

REPORTABLE (2)

ZIMBABWE CONSOLIDATED DIAMOND COMPANY (PVT) LTD
v
ADELCRAFT INVESTMENTS (PVT) LTD

CONSTITUTIONAL COURT OF ZIMBABWE
GWAUNZA DCJ, MAKARAU JCC AND PATEL JCC
HARARE, 12 SEPTEMBER 2023 & 17 JANUARY 2024

T. Magwaliba, for the applicant

M. Ndlovu, for the respondent

PATEL JCC: This is an application for an order for direct access to the Constitutional Court in terms of s 167 (5) (a) of the Constitution of Zimbabwe as read with r 21(2) of the Constitutional Court Rules, 2016. In the event that direct access is granted, the applicant intends to file a substantive court application under s 85 (1)(a) of the Constitution to set aside the judgment of the Supreme Court in Case No. SC 201/23, on the basis that the court, in dealing with a non-constitutional matter, violated the right of the applicant to equal protection and benefit of the law set out in s 56(1) of the Constitution and the right to a fair hearing and access to the courts protected by s 69(2) and (3) of the Constitution.

The Background

The applicant is a duly registered Zimbabwean company owned by the Government of Zimbabwe. The respondent is a company that engages in mining activities and is also registered in accordance with the laws of Zimbabwe.

On 2 February 2023, the respondent sued the applicant in the High Court under Case No. HC723/23 seeking an order compelling the applicant to pay the outstanding balance owed to it for a debt allegedly incurred between 2016 and 2018, in the sum of USD 13,824,163.22.

On March 15 2023, the High Court issued its decision. The court found that the applicant was indebted to the respondent in the sum of USD 10,718,373.51 plus interest, together with costs of suit on an attorney and client scale. Irked by the decision of the High Court, the applicant noted an appeal to the Supreme Court (“the court *a quo*”) on 4 April 2023 under Case No. SC 201/23.

Pursuant to the noting of the appeal, on 6 April 2023, the respondent filed an urgent chamber application seeking leave to execute the judgment of the High Court pending appeal. The application for leave to execute pending appeal was granted on 5 May 2013.

On 11 May 2023, the applicant filed an urgent chamber application seeking leave to appeal against the judgment granting leave to execute pending appeal. Nevertheless, armed with the order to execute the judgment of the High Court, the respondent instructed the Sheriff to attach the applicant’s property in execution.

The parties then entered into negotiations in view of the attachment, with the result that the applicant made two payments to the respondent on 15 May 2023 and 23 May 2023 in the sums of USD 679,103.93 and USD 1,500,000.00 respectively, in compliance with the order of the High Court.

The circumstances of the payment made are narrated and captured in an agreement concluded between the parties. The parties agreed that the execution of the judgment in Case No. HC 723/23 would be stayed on the terms and conditions set out therein. The agreement in addition provided that the respondent would, immediately upon the signature of the agreement, instruct the Sheriff to release all the assets placed under attachment. In turn, the applicant undertook to withdraw the application for leave to appeal that it had filed with the High Court on 11 May 2023.

Pursuant to the agreement between the parties, the respondent filed in the Supreme Court a notice of a preliminary objection on 12 June 2023, in terms of r 51 of the Supreme Court Rules, 2018. It contended that the applicant had perempted its right of appeal by partly paying the judgment debt as per the judgment of the High Court. It further stated that the applicant had entered into a deed of settlement with the respondent in a bid to extinguish the judgment debt. The respondent added that, by virtue of the payments made and the deed of settlement, there was no longer any live issue for determination by the court, as the matter had become moot.

In its heads of argument filed before the court *a quo*, the applicant submitted that the preliminary objection was without merit for the reason that the parties had entered into negotiations for the stay of execution, which was effected pursuant to a deed of settlement, after the applicant paid the respondent an amount of USD 1,500,000.00 on or before 26 May 2023, as a condition for the release of its assets from attachment by the Sheriff. In addition, the agreement provided that the parties would negotiate and conclude a final deed of settlement by not later than 30 June 2023. No such final deed of settlement was ever concluded.

The applicant further averred that it was agreed that the proceedings in the application for leave to appeal against the order for execution pending appeal in Case No. HC 3131/23 would be withdrawn. It also averred that no agreement to withdraw the main appeal was reached by the parties. Hence it could not be held that the applicant had perempted its right of appeal, nor could it be said that the appeal had been overtaken by events and rendered moot by virtue of the payments made. The applicant further submitted that the payments made were in compliance with the order for leave to execute pending appeal, as the failure to make such payments would have resulted in its properties being executed against.

On appeal, the Supreme Court upheld the preliminary objection in favour of peremption. It found that by electing to sign the agreement and proceeding to make the two payments as an attempt towards liquidating the judgment debt, the applicant had acquiesced to the judgment of the High Court. It also found in those circumstances that pursuing the appeal against that background was no longer a route available to the applicant. The court *a quo* proceeded to dismiss the appeal. Dissatisfied with the manner in which the court *a quo* handled the matter, the applicant has filed the present application for direct access.

The Application

In the application, the applicant avers that two of its fundamental rights, *viz.* the right to equal protection and benefit of the law under s 56(1) of the Constitution and the right to a fair hearing and access to the courts under s 69(2) and (3) of the Constitution were violated by the Supreme Court by the manner in which it disposed of the appeal before it. The intended substantive application is predicated on the assertion that the court *a quo* rendered a decision in a non-constitutional matter the effect of which was to infringe its right to be heard and to access the court for purposes of resolving a dispute lawfully and procedurally referred to it.

It is submitted that it is in the interests of justice that an order for direct access be granted on the ground that the court *a quo* violated the applicant's constitutional right to equal protection and benefit of the law when it dismissed its appeal with costs without hearing it. In doing so, the court *a quo* cited the reason that the applicant had compromised its appeal when it made part payments to the respondent, and yet this was done in order to safeguard the applicant's property from being removed and sold in execution.

It is the applicant's position that it is not aware of any other appellant who has been denied the opportunity to have its appeal determined on the basis of an unproved and unconfirmed allegation of peremption or compromise which is not supported by any evidence. This was done in circumstances where the question of the onus to prove the allegation was not even considered and where there was nothing pointing indubitably and necessarily to the conclusion that there had been an abandonment of the appeal.

The applicant submits that the Supreme Court further violated its constitutional right to access the courts for the resolution of the dispute it had with the respondent. By dismissing the appeal without determining it on the merits, the court *a quo* effectively denied the applicant access to it for purposes of resolving the real and live dispute as to whether or not the applicant was indebted to the respondent as was concluded by the High Court.

It is contended by the applicant that, in the absence of a finding that the available evidence left no shred of reasonable doubt that the applicant had unequivocally abandoned its constitutional right to appeal against the High Court's judgment and/or a determination of whether the respondent had discharged the onus placed on it by law to prove the alleged

peremption, it must be concluded that the Supreme Court failed to act in accordance with the requirements of the law governing the proceedings before it.

According to the applicant, the Supreme Court simply relied on an agreement signed by the parties for purposes of staying execution after the attachment of the applicant's assets and bank accounts and the withdrawal of the applicant's application for leave to appeal against the granting of leave to execute. The court then accepted, at face value, the respondent's counsel's interpretation of the agreement while rejecting the applicant's position altogether.

The applicant therefore prays for an order that:-

“1. Leave be and is hereby granted for the Applicant to institute an application in terms of section 85(1) (a) of the Constitution declaring that the judgment of the Supreme Court of Zimbabwe in case number SC201/23 is unconstitutional and violates the rights of the Applicant as set out in sections 56(1), 69(2) and (3) of the Constitution.

2. The application referred to in paragraph 1 above, shall be filed by the Applicant within 10 days of the date of this order and shall be substantially in accordance with the draft which is attached to the founding affidavit in this matter.”

The application is opposed by the respondent. In its notice of opposition and heads of argument, the respondent states that the Supreme Court dealt with a non-constitutional matter and that the jurisdiction of this Court is therefore not engaged. It further contends that there was no violation of the right to be heard given that the applicant was heard on the preliminary objection. The court *a quo* found that the applicant had acquiesced to the judgment and upheld the preliminary point of peremption. Thus, the failure of the court to rule in favour of the applicant does not render that decision constitutionally intrusive of any of the applicant's rights.

The respondent further avers that the right guaranteed under s 56 (1) of the Constitution is that of equality of all persons before the law and the right to receive the same protection and benefit afforded by the law to persons in a similar position. In this light, it is averred that the applicant has failed to meet the threshold for the infringement of the right and hence cannot lament a violation of that right. The respondent further states that even a wrong judgment of the Supreme Court is final. In addition, the order granting leave to execute never provided that the applicant should enter into a deed of settlement to pay. Lastly, it is submitted that the agreement between the parties and the subsequent payments made by the applicant effectively operated to compromise its rights.

The issues for determination *in casu* are as follows: whether this Court has the requisite jurisdiction to entertain this matter; whether this application is a disguised appeal; whether it is in the interests of justice to grant the application for direct access; and whether or not the intended substantive application carries prospects of success. I shall address all of these issues *ad seriatim*.

Jurisdiction of the Court

Mr *Ndlovu*, for the respondent, submits that the Court exercises a specialised jurisdiction under s 167(5) of the Constitution and can only deal with the interpretation of the supreme law. *In casu*, so it is argued, the Court lacks jurisdiction because the court *a quo* never dealt with any constitutional issue. Furthermore, by reason of s 169 of the Constitution, the Supreme Court is the final court of appeal in non-constitutional matters. Therefore, its finding on peremption is final and binding and this Court has no jurisdiction to question that finding.

Broadly speaking, Mr *Ndlovu* is certainly correct in his submissions concerning the jurisdiction of this Court. However, he misses the equally correct point that the doors of the Court are not invariably closed to the admission of every non-constitutional matter. This Court undoubtedly has the requisite jurisdiction in matters concerning the alleged violation of fundamental rights. In the instant case, it has been approached to exercise that jurisdiction in terms of s 167(5) of the Constitution as read with r 21(2) of the Rules. Moreover, the relief sought in the intended substantive application is capable of being granted in terms s 85(1)(a) of the Constitution. This would be the case where a subordinate court is alleged to have violated a fundamental right in the course of determining a non-constitutional matter.

As was appositely highlighted in *Lytton Investments (Pvt) Ltd v Standard Chartered Bank Zimbabwe Limited & Anor* CCZ 11-18, at pp 11-13, the Supreme Court is under the obligation to protect fundamental rights and freedoms and it does so by enforcing obligations borne by others through appropriate adjudicatory processes. More significantly, “it is itself under the constitutional obligation not to violate fundamental rights or freedoms when performing judicial functions involving non-constitutional issues”. In such cases, the Supreme Court “is subject to due compliance with the obligation to protect fundamental rights and freedoms”. Thus, “the allegation under s 85(1) of the Constitution that a decision of the Supreme Court has infringed the fundamental right or freedom of the complainant in a case involving a non-constitutional issue raises a constitutional matter”.

In casu, the applicant avers that the right to equal protection and benefit of the law and its rights to a fair hearing and access to the courts were violated by the Supreme Court by the manner in which it disposed of the appeal before it. The intended substantive application is predicated on the assertion that the court rendered a decision in a non-constitutional matter the

effect of which was to infringe the applicant's fundamental rights. In the circumstances of this case, the applicant's challenge is premised on the alleged infringement of rights by the Supreme Court itself. In my view, the specific nature of this allegation clearly operates to trigger the jurisdiction of this Court. Consequently, the respondent's preliminary objection founded on lack of jurisdiction is without merit and it is accordingly dismissed.

Disguised Appeal

The respondent further contends that the applicant is simply challenging the correctness of the judgment rendered by the Supreme Court. In reality, therefore, the matter is an appeal brought to this Court under the guise of an application.

In its founding affidavit, the applicant complains of the correctness of the decision *a quo* in dismissing the appeal on the basis of a preliminary point. Ordinarily, an attack premised on the fact that a matter was disposed on a preliminary point cannot *per se* trigger an application for constitutional review. The appropriate remedy in any such case is to take the matter on appeal. This is because a preliminary issue raised in any proceedings constitutes a discrete element of a dispute that has the potential to decisively conclude the dispute or a substantial part of the dispute. The dismissal of a matter on the basis of a meritable preliminary point does not normally give rise to any constitutionally reviewable irregularity.

Nevertheless, as I have already stated, the applicant's complaint *in casu* is not simply that the court *a quo* disposed of the appeal before it on the preliminary point of peremption. Rather, its grievance lies with the manner in which the court proceeded to adjudicate that ground, quite apart from the correctness of its findings in that regard. It is this particular challenge that takes the present application beyond the bounds of an ordinary appeal and

renders the decision *a quo* constitutionally reviewable. For this reason, I would dismiss the respondent's contention that the instant application is nothing more than a disguised appeal.

The Interests of Justice

The applicant's case, in essence, is that its fundamental rights under s 56(1) and s 69(2) and (3) of the Constitution were violated by the judgment of the Supreme Court. It is averred that the court so gravely misapplied the law as to render a gross injustice. Furthermore, its decision sets a wrong precedent binding on inferior courts. In the event, the applicant has no recourse other than to approach this Court.

It is now settled and trite that direct access to the Court is an extraordinary procedure granted only in deserving cases that meet the requirements prescribed by the relevant Rules of the Court. Rule 21(2) stipulates what must be contained in an application of this nature, in particular, the grounds on which it is contended that it is in the interests of justice that an order for direct access be granted. Rule 21(8) sets out the criteria for assessing the interests of justice. These include, in addition to any other relevant consideration, the prospects of success if direct access is granted, the availability of any other remedy and the existence or otherwise of any disputes of fact in the matter.

It must be emphasised that the decision of the Supreme Court in a non-constitutional matter is final and that its correctness cannot be challenged simply on the basis that it might be wrong. See *Williams & Anor v Msipa N.O. & Ors* 2010 (2) ZLR 552 (S), at 567B-C; the *Lytton Investments* case, *supra*, at p 23; *Machine v Sheriff for Zimbabwe & Ors* CCZ 8-23, at p 9. The tests to be applied in scrutinising the final determination of the Supreme Court in a non-

constitutional matter were lucidly articulated in the *Lytton Investments* case, *supra*, at pp 19-20, as follows:

“The facts must show that there is a real likelihood of the Court finding that the Supreme Court infringed the applicant’s right to judicial protection. The Supreme Court must have failed to act in accordance with the requirements of the law governing the proceedings or prescribing the rights and obligations subject to determination. The failure to act lawfully would have to be shown to have disabled the court from making a decision on the non-constitutional issue.

The theory of constitutional review of a decision of the Supreme Court in a case involving a non-constitutional matter is based on the principle of loss of rights in such proceedings because of the court’s failure to act in terms of the law, thereby producing an irrational decision. There must, therefore, be proof of the failure to comply with the law. The failure must be shown to have produced an arbitrary decision.”

I shall revert to the aforestated tests to be applied, when assessing the impugned decision of the Supreme Court *in casu*, at a later stage in this judgment.

The Prospects of Success

The test for reasonable prospects of success postulates an objective and dispassionate decision, based on the facts and the applicable law, as to whether or not the applicant has an arguable case in the intended application should direct access be granted. The prospects of success must not be remote but must have a realistic chance of succeeding. In this respect, a mere possibility of success will not suffice. There must be a sound rational basis for the conclusion that there are prospects of success in the main matter. In short, this Court must be satisfied that the applicant has an arguable *prima facie* case and not a mere possibility of success. See *Essop v S* 2016 [ZASCA] 114; *S v Dinha* CCZ 11-20, at p 6.

Subsequent decisions of this Court in cases involving the grant of leave to appeal propound the application of a more rigorous test in evaluating the prospects of success on appeal. In any such case, the applicant must demonstrate reasonable prospects that this Court

is likely to reverse the findings of the lower court or materially alter the judgment *a quo* if leave to appeal is granted. See *Cold Chain (Pvt) Ltd t/a Sea Harvest v Makoni* 2017 (1) ZLR 14 (CC), at 15G-16E; *Chombo v National Prosecuting Authority & Anor* CCZ 8-22, at pp 7-8.

Additionally, the intended application itself must raise a constitutional matter in order to render the decision of the Supreme Court reviewable. The applicant must allege or aver that the court *a quo*, in its determination of the issues that were before it, violated one or more of the applicant's fundamental rights. *In casu*, the applicant alleges the violation of his rights under ss 56(1), 69(2) and 69(3) of the Constitution.

The Impugned Supreme Court Judgment

In arriving at its determination, the court *a quo* had regard to the following factual scenario:

- The applicant noted its appeal to the Supreme Court on 4 April 2023.
- In the meantime, on 5 May 2023, the respondent obtained leave to execute pending appeal and proceeded to instruct the Sheriff to attach the applicant's property in execution.
- Before the attachment, on 11 May 2023, the applicant filed an urgent chamber application in Case No. HC 3131/23 for leave to appeal against the judgment granting leave to execute.
- Following a writ of execution issued on 9 May 2023, the Sheriff attached the applicant's property on 12 May 2023.
- Thereafter, the parties signed an agreement in terms of which the applicant undertook to withdraw its application for leave to appeal.
- On 15 and 25 May 2023, the applicant paid the respondent the sums of US\$ 679,103.98 and US\$ 1,500,000.00 respectively.
- In compliance with clause 3 of the agreement between the parties, the applicant withdrew its application for leave to appeal in Case No. HC 3131/23.

Against the foregoing background, the respondent gave notice of a preliminary objection to the effect that, under the doctrine of peremption, the applicant had by its unequivocal conduct, acquiesced to the judgment of the High Court and had thereby lost its

right to appeal against that judgment. The applicant, on the other hand, submitted that at no time did it compromise its right of appeal and that it had signed the agreement and made the two payments in order to comply with the court order for execution pending appeal and to save its property from execution. In its extremely concise ruling, the Supreme Court held as follows:

“In our view this is the essence of pre-emption [*sic*]. The appellant had 2 options available to it. That is to either comply with the court order or to pursue its urgent chamber application for leave to appeal. It elected the former, signed the agreement and made 2 payments towards liquidation of the judgment debt. Accordingly, pursuing the present appeal against that background, is no longer available to the appellant. The preliminary objection has merit and ought to be upheld.”

Turning to the agreement itself, the Preamble thereto sets out the background to the agreement leading to the stay of execution of the judgment in Case No. HC 723/23. Clause 1 records the applicant’s undertaking to pay the respondent the sum of US\$ 1,5 million before the close of business on 26 May 2023. It also records the agreement of the parties to negotiate and conclude a final deed of settlement no later than 30 June 2023. By virtue of clause 2, the respondent undertook, immediately upon signature of the agreement, to instruct the Sheriff to release all of the applicant’s assets attached pursuant to the writ of attachment issued under Case No. HC 723/23. Finally, in terms of clause 3, the applicant undertook to forthwith file the agreement together with a notice of withdrawal, withdrawing its application for leave to appeal filed under Case No. HC 3131/23. Very critically, the agreement is totally silent as to the fate of the main appeal lodged by the applicant in Case No. SC 201/23.

Evidence of Peremption

Mr *Magwaliba*, for the applicant, submits that the agreement concluded by the parties in May 2023 does not compromise the applicant’s right of appeal. The Supreme Court, so he contends, made findings of fact on the basis of no evidence at all. He also notes that the

agreement, having been introduced through the respondent's notice of preliminary objection, was not properly before the court *a quo*.

Mr *Ndlovu*, for the respondent, argues that there was clear evidence of peremption. This comprised the agreement between the parties coupled with the two subsequent payments made by the applicant. Equally importantly, the applicant's abandonment and withdrawal of its application for leave to appeal against the judgment granting leave to execute demonstrated its acquiescence to the judgment granted against it in Case No. HC 723/23 for the payment of US\$ 10,718,373.51 plus interest.

The case authorities dealing with the doctrine of peremption or acquiescence are relatively clear and consistent. In *Dabner v South African Railways and Harbours* 1920 AD 583, at 594, it was observed as follows:

“If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal. And the onus of establishing that position is on the party alleging it. In doubtful cases, acquiescence, like waiver, must be held non-proven.”

The same principles were relied upon in *Gentiruco A.G. v Firestone SA (Pty) Ltd* 1972 (1) SA 589, at 600, and also in *Cohen v Cohen* 1980 ZLR 286. In the latter case, assent or peremption was likened to estoppel by words or conduct. It was further explained that peremption is not to be lightly inferred. The court must be clearly satisfied that the appellant in question has abandoned its right of appeal.

On behalf of the applicant *in casu*, it is submitted that its conduct did not show that it indubitably and necessarily did not intend to challenge the judgment made against it. The

applicant only made the two payments after the order for leave to execute pending appeal was granted and after its property had been attached. It did not withdraw the appeal, the integrity of which was maintained in the agreement between the parties. It is further submitted that there was no unequivocal conduct inconsistent with any intention to appeal on the part of the applicant. Its compliance with the appealed judgment was only pursuant to a court order pending appeal and did not amount to acquiescence or any abandonment of its right of appeal. Lastly, it is submitted that the respondent failed to discharge the onus of establishing the acquiescence which it alleged. There was clearly doubt as to proof of acquiescence by the applicant.

Having regard to the evidence before the Supreme Court, it seems to be virtually impossible to discern any clear or unequivocal intention on the part of the applicant to preempt or compromise its right of appeal. The agreement concluded by the parties in May 2023, in the second paragraph of the Preamble, makes explicit reference to the appeal filed by the applicant on 4 April 2023 in Case No. SC 201/23 against the judgment in Case No. HC 723/23. However, the agreement makes no reference whatsoever to any compromise or abandonment of the applicant's pending appeal – nor can any such compromise or abandonment be inferred therefrom. It does not finally terminate the appeal proceedings against the merits of the High Court judgment and it clearly keeps the main appeal alive. What was to be withdrawn in terms of clause 3 of the agreement – and was in fact subsequently withdrawn – was the application for leave to appeal filed under Case No. HC 3131/23 against the judgment of the High Court on 5 May 2023 granting the respondent leave to execute the judgment granted on 15 March 2023 in Case No. HC 723/23.

As for the two payments made by the applicant in May 2023, they were undoubtedly made in terms of the last paragraph of the Preamble as read with clauses 1 and 2 of the agreement. They were obviously designed to regulate compliance with the judgment granting leave to execute, pending the main appeal against the judgment in Case No. HC 723/23. More critically, they were intended to obviate the execution of that judgment and to enable the release of the applicant's assets attached pursuant to that judgment.

To conclude this aspect of the matter, I take the view that there was no evidence before the Supreme Court showing, indubitably and necessarily, an unequivocal intention on the part of the applicant to compromise or abandon its appeal in Case No. SC 201/23. I shall address the legal ramifications of that deficiency later in this judgment.

Alleged Violation of Section 56(1) of the Constitution

Mr *Magwaliba* submits that the applicant had a right to note his appeal and the right to have that appeal determined. He contends that the judgment of the Supreme Court is unprecedented and that there is no similar judgment on record. The court ought to have dealt with the merits of the matter instead of dismissing it simply on the strength of the respondent's preliminary objection. In the event, the applicant was unfairly treated and this treatment by the court *a quo* resulted in the violation of its right under s 56(1) of the Constitution.

Mr *Ndlovu* counters that there was no violation of s 56(1). The fact that there is no similar judgment on record does not in itself create any discrimination. The applicant has failed to establish any differentiation or discrimination within the meaning of s 56(1). I am inclined to agree.

Section 56(1) of the Constitution, under the rubric of **equality and non-discrimination**, provides that:

“All persons are equal before the law and have the right to equal protection and benefit of the law.”

In the leading case on the interpretation of s 56(1), *Nkomo v Minister of Local Government, Rural and Urban Development & Ors* CCZ 6-16, it was emphasised that:

“It envisages a law which provides equal protection and benefit for the persons protected by it. It includes the right not to be subjected to treatment to which others in a similar position are not subjected.

..... The applicant has made no allegation of unequal treatment or differentiation. He has not shown that he was denied protection of the law while others in his position have been afforded such protection. He has presented the Court with no evidence that he has been denied equal protection and benefit of the law.”

In similar vein, in *Gonese v President of the Senate & Ors* CCZ 2-23, it was reiterated that:

“..... a person alleging a violation of s 56(1) must demonstrate that he was denied the protection of the law, while others similarly positioned were afforded such protection. Put differently, he must show that the law in question operated to discriminate against him in favour of others in the same or similar position. See the *Mpungu* case, *op. cit.* In other words, the general right to protection of the law *simpliciter* no longer exists or is not to be found in s 56(1).”

The question that arises *in casu* is whether the intended substantive application under s 85(1) of the Constitution meets the requisite threshold for pleading a violation of the right to equal protection and benefit of the law under s 56(1). In my considered opinion, it does not, for the following reasons.

In order to found reliance on s 56(1), the applicant must demonstrate that, by virtue of the conduct of the Supreme Court and the resultant judgment that is impugned, it has been the recipient of unequal treatment, *viz.* that certain persons similarly positioned have been afforded

some protection or benefit of the law, which protection or benefit it has not been afforded. In other words, it must show that those persons in the same or similar position as itself have been treated in a manner different from the treatment meted out to it and that it is entitled to the same or equal treatment as those persons.

In the present matter, the Supreme Court was confronted with a preliminary objection grounded in the alleged preemption of the applicant's right of appeal by virtue of its alleged acquiescence in the judgment appealed against. The court proceeded to deal with the objection and ruled against the applicant. Procedurally regarded, a preliminary issue or objection constitutes a discrete element of a dispute that has the potential to decisively conclude the dispute or a substantial part thereof. As a rule, a court seized with a dispute must examine and dispose of all the issues that are properly raised before it, including any relevant preliminary issue. The failure to do so constitutes a fatal procedural irregularity that operates to vitiate the entire proceedings. See *Gwaradzimba v C.J. Petron and Company (Pvt) Ltd* SC 12-16, at paras 20-26.

What the court *a quo* did was to determine the dispute before it by adopting a course properly acceptable at law, that of disposing of a matter on the strength of a preliminary point. In so doing, it did not differentiate or discriminate in any manner as against the applicant by subjecting it to any treatment less favourable than that accorded to other litigants in a similar or the same position. In short, the court did not in any way discriminate against the applicant or subject it to any unequal treatment.

Whether or not the court *a quo* was correct in assessing the evidence before it in arriving at its determination is an entirely separate matter. That is not the critical question in issue at

this stage for the purpose of analysing and adjudicating an alleged infringement of the right to equal protection and benefit of the law. In that respect, I do not think that the applicant has made out any persuasive or arguable case to sustain the alleged violation of s 56(1) of the Constitution. Its prospects of success in that regard are non-existent or negligible at best.

Alleged Violation of Section 69(2) and (3) of the Constitution

In the intended substantive application, the applicant avers that the Supreme Court violated its right to a fair hearing guaranteed by s 69 of the Constitution. Subsections (2) and (3) of s 69 provide as follows:

“(2) In the determination of civil rights and obligations, every person has a right to a fair, speedy and public hearing within a reasonable time before an independent and impartial court, tribunal or other forum established by law.

(3) Every person has the right of access to the courts, or to some other tribunal or forum established by law for the resolution of any dispute.”

Taking a broad perspective, the court *a quo* cannot be faulted for upholding the respondent’s preliminary objection and thereafter dismissing the appeal before it. In so doing, it correctly followed the appellate procedures prescribed by the Supreme Court Rules, 2018. On that broad basis, it cannot be said that the applicant’s right to a fair hearing and right of access to the courts were violated in the circumstances before the Supreme Court.

Mr *Magwaliba* submits that s 69 of the Constitution includes the right to have a matter determined according to the established principles of law. In this instance, the court *a quo*’s error was so gross as to transcend mere faultiness. Its decision is to be criticised on the basis that it had the effect of refusing to exercise jurisdiction that was properly exercisable. The court misconceived the principles applicable to its jurisdiction and the relevant procedure to be followed as well as the substantive law to be applied. In so doing, it arrived at a decision that

was patently wrong in its finding of peremption and compromise. In the event, so it is argued, the applicant's right to be heard and right of access to the courts were clearly violated.

Mr *Ndlovu* adopts a fundamentally different position. He argues that neither the right to a fair hearing nor the right of access to the courts was violated. Both parties were heard on the preliminary point of peremption and the resultant judgment of the court *a quo* related squarely to the applicant's acquiescence to the judgment of the High Court and the peremption of its right of appeal against that judgment. The evidence that was adduced and relied upon by the court was the proof of payments made by the applicant and the terms of the agreement between the parties. It is accordingly submitted that proper factual findings were made by the court and that, therefore, there was no violation of the applicant's rights under s 69(2) and (3) of the Constitution.

I have earlier taken the view, having regard to the agreement between the parties and their conduct pursuant thereto, that there was no evidence before the court *a quo* showing any unequivocal intention on the part of the applicant to compromise or abandon its appeal in the proceedings pending before that court. That being the case, the judgment of the court was undoubtedly flawed in its assessment of the evidence before it and the conclusion to be drawn therefrom. It was therefore not a judgment in accordance with the law and it resulted in the court declining to deal with the substantive merits of the appeal before it. Arguably, this amounted to an abdication of its responsibility to hear the matter and render a judicial determination in the dispute between the parties. It also evinced a failure to carry out the court's function to hear and determine the appeal within the realm of recognised legal principles.

The question that arises *in casu* is whether or not the evidential *lacuna* in the judgment of the court and the consequential misapplication of the law of peremption, taken together, suffice to justify the grant of direct access to this Court. Ordinarily, a wrong judicial decision would not, in itself, operate to violate the right to a fair hearing or the right of access to the courts. This is made abundantly clear in the jurisprudence of this Court, both before and after the advent of the 2013 Constitution, as appears from the case authorities that I have cited earlier. It is necessary for the complainant to demonstrate that the Supreme Court, in adjudicating the non-constitutional matter before it, failed to act in accordance with the requirements of the law governing the proceedings or prescribing the rights and obligations subject to determination. Additionally, the failure to act lawfully must be shown to have disabled the court from making a decision on the non-constitutional issue before it, thereby entailing an irrational or arbitrary decision.

In the present matter, it seems to me that the impugned judgment falls squarely within the parameters of constitutional review justifying interference with that judgment. I am accordingly inclined to answer the question posed above in the affirmative. The stark evidential deficiencies in the judgment *a quo*, coupled with the grave misapplication of the principles of peremption, followed by the failure to adjudicate the substantive dispute between the parties, bear the classic hallmarks of an irrational or arbitrary decision. In my view, the cumulative effect of the impugned judgment is to deprive the applicant of its fundamental right to a fair hearing and right of access to the courts guaranteed by s 69(2) and s 69(3) of the Constitution.

Disposition

In the final analysis, I am satisfied that the applicant has presented an arguable *prima facie* case, demonstrating a realistic chance of succeeding in the main matter. Even if one were

to apply the more stringent test endorsed in applications for leave to appeal, the applicant *in casu* has demonstrated reasonable prospects that this Court is likely to reverse the findings of the Supreme Court and materially alter its judgment. In my view, the intended substantive application carries considerable prospects of success and it would therefore be in the interests of justice to grant the instant application for direct access to this Court.

In the result, it is ordered as follows:

1. Leave be and is hereby granted for the applicant to institute an application in terms of s 85(1)(a) of the Constitution for an order declaring that the judgment of the Supreme Court in Case No. SC 201/23 violates the rights of the applicant as set out in s 69(2) and s 69(3) of the Constitution.
2. The aforesaid application shall be filed within ten (10) days of the date of this order and shall be substantially in accordance with the draft application attached to the founding affidavit in this matter.
3. There shall be no order as to costs.

GWAUNZA DCJ: I agree.

MAKARAU JCC: I agree.

Sawyer and Mkushi, applicant's legal practitioners

Tagurira Sande Attorneys, respondent's legal practitioners