appeal made in terms of s173 (1) (a) of the Labour Relations Act or a decision on any question of law in terms of s173 (1) (b) or any judgment or order made in terms of s175 of the Labour Relations Act.[93] Hence Zimbabwe and South Africa have similar requirements for leave to appeal concerning appeals from the Labour Court to the Supreme Court and from Labour Appeal Court, respectively. The Labour Court appeal provisions limit the right to appeal from the Labour Appeal Court to the Supreme Court of Appeal. An application for leave to appeal, by its nature, increases the costs of litigation and may limit the number of litigants seeking to appeal against the decision of the Labour Court. Generally, as discussed above, an appeal from the Magistrates Court to the High Court and from the High Court to the Supreme Court of Zimbabwe does not require leave to appeal. In that case, the request for leave to appeal in appeals from the Labour Court to the Supreme Court becomes unreasonable and discriminatory. In that respect, it is proposed to adopt the Kenyan approach where appeals from some specialised courts (the equivalent of the Zimbabwean Labour Court) to the Kenyan Court of Appeal do not require leave to appeal. Such proposals eliminate the requirement for leave to appeal to the Supreme Court from the Labour Court, which would reduce litigation costs significantly and increase access to the Supreme Court.

5.4.4. The requirement for leave to appeal against interlocutory orders.

Furthermore, another aspect relating to leave to appeal that enhances access to the court is the requirement for leave to appeal in interlocutory judgments or orders. While it is generally undesirable to make a requirement for leave to appeal mandatory in appeals, it becomes justifiable when a party seeks to appeal against an interlocutory matter. The rationale is that allowing the unrestricted right to appeal against interlocutory matters would result in many appeals being filed before the main principal dispute is conclusively determined. In Zimbabwe, all interlocutory matters require litigants to compulsory request leave to appeal unless the interlocutory order is final.[94] In Kenya, the Supreme Court may not grant leave to appeal against an order made by the Court of Appeal or any other court or tribunal on an interlocutory

Relations Act No 66 of 1995 and s166 of the Labour Relations Act No 166 of 1995. See Rule 4 of Rules for the Conduct of Proceedings in the Labour Appeal Court, GoN 1666, made under Labour Relations Act No 66 of 1995. The South African Labour Court is a Superior Court equivalent to the Division of the South African High Court, unlike the Zimbabwean Labour Court, which is below the High Court. See sections 151 and 152 of the Labour Relations Act No 166 of 1995.

[93] Section 183 of the Labour Relations Act No 66 of 1995.

[94] Section 43 of the High Court Act, Zimbabwe.

application unless satisfied that it is necessary for the interests of justice.[95] It can only grant leave in exceptional circumstances where the Court is satisfied that the Supreme Court must hear and determine the proposed appeal before the proceedings are concluded.[96] In these circumstances, the Supreme Court may hear and determine the proposed appeal before the proceedings concerned are concluded.[97]

The South African cases of *UDM v Lebashe Investment (Pty) & Others*[98] and *City of Tshwane Metropolitan Municipality v Afriforum and Another*[99] held that the test of appealability for interim orders in the interests of justice.[100] These two cases depart from the traditional approach being employed in Zimbabwe, which is whether the interim order appealed against has a final effect or is dispositive of a substantial portion of the relief claimed in the main application.[101] In these two cases, the Courts upheld the requirement for leave to appeal against an interim order in terms of ss 17 and 18 of the Superior Courts Act.[102] Thus, Kenya, South Africa and Zimbabwe have the same requirement for leave to appeal on interlocutory orders and judgments. However, Zimbabwe's test on appealability is still the traditional test abandoned in the *Tshwane* and *UDM* cases.[103] It is proposed that the rules of civil procedure for the Superior Courts of Zimbabwe retain the same requirements for leave to appeal governing interlocutory judgments and orders. Thus, the current practice of requiring leave to appeal on interlocutory judgments or orders in Kenya, South Africa and Zimbabwe reduces the need for the Constitutional Court to deal with matters piecemeal, especially those that may be finalised on appeal in the Constitutional Court for determination on main issues. The only modification Zimbabwean courts may need to adopt is the interests of justice test when determining an application for leave to appeal against an interlocutory judgment or order. The advantage of the interests of justice test is that it is fair in determining whether to grant leave. The certainty of the interests of justice test contributes to accessibility to the Superior Courts. Further, it is more objective than the test of whether the interim order appealed against has the

[95] Section 16 (2) (a) (b) of the Supreme Court Act No 7 of 2011 (Kenya).
[96] Section 16 (3) of the Supreme Court Act No 7 of 2011 (Kenya).
[97] Section 16 (2) (a) (b) of the Supreme Court Act No 7 of 2011 (Kenya).
[98] *UDM v Lebashe Investment (Pty) & Others* [2022] ZACC 34 (South Africa).
[99] *City of Tshwane Metropolitan Municipality v Afriforum and Another* 2016 (6) SA 279 at para 40.
[100] Ibid note 98 and 99.
[101] Ibid.
[102] Section 16 (2) (a) (b) of the Supreme Court Act No 7 of 2011. See also *The Public Protector of South Africa v The Speaker of the National Assembly, The Chairperson of Section 194 Committee, The President of the Republic of South Africa & All Political Parties represented in the National Assembly High Court of South Africa, Western Cape division,* Case No 8500/2022.
[103] Section 16 (4) of the Supreme Court Act of 2013, Zimbabwe.

final effect or is dispositive of a substantial portion of the relief claimed in the main application.

5.4.5. Increasing the number of presiding judges over an application for refusal of leave to appeal and appeal stages against refusal of leave to appeal in Superior Courts

In Zimbabwe, a single judge in the Labour Court or the High Court determines an application for leave to appeal.[104] However, if the Labour Court or High Court refuses to grant leave to appeal, a litigant is allowed to appeal against the refusal of leave to the Supreme Court. In the Supreme Court, the application for appeal against refusal of leave is heard by a single judge.[105] Further, there is no provision in the High Court for a full High Court bench to hear a refusal of leave to appeal before approaching the Supreme Court.[106] So access to the Supreme Court is limited in that the fate of an application for leave to appeal in the Zimbabwean High Court, Labour Court and Supreme Court is determined by one judge, and there is no room for more judges in those courts to hear the leave to appeal. Consequently, access to Zimbabwean Supreme Courts is diminished. Zimbabwe may benefit by drawing lessons from the Kenyan and South African rules of leave to appeal that provide for more than one judge to preside over an application for leave to appeal. In the Kenyan Supreme Court, in hearing applications for leave to appeal, two or more judges decide if an oral hearing of an application for leave to appeal to the court should be held.[107] Further, in those applications for leave to appeal, two or more judges must determine whether the application should be based solely on written submissions.[108] More importantly, it is a requirement in Kenya that two or more judges are required to determine an application for leave to appeal to the Supreme Court.[109]

Also, South Africa has better provisions for the number of judges and appeal stages to hear leave to appeal applications in the Superior Courts. Furthermore, leave to appeal may be granted by a judge or judges against whose decision an appeal is to be made or, if not readily available, by any other judge or judges of the same court or division.[110] This means that another judge or judges may hear an application for leave if the judge or judges who heard the matter

[104] Section 92F (2) of the Labour Act (28:01) and Rule 43 of the High Court Rules, 2021.
[105] Rule 43 (7) of the Supreme Court Rules, 2018.
[106] It must be noted that in High Court leave to appeal is only required in interlocutor and interim judgments, and in rulings.
[107] Section 23 (2) of the Supreme Court Act No 7 of 2011, Kenya.
[108] Ibid.
[109] Ibid.
[110] Section 17 (2) (a) of the Superior Courts Act No 10 of 2013 (South Africa). This is similar to the approach in Zimbabwe.

before no longer serve on the bench. Clearly, these provisions enhance access to the Superior Courts and guarantee the hearing of an application for leave even when the judge or judge who heard the matter before is no longer serving. This requirement is similar to Zimbabwe.[111] Further in South Africa, if leave to appeal to the High Court is refused, it may be granted by the Supreme Court of Appeal on an application within one month after such refusal or a longer period as may on good cause be allowed.[112] The South African approach is that an application for leave to appeal in the High Court may be heard by one or two judges, contrary to Zimbabwe, where at all levels, it is heard by a single judge.[113] An applicant can apply for leave to appeal before a single judge of the High Court Division and, if refused, appeal to a full bench of the High Court Division. If leave is granted, an appeal against a High Court Division decision as a court of the first instance presided over by a single judge must be heard by the full bench of that Division. [114]

Furthermore, South African leave to appeal rules have a provision where special leave may be granted by the Supreme Court of Appeal for leave to appeal against a decision of a full Division on appeal.[115] This enhances access to these Superior Courts because there is a possibility for correcting erroneous leave to appeal judgments.[116] This progressive provision enhances access to the court as opposed to the practice in Zimbabwe, where applications for leave to appeal and appeals against refusal of leave to appeal are heard by a single judge[117] In South Africa, leave to appeal to the Supreme Court of Appeal is heard by two judges of the Supreme Court of Appeal whom the President of the Supreme Court of Appeal nominates.[118] On the contrary, in Zimbabwe, an application for leave to appeal to the Supreme Court from the High Court or Labour Court is heard by a single judge.[119] The South African rules governing leave to appeal enhance access to the Supreme Court of Appeal compared to Zimbabwe and Kenya. The South African rules governing leave to appeal thus ensure that a

[111] Section 60 of the Supreme Court Rules, 2016 (Zimbabwe).
[112] Section 17 (2) (b) of the Superior Courts Act No 10 of 2013 (South Africa).
[113] Section 60 op cit note 112.
[114] Ibid.
[115] Section 17 (3) and s16 (b) of the Section 17 (1) of the Superior Courts Act No 10 of 2013 (South Africa).
[116] Section 17 (6) and s 17 (1) of the Superior Courts Act No 10 of 2013 (South Africa).
[117] Rule 39 (1) of the Court of Appeal Rules, 2022 (Kenya). Compare to *Nyamande & Anor v Zuva Petroleum* 2015 (2) ZLR 351 (CC).
[118] Section 13 (4) provides that two or more judges of the Supreme Court of Appeal may be designated by the President of the Supreme Court of Appeal to hear and determine applications for interlocutory relief, including applications for condonation and for leave to proceed in *forma pauperis* in chambers. See also Section 17 (2) (c) of Section 17 (1) of the Superior Courts Act No 10 of 2013 (South Africa).
[119] Section 60 (2) of the Supreme Court Rules, 2016 (Zimbabwe).

single judge does not determine the fate of a potential appellant.

Further, in South Africa, where an application for leave is determined by the majority of judges of the Supreme Court on whether to grant or refuse the application, such a decision is considered final.[120] However, the President of the Supreme Court of Appeal may, in exceptional circumstances, at his or her discretion or because an application was filed within one month of the decision, refer the decision to the Court for reconsideration and, if necessary, for the variation of the judgment[121] This is an exceptional provision governing leave to appeal. In South Africa, a litigant may have another opportunity to file another leave after thirty days if the President of the Supreme Court of Appeal, at his or her discretion, refers again to the application for leave to appeal for consideration. Both Zimbabwe and Kenyan rules of leave to appeal do not have such provisions. This South African approach enhances access to the Supreme Court by providing a litigant with an opportunity to bring their matter to the Supreme Court of Appeal.

Thus, it is proposed that Zimbabwe adopt the South African approach on leave to appeal that enhances access to the court, particularly by expanding the number of judges who preside over an application for leave to appeal and increasing the appeal stages in the Superior Courts. Firstly, the Labour Court rules governing leave to appeal must be reformed to allow more than two judges to hear an application for leave to appeal to the Supreme Court. Further, if a single judge of the Labour Court presided over an application for leave to appeal, an aggrieved litigant must be allowed to appeal to a full bench of the Labour Court. The same must apply to the High Court as well. In the High Court, one or two judges must hear a leave to appeal. Where it is one judge who hears the leave to appeal in the High Court, then an aggrieved litigant must appeal to a full bench of the High Court, which in this case must be set at five or a maximum of nine judges as the High Court of Zimbabwe has no Divisions like South Africa with more than fifty High Court judges at the main seat in Harare. In other seats, there are only two to three judges. This may also apply to specialised courts where leave to appeal is required, such as from the Labour Court to Supreme Court. In addition, there must be rules that provide a right to appeal against a decision of the full Labour Court or full High Court bench to the full bench of the Supreme Court. Moreso, the Zimbabwean Supreme Court, similarly to South Africa, must, after thirty days, on the opinion of the Chief Justice or application by a litigant,

[120] Section 17 of the Superior Courts Act No 10 of 2013 (South Africa).
[121] Section 17 (2) (f) of the Section 17 (1) of the Superior Courts Act No 10 of 2013 (South Africa). See also the cases of *L F Boshoff Investments (Pty) Ltd V Cape Town Municipality* (2) 1971 (4) SA 532 (C).

hear the application for leave again if there is a basis for doing so.

The current Rule 94 of the Zimbabwean High Court Rules, 2021 is designed for leave to appeal in certain criminal matters.[122] The same Rule 94 of the High Court Rules is applied in leave to appeal applications in civil matters. The provisions are drafted clumsily. There is a need to separate the rules governing criminal procedure from the rules governing civil procedure.

The same approach adopted in reforming these High Court Rules must be extended to the Labour Court Rules. Further, as the Labour Court is also affected by the leave to appeal requirements, it is proposed to reform the rules governing leave to appeal in the Labour Court to the Supreme Court to expand on the right of appeal on the refusal of leave to appeal and the number of judges that must preside over an application for leave to appeal. Hence, with other identified rules under discussion governing leave to appeal, these proposed rules enhance access to the Superior Courts of Zimbabwe.

5.5. ACCESS TO THE SUPERIOR COURTS OF KENYA, ZIMBABWE, AND SOUTH AFRICA ON APPEAL

The other critical rules of civil procedure that enhance or inhibit access to the Superior Courts of Zimbabwe are: (i) the limit of the right of appeal to the Constitutional Court to only constitutional matters; (ii) the mandatory requirements for a valid appeal; (iii) the appeal stages in the Superior Courts; and (iv) the right to appeal against an interim order or judgments, among others. These appeal principles are critically compared with similar provisions governing appeals in Kenya and South Africa. In Zimbabwe, the first stage of appeal in the Superior Courts is from the Magistrates Court to the High Court. The second stage of appeal is from the Labour Court or the High Court to the Supreme Court. The final stage of appeal is from the Supreme Court or other subordinate courts to the Constitutional Court on only constitutional matters.

In Kenya, the first stage of appeal in Superior Courts is from the Magistrates Court to the High Court. The second stage of appeal is from the High Court to the Court of Appeal, equivalent to an appeal from the High Court of Zimbabwe to the Supreme Court of Zimbabwe. Rule 66 of the Civil Procedure Act of Kenya provides that an appeal from the High Court lies

[122] Zimbabwean High Court Rules, 2021

with the Court of Appeal.[123] The final appeal stage in Kenya is from the specialised courts to the Court of Appeal or to the Kenyan Supreme Court, and from the Kenyan Court of Appeal to the Supreme Court on specific categories of civil disputes.

South Africa is like Zimbabwe in that appeals from the Magistrates Court lie to the High Court, while appeals from the High Court lie to the Supreme Court of Appeal. The final stage of appeals in South Africa is from the subordinate courts to the Constitutional Court on constitutional issues only. Further, in the final appeal stage, appeals from the Supreme Court of Appeal to the Constitutional Court are on constitutional issues and matters of public importance. Hence this analysis of appeal rules is centred on the principles and rules of civil procedure.

5.5.1. Expanding the right to appeal to the Constitutional Court to non-constitutional legal issues.

The right to appeal to the CCZ is limited to constitutional issues. A litigant can only access the CCZ with a constitutional matter or a matter expressly provided for in the Constitutional Court Rules. The Zimbabwean approach is set out in the *Lytton Investments (Pvt) Ltd v Standard Chartered Bank Zimbabwe Ltd & Anor*,[124] where the Constitutional Court held that the principle that emerges from section 169 (1) of the Constitution, as read with section 26 of the Supreme Court Act,[125] is that a decision of the Supreme Court on any non-constitutional matter in an appeal is final and binding on the parties and all courts except on the Supreme Court itself.[126] The Constitutional Court goes further to hold that no court has the power to alter the decision of the Supreme Court on a non-constitutional matter.[127] Hence, in contrast to Kenya, the principle in Zimbabwe is that only the Supreme Court can depart from or overrule its previous decision, ruling or opinion on a non-constitutional matter.[128] Therefore, the onus is on the applicant to allege and prove that the decision in question is not a decision on a non-constitutional matter.[129] The approach in the *Lytton* case was adopted in *Nyamande and Another v Zuva Petroleum*, where Ziyambi JCC ruled that the applicants were required to

[123] Rule 66 of the Civil Procedure Act, 2022 (Chapter 21) (South Africa).
[124] Lytt*on Investments (Pvt) Ltd v Standard Chartered Bank Zimbabwe Ltd & Attorney General of Zimbabwe* CCZ 11/18 at p 22.
[125] Supreme Court Act (7:13).
[126] Ibid.
[127] Ibid.
[128] Ibid.
[129] Ibid.

establish any right to approach the Constitutional Court by way of appeal.

Ziyambi JCC further held that section 167 (5) of the Constitution of Zimbabwe, No 20 of 2013 did not confer a right to appeal to the Constitutional Court on a litigant with no appeal right and that a right of appeal could only arise where the Supreme Court decides on a constitutional matter.[130] There is no right to appeal to the CCZ on non-constitutional matters in both the Constitution and the Rules. By contrary, apart from hearing constitutional matters, the South African Constitutional Court has powers to hear a matter of public importance, provided the Court grants leave to appeal. In *Tiekiedraai Eindomme Pty Limited v Shell South Africa Marketing Private Limited, H L Hall and Sons (Group Services) (Pty) Ltd and Registrar of Deeds, Province of Mpumalanga*, the Constitutional Court of South Africa held that for it to entertain a matter of public importance, it must be satisfied that the issue is substantially a broad-based matter not limited only to the interests of the parties but also having a public interest dimension.[131] The South African Constitution extends jurisdiction to non-constitutional matters; for example, the court can hear an appeal or an application on a matter that raises an arguable point of general public importance and affects a class of persons in society.[132] Thus, the Constitutional Court of South Africa has expanded jurisdiction, unlike the CCZ and can deal with matters of public importance, which the CCZ cannot do. Hence s167 of the Zimbabwean Constitution, which provides for Constitutional Court jurisdiction, must be reformed by inserting a provision to include the jurisdiction to hear non-constitutional issues, especially matters of public importance, provided that leave to appeal is granted.[133] Furthermore, in Zimbabwe, there is no express provision for the interpretation, protection and enforcement of the Constitution compared to the South African Constitution.[134] Zimbabwe must also adopt similar provisions to those of s167 (7) of the South African Constitution and expand the definition of a constitutional matter to include issues involving the interpretation, protection and enforcement of the Constitution. The justification for the new provision is that before the constitutional courts were established in Zimbabwe, the Supreme Court efficiently entertained appeals from the High Court on constitutional and non-constitutional matters

[130] *Nyamande and Another v Zuva Petroleum* 2015 (2) ZLR 351 (CC) at 354B-C.
[131] *Tiekiedraai Eindomme Pty Limited v Shell South Africa Marketing Private Limited, H L Hall and Sons (Group Services) (Pty) Ltd and Registrar of Deeds, Province of Mpumalanga* 2019 (1) BCLR 850 (CC).
[132] Ibid.
[133] Section 167 (5) of the Constitution of Zimbabwe.
[134] See also A Klassen, 'Public litigation, and the concept of deference in judicial review' (2015) (18) 5 *PER* 1901-1929; T Roux *The politics of principle: The first South African Constitutional Court, 1995-2005* Cambridge University Press (2013).

without being overburdened.[135] However, if the proposed reform is adopted, the requirement for leave to appeal must be maintained to protect the Constitutional Court from being bombarded by frivolous or vexatious appeals from Supreme Court. However as Dugard and other scholars note, a Constitutional Court can have a transformative role; hence, the need to expand its jurisdiction to enhance access to the Constitutional Court on appeal .[136]

5.5.2. Expanding the number of judges hearing an appeal in the Superior Courts

Zimbabwe, South Africa and Kenya have different numbers of judges allocated to hear an appeal. In Zimbabwe, a bench of three judges often hears an appeal, although there is a provision for a full bench of five judges to hear a matter, which is different to Kenya.[137] In s23 (1) of the Kenyan Supreme Court Act, the Supreme Court full bench is comprised of five judges who hear and determine any proceedings, including appeals.[138] This means that more judges hear the matter brought before the Court, which helps to ensure that a correct decision is likely to be made – as opposed to when fewer judges are involved.[139] This is important, especially considering that the Superior Courts are the appellate courts and sometimes the courts of last resort.

In South Africa, an appeal against any decision of a High Court Division, sitting as a court of first instance, and if a single judge hears the matter, lies to a full Division. Further, in an appeal against a decision of a full Division, if leave to appeal is granted, the appeal lies to the Supreme Court of Appeal.[140] Further, an appeal against any decision of a Division on an appeal to it lies to the Supreme Court of Appeal.[141] And lastly, an appeal against the decision of a court of a status similar to the High Court lies to the Supreme Court of Appeal.[142] South Africa has an advantage over Zimbabwe in that one or more judges of the High Court can hear an

[135] See also H Webb 'The Constitutional Court of South Africa: Rights interpretation and comparative constitutional law' (1999) 1 *Penn Law Journals* 205-208.
[136] See J Dugard 'Testing the transformative premise of the South African Constitutional Court: A comparison of High Courts, Supreme Court of Appeal, and Constitutional Court socio-economic rights decisions, 1994-2015' (2016) 20 *The International Journal of Human Rights* 1132-1169; G Schimtz 'The Constitutional Court of the Republic of Austria 1918-1920' (2003) 16 (2) *Ratio Juris*; K Lachmayer 'The Constitution of Austria in International Constitutional Networks: Pluralism, dialogues and diversity' in *National constitutions in European and global governance: Democracy, rights, the rule of law* (eds A Alibi & S Bardutzky) Springer Open (2019) 1271-1322.
[137] Rule 75 (2) of the Court of Appeal Rules, 2022 (Kenya).
[138] Section 23 (1) of the Supreme Court Rules, 2020 (Kenya).
[139] Justice Cohen, 'Jurisdiction, practice and procedure of the Court of Appeal' (1951) 11 (1) *The Cambridge Law Journal* 3-14.
[140] Section 16 (1) (a) (i) (ii) of the Superior Courts Act No 10 of 2013, South Africa.
[141] Section 16 (1) (b) of the Superior Courts Act No 10 of 2013.
[142] Section 16 (1) (c) of the Superior Courts Act No 10 of 2013.

appeal. The full High Court Division further has appellate jurisdiction of a single High Court judge's decision when it hears a matter as a court of first instance. These procedural aspects enhance access to the High Court. The High Court of Zimbabwe should introduce rules that provide that five High Court judges shall be an appellate court over a judgment of a single judge sitting as a court of first instance.

Another provision that enhances access to the Kenyan Supreme Court is that five or more judges hear an appeal in Supreme Court. This is similar to the CCZ's requirements, where the full bench of nine judges hears a matter.[143] It is proposed that a full bench for the Zimbabwean Supreme Court be increased to five judges as that helps to ensure more input in the decision-making and quality of judgments.

5.5.3. The mandatory requirements for a valid notice of appeal in Superior Courts of Zimbabwe, Kenya and South Africa

In Zimbabwe, the rules of procedure governing appeals to the Superior Courts require that every notice of appeal must state whether the appeal is against the whole or part of the judgment.[144] Further, the appeal rules require the grounds of appeal to be precise and brief. In addition, the notice of appeal must also state the exact relief being sought.[145] It is apparent that a litigant must comply with the mandatory requirements for his or her notice of appeal to be valid.[146] In Zimbabwe, an appellant must ensure that the date, name of the judge and date when

[143] Section 166 (1) of the Constitution of Zimbabwe.
[144] See Chapter 4 and also Order 33 Rule 1 and (2) of the Magistrates Court (Civil) Rules 2019, and Rule 37 of the Supreme Court Rules, 2018.
[145] Ibid.
[146] See the cases of *Dabengwa and Anor v ZEC and Others* SC-32-16; *Fungai Munyorovi v Weston Sakonda* HH-467-21 where Dube J held that a fatally defective pleading is a legal nullity. Also see *Matanhire v BP Shell Marketing Services (Pvt) Ltd* 2004 (2) ZLR147 (S), again the Supreme Court held that failure to comply with mandatory provisions of the rules renders an appeal a nullity. See also *Tamanikwa v Zimbabwe Manpower Development Fund and Anor* SC 73/17 where the court dealt with an appeal that was fatally defective and nullity at law and made it clear that an appeal or a fatally defective pleading or a nullity incurably bad, beyond repair and cannot be condoned, revived or amended. Also, see *Florence Sigulu v Minister of Lands and Rural Resettling N.O and 2 Others* HH-11-13; Korsah J in *Ngani v Mbanje and Another; Mbanje and Another v Ngani* 1987 (2) ZLR 111 at 115 relying on the dicta in *McFoy v United Africa Company Ltd* ALL ER 1169 remarked that, 'If any act is in law a nullity, it is not only bad but incurably bad. There is no need for the order of the Court to set it aside. It is automatically null and void without more ado. Though it is sometimes more convenient to do so. And every proceeding founded on it is also bad and incurably bad. It is simply invalid for failure to comply with the rules. The approach by Zimbabwean courts as Dube J in *Fungai Munyorovi v Weston Sakonda* HH-467-21 on page 7, is that where a pleading is defective and a nullity depends on the non-compliance with the rules, one cannot seek condonation of a nullity and the pleading will be liable to be struck off the roll. The *Matanhire* case seems to go further to then qualify that nullity arises from non-compliance with peremptory or mandatory rules. The Court in *Matanhire* dealing with an appeal filed outside the time ruled that, 'As no valid notice of appeal was delivered within fifteen days of the date when the decision of the Labour Court was given, there was no appeal before the

leave was granted are stated and whether the full judgment is being appealed against or only part of it.[147] As a result, in many cases (as cases discussed in Chapter 4) where the appellants failed to comply with the rules, the notice of appeal was struck off the roll as a legal nullity.[148]

In Kenya, under Rule 18 of the Kenyan Supreme Court (General) Practice, the appeal must state the grounds of appeal and identify the material error said to have been committed by the Court or Tribunal being appealed from.[149] Further, under Order 42 Rule 1 (2) of the Kenyan Rules of civil procedure, when noting an appeal from the High Court, the notice of appeal must be set concisely and distinctly set out the grounds of appeal.[150] Under Rule 3 (1) of the Kenyan Civil Procedure Rules, an amendment to the notice of appeal may be made at any time before the court gives directions on how the appeal hearing must proceed.[151] However, under Rule 3 (2) of the Kenyan Civil Procedure Rules, the appellant can amend their appeal upon the court's grant of leave.[152] In addition, under Order 42 Rule 4, an appellant, upon being granted leave of court, can raise new grounds of appeal which were previously not before the Court, provided the opposing party is granted reasonable time to contest the case on the new grounds.[153] Also, under Rule 4 of the Kenyan Rules of civil procedure, the Kenyan High Court is not only confined to deciding the appeal on the grounds of the appeal raised.[154] The Kenyan Rules are flexible concerning complying with the mandatory requirements in noting an appeal. There are fewer mandatory requirements for a notice of appeal. The mandatory requirements are that notice of appeal must be set out concisely and under distinct heads of grounds of appeal. In addition, Rule 7 (3) of the Rules of the Supreme Court of Appeal provides that a notice of appeal must state what part of the judgment or order is being appealed against, the particular respect in which the variation of the judgment or order is sought, and is accompanied by a copy

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Court and to merely insert the relevant date in the defective notice of appeal as suggested by Mr Muskwe without an application for an extension if the time within which to institute the appeal and for condonation of non-compliance with the Rules of Court, would be grossly irregular. So the settled position in Zimbabwean Superior Courts is that failure to comply with mandatory rules of appeal or court in general results in an appeal or pleading deemed to be a legal nullity. See also in Chapter 1 the full discussion.

[147] Ibid. See also the discussion under Chapter 4.

[148] *Jensen v Acavalos* 1993 (1) ZLR 216 (S). In *Freezewell Refrigeration Services (Private) Limited v Bard Real Estate (Private) Limited* SC 61-03, the Supreme Court, in explaining the effect of the mandatory provisions of r 29 (1), quoted the case of *Talbert v Yeoman Products (Private) Limited* SC-111-99 where Muchechetere JA held that a notice of appeal that did not comply with the provisions of r 29(1) was null and void.

[148] Section 22 of the Supreme Court Act (7:13) (Zimbabwe).

[149] Rule 18 of the Kenyan Supreme Court (General) Practice, 2020.

[150] Rule 1 (2) of the Kenyan Rules of civil procedure, 2010.

[151] Rule 3 (1) of the Kenyan Rules of civil procedure, 2010.

[152] Rule 3 (2) of the Kenyan Rules of civil procedure, 2010.

[153] Rule 4 of the Kenyan Rules of civil procedure, 2010.

[154] Ibid.

of the order granting leave to appeal.[155] Although worded in mandatory terms, the same Rules allow amendment at any time before and during the hearing, as discussed previously.

The flexibility of the Kenyan Rules governing appeals requirements is further supplemented by decided cases, the preamble to the Rules and the Constitution. Hancox J, in the Kenyan case of *Githere v Kimungu*, held that a court could not conduct its business without a code of procedure, but the purpose of rules of practice to the work of justice is intended to be that of a handmaid rather than a mistress.[156] He further held that the court ought not to be bound and tied by rules, which are, after all, only intended as general rules of procedure as to be compelled to do what will cause injustice in the case.[157] In Kenya, the overriding objective of the rules of procedure is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes.[158] In addition, the Kenyan Superior Courts, in the interpretation and application of rules of procedure, must be such that it realises the overriding objective.[159] The Kenyan Constitution reinforces this approach in s159 (2) (d), which provides that the courts in the administration of justice must not be restricted by 'undue regard to procedural technicalities'. The Kenyan rules, Acts of Parliament and the Constitution enhance access to the court. An appeal is not unduly dismissed simply for failure to comply with the rules of procedure, but the Courts can allow reasonable amendments.

South Africa's rules regulating the requirements for a valid notice of appeal are similar to Zimbabwe. In Rule 49 (4) of the Uniform Rules, a notice of appeal must state what part of the judgment or order is appealed against, the particulars or order sought, and the nature of the variation of the judgment or order sought.[160] Additionally, Rule 51 (7) of the Rules of the Magistrates Courts of South Africa provides that a notice of appeal must state whether the whole or part of the judgment is appealed against, and if against a part only, then what part, and the grounds of appeal, specifying the findings of fact or rulings of law appealed against.[161]

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[155] Rule 7 of the Rules of the Supreme Court of Appeal, 2020 (South Africa).
[156] *Githere v Kimungu* 1976 EA 101 (Kenyan case). The quote relied in the case is directly extracted from C E. Clark 'The handmaid of justice' (1938) 23 (3) *Washington University Law Review* 297. Also, see the case of In *re Coles* (1907) 1 K.B 1,4. See S J Wanjala 'Substantive justice over procedural law in Kenya: Gains under the 2010 constitutional dispensation', Unpublished Dissertation, Strathmore University (2017), also R L Marcus, M H Redish, E F Sherman & J E Pfander *Civil procedure: Modern approach* (7 ed) West Academic Publishing (2018) 2.
[157] Ibid.
[158] Section 1A of the Civil Procedure Act, Chapter 21.
[159] Ibid.
[160] Rule 49 (4) of the Uniform Rules, 2020.
[161] Rule 51 (7) of the Rules of the Magistrates Courts of South Africa, 2022

In Kenya and South Africa, the approach has not been to declare the appeal a legal nullity but rather to be guided by the preamble of the rules of courts or statutes providing rules of procedure. Hence, it is proposed that the Zimbabwean rules of procedure must also have a preamble that provides an overriding objective to guide the courts in interpreting and applying the rules of court governing appeals, as in Kenya and South Africa. It is recommended that the Act of Parliament and Rules of civil procedure must, in their preamble, set the overriding objective anchored in providing reasonable access to the court and justice. The purpose of the overriding objective is to free the Zimbabwean courts from being bound by technicalities. Such a reform approach would enhance access to the court and justice.

Some of the mandatory requirements, for example, stating the correct date of judgment, are not prejudicial because the date itself would be on the heading of the judgment. Further, the requirement that the draft notice of appeal must state the exact relief sought must not result in an appeal being held a nullity. The Courts retain the ultimate power to grant the final relief to grant. The prayer or relief sought remains a draft, and an appeal must not be struck off simply because the prayer is not exact. More importantly, grounds for appeal must be capable of amendment, just as in Kenya. The current rules governing the requirements for a valid notice of appeal are thus more technical and do not assist in the disposition of the substance of the appeal. The rules governing notice of appeal must be reformed. Kenya, compared to South Africa, presents the best model for reform.

Further, regarding the rules governing specific requirements for a valid notice of appeal, the requirements must be flexible and allow amendments without prejudicing the respondent. The following Rules are proposed reasonably set out the requirements of a valid notice of appeal. The reformed rules must do away with the superfluous and unnecessary requirements in the appeal process and must be simple and easy to follow. The proposed appeal rules must enhance access to the Superior Courts.

5.5.4. Overriding Objectives to the Rules of Civil Procedure.

As discussed above in this chapter, the Kenyan rules of civil procedure have an overriding objective, which essentially guides the courts in interpreting the rules of civil procedure. The author argues that having an overriding objective will ensure that courts interpret and apply the rules of civil procedure so that there is realisation of the overriding objective.

5.5.5. Direct appeals from the subordinate courts to the Zimbabwean and South African Constitutional Court and the Supreme Court of Kenya.

In Zimbabwe, there is a provision for directly appealing from the subordinate courts to the Constitutional Court. Thus, it is important to critically examine whether the rules that provide for the right to appeal directly enhances access to the Constitutional Court. Comparison is drawn from South Africa and Kenya. The Supreme Court of Kenya does not grant leave for direct appeals from any court or tribunal other than the Kenyan Court of Appeal unless exceptional circumstances directly justify the proposed appeal to the Supreme Court.[162] Hence, direct appeals to the Kenyan Supreme Court from the subordinate courts are subject to the appellant being granted leave to appeal in exceptional circumstances.[163] In other words, a litigant must exhaust all appeal procedures before approaching the Kenyan Supreme Court. This is the same approach as in Zimbabwe, where, even though s175 (4) of the Constitution of Zimbabwe, No 20 of 2013 allows direct appeals, a litigant must exhaust all other appeal procedures unless it is a referral of a constitutional matter to the Constitutional Court. However, in Kenya, similarly to Zimbabwe, where the leave to appeal is denied, the Supreme Court must state its reasons for refusing to grant leave to appeal to the Court.[164]

By contrast, the South African Constitution in s167 (6) provides that national statutes or rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court, to appeal directly to the Constitutional Court from any other court. A litigant who is aggrieved by the decision of a South African subordinate court and intends to appeal against that decision directly to the Constitutional Court on a constitutional matter is required within 15 days of the order against which the appeal is sought to be brought and after giving notice to the other party or parties, to file with the Registrar an application for leave to appeal.[165] The application for leave to appeal directly is required to contain the decision against which the appeal is brought and the grounds upon which such decision is disputed. Furthermore, the application must succinctly state the constitutional matter raised in the decision. More importantly, any other issues, including issues alleged to be connected to the decision being appealed against. The applicant must also prepare a statement

[162] Section 16(5) of the Supreme Court Act No 7 of 2011 (Kenya).
[163] Section 17 of the Supreme Court Act No 7 of 2011 Kenya).
[164] Section 18 of the Supreme Court Act No 7 of 2011 (Kenya).
[165] C Theophilopoulos, C M van Heerden, A Boraine & A Rowan, *Fundamental principles of civil procedure*, (4th) Lexis Nexis (2021) 13. See also Rule 19 (2) of the Constitutional Court Rules, South Africa and compare with Rule 21 (2) (3) (4) (5) of the Constitutional Court Rules, Zimbabwe.

indicating whether the applicant has applied or intends to apply for leave, or special leave to appeal, to any other court and, if so, which court and whether such application is conditional upon the application to the court being refused and the outcome of such application if known at the time of the application to the court.[166] The respondent is then required to respond to the application for leave to appeal within ten days of service of the application if they are opposed to it.[167] Their opposing papers must state the basis of the opposition. The respondent also has a right to cross-appeal.[168] The Constitutional Court has discretion on whether to grant the appellant leave to appeal.[169] The South African Constitutional Court, like Zimbabwe, may order that the application for leave to appeal be set down for argument or be disposed of based on papers.[170] In addition, the court may grant the leave to appeal.[171] The appellant, just as provided under the CCZ Rules, would be required to file the appeal record, judgment of the court from which the appeal is noted, all the documentation lodged by the parties in that court, and all the evidence that may have been led in the proceedings relevant to the issues that are to be determined.[172]

This procedure is not provided under the Zimbabwean rules governing appeals to the Superior Courts from subordinate courts, including the specialised courts. The Zimbabwean High Court Rules and rules governing specialised courts have no specific rule that provides for direct appeal to the Constitutional Court. However, Rule 7 of the Zimbabwean Magistrates Court (Civil) Rules provides that a party who intends to appeal against a magistrate's decision on a constitutional matter must comply with the procedure in Rules 32-39 of the Constitutional Court Rules, 2016. There must be clear and separate rules of direct appeal to the Constitutional Court.

It is submitted that Zimbabwe should adopt a rule governing direct appeals from subordinate courts, just as in South Africa. Such rules increase access to constitutional justice. The rules providing direct access to the Constitutional Court assist a litigant in accessing the apex and final court without going through all appeal structures. Thus, saving time and financial

[166] Rule 19 (4) of the Constitutional Court Rules, South Africa and compare with Rule 21 (2) (3) (4) (5) of the Constitutional Court Rules, Zimbabwe.
[167] Rule 19 (5) of the Constitutional Court Rules, South Africa and compare with Rule 21 (2) (3) (4) (5) of the Constitutional Court Rules, Zimbabwe.
[168] Rule 19 (5) of the Constitutional Court Rules, South Africa.
[169] Rule 19 (6) (a) of the Constitutional Court Rules, South Africa.
[170] Rule 19 (6) (b) of the Constitutional Court Rules, South Africa.
[171] Rule 19 (6) (c) of the Constitutional Court Rules, South Africa.
[172] Rule 20 (1) (a) (b) of the Constitutional Court Rules, South Africa and compare with Rule 21 (2) (3) (4) (5) of the Constitutional Court Rules, Zimbabwe.

resources pursuing a matter through the normal appeal stages. This proposed changes on direct appeal from the subordinate courts is meant to simplify the procedure and bring certainty to the requirements a litigant must satisfy to appeal directly to the Constitutional Court.

5.6. AUGMENTING ACCESS THROUGH THE APPEAL PROCEDURE TO THE CONSTITUTIONAL COURT BY EXTENDING DIRECT ACCESS TO ALLEGED VIOLATIONS OF BILL OF RIGHTS CASES

The discussions in prior sections are largely centred around appeals, leave to appeal to the Superior Courts of Zimbabwe and referrals of constitutional matters to the CCZ. Although the issue of access to the Constitutional Court as a court of first instance is not an appeal or leave to appeal procedure *perse* nor related to the referral of the constitutional issues procedure, it is a procedural avenue that has the potential to enhance access to the Superior Courts of Zimbabwe. Direct access means that the litigant does not require to be granted leave to file their court process in the Constitutional Court. The opposite procedure is indirect access. Indirect access is whereby a litigant must first be granted leave to access the Constitutional Court.[173] Direct access thus benefits litigants as it saves litigation costs of going through all courts in an appeal process to the Constitutional Court. The litigant is not burdened by going through the other subordinate courts and the Superior Courts to resolve their constitutional matter. Gentili argues that the systems of direct access to a Constitutional Court and Supreme Courts are very important and complement the existing avenues for access to Constitutional or Supreme Courts and guarantee the protection of fundamental rights in areas that are not covered by procedures for the usual remedies.[174]

Direct access to the Constitutional Court, thus, is key in providing remedies to litigants in constitutional matters. However, on the other hand, if the rules providing direct access are not properly designed, the direct access systems will likely overload the Constitutional Courts or the Supreme Courts.[175] The rationale for restricting access to the court is premised on the fact under appeal systems; justice requires that court judgments must, in principle, not be a product of a single court.[176] Another argument that has been advanced for not providing for the

[173] Section 167 of the Constitution of Zimbabwe.
[174] G Gentili, 'A comparative perspective on direct access to Constitutional and Supreme Courts in Africa, Europe, and Latin America: Assessing advantages for the Italian Constitutional Court' (2010) 29 *Penn St International Law Revie* 707.
[175] Ibid at 709.
[176] I M Rautenbach 'Constitutional Court 1995-2012: How did the cases reach the court, why did the court refuse to consider some of them, and how often did the court invalidate laws and actions?' (2013) 16 *PER* 46-93.

Constitutional Court as a court of first instance is that cases are decided without leaving room for appeal against the decision given, as decisions are probably correct if more than one court is requested to determine the issues raised.[177] In such situations, the losing litigant has a chance of challenging the reasoning on which the first judgment is premised and of recasting and enhancing the arguments previously raised in the light of such a judgment.[178] At the same time, although direct access to the Constitutional Court is important, there must be a balance, particularly in not opening access to the Court for all first-instance cases. It is important to also protect the court from abuse by litigants who may bring forward frivolous and vexatious claims. However, as Gentili notes, the balance between effective protection of human rights and efficient and timely exercise of the court's functions has been struck differently in different jurisdictions.[179] South Africa and Zimbabwe provide direct access to the Constitutional Court, and in Kenya, there is also direct access to the Kenyan Supreme Court. The Rules of the Constitutional Court of South Africa and Zimbabwe restrict direct access to the Constitutional Court in favour of indirect access.

In Zimbabwe, however, there is limited provision for direct access to the Constitutional Court as a court of first instance in the Constitution, the Constitutional Court Act and the Rules.[180] In most instances, the Constitutional Court defers jurisdiction to act as a court of first instance to the High Court and other subordinate courts in constitutional matters.[181] The current Constitutional Court Rules provide for matters where a litigant can directly approach the Constitutional Court without applying for leave to approach the Court directly.[182] Further, in Zimbabwe, direct access is only provided for in the following matters; matters pertaining to the disputed election of the president or vice president,[183] referral of constitutional matters in proceedings before a court,[184] reservations regarding a bill,[185] a bill that contravenes the Constitution,[186] failure to fulfil constitutional obligations,[187] validity of the declaration of public emergency,[188] a declaration of invalidity of a statutory instrument,[189] a review of a

[177] Ibid.
[178] Ibid.
[179] Ibid at 708.
[180] Ibid and Rule 22 of the Constitutional Court Rules, 2016 (Zimbabwe).
[181] Rule 21 (1) of the Constitutional Court Rules, 2016 (Zimbabwe).
[182] Rule 23 of the Constitutional Court Rules 2016 (Zimbabwe).
[183] Rule 23 of the Constitutional Court Rules 2016 (Zimbabwe).
[184] Rule 24 of the Constitutional Court Rules 2016 (Zimbabwe).
[185] Rule 25 of the Constitutional Court Rules 2016 (Zimbabwe).
[186] Rule 26 of the Constitutional Court Rules 2016 (Zimbabwe).
[187] Rule 27 of the Constitutional Court Rules 2016 (Zimbabwe).
[188] Rule 28 of the Constitutional Court Rules 2016 (Zimbabwe).
[189] Rule 29 of the Constitutional Court Rules 2016 (Zimbabwe).

decision by President to dissolve Parliament[190] and confirmation of an order of invalidity.[191] The South African Constitutional Court Rules also provide for the matters exclusively under the jurisdiction of the Constitutional Court of South Africa: referral of the bill,[192] the constitutionality of an act,[193] confirmation of an order of invalidity[194] and certification of a provincial constitution.[195] The matters that are exclusively within the jurisdiction of South Africa as the same as those provided by the CCZ Rules save for certification of a provincial constitution.

In South Africa, the Constitutional Court has kept referring to urgency and public importance requirements as conditions for granting direct access to the Constitutional Court.[196] In section 167 (6) (a) of the Constitution of South Africa, there is a provision for direct access. A constitutional matter may be instituted firstly through the leave of court in the Constitutional Court in exceptional circumstances.[197] Direct access may be granted on pending appeals before the Supreme Court of South Africa.[198] However, the South African Constitutional Court still considers direct access as an extraordinary procedure that can be employed only in exceptional circumstances.[199] Thus, many applications in South Africa for direct access are turned down.[200] South Africa and Zimbabwe limit matters the Constitutional Court can hear as a court of first instance.

The Kenyan Supreme Court's original civil jurisdiction is limited to only exclusive jurisdiction to hear and determine disputes relating to the elections to the office of the President.[201] On the other hand, the Kenyan Supreme Court has appellate jurisdiction to hear and determine appeals from the Court of Appeal or from any other court or tribunal as provided

[190] Rule 30 of the Constitutional Court Rules 2016 (Zimbabwe).
[191] Rule 31 of the Constitutional Court Rules 2016 (Zimbabwe).
[192] Rule 14 of the Constitutional Court Rules 2003 (South Africa).
[193] Rule 15 of the Constitutional Court Rules 2003 (South Africa).
[194] Rule 16 of the Constitutional Court Rules 2003 (South Africa).
[195] Rule 17 of the Constitutional Court Rules 2003 (South Africa).
[196] See the case *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) (South African case).
[197] *Shongwe v S* 2003 (5) SA 276 (CC) para 4 (South African case).
[198] *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC) paras 40 and 44 (South African case).
[199] *Besserglik v Minister of Trade, Industry and Tourism* 1996 (4) SA 331 (CC) para 1 and *Minister of Home Affairs v NICRO* 2005(3) SA 280 (CC) para 52 (South African cases).
[200] J Dugard 'Judging the judges: Towards an appropriate role for the judiciary in South Africa's transformation (2007) 20 *Leiden Journal of International Law* 972. The numbers per year are as follows as put forward by Dugard: 1995: 0; 1996: 3; 1997: 1; 1998: 3; 1999: 2; 2000: 3; 2001: 2; 2002: 3; 2003: 7; 2004: 2; 2005: 4; 2006: 1; 2007: 1; 2008: 1; 2009: 2; 2010: 5; 2011: 4; 2012: 1.
[201] Section 163 (3) (a) of the Constitution of Kenya, 2010.

by the law,[202] provided the appeals from the Court of Appeal are on cases involving interpretation or application of the Constitution and also a case which the Supreme Court or the Court of Appeal certify is a matter of general public importance.[203] Access to the Kenyan Supreme Court is more restricted as a court of first instance than in Zimbabwe and South Africa. It means the Kenyan Court of Appeal hears all other matters as a court of first instance, which are not under the purview of the Supreme Court.

In Zimbabwe, a single judge determines the application for leave to appeal and decides whether to grant the right of direct access.[204] There is a vague provision in Rule 21 (10) of Constitutional Court Rules, a requirement that a single judge who presides over an application for leave to appeal and he or she seeks to dismiss such an application, such dismissal requires the concurrence of two judges. However, these additional judges are not part of the hearing and are not privy to the arguments submitted orally. In addition, they are not officially allocated to the case themselves; they are technically not part of the case. Rule 21 (10) of the Constitutional Court Rules is likely to prejudice a litigant seeking leave to approach the Constitutional Court directly per the reasons given above. Hence a litigant in Zimbabwe seeking direct access is entirely in the hands of a single judge.

Further, the restriction of direct access extends to matters emanating from the alleged violation of the Bill of Human Rights in Chapter 4 of the Constitution of Zimbabwe. Rule 21 (2) (3) of the CCZ Rules makes it mandatory for a litigant seeking redress of violation of their right under Chapter 4 of the Constitution to be granted leave for direct access to the Constitutional Court. The restriction of direct access is contrary to the provisions of s85 (3) of the Constitution of Zimbabwe, which mandates that every set of court rules must include a procedure that enhances access in cases where relief is sought under s85 (1) of the Constitution-alleged violation of Chapter 4 Bill of Human Rights. Section 85 (3) of the Constitution of Zimbabwe, No 20 of 2013 further states that the court's rules must ensure that the right to approach the court is fully realised. The court's rules should contain few formalities, and the court must be guided by the interests of justice while being less restricted by procedural technicalities.[205] Clearly, in constitutional matters arising from the Bill of Human Rights, the

[202] Section 163 (3) (b) (i) (ii) of the Constitution of Kenya, 2010.
[203] Section 163 (4) (a) (b) of the Constitution of Kenya, 2010.
[204] Rule 21 (8) of the Constitutional Court Rules, 2016.
[205] Section 85 (4) of the Constitution of Zimbabwe.

Constitution provides for an extensive right of access to the court, and even legal technicalities cannot stand in the way of the disposal of substantive issues in a case.[206]

Thus, in South Africa and Zimbabwe, the strict direct access requirements result in direct recourse as a merely ancillary mechanism for the protection of constitutional rights and necessitating; for example, the prior exhaustion of all other legal remedies or the prior approaching of other courts is clearly undesirable. The matters provided for direct access in Zimbabwean and South African Constitutional Courts are specific and few in the author's view.[207] There is nothing in s167 (5) of the Zimbabwean Constitution that restricts expanding matters for direct access to the Constitutional Court.[208] The matters currently under the direct access provisions in the rules are matters that do not arise often.

Disputes relating to the election of a president or whether one is qualified to be a president or vice president arise once every five years.[209] This means that the right of access in these instances is restricted to litigants involved in the president's election or issues of whether one qualifies to be a president or a vice president.[210] The third scenario is where direct access is granted to a litigant bringing a referral of a constitutional matter from a court of lesser jurisdiction. Again, this procedure depends on whether the referral of a constitutional matter has been successful or not. In essence, the referral of a constitutional matter to the Constitutional Court is not a direct access scenario in the strict sense because another court must hear the matter, and an inquiry must be made for the matter to be referred to the Constitutional Court. Rule 21 (1) (d) of the CCZ Rules deals with situations where a parliament or president has failed to fulfil a constitutional obligation; these cases are rare and may never happen in any five-year election period. Direct access is also granted when the president has a reservation regarding a Bill. Again, Parliament has its mechanisms for reviewing its bills and maintaining its independence; Parliament rarely wants interference in their work by another organ of the State.[211] Further, matters of reservation regarding a bill are specifically for the president and not for any other ordinary litigant. Hence, the benefit of the right of access granted under Rule 25 of the CCZ Rules is for the president and the respondents, who may be

[206] Ibid.
[207] Ibid at 709.
[208] Section 167 (5) of the Constitution of Zimbabwe.
[209] See the cases of *Njanina and Others v Zimbabwe Electoral Commission and Others* [2008] CCZ 100, also *Shumba and 2 Others v Minister of Justice and Parliamentary Affairs and Five Others* CCZ 4/18, *Tsvangirai v R.G. Mugabe and Others* CCZ 20/17 (Zimbabwean cases).
[210] Rule 21 (1) (a) (b) of the Constitutional Court Rules, 2016 (Zimbabwe).
[211] Rule 25 (1) of the Constitutional Court Rules, 2016 (Zimbabwe).

the Speaker, interested political parties or independent members of the National Assembly who may wish to participate in the proceedings. These matters, again, are not everyday matters affecting ordinary people.

Rule 26 of the CCZ Rules also provides direct access where a Bill contravenes the Constitution.[212] The applicants who have locus standi are the minister, vice president and not every litigant. The benefit of direct access is, therefore, for specific litigants. Rule 28 provides for an application to the court in s113 (7) of the Constitution challenging the validity of a declaration of a State of Public Emergency or an extension of public emergency; again, these are rare cases. The government rarely declares a State of Public Emergency. Rule 29 provides for the declaration of the invalidity of a statutory instrument in para 9 (2) of the Schedule to the Constitution, another potential case for litigation.[213] Finally, direct access is granted for a case of review of a decision by the president to dissolve parliament, and the applicant or applicants can only be only a member or members of parliament.[214] Most direct access matters have specified applicants, meaning no other applicant can institute proceedings. Direct access apparently is largely for the actors of the three arms of the State and not the ordinary litigants. Members of the society have fewer instances; they can approach the Constitutional Court without leave to appeal.

There is, therefore, the risk that the CCZ may turn into a white elephant if its jurisdiction is not expanded. The Constitutional Court can easily become an appellate and a referral court waiting for appeals on constitutional issues only. In fact, they may become a huge cost to taxpayers in that a large number of nine experienced judges in Zimbabwe are paid to hear a few cases. This is despite the provisions of s85 (1) of the Constitution that provide wide access to the court.

The right of direct access to the Constitutional Court is restricted. This is because the Zimbabwean Constitution and the rules of the Constitutional Court provide only for limited matters (as stated above) that can be instituted in the Constitutional Court.[215] Gentili argues that the system of direct access to the Constitutional Court set up in the Republic of South

[212] South Africa Constitutional Court Rules, 2003, Rule 15 and s79 (4) (b) or 121 (2) (b) of the Constitution of South Africa.
[213] South Africa Constitutional Court Rules, 2003, Rule 14 and s80 (1) (b) or 122 (1) (b) of the Constitution of South Africa.
[214] Rule 30 (1) of CCZ Rules, 2016 (Zimbabwe).
[215] Rule 21 of the Constitutional Court Rules, 2016 (Zimbabwe).

Africa deserves to be mentioned for the rather strict criteria that the court has applied to review applications of those citizens seeking direct access.[216] Hence, Zimbabwean and South African Constitutional Courts have similar approaches relating to direct access. Therefore, the South African Constitutional Court Rules restrict access, as the CCZ Rules do. The South African Constitutional Court Rules restrict direct access even in socio-economic cases.[217] The right of access to the Constitutional Court must be an avenue for enhancing socio-economic rights.[218] The CCZ, like the South African Constitutional Court, has granted few socio-economic cases direct access in the past.[219] The structure and content of the South African and CCZ Rules extinguish the possibility of direct access – particularly in the case of the alleged violation of Chapter 2 and Chapter 4 Bill of Rights, respectively.[220] The idea behind establishing the Constitutional Courts in Zimbabwe and South Africa is due to the requirement for better enforcement of the Constitution, resulting in enhanced access to constitutional justice.

The author submits that direct access to the Constitutional Court must be expanded by extending direct access to all matters emanating from violations of the Bill of Rights in Chapter 4 of the Zimbabwean Constitution. In addition, three or more judges should hear all applications for direct access. Currently, several cases suffer a 'stillbirth', and most do not reach the Constitutional Court due to a lack of legal fees or procedural technicalities which burden an applicant.[221] Hence the CCZ Rules must extend to matters that do not require direct access, and the number of judges hearing applications for direct access must be more than one. These proposed changes will likely expand access to the CCZ beyond the scope of appeals and referrals.[222]

5.7. SIMPLIFYING THE REFERRAL PROCEDURE TO INCREASE ACCESS TO THE ZIMBABWEAN CONSTITUTIONAL COURT: DRAWING LESSONS FROM KENYAN SUPREME COURT AND THE SOUTH AFRICAN CONSTITUTIONAL COURT.

Under this section, a critical analysis is made of the procedure in Zimbabwe, commonly

[216] Gentili op cit note 175.
[217] Ibid 972.
[218] Ibid 972.
[219] I M Rautenbach op cite note 177 at 446-447.
[220] See J Dugard 'Court of first instance? Towards a pro-poor jurisdiction for the South African Constitutional Court' (2006) *SAJHR* 261-282.
[221] See Constitutional Cases discussed under Chapter 1 para 2 and 3.
[222] Rule 55 (4) of the Supreme Court Rules, 2018. In *O'Gormain v Forestry Commission & Ors* HH-107-06,

referred to as the referral procedure. The procedure is whereby a litigant or a court, on its initiative, if a constitutional matter arises in proceedings ongoing before a court aquo, directly refers to the Constitutional Court. As discussed in Chapter 4, the constitutional matter arising must be such that if determined by the CCZ, it would dispose of the matter in the court a quo. The advantage of this referral process is that it allows the resolution of a matter quickly and conclusively without going through appeal structures. The litigant has a prerogative of circumventing the whole appeal process of appealing through other Superior Courts. This increases access to the Superior Courts in that it reduces litigation costs and the timeframe upon which a case with a constitutional issue is resolved. However, as pointed out in Chapter 4, the requirements of this procedure are rigid and strict.[223] As a result, only a few cases have been determined on merits.[224] On the contrary, cases referred to the Court were dismissed on technical grounds.[225]

It is, therefore, very important to compare how constitutional matters are referred for determination in South Africa and Kenya to the Constitutional Court and the Supreme Court, respectively. The Kenya Constitution has no equivalent to s175 of the Constitution of Zimbabwe, which provides for the referral of constitutional matters to the Constitutional Court. As discussed in this chapter, the equivalent of the CCZ is the Kenyan Supreme Court.[226] The Kenyan Supreme Court hears and determines constitutional matters brought before it through an ordinary application or direct appeals. Hence there is no referral procedure, in contrast to Zimbabwe's rigid referral procedure. In South Africa, in terms of s15 (1) (a) of the Superior Courts Act No 10 of 2013, the referral procedure is limited only to confirmation or variation of the order of constitutional invalidity, where the Supreme Court or a division of the High Court makes such an order.[227] The referral of the order for confirmation or variation of constitutional invalidity only occurs if any person or organ of state with sufficient interest appeals or applies directly to the Constitutional Court to confirm or vary the order.[228] There is

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Gowora J held that it is trite that under our law any person who is a foreigner or who is not ordinarily resident within this jurisdiction may, as plaintiff, be called upon to provide security for costs unless he can prove that he has immovable property sufficient to pay the costs which may arise. She further ruled that, in the matter, before her, the applicant has not denied that he has an obligation to provide security for the costs. He has not indicated what amount would constitute a reasonable sum. In that matter, she went further to rule that the court has the discretion to dispense with the provision by a peregrine to provide security for costs but only in exceptional cases.

[223] Chapter 4 Section 4.18.

[224] Ibid.

[225] Ibid.

[226] See art 163 (4) of the Constitution of Kenya, 2010.

[227] Section 15 (1) (a) Superior Courts Act 10 of 2013 and s16 (1) of the Constitutional Court Rules, 2003.

[228] See s175 of the Constitution of Zimbabwe.

no standalone procedure for referring constitutional matters to the Constitutional Court from the South African subordinate courts, the High Court or the Supreme Court of Appeal. In fact, the procedure is not for the general resolution of constitutional matters but is limited to constitutional invalidity.[229] The referral procedure seems only a unique Zimbabwean procedure, which can be reformed based on the South African or Kenyan experience. Therefore, the South African structure of the referral procedure for confirmation or variation of an order of constitutional invalidity can be a valuable model in reforming the Zimbabwean referral procedure. The South African referral procedure for confirmation or variation of an order of constitutional invalidity is largely a simple application procedure.[230] There are no complex requirements for the procedure. Zimbabwe may benefit by developing a procedure that is simply an application procedure similar to South Africa's application procedure, which is being used for referral of constitutional invalidity matters. Where a constitutional matter arises in proceedings before any court, it must be referred to the Constitutional Court using the application procedure.

5.8. ENHANCING ACCESS TO THE SUPERIOR COURTS THROUGH REFORM OF SECURITY FOR COSTS RULES BY DRAWING LESSONS FROM SOUTH AFRICA AND KENYA

One of the barriers to access to the Superior Courts is the requirement for security for costs in the Superior Courts of Zimbabwe. In Zimbabwe, as discussed in Chapter 4, the respondent may request security for costs, and the appellant is required to furnish the same.[231] Also, the exemption for security for costs is allowed if the respondent is the government, local or municipal authority.[232] If a litigant fails to furnish security for costs, his or her case is dismissed, thus unreasonably limiting access to the Superior Courts.[233] The requirement of cost for security is applicable in many jurisdictions, except that in some jurisdictions under comparison – Kenya and South Africa – they are not applied as extensively as in Zimbabwe.[234] In the Kenyan Rule 84 of the Court of Appeal Rules, 2022, an appellant is required to furnish security for the costs of the appeal within 60 days of appealing. However, there is a provision in Rule 120 of the Kenyan Court of Appeal Rules for waiving security for costs (Rule 120 of the

[229] Section 172 of the Constitution of South Africa, 1996.
[230] There is no dedicated procedure for referral of constitutional matters in South Africa.
[231] See Chapter 4, Section 4.16.
[232] Ibid.
[233] Ibid.
[234] Ibid. In Zimbabwe, the requirement for security for costs is limited to appeals mainly.

Kenyan Court of Appeal Rules provides that the Court of Appeal has the power on application to waive the requirement for security for costs).

In Zimbabwe, this waiver requirement is limited to indigent litigants and not any other litigant. By contrast for example, the Kenyan Court of Appeal may grant the waiver if it is satisfied that the appellant lacks the means to pay the required fees or to deposit the security. The Court further considers another aspect: the intended appeal must have reasonable prospects of success.[235] Thus, the Kenyan Court of Appeal has the power to order the filing of the appeal without prior payment of costs or reduced security costs.[236] In Kenya, the application for exemption or reduced security for costs is free of court charges.[237] In other words, the appellant does not incur court fees to lodge such an application. In Zimbabwe, there is no such provision for a free court process. Rather, in Zimbabwe, an appeal may be struck off the record if the security costs are not paid. Unlike Zimbabwe, the Kenyan security for costs requirement does not restrict access to the court.

Further, in Zimbabwe, under Rule 55 (3) of the Zimbabwe Supreme Court Rules, 2018, a judge may, on the application of the applicant and with good cause shown, exempt the appellant from paying the full security costs or part of the security costs. While Rule 55 (3) provides for the exemption of payment of security for costs, it is not based on the appellant's lack of resources but on showing good cause. The test requires the appellant to demonstrate their case has merit.[238] However, an applicant must pay court fees when making such a challenge. Rule 55 (5) of the Zimbabwean Supreme Court Rules requires the security costs to be paid within one month or as specified by the Registrar.[239] The period is shorter than Rule 84 of the Court of Appeal Rules of Kenya, which is 60 days. Hence failure to furnish security costs results in an appeal deemed abandoned and dismissed.[240] Furthermore, Rule 55 of the Supreme Court Rules is discriminatory in that the Government of Zimbabwe, municipal or town management

[235] Rule 120 (1) of the Court of Appeal Rules, 2022 (Kenya).
[236] Ibid.
[236] Ibid.
[237] Rule120 (3) of the Court of Appeal Rules, 2022 (Kenya).
[238] Rule 55 (3) of the Supreme Court Rules, 2018 (Zimbabwe) and *Chitsaka & Ors v Public Service Association* 1993 (2) ZLR 345 (S) Mcnally JA.
[239] Rule 55 (3) Of the Supreme Court Rules, 2018 (Zimbabwe), and *Makaruse v Hide and Skins Collectors (Pvt) Ltd* 1996 (2) ZLR 60 (S) Korsah JA.
[240] Rule 55 (6) of the Supreme Court Rules, 2018, and *MDC & Anor v Mudzumwe & Ors* 2012 (2) ZLR 287 (S) Chidyausiku CJ.

boards, whether they have a hopeless appeal or not, are requested to furnish security for costs.

Comparably, in the Kenyan High Court under the Civil Procedure Act of Kenya, security for costs is required on two fronts. Firstly, s65 of the Civil Procedure Act provides that where there is a provision for furnishing security costs, an appellant to the High Court must first pay the security for costs.[241] Section 66 similarly states that where there is a requirement for security in the rules governing appeals, the party intending to appeal to the Court of Appeal must first furnish the security costs. Hence in the Kenyan High Court, similarly to the Zimbabwean High Court, security for costs is required. In addition, under Rule 29 (1) of the Magistrates Court Rules, Kenya, it is provided that the High Court has the power to order security costs if the respondent applies for security costs.[242] Furthermore, if security costs are not provided within a period of 30 days or such time fixed by the High Court, the appeal may be dismissed.[243] However, on application, an appeal dismissed for failure to furnish security for costs may be reinstated.[244] This is unlike Order 31 of the Magistrates Court Rules of Zimbabwe, wherein security costs are fixed and must be paid. Rule 29 of the Magistrates Court Rules is clear that security costs may be payable only if a party applies for the same, meaning that they are not mandatory on appeals from the Magistrates Court of Kenya.[245]It is important to note that the rules governing security costs in Kenya enhance access to the Superior Courts compared to those of Zimbabwe. Therefore, the security for costs rules must be reformed. The proposed draft rules must be flexible and restrict the requirement for security costs to peregrinus litigants.

Compared to Kenya and Zimbabwe, South Africa has progressive security for costs rules. Under section 25 of the South African Superior Courts Act, there are circumstances where security for costs is not required.[246] Firstly, if the plaintiff in civil proceedings in a Division resides in the Republic but outside the area of jurisdiction of that Division, he or she is not required to give security for costs in those proceedings.[247] Therefore, this rule enhances access to the court. It excludes the requirement of security for costs *incola* litigants accessing the High Court of South Africa.[248] Further, under s47 of the Uniform Rules Of Court, it is provided that "a party entitled and desiring to demand security for costs from another shall, as soon as

[241] Ibid.
[242] Rule 29 of the Magistrates Court of Kenya, revised 2001.
[243] Ibid.
[244] Ibid.
[245] Ibid.
[246] Section 25 of the Superior Courts Act No 10 of 2013.
[247] Ibid.
[248] Section 28 of the Superior Court Act (28:01).

practicable after the commencement of proceedings, deliver a notice setting forth the grounds upon which such security is claimed, and the amount demanded".[249] This rule places an onus on a party seeking costs to justify the request on notice to another party. In Rule 47 (2) of the Uniform Rules, if the amount of security is contested, the Registrar has powers to determine the amount to be given, and his decision is final.[250] The Unform Rules also provide for the contestation of the request for security costs. A party can contest the question of liability or the amount requested.[251] This is different to the provisions of Rule 55 of the CCZ Rules and the other Rules of the High Court and Supreme Court, which do not have such provisions. In Rule 47 (3) of the Uniform Rules, a party may fail or refuse to furnish the amount demanded or determined by the Registrar. In those circumstances, the other party is entitled to apply for an order from the court that the security is furnished or that the proceedings stay until the order is complied with.[252]

In Rule 47 of the Uniform Rules, there is also a provision that where the security costs are not given within a reasonable time, the court may dismiss the proceedings instituted or strike out the pleadings filed by the party in default.[253] The Registrar determines the form, amount and manner of payment of security costs unless the court directs otherwise. [254] In South Africa, unlike Zimbabwe and Kenya, as provided in the Uniform Rules, if a party thinks that the security furnished is no longer sufficient, it can apply for an increase of the same, and the Registrar will make a final decision.[255] This restricts access to the Superior Courts of South Africa, as security costs are unnecessary unless the litigant is a peregrine. Rule 47A of the Uniform Rules offers an exemption to those litigants accessing legal aid from a statutorily established legal aid board.[256] Rules 47 and 47A of the Uniform Rules thus have similar requirements for furnishing security costs with Zimbabwe.

Furthermore, in s9 (1) of Act 105 of 1983 of South Africa, security for costs may be required if the court that grants leave to appeal orders the appellant to provide security for the respondent's costs of the appeal. In those circumstances, the appellant must first furnish the

[249] Rule 47 (2) of the Uniform Rules.
[250] Ibid.
[251] Rule 47(3) of the Uniform Rules.
[252] Ibid.
[253] Rule 47(4) of the Uniform Rules.
[254] Rule 47 (5) of the Uniform Rules.
[255] Rule 47 (6) of the Uniform Rules.
[256] Rule 47A of the Uniform Rules.

Registrar with the requested security for costs before filing their appeal.[257] The Registrar, as provided in the Uniform Rules, has powers to determine the amount or form of security, and their decision is final. It is also important to note that in s62 of the Rules Regulating the Magistrates Courts, plaintiffs or a party to litigation may be required to furnish security of costs.[258] However, it is the party entitled and requesting security for costs after the commencement of proceedings who is supposed to deliver a notice setting the grounds upon which security is claimed and the amount claimed.[259] This, however, does not make payment of security costs mandatory and automatic. An inquiry must be made about why it is needed and also to determine the amount.[260] A party who is required to furnish security for costs may contest liability or refuse to pay the same, and the party requiring security for costs has a remedy to approach the court on application.[261] The court has powers to order that the security for costs is furnished or that the proceedings stay until the security costs are furnished.[262] The court also has powers to dismiss or strike out any proceedings instituted if a party required to furnish security costs fails to do so. Normally, security costs, unless agreed by the litigants on form and quantum, would be as directed by the Registrar or clerk of court.[263]

Further, in South Africa, a party may request an increase of security for costs if he or she thinks the security for cost furnished needs to be increased. The Registrar or clerk of the court has the power to decide whether to increase or not increase security costs, and his or her decision is final.[264] The rule is worded in the same manner as Kenya's rules governing appeals from the Magistrates Court to the High Court. These provisions of the South African rules, as

[257] Section (9) (1) of Act 105 of 1983.
[258] Section 62 of the Uniform Rules-Rules Regulating The Conduct of the Proceedings of the Magistrates Court of South Africa. See also *Van Zyl v Euodia Trust (Edms) Bpk* 1983 (3) SA 394 (T) Van Dijkhorst R who held that s13 of the Companies Act 61 of 1973 does not make provision for the furnishing of security for costs by a company proceeding as a plaintiff in reconvention. See also *Magida v Minister Of Police* 1987 (1) SA 1 (A) Jansen JA, Joubert JA, Viljoen JA, Boshoff JA and Nestadt AJAA held that although the cautio juratoria as security on oath has become obsolete, the common law principles which underlie its granting are still applicable in modern practice when an application is E made by an incola for the furnishing of security for costs by a peregrinus.
[259] Section 62 (1) of the Uniform Rules – Rules Regulating the Conduct of the Proceedings of the Magistrates Court of South Africa. And also, *Compair Sa (Pty) Ltd V Global Chemical Co (Pty) Ltd* 1985 (1) SA 532 (C); *Duncan No* v *Minister Of Law And Order* 1985 (4) SA 1 (T) Van Dijkhorst J held that s20 (5) (b) of the Supreme Court Act 59 of 1959 does not empower the Supreme Court as a Court of first instance to order that security be furnished for the respondent's costs of appeal when it grants leave to appeal from its judgment.
[260] Section 62 (2) of the Uniform Rules – Rules Regulating the Conduct of the Proceedings of the Magistrates Court of South Africa.
[261] Section 62 (3) of the Uniform Rules – Rules Regulating the Conduct of the Proceedings of the Magistrates Court of South Africa.
[262] Ibid.
[263] Section 62 (4) of the Uniform Rules – Rules Regulating the Conduct of the Proceedings of the Magistrates Court of South Africa.
[264] Section 62 (6) of the Uniform Rules – Rules Regulating the Conduct of the Proceedings of the Magistrates Court of South Africa.

stated, restrict access to the Superior Courts. However, the discussed legal positions in the Uniform Rules and the Rules Regulating the Magistrates Courts, due to their restrictive nature, have since been altered by the South African courts, as critically analysed below.

In *Mthethwan (Khoza) and Others v Diedericks and Others,*[265] Thirion JA held that Rule 49 (1) of the Magistrates Courts Rules, in providing that an applicant for rescission of a default judgment is obliged to furnish security to the respondent for the costs of the default judgment plus an amount of R200 as security for the costs of the application for rescission, is inconsistent with the provisions of s22 of the Constitution of the Republic of South Africa Act 200 of 1993. It is, as presently formulated, an impediment to the indigent litigant's right to settle justiciable disputes by the Magistrates Court.[266] In addition, the court further found that Rule 49 (1) of the Magistrates Courts Rules requires an applicant in a matter for rescission of default judgment to furnish security for costs, which is inconsistent with s22 of the Constitution of South Africa, 1996, and is, therefore, invalid.[267] This is because, as in Zimbabwe, courts must interpret the rules in a manner that enhances the right of access to the court in terms of s22 of the Constitution of the Republic of South Africa Act 200 of 1993. Hence, in South Africa, the courts have already held that a general request for security for costs inhibits access to the court.[268]

In South Africa, the position is that a peregrinus who initiates proceedings in the courts must, as a rule, give security to the defendant for his costs unless he has, within the area of jurisdiction of the court, immovable property with a sufficient margin unburdened to satisfy any costs which may arise.[269] Hence for the defendant to own immovable property in the court's jurisdiction is a defence for the request for security for costs claim; however, the doctrine has not been extended to include movable property.[270] The Court may dispense with the requirement for security for costs in exceptional cases, but it exercises its discretion sparingly.

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[265] *Mthethwan (Khoza) and Others v Diedericks and Others* 1996 (4) SA 381 (South African case).
[266] Ibid.
[267] Ibid.
[268] Section 69 (3) of the Constitution of Zimbabwe.
[269] See *Protea Assurance Co Ltd v Januszkiewicz* 1989 (4) SA 292 (W) Goldstone J held that the domicile or residence of some permanent or settled nature is sufficient to constitute a person an *incola* for the purpose of being obliged to furnish security for costs. In an action where the plaintiff was domiciled in South Africa and had a house there but was temporarily resident in Bophuthatswana, the Court held, applying the above principle, that the plaintiff was not required to furnish security for costs and The Civil Practice of the Superior Courts of South Africa 3rd ed at p 251.
[270] *Seboko v Moaki* 1978 (3) SA 639 (W). And also *H Burton v Villieria Diamond Syndicate Ltd* 1905 TS 85 at 87; *O'Connell Manthe & Partners Inc v Vryheid Minerale (Edms) Bpk* 1979 (1) SA 553 (T); *Selero (Pty) Ltd And Another v Chauvier And Another* 1982 (3) SA 519 (T).

The Supreme Court of South Africa has since altered the general position on security costs in the case of *Boos*t *Sports Africa (Pty) Ltd v The South Africa Breweries (Pty) Ltd.*[271] The Supreme Court ruled that security for costs is granted only to protect an *incola* where, if a judgment were to be granted in its favour, execution in the court's jurisdiction would be difficult.[272] Hence it would be requested in most cases where the peregrine defendant had no assets in the jurisdiction of South Africa. As such, the requirement for security for costs in South Africa is not on every litigant but is only reserved for cases where the pregrinus litigant[273] has no assets in South Africa unless in exceptional circumstances.

However, there are few exceptional circumstances where an *incola* is called upon to furnish security for costs. Security for costs may be requested for actions brought by insolvent persons where the action is shown to be reckless or vexatious. Under the New Companies Act 71 of 2008, [274] the position on request for costs with regard to both natural and juristic residents save for close corporations where s8 of the Companies Act still exists, for a litigant to obtain security for costs, the litigant in question must be in a state of impecuniosity and further that the matter must be vexatious or reckless.[275] Therefore, from the above discussion, in South Africa, a request for the security of costs is not granted as a result of merely asking. Rather, it is granted in circumstances that ensure that the other party's right of access to the court is not unduly restricted. This is unlike the Zimbabwean approach where the request for security costs is

[271] *Boost Sports Africa (Pty) Ltd v The South Africa Breweries (Pty) Ltd [2015]* (SCA) (South African case). See also the cases of *Skjelbreds Rederi A/S And Others V Hartless (Pty) Ltd* 1982 (2) SA 710 (A); *South African Television Manufacturing Co (Pty) Ltd V Jubati And Others* 1983 (2) SA 14 (E) Kannemeyer J held that incola does not have a "right, privilege or benefit" not to be compelled to provide security; what he has is a right to compel a peregrinus to provide security.

[272] *Boost Sports Africa (Pty) Ltd v The South Africa Breweries (Pty) Ltd [2015]* (SCA) (South African case).

[273] *Mchugh N.O and Others v Wright* [2021] ZWCHC 205.

[274] *Mears v Brook's Executor and Mears's Trustee* 1906 TS 546 at 550. And also *Vanda v Mbuqe & Mbuqe; Nomoyi v Mbuqe* 1993 (4) SA 93 (TK).

[275] See s216 of the Companies Act 61 of 1973 and also *Fedgen Insurance Co Ltd v Border Bag Manufacturing (Pty) Ltd And Another* 1995 (4) SA 355 (W) where Labe J held that in the Transvaal Provincial Division, it is settled law that, where an application is made by a defendant under s 13 of the Companies Act 61 of 1973 for security for costs on the ground that the plaintiff will be unable to pay the costs of the defendant if the latter succeeds, the Court will exercise its discretion on the basis that it will not deprive the defendant of the benefit of the section unless special circumstances exist and will lean towards the granting of security. Also, *Agro Drip (Pty) Ltd v Fedgen Insurance Co Ltd* 1998 (1) SA 182 (W) where Streicher J ruled that although Rule 47 (1) of the Uniform Rules of Court cannot deprive a party who, in terms of s13 of the Companies Act 61 of 1973, is entitled to security for costs of its entitlement to security if the application for such security is not brought as soon as practicable, the failure of an applicant to bring such an application as soon as practicable after the commencement of proceedings may nevertheless in appropriate circumstances constitute a special circumstance in the light of which a court may refuse to exercise its discretion to require security, for example where the application is being used unnecessarily oppressively to cause unnecessary prejudice to the other party. It does not necessarily follow, however, that a plaintiff would suffer prejudice if an application for security is not brought as soon as practicable after the commencement of proceedings.

granted as a matter of procedure and does not consider the merits of the case.

Therefore, to reform the rules governing security for costs, it is prudent to adopt the South African approach, which limits security for costs as it enhances access to the Superior Courts and aligns with the provisions of s69 (3) of the Zimbabwean Constitution – the right of access to the court.

5.9. CONCLUSION

The rules governing appeals, leave to appeal, referral of constitutional matters to the Constitutional Courts and security costs restrict access to the Superior Courts. South Africa and Kenya's appeal, leave to appeal, referral of constitutional matters and security costs rules provide some useful guidance in reforming the selected rules of civil procedure in the Superior Courts of Zimbabwe. In this chapter, a proposal is made to reform the rules governing appeals by (i) enhancing access to the Constitutional Court through extending the right of appeal to non-constitutional matters; (ii) simplifying the rules governing the requirements for a valid notice of appeal, and allow an amendment to a notice of appeal if there is a defect; (iii) providing an automatic right of appeal from the Supreme Court to the Constitutional in constitutional matters; (iv) providing a right of appeal against a judgment of a High Court judge to the full bench of the High Court before approaching the Supreme Court; and (v) providing an overriding objective in all rules of civil procedure that guides the courts in application and interpretation of appeal rules. Further, leave to appeal rules must be reformed by (i) removing the requirement for leave to appeal rules on appeals from the High Court to the Supreme Court and also on appeals from the Supreme Court to the Constitutional Court on constitutional matters; (ii) the rules of leave to appeal where required to provide for the hearing of applications for leave to appeal by more than one judge or refusal of leave to appeal matters by a single judge must be heard by a full bench of a court; (iii) leave to appeal must be maintained in appeals against interlocutory judgments or orders; (iv) the requirement for leave to appeal must be removed on appeals from the Labour Court to Supreme Court and only be limited to appeals against interlocutory judgments and order; and (iv) the Chief justice be empowered to allocate an application for refusal of leave to appeal for reconsideration in Supreme Court brought after third days from the date of the refusal of leave to appeal. More importantly, the requirement of security for costs must be limited to a litigant who is a man of straw or insolvent and is bringing a vexatious and frivolous appeal. Finally, the rules governing the referral of constitutional matters must be simplified and made accessible to increase their use by litigants.

CHAPTER SIX

REFORMING THE SELECTED RULES OF CIVIL PROCEDURE TO ENHANCE COURT ACCESS

6.1.INTRODUCTION

This chapter summarises the key findings of the thesis and advances recommendations for the revision of selected rules and procedures. The recommendations are a product of the discussions and critical analysis in the preceding chapters of this thesis. This study sought to identify the major procedural provisions within the rules governing appeals, leave to appeal, referral of constitutional matters and security costs rules that restrict procedural access to the Superior Courts of Zimbabwe and unreasonably restrict the constitutional right to access justice. The principal theme of this study is to recommend several revisions and additions to the selected rules with the purpose of procedurally increasing a litigant's access to the court. Two research questions are framed herein to establish the impact of the selected rules of civil procedure on access to the court. Firstly, how do procedural rules regulating security costs, leave to appeal, referral of constitutional matters and appeal procedures restrict access to the Superior Courts of Zimbabwe?[1] Secondly, how can the selected rules of procedure be reformed and redrafted to enhance access to court?[2] The two questions are analytically resolved by tracing the development of the selected rules of procedure from colonial Zimbabwe to post-colonial Zimbabwe. Further, the selected rules of civil procedure currently in use are compared to those in Kenya and South Africa.[3] The outcomes are, therefore, critically analysed in the summary of insights below, and the proposed revisions are set out in subsection 6.3.

6.2.SUMMARY OF INSIGHTS

Chapter 1 set the key research questions.[4] Chapter 1 concluded that a number of rules of civil procedure, though theoretically designed to enhance access to the court, may instead restrict access to the court if not properly drafted. In Chapter 1, the selected rules of civil procedure restricting access were identified as appeal, leave to appeal, security for costs and referral of constitutional matters rules.[5] A relationship between these selected rules of civil procedure and

[1] See Chapter 1, section 1.4.
[2] Ibid.
[3] See Chapter 5 in general where the comparison is made.
[4] See Chapter 1, section 1.2.
[5] Chapter 1, section 1.2 and 1.6.

access to the Superior Courts was examined. Firstly, the selected rules of civil procedure, predominantly the appeal and leave to appeal, are the primary procedural gateway to the Superior Courts. Most cases before the Superior Courts are appeals, and litigants are procedurally required to be granted leave to appeal to submit a notice of appeal.[6] Therefore, the author argues that the appeal and leave to appeal procedures should be less procedurally technical to reasonably allow litigants to access the Superior Courts. The right to appeal is compulsory in Zimbabwe's civil procedural system. The right to appeal can be reasonably exercised by a litigant if the rules providing for the right to appeal are less restrictive. The rules of appeal and leave to appeal are not an end in themselves but are part of a framework of rules of procedure that ensures that litigants access justice in an orderly and uniform manner. The literature examined in Chapters 1 and 2 demonstrates that the selected rules of civil procedure are central to accessing justice. There can be no realisation of substantive justice on appeal without reasonable access to the court. Hence, the author concludes that selected rules of civil procedure must be broadly worded without being vague or ambiguous and less technical to ensure that represented and unrepresented litigants can easily access justice. The structure and content of the selected rules of civil procedure impact procedural accessibility. In addition, the judiciary and the State are responsible for ensuring procedural accessibility.[7] Firstly, the courts must interpret the rules of procedure flexibly to ensure reasonable access to the court. Further, the State and the judiciary are responsible for ensuring that litigants access justice, and as such, they must ensure that procedural rules are accessible. The State and judiciary drive the reform agenda, and it is recommended that the Zimbabwean State extensively undertake reform of the selected rules of civil procedure to enhance reasonable access to the court by litigants. Further, Chapter 1 introduces various principles that entrench the centrality of procedural accessibility as a human right globally, entrenched in many countries' constitutions, including Zimbabwe, South Africa and Kenya. More importantly, Chapter 1 identifies the right of access to the court as a component of the right of access to justice, which consists of two major components: (i) a right of procedural access and (ii) a right of substantive access. The two rights are co-depended. Justice is achieved if the two components are enshrined in a legal system. After critically analysing the right of access to the court and access to justice, this thesis then examined the accessibility of the Zimbabwean Superior Courts. The choice of the Superior Courts in this

[6] See Chapter 4 in general. However, of the Superior Courts the High Court is an exception, as it hears matters as a court of first instance. In the High Court, many of the cases are not appeals but new matters.
[7] See Chapter 1 sections 1.12, 1.13 and 1.14, which deals with discussions on the role of courts, the State and judiciary in general in enhancing access to the court and justice.

study is because the Lower Courts' rules of civil procedure were the subject of the author's MPhil thesis.[8] In addition, no other author has before researched the impact of the selected rules of civil procedure, namely appeal, referral of constitutional matters and security costs in Zimbabwe. The justification for focusing on the selected procedural rules in the Superior Courts is fortified by the fact that since the inception of the Constitution of Zimbabwe, No 20 of 2013 (and the entrenchment of s69 (3) of the Constitution), the alignment of these selected procedural rules to the constitutional right of access to the court procedure remains elusive. The selected rules of civil procedure have not yet been reformed to align with s69(3) of the Constitution and are, therefore, a restriction on access to justice. In Chapter 1, the selected rules of civil procedure were identified. Briefly, the limitations of these rules on access to the courts were critically explained within the framework of the right of access to the court and justice. It was apparent from the onset that those rules restrict access, but the question that remained was: What aspect and part of the selected rules restrict access to justice, and if so, how are these rules restrict access to justice? More importantly, how can these selected rules of civil procedure be reformed? These questions were answered in the thesis by: (i) critically analysing the development of the right of access to the court and justice as rules that set the foundation of any critique and reform proposal; (ii) an analysis of the development of the selected rules of civil procedure, noting the historical procedural developments from pre-colonial to the colonial era because these historical developments inform procedural reform proposals being made; (iii) setting out in detail the content of the selected rules particularly focusing on the aspects or principles that restrict access to the court and how they restrict such access to the court; and (iv) offering a critical comparative analysis of the accessibility to the Superior Courts of Kenya and South Africa in the context of the selected rules of civil procedure. The author's proposed reforms and revisions are grounded, firstly, in the theoretical framework of the right of access to the court and justice and, secondly, in the lessons drawn from the comparative analysis of South African and Kenyan selected rules of civil procedure.

Chapter 2 critically argued that the right of access to the court is a component of access to justice, which is vital in enabling a litigant to access courts and, in turn, obtain justice. However, in earlier historical developments of the right of access to justice, scholars, such as Cappelletti, argued for initiatives, such as legal aid, as a possible solution to enhance access to justice. Initiatives, such as legal aid, can improve access to justice if adequate resources are

[8] R Matsikidze, *The civil procedure in the Magistrates Courts of Zimbabwe. A denial of justice to self actors?* Unpublished Thesis, University of Zimbabwe (2014).

channelled to fund the same. In Africa, resources are channelled towards key priority areas, such as shelter, food and healthcare, and there are few legal aid funding options. Hence, while legal aid is key in enhancing access to the court, funding in Zimbabwe remains insignificant and does not impact on access to the court. There is a need to identify other procedural approaches to enhance access to court, particularly reforming rules of civil procedure. The reform of selected rules of civil procedure must also be understood in the context that the right of access to the court is a human right.[9] The right to access to the court as a human right is, therefore, at the centre of the realisation of substantive law.[10] The right of access to the court includes accessing Superior Courts on appeal. Furthermore, the right of access to the court is enshrined in key international conventions such as the United Nations Declaration of Human Rights; the International Covenant on Economic, Social and Cultural Rights, 1966; the International Covenant on Civil and Political Rights, among others.[11] In Africa, the ACHPR recognises this right of access to the court.[12] The international and regional instruments discussed in this thesis demonstrate that the right of access to the court is essential to realising substantive law. Also, judicial precedents of locus classicus, such as the *Golder* and *Airey* cases discussed in Chapter 2, buttresses the centrality of access to the court as a human right.[13] It also noted the right of access to the court has been globally constitutionalised.[14] Zimbabwe is also among those countries that have constitutionalised this right. The constitutionalisation of the right means that the rules of procedure must be aligned with the constitutional provisions of the Constitution. The Zimbabwean Constitution in s69 provides that every person has a right to access the court. Hence, in Zimbabwe, the constitutional framework is already provided for. In comparison, Kenya emerged as a country with an extremely well-developed right of access to the court. In the Kenyan Constitution, justice must be administered without regard for procedural technicalities.[15] The Kenyan Constitution links the right of access to the court and the application of rules of civil procedure in resolving disputes. Therefore, rules of civil procedure can enhance access to the court and justice.

Chapter 2 also sets the theoretical foundations of the right of access to the court and justice.

[9] R Angler 'Justice for all including the unrepresented poor: Revisiting the role of the judges, mediators, and clerks' (1987) *Fordham Law Review* 67.
[10] *Airey v Ireland* 1979 2 EHRR 305.
[11] United Nations Declaration of Human Rights, 1948, International Covenant on Civil and Political Rights,1966, the Covenant on Social and Cultural Rights, and the International Covenant on Civil and Political Rights, 1966.
[12] African Charter on Human Rights and People's Rights, 1981.
[13] *Airey* supra op cit note 6.
[14] See s34 of the Constitution of South Africa, and s48 and s50 of the Constitution of Kenya, 2010.
[15] Section 50 (2) of the Constitution of Kenya, 2010.

The right of access to the court has been fundamentally overshadowed by the constant need to reform substantive law (for example, the quest for better provisions for human rights in Zimbabwean Constitution). However, from the discussion in Chapter 2, it is apparent that since 1900, the focus has been slowly shifting globally from reforming substantive law to procedural law reform.[16] As Cappelletti points out, around 1900, the wave of reform focused on providing legal aid, class actions and civil procedure reform.[17] Civil procedure reform has not been the major focus in Zimbabwe even during 1900 (which is essentially the colonial era). There is a paucity of literature and research on the selected rules of civil procedure in Zimbabwe that critically examines the impact of specific rules of civil procedure. This thesis will be the first to critically analyse these selected civil procedure rules. In particular, no research has been conducted examining the impact of the selected rules of civil procedure on access to the Superior Courts on appeal. This thesis seeks to fill that procedural gap. Firstly, the thesis connected the right of access to justice and court in the Zimbabwean context. Secondly, the thesis examined the selected rules of civil procedure in the context of the right of access to the court. Thirdly the thesis demonstrated that the selected rules of civil procedure in their current format and wording are *ultra vires* s69 (3) of the Zimbabwean Constitution. Hence, because of the recognition of the right of access to the courts in Zimbabwe, Kenya and South Africa,[18] there is a natural call for the State and the judiciary to ensure that the selected rules of civil procedure support the realisation and entrenchment of the right of access to the court and ultimately access to justice. The only way the procedural framework can support the entrenched right of access to the court in s69 (3) of the Constitution is through reform of the rules of civil procedure. In Chapter 4, the author's analysis of the selected rules of civil procedure demonstrates that certain provisions restrict the right of access to the court. Hence it is apparent that rules of civil procedure enhance access to the court or, in some instances, restrict access to the court. The rules of civil procedure are the foundation of accessibility to the courts. It is not just physical accessibility that matters but also procedural accessibility. To explain the theoretical foundations of the right of access to the court and its importance in dispensing justice, this thesis proceeded to analyse the historical context and development of rules of

[16] M Cappelletti, G Bryant & N Trocker 'Access to justice, variations and continuity of world-wide movement (1982) 46 *Journal of Comparative and International Private Law* 664-707.
[17] Ibid.
[18] Section 34 of South African Constitution, 1996 and s48 and 50 of the Kenyan Constitution.

procedure extensively and critically in Zimbabwe.

Further, the rules of civil procedure are an import of colonialism.[19] In Zimbabwe, the rules of civil procedure were established through colonialism.[20] The rules of civil procedure were superimposed on the indigenous legal system, which essentially consisted of a unitary single justice system.[21] The headmen and chiefs dispensed both criminal and civil justice.[22] Chapter 3 examined the British South Africa Company as the driver of establishing the procedural and substantive legal framework[23] of Southern Rhodesia through the Southern Rhodesia (also referred to as Rhodesia) Orders-in-Council, 1891,1894 and 1898.

Through the Orders-in-Council of 1891, 1894 and 1898, the Anglo-Saxon adversarial legal system (though substantively made of Roman-Dutch Law) became the dominant legal system for Zimbabwe, and the indigenous customary law became a subsidiary law. The indigenous laws were then in Rhodesia and are still called customary law, and together with the customary courts, they make up the customary law system. On the other hand, the general law system (Roman-Dutch Law-substantive law and English law-procedural law) comprises general/formal law courts. Essentially the customary law courts were designed for indigenous persons, while the general law courts were for European settlers. As pointed out in Chapter 3, according to authors such as Bennet, the general law courts were foreign to the indigenous person just as the customary law was foreign to the White settlers. The initial establishment of the general law system was thus not meant to be accessible to the indigenous litigants. The indigenous litigants were subjected to the general law system through interaction with the White settlers, for example, as employees or through contractual transactions. Two major findings emerged in this thesis: firstly, there were new users of the general law system, the indigenous persons, and secondly, judicial officers were selected from the White settlers. The White settlers presided over disputes between the whites and the indigenous persons.

More importantly, the convergence of the indigenous and the general law system was at the appeal level. All indigenous civil appeals from the customary law system ended up in the African Court of Appeal or the Tribal Appeal Court. The African Court of Appeal or the Tribal

[19] T W Bennet ' Conflict of Laws: The application of customary law and the common law in Zimbabwe' (1981) (30) 1 *The international Comparative Law Quarterly* 59-103.
[20] Ibid.
[21] B Goldin & M Gelfand *African law and custom in Rhodesia* Juta and Company (1975).
[22] Ibid.
[23] The Rhodesian legal system comprised of procedural law which was English and substantive law which was Roman-Dutch Law as explained in detail under Chapter 3. See also Chapter 3 para 3.3.

Appeal Courts were presided over by the White Settlers unfamiliar with the indigenous laws but fully conversant with Roman-Dutch substantive and adversarial English procedural law. That posed a legal and procedural challenge; the user did not know European substantive and procedural law but was subjected to the same on appeal. At the same time, the presiding appeal officers did not know the indigenous laws.

The appeal processes thus had limitations from a procedural and substantive law point of view. The procedural inaccessibility became pronounced when the High Court was established in 1898 and had jurisdiction to hear appeals from the customary law system. Thus, the appeal procedure became foreign and so were the presiding officers. Further appeals from the High Court were made to her Majesty in Council (United Kingdom), and after 1900, appeals were made to the South African Supreme Court. Geographically too, launching an appeal became impossible for the ordinary indigenous.

Chapter 3 also demonstrated that from 1923, after the British South Africa Company rule ended, the White settlers established a constitutional dispensation dominated by formal courts.[24] There were the Magistrates Courts, the High Court and the Appellate Division of the High Court.[25] This self-contained court system had its own set of rules of civil procedure. The Magistrates Court Rules, The High Court and the Appellate Division Rules. More importantly, those rules of civil procedure that developed from 1898 to 1979 are the foundation of the rules in force in Zimbabwe post-independence from 1980 to date. Firstly, the appeals procedure's rules have not been materially revised, except for minor modifications from 1980 until today. Secondly, the basic rules governing leave to appeal emerged from the colonial era. Thirdly, the rules for security for costs and referral of constitutional matters also have their roots in the colonial era. These selected rules had one common structural feature; they restricted access to the Superior Courts, particularly the High Court and the Appellate Division.

The right to appeal during the colonial era was subject to leave from the Magistrates to the High Courts and from the High Court to the Appellate Division. Security for costs was required from all litigants.[26] Further, a litigant who intended to appeal to the High Court was required to have a claim above 100 Pounds.[27] Any legal matter below that threshold in terms of the value

[24] Chapter 3 section 3.3- 3.5
[25] Ibid.
[26] Section 58 of the Southern Rhodesia Order-in-Council, 1898.
[27] Ibid.

of the monetary limit of 100 Pounds was not appealable to the High Court.[28] No leave could be granted to the Supreme/Appellate Division if the civil claim was less than 100 Pounds.[29] Some aspects of those appeal and leave to appeal rules were not restrictive of access to the court. Firstly, the High Court's jurisdiction to have an Appellate Division was an important aspect of the appeal procedure as it provided increased appeal structures. The South African High Court has a similar appellate structure, and it is recommended for adoption in Zimbabwe.[30] As explained above, the selected rules of civil procedure are a carry-over from the colonial era. In fact, until 2016, most of the present rules of civil procedure were still based on the rules promulgated during the colonial era; for example, the rules of civil procedure governing the High Court and Supreme Court and the content of the rules is derived from the colonial rules. Undoubtedly, the selected rules of procedure and other rules are a by-product of the colonial process, whose foundational principles were not centred around concepts such as access to court and justice. However, credit must be given to the colonial constitutional dispensation because, for example, s62 of the Constitution of Rhodesia provided the right to a fair hearing, which became part of the post-colonial Bill of Rights.[31] Thus, to some extent, there was recognition of a fair hearing, a right that extends to the provision of rules of procedure with respect to access to the court.[32]

In Chapters 4 and 5, the selected rules were explained in detail and their application and content were critically examined. It emerged that the selected rules of civil procedure have certain aspects and principles that restrict access and some that enhance access to the court. This thesis concentrated on the parts of the rules that restrict the right of access to the Superior Courts. The author suggests that the requirements for a valid notice of appeal are too technical, unnecessary and restrictive compared to Kenya and South Africa.[33] Although Kenya and South Africa also have mandatory requirements on the validity of a notice of appeal, they have provisions in their appeal rules that make amendments to an appeal possible. In addition, the appeal right in the Zimbabwean Superior Courts is further restricted by the requirement of leave to appeal, particularly of appeals from the Labour Court to the Supreme Court, and to have uniform provisions on rules governing appeals from the High Court to the Supreme Court, where a litigant is not required to apply for leave to appeal. There is, therefore, the need for an

[28] Ibid.
[29] Ibid.
[30] Section 16 of the Superior Courts Act No 10 of 2013.
[31] Bill of Rights, The Zimbabwean Lancaster House Constitution,1980.
[32] *Airy* case op cite note 6 and *Golder v The United Kingdom* (1976) 1 EHRR 524.
[33] See Chapter 5 section 5.5.

automatic right of appeal from the Zimbabwean Labour Court to the Supreme Court. However, this thesis generally agrees that leave to appeal must be maintained in appeal processes relating to interlocutory judgments or orders.

In addition, appeals from the Zimbabwean Supreme Court to the CCZ are currently limited to constitutional matters. Three aspects potentially limit access to the Constitutional Court. First is the absence of a definition of what is meant by a constitutional issue in the Zimbabwean Constitution and the appeal rules, and the extent of the nature of constitutional issues that can be appealed against. For example, in South Africa, the rules of civil procedure and the Constitution[34] define a constitutional matter and what aspects of the constitutional matters are appealable. Indeed, the South African Constitution and rules of civil procedure clearly define the scope of constitutional matters determinable by the South African Constitutional Court.[35] More importantly, the right of appeal from the Zimbabwean Supreme Court to the Constitutional Court must not be limited to constitutional issues but must be extended to matters of public importance. Further, the right of appeal must be extended to non-constitutional matters, just as in South Africa. Non-constitutional matters can change the legal landscape, for example, land rights and political disputes, which may require a more experienced and expanded bench of the Constitutional Court to preside over as an appeal court.

Another important aspect that restricts the right of appeal, as determined in this thesis, is the absence of the right to appeal against a single judge's decision to a full bench, as in South Africa – a practice that enhances access to the court on appeal. Further observations made in this thesis are that the requirements for leave to appeal generally restrict access to the Zimbabwean Superior Courts. Firstly, appeals from the Supreme Court to the Constitutional Court on constitutional issues must be granted an automatic right of appeal. This is important to develop constitutional jurisprudence by ensuring litigants do not end up abandoning their cases before reaching the Constitutional Court due to the additional costs of seeking leave to appeal. More importantly, this thesis established that in Zimbabwe, the test or requirements used by the Superior Courts to grant leave to appeal are not set out in any formal regulations, rules or Acts of Parliament presently governing the leave to appeal procedure. Zimbabwe relies solely on judicial precedent to determine whether to grant leave to appeal, thus resulting in uncertainty.

[34] Section 167 (7) of the South African Constitution and also see C Sprigman & M Osborne 'Du Plessis is not dead: South Africa's 1996 Constitution and the application of the Bill of Rights to private disputes' (1999) 15 *South Africa Journal on Human Rights* 25 at 28.
[35] Ibid.

There is, therefore, a need to adopt the Kenyan and South African approach, where the requirements are set out in the leave to appeal process governing rules.

In addition, on leave to appeal, it was found that in Zimbabwe, a single judge presides over an application for leave to appeal and an appeal is further made to a single judge. It is recommended that where a litigant intends to appeal against the decision of a single Labour Court judge or single High Court judge, it should be made to the full bench of the High Court and the Labour Court. If two or more judges of the Labour Court or High Court hear the appeal, an appeal against the refusal of leave to appeal must be made to the Supreme Court full bench, not to a single judge. The practice, as adopted in South Africa, improves the decision made by the courts a quo or judge a quo and increases the probability of critically reasoned judgment to be arrived at.

In this thesis, it was determined that direct access and direct appeal to the Constitutional Court improves accessibility to the Court. Therefore, clear rules that govern direct appeals to the Constitutional Court must be set, as proposed in Chapter 5. However, leave to appeal provisions must still be retained in direct appeals matters to the Constitutional Court. More importantly, direct access to the Constitutional Court must also be broadened to include cases emanating from the Bill of Human Rights as provided in the Zimbabwean Constitution. Matters emanating from the Zimbabwean Bill of Human Rights must be instituted in the Constitutional Court without the requirement for leave to appeal.

Further aspects of the rules this thesis found to be restrictive are the requirements for security for costs. In Zimbabwe, an appellant has the right to request leave for an appeal from the Magistrates Court to the High Court, from the Labour Court to the Supreme Court and from the Supreme Court to the Constitutional Court; however, the requirement of security for costs restricts the right of appeal to the Superior Courts. However, as determined from South African case law,[36] the request for security costs violates the right of access to the court. Further, it should be limited to two aspects: where a man of straw vexatiously or frivolously institutes an appeal to harass the respondent or if it is an insolvent company filing an appeal lacking merit. Hence, the current rules must be reformed to limit the security for costs requirement for specific

[36] *Mchugh N.O & Others v Wright* [2021] ZAWCHC 205 and also *Boots Sports Africa (Pty) v South African Breweries (Pty) Ltd* 2015 (5) SA 38 (SCA).

cases brought before the court.

Finally, this thesis found the referral procedure rules to be restrictive, making it almost procedurally impossible for a litigant to approach the Constitutional Court as the referral process is complex and difficult to apply. However, in Kenya and South Africa, a litigant makes use of appeal and application procedures to bring their matters to the Supreme Court and the Constitutional Court, respectively. As a result, this thesis suggests a simplified version of the referral of constitutional matters procedure to be used in Zimbabwe. The reason is that the referral of constitutional matters procedure is important, and it speeds up the resolution of constitutional proceedings arising in the court a quo that can easily dispense of a matter. Instead of relegating the referral procedure, it is important to reform the same.

This thesis concludes that specific aspects as identified in Chapters 4 and 5 require imminent reform to enhance access to the Superior Courts of Zimbabwe. The thesis concludes by suggesting specific reform to the selected rules of civil procedure.

6.3.THE MAIN RECOMMENDATIONS

The main argument in this thesis is that the Zimbabwean rules of civil procedure can sometimes enhance or inhibit access to the courts. The thesis identified certain aspects of the selected rules of procedure regulating appeals, leave to appeal, security costs and referrals of constitutional matters to the Constitutional Court, all of which restrict access to the Superior Courts of Zimbabwe. Therefore, there is a material need to reform these selected rules of civil procedure and amend some of the sections of the Constitution of Zimbabwe, No 20 of 2013 and some statutes providing for rules of procedure, as argued in Chapter 5. The following are some of the major recommendations made by this thesis:

6.3.1. Recommendation 1: The Constitutional Court of Zimbabwe's jurisdiction on appeal must be extended to include hearing non-constitutional matters of general public importance.

As discussed, the South African Constitutional Court[37] and the Supreme Court of Kenya, on appeal, can hear non-constitutional matters of general public importance instead of

[37] P Nkoane 'Deciding non-constitutional matters of general public importance in South African law: can constitutional values be used?' 2021 (25) *Law Democracy & Development* 604 and also D Van der Merwe 'Constitutional colonisation of the common law: a problem of institutional integrity' (2000) *Journal of South African Law* 12.

constitutional matters only. Zimbabwe should expand its Constitutional Court jurisdiction to non-constitutional matters and hear arguable points of law of general public importance. This should be effected by amending certain provisions of the Constitution of Zimbabwe, the Constitutional Court Act and the Constitutional Court Rules to provide a revised framework for such, as suggested in Chapter 5. This would increase access to the Constitutional Court on appeal.

The right to appeal to the CCZ is limited to constitutional issues. A litigant can only access the CCZ with a constitutional matter, or a matter expressly provided for in the Constitutional Court Rules. Expanding a right of appeal to the Constitutional Court is justified because before the Constitutional Court was established in Zimbabwe, the Supreme Court efficiently determined appeals from the High Court on constitutional and non-constitutional matters without being overburdened.[38] However, if the proposed reform is adopted, the requirement for leave to appeal to non-constitutional matters must be maintained to protect the Constitutional Court from being bombarded by frivolous or vexatious appeals from the Supreme Court.

It is, therefore, proposed to adopt rules and provisions similar to South Africa and Kenya, as set out in Chapter 5.

It is, therefore, proposed to incorporate the following rules and sections into the Constitution:

(i) Amendment of s167 of the Constitution of Zimbabwe, No 20 of 2013

Section 167 is amended by adding a new s167 (6) following:

(6)- The Constitutional Court shall have the power to hear matters of public importance or that resolve conflicting judgments of the Supreme Court subject to a party being granted leave to appeal.

Section 167 (7)- A Constitutional matter shall include any issue involving the Constitution's interpretation, protection or enforcement.

[38] See, also, H Webb 'The Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law' (1999) 1 *Penn Law Journals* 205-208.

(ii) Amendment of Rule 32 of the Constitutional Court Rules, 2016

Rule 32 is amended by the addition of Rule 2(b) as follows:

2(b)- A party seeking to appeal against the decision of the Supreme Court on a matter of public importance or that resolve conflicting judgments of the Supreme Court must apply for leave in terms of these rules.

These rules and provisions expand access to the Constitutional Court on non-constitutional matters, just as in South Africa and Kenya.

6.3.2. Recommendation 2-Augmenting access through the appeal procedure to the Constitutional Court by extending directing access to alleged violations of Bill of Rights

The direct access to the Constitutional Court as discussed, in Chapter 5 has been largely restricted to only specified cases as provided in the Constitution of Zimbabwe, the Constitutional Court Act of Zimbabwe and Constitutional Court Rules. This thesis therefor proposes to amend the Constitution and Constitutional Rules as below:

(i) Rule 21 of the Constitutional Court Rules, 2016.

Rule 21 of the Constitutional Court Rules is amended by the insertion of-

Rule 21(h)- matters arising from alleged breach or violation of Chapter 4 of the Constitution.

(ii) Rule 21 (10) of the Constitutional Court Rules, 2016.

Rule 21 (10) of the Constitutional Court Rules, 2016 is repealed and substituted with the following:

Rule 21(10)-Application for direct access shall be heard by at least three Constitutional Court judges.

6.3.3. Recommendation 3: Expanding the right of appeal against refusal of leave to appeal in the High Court and the Labour Court of Zimbabwe

It is recommended that a litigant seeking leave to appeal before a single High Court or Labour Court judge be allowed to appeal to the full bench of the Labour Court and, if denied, be

allowed to seek special leave to appeal to the full bench of the Supreme Court. This proposed practice is in force in South Africa.[39] It enhances access to the court, as a single judge should not refuse the right of access to a litigant without giving other judges the opportunity to express their opinion. The multi-layered leave to appeal process in South Africa up to the Supreme Court enhances access to the court. It ensures that cases that deserve to be heard on appeal do not fall by the wayside.

6.3.4. Recommendation 4: Simplify the referral to the Constitutional Court Rules

The referral rules, being uniquely designed for the Superior Courts of Zimbabwe, have failed to offer reasonable access to the Constitutional Court. The referral rules must be simplified or they will remain a white elephant and fail to deliver on the purpose for which they were designed; for example, to speed up the referral of constitutional matters to the Constitutional Court for resolution. The referral procedure must allow litigants to refer their matters to the Superior Courts without going through many procedural hurdles. The referral procedure must be simplified, allowing the magistrates and the litigants to complete the form and attach the record of proceedings for onward transmission to the Constitutional Court. The referral form must be able to be completed by any layperson.

The author proposes a revised application procedure has fewer technical requirements can enhance access to the Constitutional Court of litigants with constitutional issues through a referral procedure. The solution lies in repealing Rule 108 (1) of the High Court Rules, 2021; Rule 71 of the Supreme Court Rules, 2018; and Rule 24 of the Constitutional Court Rules, 2016 and substituting repealed rules with the following content, which can be used for each rule repealed:

Referral of constitutional matters to the Constitutional Court

1. A party which believes that a constitutional matter has arisen in proceedings in court *a quo* and that the disposition of the same matter by the Constitutional Court will bring finality to the matter in the court *a quo* shall apply to the Constitutional Court for the matter to be heard.

2. A party may use the normal application procedure to refer the matter to the

[39] J D Van der Vyver ' The private sphere in constitutional litigation' (1994) (10) *THRHR* 360 and also P J Visser 'A successful constitutional invasion of private law' (1995) (11) *THRHR* 745.

Constitutional Court by filling the application in Form 2 to refer the matter to the Constitutional Court before the judge or magistrate.

3. If the magistrate or a judge believes that the matter is not frivolous or vexatious, they shall grant the application for referral, and the proceedings before the court shall remain pending the outcome of the referral application.

4. Alternatively, a party seeking leave to refer the matter to the Constitutional Court shall use Form 2 attached hereto, which shall be signed by the magistrate or judge if satisfied that the application is not frivolous or vexatious.

5. On their initiative, a judge or a magistrate may refer a constitutional matter for determination in proceedings where the litigant is not legally represented by completing Form 2.

6. Parties may refer a constitutional issue to the Constitutional Court by consent, and in those circumstances, the magistrate or judge has no power to make a ruling otherwise.

7. The mere fact of procedural irregularity shall not be the basis for refusal to hear an application for referral of a constitutional matter.

These provisions can be applied to all referrals from all courts in Zimbabwe to the CCZ. They are meant to increase access to the CCZ and are flexible and easy to use as an application procedure.

6.3.5. Recommendation 5: Rules governing a notice of appeal or appeal must provide for a simple notice of appeal or appeal

As demonstrated in Chapter 4, Zimbabwean Superior Courts rigidly and strictly interpret the rules governing appeals, particularly those that govern the mandatory requirements for a valid appeal. This can restrict access to the court. The restriction may happen because an appeal with merit can be dismissed for failure to comply with a valid notice of appeal's overly technical and mandatory requirements. Thus, the rules must be revised as suggested in this thesis to allow condonation or amendment of the requirements for a valid notice of appeal. Kenya offers the best model for reforming the rule governing these mandatory notice of appeal requirements.

The Kenyan Rules allow amendment at any time before the conclusion of a hearing.

Furthermore, there is a need for a simplified notice of appeal that requires a litigant to file in several blanks provided in the proforma notice to reduce the chances of dismissal of an appeal for want of compliance with the formal technical requirements. It is suggested that drafting rules governing the contents of a notice of appeal or appeal should be flexible and allow amendment of the notice of appeal at any procedural stage – provided it is not after the appeal hearing. This would reduce the number of appeals being struck off the roll because of procedural and technical defects. The mandatory wording must be removed, particularly concerning quoting the correct date of hand down, parts of the judgment being appealed against and the relief being sought. Those aspects must be amended as they do not affect the substance of the appeal. Also, the grounds of appeal must be capable of the amendment at any stage before the judgment or hearing is completed. The rationale is that the rules governing appeal must be accessible to all. A draft notice of appeal was provided herein in Form 1.

The amended rules mirror the Kenyan Rules of Civil Procedure on appeal:

Notice of Appeal from the Magistrates Court

Order 31 Rule 1 (4) of the Magistrates Court (Civil) Rules, 2019, is repealed and substituted as follows:

A notice of appeal or cross-appeal must state-

(a) whether the whole judgment or some parts of the judgment are being appealed (the litigant must indicate in the notice of appeal form – (the appeal against the whole judgment or part of the judgment) and delete the inapplicable);

(b) the grounds of appeal, and each ground must be brief;

(c) the relief sought.

Further, there must be the addition of the following Rules:

(i) In the event that there is a defect in the notice of appeal, the respondent shall give notice to the Appellant to rectify the same or withdraw the appeal.

(ii) If the Court on its own notices a defect in an appeal through the Registrar, it shall advise the parties accordingly, and within thirty days before the hearing, the

appellant must rectify the same or withdraw the appeal.

(iii) Amendments to a notice of appeal may be permitted during the appeal hearing provided the Court shall allow postponements of the matter to allow amendments and response from the other party.

(iv) No appeal shall be dismissed for failure to comply with Rules unless the defect is gross such that the appeal in question has no prospects of being saved through an amendment.

These provisions must also be extended to the High Court, Supreme Court and Constitutional Court Rules as follows:

Notice of Appeal to the High Court

Rule 95(10) of the High Court Rules, 2021, is repealed and substituted as follows:

(10) A notice of appeal or cross-appeal must state-

(a) Whether the whole judgment or some parts of the judgment are being appealed (the litigant must indicate in the notice of appeal form -the appeal against the whole judgment or part of the judgment) and delete the inapplicable).

(b) The grounds of appeal and each ground must be brief.

(c) The relief sought.

Addition of Rules 11-14 Rule 95 (11)-(15) of the High Court Rules as follows:

(11) In the event that there is a defect in the notice of appeal, the respondent shall give notice to the Appellant to rectify the same or withdraw the appeal.

(12) If the Court on its own notices a defect in an appeal through the Registrar, it shall advise the parties accordingly, and within thirty days before the hearing, the appellant must rectify the same or withdraw the appeal.

(13) Amendments to a notice of appeal may be permitted during the appeal hearing provided the Court shall allow postponements of the matter to allow amendments

and response from the other party.

(14) No appeal shall be dismissed for failure to comply with Rules unless the defect is gross such that the appeal in question has no prospects of being saved through an amendment.

(i) Notice of Appeal from the High Court

Repeal of Rule 37(1) of The High Court Rules and substitution with:

Rule 37

(1) A notice of appeal or cross-appeal must state-

(a) Whether the whole judgment or some parts of the judgment are being appealed (the litigant must indicate in the notice of appeal form -the appeal against the whole judgment or part of the judgment) and delete the inapplicable).

(b) The grounds of appeal and each ground must be brief.

(c) The relief sought.

(2) In the event that there is a defect in the notice of appeal, the respondent shall give notice to the Appellant to rectify the same or withdraw the appeal.

(3) If the Court on its own notices a defect in an appeal through the Registrar, it shall advise the parties accordingly, and within thirty days before the hearing, the appellant must rectify the same or withdraw the appeal.

(4) Amendments to a notice of appeal may be permitted during the appeal hearing provided the Court shall allow postponements of the matter to allow amendments and response from the other party.

(5) No appeal shall be dismissed for failure to comply with Rules unless the defect is gross such that the appeal in question has no prospect of being saved through an

amendment.

(iv) Notice of Appeal from Subordinates Courts to the Constitutional Court

Repeal of Rule 33(2) of The Constitutional Court Rules and substitution with:

Rule 33

(2) A notice of appeal or cross-appeal must state-

(a) Whether the whole judgment or some parts of the judgment are being appealed (the litigant must indicate in the notice of appeal form -the appeal against the whole judgment or part of the judgment) and delete the inapplicable).

(b) The grounds of appeal and each ground must be brief.

(c) The relief sought.

(3) In the event that there is a defect in the notice of appeal, the respondent shall give notice to the Appellant to rectify the same or withdraw the appeal.

(4) If the Court on its own notices a defect in an appeal through the Registrar, it shall advise the parties accordingly, and within thirty days before the hearing, the appellant must rectify the same or withdraw the appeal.

(5) Amendments to a notice of appeal may be permitted during the appeal hearing provided the Court shall allow postponements of the matter to allow amendments and response from the other party.

(6) No appeal shall be dismissed for failure to comply with Rules unless the defect is gross such that the appeal in question has no prospect of being saved through an amendment.

The following draft is proposed for the formatting and structure of a notice of appeal sample:

Draft Notice of Appeal

Form 1

In the Supreme Court/ High Court or Constitutional Court of Zimbabwe

In the matter between

XXXXXXXX Appellant

And

ZZZZZZZZZZ Respondent

Notice of Appeal

Take notice that the appellant herein files an appeal against:

1. Judgment of the……Court;
2. The judgment was handed down on…….
3. Dated …….(if there are two dates insert all)
4. By Judge/Justice …….
5. Leave to appeal was granted on……..(if applicable)
6. The judgment is being appealed (the whole judgment or part of the judgment) (delete as applicable).

Grounds of Appeal

The following grounds are the grounds for appeal:

1. ……
2. ……
3. ……
4. …….

Relief Being Sought

The appellant seeks the following relief from the Court:

1. The appeal succeeded, and the following relief is granted:
   1.1. ……
   1.2. ……
   1.3. ……

DATED AT HARARE THIS ……..NOVEMBER 2022

Signed by Appellant…….

Appellant's Address (……)

And To:

Registrar

Supreme Court or High Court or Constitutional Court

Harare

And To

Registrar/Clerk of Court

……. (name of court of the decision being appealed against).

Harare

And to

Respondent

(address)

Harare.

These proposed rule revisions remove the strict requirements for a valid notice of appeal. In addition, the rules allow for amendments and do away with some unnecessary mandatory requirements, such as the date of the judgment sought to be appealed against and the exact relief being sought. In addition, it is suggested that the rules of civil procedure, in general, must contain in their first sections or rules an overriding object like Kenya to guide the courts to be flexible in determining the validity of a notice of an appeal.

Finally, the general suggested requirements applicable to all appeals to the High Court, Supreme Court and Constitutional Court should be based on the following:

(i) Rules Governing Appeals

1.1. An appeal from the Magistrates Court to the High Court, from the High Court to the Supreme Court, or from the Supreme Court to the Constitutional Court, or from any other court or tribunal to the Superior Courts shall be in terms of these Rules.

1.2. An appeal shall be noted in the notice of appeal Form 1, attached hereto.

1.3. The appellant must complete all the required information on the notice of appeal Form 1.

1.4. The appeal referred to in Rule 2.2 shall be noted within 30 days from when the written judgment was handed down or when the leave to appeal judgment or order was granted.

1.5. The appeal shall be served to the respondents within five days of issuance of the appeal by the court where the appeal was lodged.

1.6. The respondent/s shall file their notice of response to the appeal within 15 days of receiving the appeal.

1.7. Thereafter, the appellant shall file heads of arguments within ten days of filing a response, together with any amendment in response to any objection raised on the validity of the appeal.

1.8. The respondent shall file their heads within ten days of receipt of the appellant's

heads and any answer to any amendment done by the respondent.

1.9. The Registrar shall then set the matter down for hearing.

6.3.6. Recommendation 6: Reforming the security for costs rules to remove the blanket requirement.

Security for costs restricts access to the court and should only be requested from a peregrine plaintiff with no immovable asset in the jurisdiction. The security for costs requirement should apply only to an insolvent artificial person and a man of straw instituting vexatious and frivolous appeals. A litigant's access to the courts should be without the hindrance brought by the requests for security for costs. The South African approach is preferable because it only limits the request for security for costs to the insolvent artificial persons and a man of straw instituting vexatious and frivolous appeals. Court access must not be affected by a blanket request of security for costs.

The author proposes to repeal Rule 42 of the Constitutional Court Rules, Rule 55 of the Supreme Court Rules, Rule 75 of the High Court Rules, and Order 33, Rule 1 (2) of the Magistrates Court Rules, substituting the same with a uniform rule for all courts. The following is the proposed rule:

(i) Security for costs in the High Court, Supreme Court and Constitutional Court.

1. Security for costs may only be required-
   a. if the appellant is a foreign peregrinus who has no assets with jurisdiction;
   b. if the appellant is an unrehabilitated insolvent;
   c. if the appellant is a limited liability company or body corporate that is insolvent;
   d. where the court process is vexatious or frivolous.
2. Rule 1 shall not apply to a peregrine litigant with no immovable property within the court's jurisdiction or to a company or an insolvent company.
3. A party subject to the provisions of Rule 1 may apply to the court for an order to provide security for costs.
4. The application referred to above shall be heard by two or more judges, and the

court's decision is final.

6.3.7. Recommendation 7: Extending the right of automatic appeal to appeals from the Labour Court to the Supreme Court of Zimbabwe.

Zimbabwe and South Africa have similar requirements for leave to appeal concerning appeals from the Labour Court to the Supreme Court and from the Labour Court to the Labour Court of Appeal, respectively. The provisions in those courts limit the right of access to appeal from these specialised courts to appeal courts. An application for leave to appeal, by its nature, increases the litigation costs and may limit the number of litigants seeking to appeal against the decision of the Labour Court. Generally, an appeal from the Magistrates Court to the High Court and from the High Court to the Supreme Court of Zimbabwe does not require leave to appeal. In that case, the compulsory requirement for leave to appeal in appeals from the Labour Court to the Supreme Court becomes unreasonable and discriminatory. In that respect, it is proposed to adopt the Kenyan approach where appeals from some specialised courts (same as the Zimbabwean Labour Court) to the Kenyan Court of Appeal do not require compulsory leave to appeal.

The following are the proposed new amendments to the s92F of the Zimbabwean Labour Act (28:01) and s43 of the Labour Court Rules:

(i) Amendment of s92F of the Labour Act (28:01)

Repeal of s92 (2) and (3) F and substitute with the following:

92F (2)- An appeal against the decision of the Labour Court to the Supreme Court shall be automatic; there shall be no requirement for leave to appeal.

92F (3) A party not satisfied with the decision of the Labour Court shall appeal to the Supreme Court within 21 days in terms of the Supreme Court Rules,2018.

(ii) Amendment of Rule 43 of the Labour Court Rules, 2017

Repeal of Rule 43 of the Labour Court Rules and substitution with the following:

Rule 43- A party not satisfied with the decision of the Labour Court shall appeal to

the Supreme Court within 21 days in terms of the Supreme Court Rules, 2018.

6.3.8. Recommendation 8 – Expanding the right of appeal against refusal of leave to appeal in the High Court and the Labour Court in interlocutory matters

Another aspect relating to leave to appeal that enhances access to the court is the requirement for leave to appeal in interlocutory judgments or orders. While it is generally undesirable to require leave to appeal in all appeals, it is reasonable to do so when a party seeks to appeal against an interlocutory matter. Allowing such appeals in interlocutory matters results in the multiplicity of appeals, clogging the appellate courts before the conclusion of the main matter. In Zimbabwe, all interlocutory matters require litigants to request leave to appeal unless the interlocutory order is final.[40] Thus, the current practice of requiring leave to appeal on interlocutory judgments or orders is similar to that in Kenyan and South African Superior Courts.[41] The practice reduces the need for the CCZ, the Supreme Court and the High Court to deal with matters piecemeal, especially those that may be finalised on appeal in the Constitutional Court for determination on main issues. Therefore, maintaining the Rule that requires leave to appeal against an interlocutory order or judgment is recommended.

A subsequent appeal hearing of an application for leave to appeal must be heard by two or more judges when a single judge heard the initial leave to appeal. This will ensure that a legitimate judgment is more likely to be reached. More judges would have had an opportunity to apply their minds. This, in turn, will improve the litigants' access to justice. This, again, is a rule in force in South African and Kenyan Superior Courts, ensuring more judges' opinions are expressed over a particular matter.

The following are the proposed reforms to the rules governing leave to appeal:

(i) Amendment of s92F of the Labour Act (28:01)-Leave to appeal against interlocutory judgments or orders.

Section 92F (2) is repealed and substituted as follows:

Section 92F (2)- Leave to appeal shall only be required in interlocutory orders

[40] Section 43 Uniform Rules, South Africa.
[41] See Chapter 5 section 5.4.4.

or judgments.

Section 92F (3)- An application for leave may be heard by a single judge, and if leave is refused, an appeal against refusal shall be heard by a full bench of the Labour Court consisting of at least three judges.

Section 92F (4)- If an application for leave to appeal is heard by three or more judges in the first instance, an appeal against refusal shall lie with the Supreme Court, and a full bench of not less than five judges shall hear the application.

The following are the proposed amendments to the High Court Rules to govern the leave to appeal and the number of judges to preside over leave to appeal applications: in interlocutory matters:

(i) Amendment of Rule 94 of the High Court Rules, 2021 by inserting new Rule 94A

Rule 94A. Leave to appeal in interlocutory orders or judgments

Section 92A- Leave to appeal shall only be required in interlocutory orders or judgments.

Section 94A (3)- An application for leave may be heard by a single judge, and if leave is refused, an appeal against refusal shall be heard by a full bench of the High Court consisting of at least three judges.

Section 94A (4)- If an application for leave to appeal is heard by two or more judges in the first instance, an appeal against refusal shall lie with the Supreme Court, and a full bench of not less than five judges shall hear the application.

There is need to also adopt the test of 'in the interest of justice in determining leave to appeal against an interlocutory order. The following is a new provision that can be added in all Court Rules to guide the Superior Courts in determining leave to appeal applications:

The test on the appealability of interim orders or judgments

The Courts shall, when determining the appealability of the interim order or judgment, consider

whether it is in the interests of justice or not.

6.3.9. Recommendation 9: Legislating the requirements to be considered in granting leave to appeal-the best interests of justice as opposed to the finality of judgment test

Zimbabwean Superior Courts may need to adopt the interests of justice test when determining an application for leave to appeal against an interlocutory judgment or order. The test can be inserted in all Court Rules to guide the Superior Courts in determining leave to appeal applications. The advantage of the interests of justice test is that it brings certainty and fairness when determining whether to grant leave.[42] The certainty of the interests of justice test contributes to accessibility to the Superior Courts. The 'interests of justice test' is more objective than the test of whether the interim order appealed against has the final effect or is dispositive of a substantial portion of the relief claimed in the main application. The following are the proposed rules setting the principles:

New section/Rule: Principles to be considered when granting leave to appeal.

(i) The High Court, Supreme Court or Labour Court shall only grant leave to appeal to the Court if it is satisfied that it is in the interests of justice for the Court to hear and determine the proposed appeal.

(ii) The Court shall hear and determine a proposed appeal if –

(a) the appeal has a reasonable prospect of success; or

(b) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration, or

(c) the matter is not trivial, or

(d) the appeal would lead to a just and prompt resolution of the real issues between the parties.

These proposed rules could be adopted in rules governing leave to appeal in the Labour Court, High Court and Supreme Court.

[42] *UDM v Lebashe Investments (Pty) & Others* [2022] ZACC 34.

6.3.10. Recommendation 10: Expanding the number of judges hearing an appeal in Superior Courts

Zimbabwe, South Africa and Kenya have a different quorum of judges allocated to hear an appeal. The author argues that having more judges on a bench could ensure that the decision made is likely to be correct – compared to when fewer judges are involved.[43] This is important especially considering that the Superior Courts are the appellate courts and some are the last courts in determining a matter. Therefore, the High Court of Zimbabwe should introduce rules that provide that five High Court judges shall be an appellate court over a judgment of a single judge sitting as a court of first instance. Another provision that enhances access to the Kenyan Supreme Court is that five or more judges hear an appeal in Supreme Court. This is similar to the CCZ's requirements, where the full bench of nine hears a matter. [44] It is proposed that a full bench for the Zimbabwean Supreme Court be increased to five judges to ensure more input in decision-making, providing quality judgments. These provisions would bring at the same level the stages of appeal as in South Africa and the number of judges determining an appeal as of the Kenyan Supreme Court.

The following are the proposed amendments:

(i) Amendment of s3 High Court Act (Chapter 07:06)

Section 3 of the High Court Act is amended by adding s3A as follows:

> The full bench of the High Court comprised of five judges shall sit as an appellate court where the decision of a single judge is being appealed against any matter.

(ii) Amendment of s3 of the Supreme Court Act (7:13)

> Section 3 of the Supreme Court Act is amended by the substitution of 'three judges' with 'five judges'.

These provisions would bring additional appeal stages within the Superior Courts' structure

[43] J Cohen, 'Jurisdiction, practice and procedure of the Court of Appeal' *The Cambridge Law Journal* (1951) 11 (1) 3-14.
[44] Section 166 (1) of the Constitution of Zimbabwe.

and create more opportunities for a litigant to have their matters heard on appeal.

6.3.11. Recommendation 11: Develop a preamble for all Superior Courts Rules that emphasises interpreting rules to enhance access to court and justice

South African and Kenyan court rules are premised on enhancing access to court and, in turn, access to justice. Therefore, all rules governing the procedure in the Zimbabwean Superior Courts must have a preamble or a clause that guides the interpretation of the rules. Any interpretation of the rules must be premised on enhancing access to court and justice. Litigants visit the courts for justice; therefore, the court's rules must not be barriers – particularly on appeal. The preamble to the appeal rules must make it mandatory for courts to apply the rules of the civil procedure without being unreasonably restricted by technicalities. Finally, the preamble to the rules must provide for the appeals before courts not to be unduly thrown out of court without considering the merits. Such an approach would help the Superior Courts to move away from the current strict interpretation approach.

. The author proposes the following samples of overriding objective rules:

(i) Insertion of an overriding objective in every preamble of Rules of Civil Procedure.

Preamble

1.10. These rules aim to facilitate speed and prompt resolution in a less technical manner.

1.11. The overriding objective of these rules is to ensure that litigants access justice in a simplified manner at minimum cost.

1.12. The courts shall not dismiss any matter due to procedural technicalities unless the non-compliance is deliberate and gross and there is no other remedy that the court can order to cure the defect.

1.13. In the event of a lacuna in the rules, the approach of the courts shall be to ensure that the lacuna is filled in a manner that assists the litigant in accessing the court.

Finally, the Constitution of Zimbabwe, No 20 of 2013 must be amended to reinforce the importance of interpreting the court's rules to enhance access to justice. The author proposes

the following amendments to the Constitution:

(i) Constitutional Amendment Proposal to the Constitution of Zimbabwe

Section 165 is amended by addition of section 165(8), which provides as follows:

165 (8) (a) The judges or any judicial officer shall not unduly apply the rules of procedure in a manner that hinders access to justice.

(b). Rules of the court must be interpreted in a manner that enhances access to the court and justice.

Section 166 (3) is amended by the addition of section 166 (3) (c), which provides:

166 (3) (c) The constitutional court subject to leave being granted by the court *a quo* or the court itself shall have jurisdiction to hear a matter that raises issues of general public importance.

6.3.12. Recommendation 12: Amend Rules to allow direct appeals from the subordinate courts to the Constitutional Court of Zimbabwe

As discussed in Chapter 5, Zimbabwe should adopt a rule governing direct appeals from subordinates courts, just as in South Africa. The following proposed rules governing direct appeals that can be inserted in all Zimbabwean courts' rules, including the Constitutional Court:

(i) Appeals from the subordinate courts to the Constitutional Court of Zimbabwe.

1. A litigant who is aggrieved by the decision of this Court[45] may appeal directly to the Constitutional Court if:

(a) leave to appeal is granted; and

(b) the appeal raises a constitutional issue.

2. An application for leave to appeal against the decision of this Court directly to the Constitutional Court on a constitutional matter must be within 15 days of the order

[45] The phrase "Court' in this rule will be replaced by an appropriate Court name when the rules are amended. The proposed rule is meant to be for all subordinate courts.

against which the appeal is sought to be brought and after giving notice to the other party or parties, and the Registrar.

3. The application for leave to appeal directly shall contain:

(a) the decision against which the appeal is brought and the grounds upon which such decision is disputed;

(b) a statement setting out clearly and succinctly the constitutional matter raised in the decision;

(c) any other issues, including issues alleged to be connected to the decision being appealed against.

(d) The applicant must also prepare a statement indicating whether he/she has applied or intends to apply for leave or special leave to appeal to any other court and, if so, which court and whether such application is conditional upon the application to the court being refused and the outcome of such application if known at the time of the application to the court.

(e) The respondent shall respond to the application for leave to appeal within ten days of service of the application if they are opposed to it.

(f) The opposing papers must state the basis of the opposition.

(g) The respondent may file a cross-appeal.

(h) The Constitutional Court has discretion on whether to grant the appellant leave to appeal.

The following are the author's proposed new sections to the Supreme Court Act (7:13) and rules to regulate leave to appeal from the Supreme Court to the Constitutional Court:

(i) Amendment of s6 of the Supreme Court Act (Chapter 07:13)

Section 6 of the Constitutional Court Act is amended by inserting s6A as follows:

6A- There shall be an automatic right of appeal from the Supreme Court to this Court in all matters relating to the interpretation and application of the Constitution.

(ii) Amendment of Rule 32(2) of the Constitutional Court Rules, 2016

Rule 32(2) of the Constitutional Court Rules, 2016 is amended as follows:

32(2)- An appellant appealing from the Supreme Court to this Court on the decision of the Supreme Court on all constitutional matters, including interpretation and application of the Constitution, shall not require leave to appeal.

These proposed new rules of civil procedure increase access to the CCZ.

6.4. CONCLUSION

Anchored in the main argument in this thesis – litigants' right of access to the Superior Courts of Zimbabwe is restricted and would be significantly improved through the reform of the selected rules of civil procedure: appeal, leave to appeal, referral of constitutional matters rules and security costs rules – the thesis provided a set of proposed draft Rules and revised sections of specific Acts of Parliament and the Constitution of Zimbabwe. It is submitted that adopting the proposed recommendations will increase access to the Superior Courts of Zimbabwe. In addition, when litigants can easily access the Superior Courts, then access to justice is enhanced. However, there is a need for further research into some rules of civil procedure not selected in this thesis for investigation. The rules of procedure are not an end in themselves but are aids to ensure that justice is attained. Hence the primary focus of the rules of civil procedure must be to enhance access to justice.

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7.7.TABLE OF STATUTES

7.7.1. List of International, Regional Conventions

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African Commission on Human Rights and People's Rights

American Convention on Human Rights, 1978

American Declaration of the Rights and Duties of Man, 1948

Convention on the Elimination of all forms of Discrimination Against Women, 1979

European Convention for the Protection of Human Rights and Fundamental Freedom 1953

European Convention of Human Rights, 1950, 1970

European Court of Human Rights

European Union Agency for Fundamental Rights

Government Notices, No. 1932, Order No. XXX

Indigenous and Tribal People's Convention (No 6, 169)

International Covenant on Economic, Social and Cultural Rights 1966

International Labour Organization, 1989

SADC Treaty, 1992

United Nations International Convention on Civil and Political Rights, 1976

United Nations Universal Declaration of Human Rights, 1948

7.7.2. Constitutions

Bill of Rights, South Africa

Constitution of Angola

Constitution of Austria

Constitution of Botswana

Constitution of Kenya

Constitution of Lesotho

Constitution of Malawi

Constitution of Mozambique

Constitution of South Africa, 1996

Constitution of the Republic of Namibia

Constitution of Zimbabwe (No 20 of 2013)

Southern Rhodesia Constitution Amendment No 13 of 1964

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7.7.3. Acts of Parliament and Rules of Courts

Constitutional Court Act (7:22), Zimbabwe
Courts and Adjudicating Authorities Publicities Restrictions Act (7:04), Zimbabwe
Court Practice and Procedure Act
Customary Law and Local Court Act (7:05), Zimbabwe
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High Court Act (7:06), Zimbabwe
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