REPORTABLE (14)

CENTRAL AFRICAN BUILDING SOCIETY
v
(1) PENELOPE DOUGLAS STONE (2) RICHARD HAROLD STUART BEATTIE (3) THE RESERVE BANK OF ZIMBABWE (4) THE MINISTER OF FINANCE AND ECONOMIC DEVELOPMENT
AND

THE RESERVE BANK OF ZIMBABWE
v
(1) CENTRAL AFRICAN BUILDING SOCIETY (2) THE MINISTER OF FINANCE AND ECONOMIC DEVELOPMENT (3) PENELOPE DOUGLAS STONE (4) RICHARD HAROLD STUART BEATTIE
AND
THE MINISTER OF FINANCE AND ECONOMIC DEVELOPMENT
v
(1) CENTRAL AFRICAN BUILDING SOCIETY (2) THE RESERVE BANK OF ZIMBABWE DEVELOPMENT (3) PENELOPE DOUGLAS STONE (4) RICHARD HAROLD STUART BEATTIE

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, MAKONI JA, KUDYA AJA
HARARE: OCTOBER 20, 2020 & MARCH 16, 2021

T. Magwaliba, for Central African Building Society

L.Uriri, for the Reserve Bank of Zimbabwe

L.Madhuku, for the Minister of Finance & Economic Development

T. Biti, for Penelope Douglas Stone & Richard Harold Stuart Beattie

GWAUNZA DCJ

[1] This is a composite judgment in respect of three appeals which were heard at the same time. The appeals are against the whole judgment of the High Court handed down on 14 May 2020. They all rely on essentially the same grounds of appeal. The three appellants were the respondents in the court *a quo* but filed separate appeals under SC 183/20, SC 187/20 and SC 203/20.

In this judgment the appellants will be referred to as Central African Building Society (CABS), the Reserve Bank of Zimbabwe (RBZ) and the Minister of Finance and Economic Development (Minister of Finance). Penelope Douglas Stone and Richard Harold Stuart Beattie, who were the applicants in the court *a quo*, will be referred to as the respondents.

BACKGROUND FACTS

[2] CABS is a bank registered in terms of the laws of Zimbabwe. The respondents are partners in a firm of architects trading under the name of The Stone/Beattie Studio. They have had a savings account with CABS for a number of years, being account number 1005428905. As at the end of October 2016, the respondents' account had a credit balance of US$142 000.

[3] On 4 May 2016 the Governor of the Reserve Bank issued a statement entitled "*Measures to deal with cash shortages whilst simultaneously stabilising and stimulating the economy.*" Through the statement the Governor proclaimed the introduction of bond notes and coins which would operate alongside the family of currencies in the multi-currency basket and would be at par with the United States

Dollar. He also announced that the process to configure the RTGS system into the multi-currency basket was underway.

[4] On 31 October 2016 S.I 133/2016 was enacted in terms of s 2 of the Presidential Powers (Temporary Measures) Act [*Chapter 10:20*]. Pursuant to such enactment, on 28 November 2016, the respondents by way of correspondence instructed CABS to freeze their account. This was in a bid to preserve their bank balance in the United States Dollar currency. Two years later on 4 October 2018, the Reserve Bank issued the Exchange Control Directive No. RT120/2018 ('the 2018 Directive') whose effect was to separate RTGS Foreign Currency Accounts from *Nostro* Foreign Currency Accounts based on the source of the relevant funds. As a result of this directive, the respondents' account with CABS was categorised as an RTGS Foreign Currency Account payable in bond notes and not USD currency.

[5] On 17 October 2018, the respondents wrote a letter to CABS advising that they wished to withdraw the entire amount held in their account in US dollars or, alternatively, that the same amount be transferred into a *Nostro* FCA account *'as provided for by the Central Bank in its Monetary Policy Statement of the 1 October 2018.'* In response, CABS advised the respondents that it could only pay the balance due to them in bond notes in terms of the Reserve Bank's 2018 Directive.

[6] Disgruntled at this response, the respondents filed an application before the High Court entitled *AD PECUNIAM SOLVENDAM*, seeking an order in the following terms: -

> "IT IS ORDERED THAT
>
> 1. The first respondent (CABS herein) must, within seven (7) days from the date of this order pay to the first and second respondents (*sic*) the sum of

US$142,000-00 (One Hundred and Forty-Two Thousand United States dollars) cash as United States dollars, together with United States dollar interest on the aforesaid amount at the rate of 5 percent per annum with effect from the 28 November 2016 to the date of payment.

2. The first respondent must pay costs of suit.

ALTERNATIVELY

3. The second and third respondents (RBZ and Minister of Finance herein) jointly and severally each paying the other and the other to be absolved must pay the sum of US$142 000 (One Hundred and Forty-Two Thousand United States dollars) cash to the Applicants.
4. It is declared that exchange control directive No R120/2018 dated 1 October 2018 is a nullity and is hereby set aside.
5. It is declared that section 44B (3) and (4) of the Reserve Bank Act *[Chapter 22.15]* are unconstitutional.
6. The respondents jointly and severally each (*sic*) paying the other to be absolved must pay (*sic*) the cost of suit."

[7] The respondents in relation to their main relief relied on the principle *ad pecuniam solvendam,* and stated in their founding affidavit that their claim against CABS was simply a demand for the return of their deposit in the sum of USD142 000 plus interest. The respondents submitted further that the alternative relief as set out in their draft order, was being sought in terms of s 85(1) (a) of the Constitution of Zimbabwe.

PROCEEDINGS IN THE COURT *A QUO*

[8] The respondents submitted that the relationship between them and CABS was *sui generis* and that CABS was obliged to pay back the money in the currency in which it was deposited. In their view, the bond note and the USD 1:1 parity was a legal fiction. They further contended that CABS could not hide behind the 2018 Directive as the instrument was unreasonable and *ultra vires* the provisions of the enabling Act. However, the respondents neither identified nor elaborated on the exact provisions of the Act that they referred to.

[9] The respondents further argued that s 44B (3) and (4) of the Reserve Bank of Zimbabwe Act *[Chapter 22:15]* were unconstitutional in that they constituted an unlawful appropriation of value and property contrary to the provisions of s 71 of the Constitution of Zimbabwe (No.20) of 2013. Secondly, they argued that the same provisions violated their right to equal protection of the law as defined in s56 of the Constitution, in that they 'are grossly irrational and unreasonable.'

[10] On the other hand, CABS submitted that it did not 'refuse' to pay the amounts standing to the respondents' credit. Rather, it was not for them to insist that such payment be tendered in a specific currency. It further argued that the respondents had not proffered evidence to show that they had deposited hard currency into their account nor that offshore payments had been deposited therein. It further submitted that it had an obligation to comply with the terms and conditions of its registration which include compliance with the law and other directives given by the RBZ. In that regard, CABS pointed out that such regulating directives or laws were extant as they had not been declared unlawful.

[11] Concerning the alternative relief sought by the respondents, the RBZ submitted that such relief was incompetent given that its Governor had acted lawfully in issuing the directive in question. With regard to the constitutionality of the operative legal framework in *casu,* the RBZ, like CABS, argued that the 2018 Directive was valid and demanded full compliance thereof unless and until it was declared invalid. Further, that any act done in accordance with a valid piece of legislation was also valid.

[12] The Minister of Finance objected to having been cited in the proceedings, arguing that he had no interest in the dispute since the respondents' claim, being one for an order *ad pecuniam solvendam* against CABS was premised on a contract between them. However, the court ruled that given the special relationship between the RBZ and the Ministry of Finance, the Minister had a legal interest in the proceedings and was properly cited.

FINDINGS OF THE COURT *A QUO*

[13] The court *a quo* found that the relationship between CABS and the respondents was contractual and that the former accordingly had an obligation to repay the equivalent sum of money and not the exact notes deposited into the bank. It further found that the respondents' account balance being denominated in United States dollars and not any other currency, CABS should not seek to unilaterally change the value of its indebtedness.

[14] The court, however, noted that CABS was correct in its submission that it could not defy the directive of the RBZ, an entity established in terms of s317 of the Constitution of Zimbabwe No.20/2013. In issuing the impugned directive, the court observed that the RBZ was exercising its powers as conferred by the Constitution and the Reserve Bank of Zimbabwe Act *[Chapter 22:15]*. It accordingly held that as long as the Exchange Control Directive No. RT120/18 had not been set aside, CABS could not comply with the respondents' demand without incurring the penalties and consequences threatened by the enabling body. In that regard, the court *a quo* held that it could not order such payment in the face of an extant directive of the RBZ. The court thus effectively dismissed the respondent's main claim.

[15] Having made these findings, the court then opined that there was need *'for an inquiry into the constitutionality of that directive and/or the section in terms of which it was issued.'* It proceeded, *mero motu*, to make this enquiry based on considerations not presented or argued before it. The court concluded that the retrospective application of the directive had the effect of arbitrarily converting the USD balance in the respondents' account, into an RTGS bank balance. It then expressed the view that the directive was *'an incursion of vested rights,'* and therefore 'unreasonable'. The court further held that the 2018 Directive reflected insensitivity and unresponsiveness which offended against the values espoused in the Constitution. Lastly, the court found that the directive was illegal, irrational and unreasonable for offending against the rule of law and the constitutional values of good governance. Accordingly, it pronounced that the directive was unconstitutional.

[16] Having made this pronouncement, the court determined that it was not necessary to consider the constitutionality of s44B (3) and (4) of the Reserve Bank Act *[Chapter 22:15]*. It should be noted that this was part of the relief that the respondents sought as an alternative to its main claim. The court accordingly declared the 2018 Directive to be invalid and set it aside. Inexplicably and unprompted, the court went on to grant the main relief sought by the respondents, and ordered CABS to pay them USD$142 000 in its denominating currency or transfer the funds into a *Nostro* Foreign Currency Account within 7 days of granting of the order. Consequently, the court did not consider the rest of the relief sought by the respondents in the alternative, to the effect that the RBZ and the Minister be ordered, in the place of CABS, to pay to the respondents the full amount that they had claimed from CABS.

THE GROUNDS OF APPEAL AND ISSUES FOR DETERMINATION

[17] Aggrieved by the decision of the court *a quo*, the appellants noted the instant appeals to this Court. Although they together articulated a total of 15 grounds of appeal, in the court's view the grounds raise the following issues for determination: -

a. **Having initially declined to grant the main relief sought, whether the court *a quo* erred in proceeding to grant the exact same relief: -**
   i) **on a basis not argued by the respondents, and**
   ii) **even though such relief had not been sought under the respondents' alternative prayer;**
b. **Whether the court *a quo* erred by setting aside the 2018 Exchange Control Directive when such relief had not been sought on a constitutional basis, and in any case, contrary to the principle of subsidiarity; and**
c. **Whether the court erred in ordering CABS to pay the respondents an amount in foreign currency contrary to the provisions of SI 133/19 and ss 20, 21, 22 and 23 of the Finance Act (No. 2) of 2019.**

These issues will be considered *seriatim*.

Having declined the main relief sought, whether the court *a quo* erred in proceeding to grant the exact same relief even though it had not been sought under the alternative relief, and on a basis not argued before it.

[18] The appellants submit that the court *a quo* granted an order which was not sought by the respondents, given that the latter had sought in the main, an order that CABS pays them the sum of USD$142 000 within seven days of the order being granted. However, in the event that the CABS was found to have acted lawfully in not acceding to their request for payment of this amount, the alternative relief sought by the respondents was: -

i) that the RBZ and the Minister be ordered to pay the amount in question to the respondents;
ii) that the Exchange Control Directive No. R120/2018 be declared a nullity;
iii) that s44B (3) and (4) of the Reserve Bank of Zimbabwe Act *[Chapter 22:15]* be declared unconstitutional.

[19] The appellants further contended that the court *a quo* created an additional basis for the main relief sought by the respondents, in respect of, the constitutional validity or otherwise of the 2018 Directive, and proceeded to grant the same relief even though it did not form part of the alternative relief that they sought. That being the case, the appellants charge that the court went on a frolic of its own by crafting a case for the respondents and proceeding to determine a matter not before it.

[20] Mr *Magwaliba* for CABS further submitted that CABS and the respondents enjoyed a banker/customer relationship which was then interfered with by the RBZ through the issuance of the 2018 Directive. The implication of this interference, he further argued, was that the principal relief, which was based on the banker/customer relationship could not be granted. The court *a quo* having made a finding to that effect, Mr *Magwaliba's* contention was that the matter should have ended there in so far as the main, and only, relief against CABS was concerned.

[21] The court finds merit in the appellants' contentions. In their heads of argument, the respondents do not dispute that the court *a quo* granted an order that was not sought by them as an alternative to the main relief. Indeed, the cause of action in relation to the principal relief sought by the respondents, was anchored on a perceived breach of the banker-customer relationship between them and CABS. Hence the claim *ad pecuniam solvendam* against that bank. The court *a quo* indicated that CABS was correct in its submission that it could not defy the 2018 Directive of the Reserve Bank in circumstances where the Directive had not been set aside. It was on this basis that the court in its judgment stated as follows: -

> "This Court accepts that as long as the exchange control directive has not been set aside, the first respondent could not comply with the applicant's demand

> without incurring the penalties and other consequences threatened by the second respondent. On this basis, the court cannot order the first respondent to make payment in the face of the exchange control directive which is to the contrary … (*my emphasis*)

[22] The finding that the court *a quo* could not order the first respondent to make the payment in question was in this Court's view not only correct, but also dispositive of the main claim of the respondents. This is because it was effectively a dismissal of that claim, the only one seeking any relief against CABS. As is evident from the evidence before the court, the appellants did not advance or argue any other basis for this relief. The court, after reaching that decision, could and should only have adverted to the alternative relief sought by the respondents against the RBZ and the Minister. This it effectively did not do. As already noted, the respondents made it clear in their founding affidavit that the alternative claim requiring RBZ and the Minister to pay the amount in question, was to be granted only in the event that the court was not persuaded to grant the main relief against CABS. Thus, by completely disregarding that part of the respondents' alternative claim - whatever its merits or demerits given that no clear cause of action in this respect was articulated - the court *a quo* clearly misdirected itself. A court is duty bound to consider and determine every issue that is placed before it unless such issue has otherwise been resolved.

Whether the court *a quo* erred by setting aside the 2018 Exchange Control Directive when such relief had not been sought on a constitutional basis, and in any case, contrary to the principle of subsidiarity

[23] The court *a quo*, in what seems to be a procedural *non sequitur*, took the view that its dismissal of the main claim against CABS somehow gave rise to the need for an enquiry by it, into the constitutional validity of the directive or the provision in terms of which it was issued. This was despite the fact that the respondents had not challenged the

constitutional validity of the 2018 Directive. Instead, in part of their alternative relief, the respondents explicitly sought an order striking down s 44B (3) and (4) of the Reserve Bank Act - the enabling provisions - on the basis that they were unconstitutional. In fact, the only reference - indirect at that - that the respondents made to any constitutional challenge to the directive was contained in para 15 of the respondents' founding affidavit as follows: -

> "As far as our *locus standi* in respect of our alternative claim (sic), (we) bring this application in terms of s85 (1)(a) of the Constitution of Zimbabwe."

[24] As already indicated, to the extent that the respondents may have, on the basis of these words, intended to motivate a constitutional challenge to the 2018 Directive, in the end they did not do so. It would appear though, from a reading of the judgment of the court *a quo* that the genesis of its belief that it had a constitutional matter before it concerning the 2018 Directive, was a misapprehension of the issues that it was called upon to determine. The court formulated the third issue for its determination, as follows: -

> "Whether the Exchange Control Directive RT12/18 is unconstitutional and, if so, the implications thereof."

It not being in dispute that the respondents did not impugn the 2018 Directive on the basis of its constitutional invalidity or otherwise, there is little doubt that the court *a quo* read into the papers before it, an issue that was clearly not there. Its determination of that issue was therefore incompetent.

[25] After it improperly considered the issue of the constitutional validity of the 2018 Directive, the court *a quo* concluded as follows: -

> "The exchange control directive is in my view illegal, irrational, and unreasonable for offending against the rule of law and the constitutional values of good governance. It is therefore unconstitutional. (*my emphasis*)"

[26] On this basis, the court declared the 2018 Directive to be invalid and accordingly set it aside. Thereafter, and instead of relating to para 1 of the respondents' alternative relief, it proceeded to resuscitate and grant the principal relief against CABS that it had earlier properly thrown out. This *faux pax* could only have compounded the misdirection by the court, that started with it crafting a case for the respondents. Further to this and as discussed below, the court's unprompted consideration of the constitutionality or otherwise of the 2018 Directive violated the doctrine of subsidiarity.

[27] The respondents in their heads of argument sought to sanitise the irregular process adopted by the court *a quo*, by stating that <u>in constitutional matters</u>, the power of the court to grant a just and equitable order is *'so wide and flexible, that it allows courts to formulate an order that does not follow prayers in the notice of motion, or some other pleadings.*' They in this respect submitted as follows in para 70: -

> "Against this backdrop, it cannot be said the court *a quo* erred in the granting of "*consequential relief*" against the appellant (CABS). The payment of the amount claimed by the first and second respondents is at the heart of the matter. The court *a quo* held that it would have been unable to grant the relief sought by the first and second respondents without having set aside the Exchange Directive because that would mean that the appellant (CABS) would be susceptible to breaching its contractual obligations under the banker-customer relationship. We agree."

The respondents thus took the view that the court *a quo*, having declared the 2018 Directive unconstitutional, granted the order requiring CABS to pay the amount in question, as some form of 'consequential relief'.

[28] The court finds these submissions by the respondents to be flawed in a number of respects. Firstly, and as is evident from their founding affidavit, they did not challenge the validity of the 2018 Directive on the basis that it offended against any provision of

the Constitution. Their cause of action was based on the principle of *ad pecunium solvendam*. There was therefore no 'constitutional matter' before the court in so far as the directive was concerned. Secondly the order of the court *a quo* requiring CABS to pay the amount at issue cannot, as a consequence, be categorised as an order issued in the exercise of a court's power in constitutional matters to *'formulate an order that does not follow prayers in the notice of motion, or some other pleadings'*. Lastly, because the order was granted as a result of the court *a quo* having gone on a frolic of its own, it stands to reason that no consequential relief could competently flow from it.

The appellants are therefore correct in their submissions that the court *a quo* created a (constitutional) case for the respondents and went on to determine it in their favour.

[29] It is trite that the court's duty is to determine disputes as presented before it and not to go on a frolic of its own. This position was authoritatively articulated as follows in the Namibian case of *Kauesa v Minister of Home Affairs and Others* 1996(4) SA 965 (NMS): -

> "It is the litigants who must be heard and not a judicial officer. It would be wrong for judicial officers to rely for their decisions on matters not put before them by litigants either in evidence or in oral or written submissions. Now and again a judge comes across a point not argued before him by counsel but which he thinks material to the resolution of the case. It is his duty in such circumstances to inform counsel on both sides and invite them to submit arguments either for or against the judge's point. It is undesirable for a court to deliver a judgment with a substantial portion containing issues never canvassed or relied upon by counsel." (*my emphasis*)

[30] These sentiments were reinforced by this Court in the case of *Nzara & Ors v Kashumba N.O & Ors* SC18/18 wherein it was stated as follows: -

> "This position has become settled in our law. Each party places before the court a prayer he or she wants the court to grant in its favour. The Rules of court require that such an order be specified in the prayer and the draft order. These

requirements of procedural law seek to ensure that the court is merely determining issues placed before it by the parties and not going on a frolic of its own. The court must always be seen to be impartial and applying the law to facts presented to it by the parties in determining the parties' issues. It is only when the issues or the facts are not clear that the court can seek their clarification to enable it to correctly apply the law to those facts in determining the issues placed before it by the parties. The judgment of the court *a quo* unfortunately fell short of these guiding principles. In seeking to find middle ground, the court *a quo* granted orders which had not been sought by either party. It granted the first and fourth respondents a further grace period and a referral to arbitration. The first and fourth respondents had not sought such orders." (*my emphasis*)

[31] The weighty remarks cited above are eminently apposite *in casu*. By setting aside the 2018 Directive on the basis that it was unconstitutional, the court *a quo* granted relief that was neither motivated nor sought by the respondents. Like in the *Nzara* case (*supra*) the judgment of the court *a quo* in this respect fell short of the guiding principles enunciated in the relevant authorities on the issue. The relief that the court granted against CABS was therefore incompetent and cannot be sustained.

Accordingly, the attempt by the respondents to justify the granting of such relief, was misplaced.

[32] The court *a quo*, by considering the constitutional validity of the 2018 Directive, not only went on a frolic of its own, but did so in a manner that violated the principles of subsidiarity. Mr *Magwaliba* for the appellant correctly submits that the 2018 Directive could not be declared unconstitutional without regard to the constitutionality of the enabling provisions under which it was made in the Act. In view of this, the court *a quo* clearly misdirected itself when it stated as follows: -

> "In view of the conclusion reached in respect of the constitutionality of (the) Exchange Control Directive RT120/18, it is unnecessary for the court to determine the constitutionality of s44(3) and (4) of the Reserve Bank Act. This is so because the matter turns to be disposed on the basis of this Court's

conclusion that the impugned directive is unconstitutional and consequently invalid".

[33] Based on the principle of subsidiarity, and also because the respondents specifically sought such relief, it was incumbent upon the court *a quo* to consider and determine the constitutional validity of s 44B (3) and (4) of the Act, before addressing its mind to the issue of whether or not the 2018 Directive was a nullity. The court, instead, relied directly on principles enshrined in the constitution, to hold, as it did, that the 2018 Directive was unconstitutional. That the court could not properly proceed in that manner is stressed in a number of authorities in this jurisdiction and beyond.

[34] MALABA CJ in the constitutional case of *Moyo v Sergent Chacha* CCZ 7/17 elaborated on the principle of subsidiarity as follows: -

> "One cannot ignore non constitutional remedies preferring to **directly enforce the right as enshrined in the Constitution,** where the question for determination is whether conduct the legality of which is impugned is consistent with the provisions of a statute, the principle of subsidiarity forbids reliance on the Constitution, the provisions of which would have been given full effect by the statute." (*my emphasis*)

[35] In the South African case of *My Vote Counts NPC v Speaker of the National Assembly & Ors* [2015] ZACC 31; 2010 (4) SA 1 (CC), the Constitutional Court of South Africa in explaining the meaning of the doctrine of subsidiarity relied on the judgment rendered in ***Mazibuko and Others v City of Johannesburg and Ors*** [2009] ZACC 28. It stated as follows in paras 53 and 54: -

> **"These considerations yield the norm that a litigant cannot directly invoke the Constitution to extract a right he or she seeks to enforce without first relying on, or attacking the constitutionality of, legislation enacted to give effect to that right.** This is the form of constitutional subsidiarity Parliament invokes here. Once legislation to fulfil a constitutional right exists, the Constitution's embodiment of that right is no longer the prime mechanism for its enforcement. The legislation is primary. The right in the Constitution plays only a subsidiary or supporting role." (*my emphasis*)

[36] The remarks cited above make it very clear that the court *a quo* fell into grave error when, after improperly crafting a constitutional case for the respondents, it went on to determine the case in a manner that fundamentally offended against the requirements of the doctrine of constitutional subsidiarity. More damning in this respect is the fact that the respondents themselves, perhaps taking cognisance of the principle of subsidiarity, had properly sought to have the enabling provisions to the 2018 Directive set aside as being unconstitutional, relief that the court *a quo* decided not to entertain. In the result, the court's decision setting aside the 2018 Directive cannot be sustained on any ground.

Accordingly, the first and second issues are determined against the respondents.

Whether the court erred in ordering CABS to pay the respondents an amount in foreign currency contrary to the provisions of SI 133/19 and ss 20, 21, 22 and 23 of the Finance Act (No. 2) of 2019

[37] This Court has found that the court *a quo* was correct in its finding that it could not grant the main relief sought by the respondents given that CABS had acted lawfully in terms of the 2018 Directive, in its refusal to pay the amount claimed in United States dollars. The directive had not been set aside and therefore remained valid. This Court also determined that the court *a quo* could not properly grant this same relief on a basis neither pleaded nor argued before it. That order, being incompetent, must be vacated.

That being the case, the court considers that it is not necessary to determine the third issue listed for determination.

[38] A number of other issues however, call for comment.

The manner in which the respondents presented and argued their case before the court *a quo* left a lot to be desired. It is clear that due care and diligence were not exercised, nor was proper consideration given to the relevant procedural and substantive law. As correctly stated by Mr *Madhuku* for the Minister, an application under s 85 of the Constitution should not be raised as an alternative cause of action. In addition to that, the propriety of combining an ordinary application with a s 85 (1) constitutional application on the basis of the same founding papers may also be open to question. Section 85 (1) is a fundamental provision of the Constitution and an application under it, being *sui generis*, should ideally be made specifically and separately as such.

[39] To the extent that a case stands or falls on its founding papers, the respondents lamentably failed to meet the test of soundly articulating their case in their founding affidavit. Some material averments were not fully canvassed or motivated. For instance, the respondents, while challenging the validity of the 2018 Directive on the basis of it being unlawful, grossly irrational and *ultra vires* 'the provisions of the enabling Act', did not identify the Act in question, nor the exact provisions referred to. They only did so in their draft order. Further to this, the respondents' challenge to the constitutionality of s 44B (3) and (4) of the Reserve Bank Act was superficially set out in half a paragraph of text. Contrary to the assertion in para 15 of their founding affidavit that their alternative claims were being brought in terms of s 85 (1) (a) of the Constitution, no case based on this provision was motivated in relation to paras 3 and 4 of the alternative relief sought. Over and above this the respondents' papers are littered with a myriad of typographical and other errors ranging from misspellings to wrong citation of the parties.

[40] It hardly needs mentioning that presenting a case that properly pays homage to the requisite procedural and substantive law would greatly aid the court in fully comprehending, and therefore properly determining, the issues that are before it. By the same token, the opposing party would be placed in a good position to fully appreciate the case that it has to meet. This is particularly so in the case of disputes of such national importance and significance as the one at hand. The situation created by the shortcomings in the presentation of the matter before the court *a quo* was compounded by the court's misconstruction of the basis upon which the respondents sought the striking down of the 2018 Directive. Needless to say, a judicial officer cannot competently determine a case arising out of his or her misreading of the issues placed before the court. Nor can the judicial officer create and determine a case for the parties no matter how strong his or her views may be as to how the case should have been articulated.

DISPOSITION

[41] In all respects therefore, the court finds that the appeals are meritorious and ought to be allowed.

Costs will follow the cause.

In the result, it is ordered as follows: -

1. The appeals in cases SC 187/20, SC 203/20 and SC 183/20 be and are hereby allowed with costs.
2. The judgment of the court *a quo* be and is hereby set aside and substituted with the following: -

"The application be and is hereby dismissed with costs."

MAKONI JA: **I agree**

KUDYA AJA: **I agree**

Mawere & Sibanda, legal practitioners for CABS

Civil Division of the A-G's Office, legal practitioners for the Minister of Finance & Economic Development

Mlotshwa & Maguwudze, legal practitioners for RBZ

Tendai Biti Law, respondents' legal practitioners