

REPORTABLE (13)

UNIFREIGHT AFRICA LIMITED
(Formerly Pioneer Corporation Africa Limited)
v
EMILY MASHINYA

CONSTITUTIONAL COURT OF ZIMBABWE
MAKARAU JCC, HLATSHWAYO JCC & PATEL JCC
HARARE: 11 JUNE & 17 SEPTEMBER 2024

L. Uriri with *B. Mudhau*, for the applicant

V. Mugumba with *V. Ndagurwa*, for the respondent

PATEL JCC:

This is an application for direct access brought in terms of s 167(5) of the Constitution of Zimbabwe, as read with r 21 of the Constitutional Court Rules, 2016 (the Rules). The applicant seeks an order allowing it to approach this Court directly so as to challenge the decision by the Supreme Court, under SC 11-24, wherein it ordered the applicant to pay the respondent damages arising from the unlawful termination of her employment, such damages to be paid at the prevailing interbank rate.

The Factual Background

The applicant is a company duly registered in accordance with the laws of Zimbabwe. The respondent is a former employee of the applicant. She was employed as the group internal audit manager. On 6 December 2013, after a disciplinary hearing, the respondent was found guilty of misconduct and dismissed from employment. The ensuing dispute between the parties was submitted for arbitration and the arbitrator ruled in favour of the applicant. Irked by the decision of the arbitrator, the respondent appealed to the Labour Court, which also ruled in favour of the applicant. The respondent then appealed to the Supreme Court on 6 July 2018, under SC 1100/17. The court allowed her appeal and remitted the matter to the Labour Court. Pursuant to the order in SC 1100/17, the Labour Court, in LC/H/ORD/112/22, handed down a default judgment reinstating the respondent to the employment of the applicant.

Following the order by the Labour Court, the respondent wrote a letter to the applicant seeking her reinstatement, which request the applicant refused to grant. Amid negotiations between the parties, the Presidential Powers (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act and Issue of Real Time Gross Settlement Electronic Dollars (RTGS Dollars)) Regulations, S.I. 33 of 2019, were promulgated on 22 February 2019. By dint of the Regulations, all debts and liabilities incurred before the effective date, *i.e.* 22 February 2019, were dischargeable at the rate of one United States dollar to one RTGS (Zimbabwean) dollar. As a result, the issue of the applicable currency to settle the debt became contentious and a further dispute arose.

Subsequently, the respondent filed an application in the Labour Court for quantification of damages, under LC/H/601/22. The applicant's position in its notice of opposition was that the damages payable to the respondent were to be calculated from the date of the wrongful

dismissal, at the rate of one United States dollar to one Zimbabwean dollar. The Labour Court agreed with the applicant and ordered the payment of US\$ 153 300, at the rate of one United States dollar to one Zimbabwean dollar, in line with the position set out in s 4(1)(d) of S.I. 33 of 2019.

Aggrieved by the decision of the Labour Court, the respondent appealed to the Supreme Court in SC 216/23. The judgment and order of the court, under SC 11-24, are the subject of the present application. The applicant's argument remained that the respondent was entitled to damages *in lieu* of reinstatement at the rate of one United States dollar to one Zimbabwean dollar, while the respondent took the view that she was entitled to damages in United States dollars, payable in Zimbabwean dollars at the United States dollar interbank rate applicable on the date of payment.

The Supreme Court found for the respondent. It held that the applicant was liable to pay damages for a period of three years and that the damages were to be expressed in United States Dollars and payable in Zimbabwean Dollars, using the interbank rate applicable on the date of payment. In reaching that decision, the court reasoned that the origin of the liability in question was not the correct criterion to be applied in the application of S.I. 33 of 2019. Instead, what brings the asset or liability within the provisions of s 4 (1) (d) of the Regulations is the fact that its value was expressed in United States dollars immediately before the effective date, namely, 22 February 2019.

The court *a quo* further held that the value of the damages claimed by the respondent was expressed in the decision of the Labour Court handed down on 21 October 2022, after the effective date. In that vein, the court held that the applicant's argument that the date of dismissal

determined the conversion rate was unreasonable. The court also concluded that the correct exchange rate to be applied was the interbank rate prevailing at the time of payment.

The Relief Sought

Aggrieved by the decision of the court *a quo*, the applicant has approached this Court for an order allowing it to approach the Court directly, on the basis that the Supreme Court violated its right to the benefit and protection of the law. In the event that direct access is granted, the applicant seeks leave to file an application in terms of section 85(1)(a) of the Constitution, as read with rule 21 of the Rules.

The specific relief sought in the intended substantive application is four-fold: (i) a declarator that the order of the Supreme Court breaches the applicant's right to equal protection and benefit of the law as prescribed in s 56(1) of the Constitution; (ii) an order setting aside the Supreme Court order to pay damages in the sum of US\$ 153,300 at the interbank rate applicable on the date of payment; (iii) a consequent order requiring the applicant to pay the respondent the sum of ZW\$ 153,500 as damages *in lieu* of reinstatement; (iv) an order for the respondent to pay costs at the legal practitioner and client scale.

Submissions by Counsel

Mr *Mudhau* and Mr *Uriri*, counsel for the applicant, note that the issue before the court *a quo* involved the quantification of damages *in lieu* of reinstatement. They contend that damages *in lieu* of reinstatement ought to be calculated as at the date of the wrongful dismissal and not at the date when quantification of damages was concluded. Consequently, the Supreme Court failed to take into account an elementary principle of law, as applied in other labour law

matters. It thereby violated the applicant's right to equal protection of the law as provided by s 56(1) of the Constitution.

Counsel further argue that the respondent was wrongfully dismissed from employment before the effective date of S.I. 33 of 2019. Hence, damages ought to be paid at the rate of one to one in Zimbabwean dollars in accordance with s 4(1)(d) of S.I. 33 of 2019. The applicant's right to equal protection of the law was violated when it was ordered to pay damages *in lieu* of reinstatement at the interbank rate applicable on the date of payment. Thus, the decision of the Supreme Court was arbitrary in that it showed grave inconsistency in applying the law.

Per contra, Mr *Mugumba* for the respondent, submits that the obligation to pay the applicant's debt arose when the damages were quantified on 21 October 2022, after the effective date of S.I. 33 of 2019. Hence, damages were payable at the interbank rate applicable on the date of payment. In this regard, the decision of the Supreme Court did not violate the applicant's right to equal protection of the law. There is no evidence that the applicant was subjected to treatment which was different from other persons who were in a similar position. Therefore, the Supreme Court was consistent in its interpretation of S.I. 33 of 2019.

Mr *Mugumba* also relies on the decisions in *Ingalulu (Pvt) Ltd & Anor v National Railways of Zimbabwe* SC 42-22 and *Magauzi v Jekera & Anor* SC 54-22. In these cases, the Supreme Court maintained the view that debts expressed after the effective date of S.I. 33 of 2019 were payable at the prevailing interbank rate. In any event, he further contends that the relief sought by the applicant is untenable as no constitutional issues were decided by the Supreme Court. This rendered its decision in this case final and binding in all respects.

Requirements for Direct Access

In an application of this nature, a litigant has to satisfy the requirements set out in r 21(3) of the Rules which reads as follows:

“(3) An application in terms of subrule (2) shall be filed with the Registrar and served on all parties with a direct or substantial interest in the relief claimed and shall set out—

- a) the grounds on which it is contended that it is in the interests of justice that an order for direct access be granted; and
- b) the nature of the relief sought and the grounds upon which such relief is based; and
- c) whether the matter can be dealt with by the Court without the hearing of oral evidence or, if it cannot, how such evidence should be adduced and any conflict of facts resolved.”

The “interests of justice”, as contemplated in rule 21(3), are delineated in rule 21(8) as follows:

“(8) In determining whether or not it is in the interests of justice for a matter to be brought directly to the Court, the Court or Judge may, in addition to any other relevant consideration, take the following into account—

- a) the prospects of success if direct access is granted;
- b) whether the applicant has any other remedy available to him or her;
- c) whether there are disputes of fact in the matter.”

The importance of establishing the interests of justice requirement was underscored in *Denhere v Denhere & Anor* CCZ 9-19, at p 12, where this Court held that:

“The underlying requirement is that the application ought to clearly illustrate that it is in the interests of justice that an order for direct access be granted. As was noted by the Court in the *Lytton Investments (Private) Limited* case *supra*, the filtering mechanism for leave for direct access effectively prevents abuse of the remedy.”

I would add at this juncture that in matters where the allegation founding the cause of action in the intended application is that the Supreme Court, in deciding a non-constitutional matter, breached one or more fundamental rights of the applicant, the threshold to be met in establishing the interests of justice includes an allegation and demonstration of an erroneous decision, one that is arbitrary and amounts to an abdication of judicial authority. In the absence

of such demonstration, the decision remains protected by the provisions of s 169 of the Constitution as one that is final and unappealable.

In light of the foregoing, the principal issue arising for determination *in casu* is whether or not, having regard to the applicant's prospects of success in the intended application, it is in the interests of justice for this matter to be brought directly to this Court. In evaluating the prospects of success, it is necessary in the first instance to ventilate and assess the submissions of the parties pertaining to the calculation and quantification of damages *in lieu* of reinstatement in the context of S.I. 33 of 2019.

Calculation and Quantification of Damages in Labour Matters

On behalf of the applicant, it is submitted that damages *in lieu* of reinstatement following unlawful dismissal must be calculated from the date of the wrongful dismissal, being the date when the contract of employment was breached by its unlawful termination. Damages for breach of contract are reckoned as from the date of breach, regardless of their quantification. In the instant case, the contract was for payment in United States dollars and the respondent's salary was due and payable in that currency as at the date of the unlawful termination of her employment. Thus, the applicant's liability for damages as expressed in United States dollars arose and became due and payable on that date, *i.e.* before the effective date of S.I. 33 of 2019. Consequently, the damages due to the respondent were to be calculated in United States dollars as at the date of her unlawful dismissal. However, in terms of s 4(1)(d) of S.I. 33 of 2019, they became payable in Zimbabwean dollars at the parity rate of one-to-one, irrespective of the date of payment.

In contrast, the argument advanced on behalf of the respondent runs as follows. The main issue before the Supreme Court was the correct conversion rate to be applied to the respondent's claim for damages. The relevant judgment of the Labour Court was delivered on 21 October 2022, while the decision of the Supreme Court was rendered on 7 February 2024. As at the effective date of S.I. 33 of 2019, the applicant's liability to pay damages was not as yet assessed or expressed in United States dollars. The judgment debt which created and quantified the applicant's obligation to pay damages in that currency arose well after the effective date. Thus, that liability was to be discharged in Zimbabwean dollars at the interbank rate applicable at the time of payment.

On the facts of this case, I am inclined to agree with the position advanced by the respondent and adopted by the court *a quo*. While the damages payable to the respondent by the applicant were capable of being calculated in United States dollars before the effective date of S.I. 33 of 2019, they had not been so agreed or quantified and therefore expressed in that currency at any time before that date. They only became a liability in the form of a judgment debt, within the contemplation of s 4(1)(d) of S.I. 33 of 2019, after the effective date of 22 February 2019. Consequently, in accordance with s 4(1)(e) of S.I. 33 of 2019, they must be discharged in Zimbabwean dollars, not at the parity rate of one-to-one, but at the interbank rate prevailing at the time of payment.

Additionally, I note that the same position was accepted and adopted in two other decisions of the Supreme Court, namely, the *Ingalulu* and *Magauzi* cases, *supra*, which are relied upon by counsel for the respondent. In the former case, it was held that the origin of the liability in question is irrelevant. What matters is the date of expression of that liability for the purpose of determining the applicable rate of exchange, namely, the interbank rate. Similarly,

in the latter case, a consent order was concluded on the effective date, *i.e.* 22 February 2019. It was held that the debt in question was to be discharged at the interbank rate. What these cases demonstrate is that the approach of the court *a quo* in endorsing the interbank rate applicable at the time of payment is consistent with other decisions of the Supreme Court.

Right to Equal Protection and Benefit of the Law

The applicant contends that it is in the interests of justice for this Court to grant it direct access on the ground that the decision of the Supreme Court violated its right to equal protection and benefit of the law when it was ordered to pay the amount due to the respondent at the prevailing interbank rate. It is argued that other persons in the same position and circumstances would have had the benefit of the provisions of s 4(1)(d) of S.I. 33 of 2019, which enables the payment of debts or liabilities expressed in United States dollars at the parity rate at any time after the effective date.

The respondent counters that there was no violation of the right to equal protection and benefit of the law. The applicant did not receive any differential treatment and has failed to show that other persons in the same position were treated differently as regards the satisfaction of their outstanding debts or liabilities. The applicant has not demonstrated how the court *a quo* infringed its right to equal protection and benefit of the law.

The Supreme Court has had occasion to interpret the provisions of S.I. 33 of 2019 in several cases. In these cases, it has been established that for an asset, liability or obligation to fall within the ambit of s 4(1)(d) of S.I. 33 of 2019, its value must have been expressed in United States dollars before the effective date of 22 February 2019. In this respect, these

decisions have followed and applied the reasoning adopted in the landmark case of *Zambezi Gas Zimbabwe (Pvt) Ltd v NR Barber and Anor* SC 3-20, wherein the court held the following:

“Section 4(1)(d) of S.I. 33/19 would not apply to assets and liabilities, the values of which were expressed in any foreign currency other than the United States dollar immediately before the effective date. If, for example, the value of the assets and liabilities was, immediately before the effective date, still to be assessed by application of an agreed formula, s 4(1)(d) of S.I. 33/19 would not apply to such a transaction even if the payment would thereafter be in United States dollars. **It is the assessment and expression of the value of assets and liabilities in United States dollars that matters.**” (My emphasis)

The same reasoning was subsequently followed in the two cases that I have referred to earlier, *viz.* the *Ingalulu* and *Magauzi* cases, *supra*. It was also applied in the later case of *Rydale Ridge Park (Pvt) Ltd v Muridzo N.O.* SC 17-23, wherein the Supreme Court held that the phrase “immediately before the effective date” means that the assets and liabilities must have been valued and expressed in United States dollars at some stage before the effective date.

As was correctly found by the court *a quo*, the quantified value of the damages claimed by the respondent was eventually expressed on 21 October 2022. The court found no merit in the applicant’s argument that the origin of the liability, being the employment contract and the date of unlawful dismissal, should be relied upon to determine the applicable conversion rate. This is because a mere claim for damages cannot be considered an asset or liability in favour of or against the parties involved. It can only be deemed as such after a competent court has made a determination and assessed the actual measure of those damages. *In casu*, the damages due to the respondent were only clearly valued and expressed through the order of the Labour Court, which was handed down on 21 October 2020, well after the effective date of 22 February 2019.

The applicant contends that the court *a quo* was inconsistent in the manner in which it interpreted and applied the provisions of the law. In my view, the cases concerning the application of SI 33 of 2019, which were decided by the Supreme Court during the relevant period, were determined by that court on the basis of the juristic facts that were peculiar to each case. They yielded different outcomes on the basis of differing facts and not on the basis of the individual circumstances or characteristics of the litigants involved. Therefore, it cannot be said that the applicant itself was discriminated against when compared with other employers who were in the same or similar position as the applicant. Accordingly, I am unable to perceive any violation of its right to equal protection and benefit of the applicable law in contravention of s 56(1) of the Constitution.

Finality of Supreme Court Decisions

It is important to emphasise at this juncture that the matter in the court *a quo* was not premised on the interpretation, protection or enforcement of the Constitution. In other words, there was no constitutional question for determination before the court. Rather, the main issue was whether the respondent's damages were to be paid using the interbank rate of exchange or the rate of one United States dollar to one Zimbabwean dollar.

Generally speaking, the jurisdiction of this Court in relation to any decision of the Supreme Court is ordinarily only triggered where there is evidence to demonstrate that such decision violated one or more of the applicant's fundamental rights. The mere allegation of an infringement of a human right does not necessarily mean that a constitutional issue has arisen. This position was reiterated in the case of *Mukondo v The State* CCZ-8-20, at p 7, wherein it was held that:

“The mere allegation that a fundamental human right enshrined in Chapter 4 of the Constitution has been infringed does not mean that a constitutional issue has arisen

from a decision of a subordinate court. A decision of a subordinate court on any matter within the ambit of its jurisdiction would not be found to have given rise to a constitutional matter on the basis of a founding affidavit complaining about an alleged incorrectness of the decision of the subordinate court.”

The decision of the court *a quo* was on a non-constitutional matter and is therefore final. It is trite that the Supreme Court is the last court of appeal and that no decision of that court is appealable unless it determines a constitutional matter. In this regard, the decision of this Court in *Lytton Investments (Pvt) Ltd v Standard Chartered Bank Zimbabwe Ltd & Anor* CCZ 11-18 becomes apposite. In the words of Malaba CJ, at p 22:

“The principles that emerge from s 169(1) of the Constitution, as read with s 26 of the [Supreme Court] Act, are clear. **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 the Supreme Court itself. No court has the power to alter the decision of the Supreme Court on a non-constitutional matter. Only the Supreme Court can depart from or overrule its previous decision, ruling, or opinion on a non-constitutional matter.** The *onus* is on the applicant to allege and prove that the decision in question is not a decision on the non-constitutional matter.” (My emphasis)

The same sentiments were repeated in the *Denhere* case, *supra*, at p 23, wherein this Court held that:

“It is only an appeal court that can make a declaration on the correctness or otherwise of a judgment. In the absence of the right to appeal, the judgment cannot be said to be wrong. Just because a party thinks a judgment is wrong, that does not make it so. **No judicial authority can pronounce on the correctness or otherwise of decisions of the Supreme Court on non-constitutional matters.**” (My emphasis)

Present Status of S.I. 33 of 2019 : Exchange Rates after Effective Date

For the sake of completeness, it is necessary to address and clarify the present status of S.I. 33 of 2019. This statutory instrument was enacted in terms of s 2 of the Presidential Powers (Temporary Measures) Act [*Chapter 10:20*]. By virtue of s 6(1) of that Act, S.I. 33 of 2019 lapsed after the expiry of a period of 180 days. However, its provisions have been re-enacted, with crucial modifications, through s 22 of the Finance (No. 2) Act 2019 (Act No. 7 of 2019).

This Act was promulgated on 21 August 2019 and came into operation and effect on the same date.

Section 21 of the 2019 Act inserts and re-enacts, with effect from the “first effective date”, *i.e.* 22 February 2019, the entirety of s 44C of the Reserve Bank Act [*Chapter 2215*] as was contained in s 3 of S.I. 33 of 2019. Section 44C(2) preserves the position of funds held in foreign currency designated accounts as well as the continued acquittal of foreign loans and foreign obligations denominated in any foreign currency in such foreign currency.

As regards the issuance and legal tender of RTGS dollars, s 22 of the 2019 Act re-enacts the provisions of S.I. 33 of 2019, but with certain critical changes, with retrospective effect from the first effective date, *i.e.* 22 February 2019. Section 22(2) equates bond notes and coins at parity with the RTGS dollar, while s 22(3) validates the use of the RTGS currency with effect from the first effective date. The crucial alterations that I have adverted to are to be found in subss (1) and (4) of s 22. Subsection (1), in its relevant portions, provides as follows:

“(d) that, for accounting and other purposes (including the discharge of financial or contractual obligations), all assets and liabilities that were, **immediately before the first effective date**, valued and expressed in United States dollars (other than assets and liabilities referred to in section 44C(2) of the principal Act) shall **on the first effective date** be deemed to be values in RTGS dollars at a rate of one-to-one to the United States dollar; and

(e) that **after the first effective date** any variance from the opening parity rate shall be determined from time to time by the rate or rates at which authorised dealers exchange the RTGS dollar for the United States dollar on a willing-seller willing-buyer basis; and

(f) every enactment in which an amount is expressed in United States dollars shall **on the first effective date** (but subject to subsection (4)), be construed as reference to the RTGS dollar, at parity with the United States dollar, that is to say, at a one-to-one rate.”

(My emphasis)

Subsection (4) clarifies the impact of subs (1) in relation to financial or contractual obligations concluded or incurred before 22 February 2019. It also addresses the incidence of

statutory penalties or fines and statutory fees that were incurred before that date and which were expressed in any statute to be payable in United States dollars. It provides that:

“For the purposes of this section –

- (a) it is declared for the avoidance of doubt that financial or contractual obligations concluded or incurred **before the first effective date**, that were valued and expressed in United States dollars (other than assets and liabilities referred to in section 44C(2) of the principal Act) shall **on the first effective date** be deemed to be values in RTGS dollars at a rate of one-to-one to the United States dollar;
- (b) where a person was adjudged to be liable for the payment of any statutory monetary penalty or statutory fine **before the first effective date** such person is liable **after the first effective date** to pay the penalty or the fine or the unpaid portion of it in RTGS dollars at a rate of one-to-one to the United States dollar;
- (c) where a person became liable for the payment of any statutory fee **before the first effective date** such person is liable **after the first effective date** to pay the fee or the unpaid portion of it in RTGS dollars at a rate of one-to-one to the United States dollar.” (My emphasis)

The clear and unambiguous effect of the above-cited provisions of the 2019 Act is to modify and clarify, with retrospective effect, the position that previously obtained under S.I. 33 of 2019. As regards the values of assets and liabilities, as well as the values of financial or contractual obligations, these were originally deemed to be values in RTGS dollars at a rate of one-to-one to the United States dollar, for accounting and other purposes, both on and after the effective date. That position has now been altered through an Act of Parliament so that the deemed parity rate between the RTGS dollar and the United States dollar applies only on the first effective date, *i.e.* 22 February 2019. After that date, any variance from the opening parity rate is to be determined from time to time at the inter-bank market exchange rate. The position is different, however, insofar as concerns the payment of statutory monetary penalties or fines and statutory fees that were expressed in any statute to be payable in United States dollars. Where the liability to pay any such penalty, fine or fee was incurred before 22 February 2019, such liability remains due and payable after that date in RTGS dollars at a rate of one-to-one to the United States dollar.

In summation, apart from foreign loans and foreign obligations, all financial or contractual obligations that were previously valued and expressed in United States dollars are now to be settled or discharged in RTGS dollars at the inter-bank market exchange rate prevailing on the date of settlement or discharge. On the other hand, all statutory penalties, fines or fees that were previously due and payable in United States dollars are now to be paid at parity in RTGS dollars.

The construction that I have enunciated and adopted above *apropos* the rates of exchange applicable after the effective date is entirely concordant with the golden rule of interpretation. That rule enjoins the application of the principle that the words of every enactment must be construed in accordance with their ordinary and grammatical meaning, unless to do so would result in some absurdity, incongruity or repugnancy.

I do not perceive any such anomaly in my interpretation of the provisions in question. On the contrary, apart from conforming with the language used, it also accords with the basic precepts of commercial equity. Given the extraordinary devaluation that the Zimbabwean dollar was subjected to between February 2019 and the introduction of the ZIG currency in April 2024, any contrary interpretation applying the parity rate after the effective date would operate to the grave and extreme prejudice and disadvantage of local sellers, creditors and lenders who contracted or transacted with their respective buyers, debtors and borrowers in foreign currency.

In my considered opinion, the “golden” interpretation of the provisions under scrutiny operates to safeguard the rights and interests of all the parties concerned. And in the particular context of the present case, it also entails the result that the judgment of the court *a quo*, by

dint of which the respondent is to be fairly and adequately compensated, ultimately arrived at the correct conclusion, albeit from a different perspective and for different reasons.

Prospects of Success

The test to be applied in the constitutional review of decisions of subordinate courts in non-constitutional matters was succinctly spelt out by Malaba CJ 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.**” (My emphasis)

In other words, it must be shown that the subordinate court has failed to act in accordance with the applicable substantive and/or procedural law and thereby rendered an arbitrary or irrational decision entailing the violation of a fundamental right. As I have already concluded earlier, the applicant has failed to evince any failure on the part of the court *a quo* to adhere to the substantive law governing the interpretation of the relevant provisions of S.I. 33 of 2019. Moreover, as was quite correctly conceded by counsel for the applicant, the founding affidavit does not show anything to suggest that the court *a quo* disabled itself procedurally within the contemplation of the test expounded in the *Lytton Investments* case.

As regards the alleged violation of the right to equal protection and benefit of the law, the applicant has been unable to demonstrate any infringement of s 56(1) of the Constitution

as consistently construed and applied in previous decisions of this Court. The applicant has not shown that other persons in the same circumstances as the applicant were allowed to pay the amounts owed in Zimbabwean dollars at the parity rate of one to one to the United States dollar, where the value of the debt or liability in question was quantified and expressed after the effective date. There is no evidence to establish that a person other than the applicant has been accorded any protection or benefit of the law, which was not the same as or different from that which was afforded to the applicant.

Lastly, it must be re-emphasised that the decision of the Supreme Court in a non-constitutional matter is final and binding in the absence of any fundamental substantive incorrectness or procedural irregularity. In short, the applicant's prospects of success in its intended application before the full bench of this Court are eminently non-existent and do not justify the grant of direct access that is sought in the present application.

Disposition

Having failed to demonstrate any prospects of success in the intended substantive application, it is not in the interests of justice that the applicant be granted leave for direct access to this Court.

As regards costs, nothing has been put forward by either party to warrant the imposition of costs on the other party. Accordingly, I see no reason to depart from the established practice of not awarding costs in constitutional matters.

In the result, it is ordered that the instant application be and is hereby dismissed with no order as to costs.

MAKARAU JCC : I Agree

HLATSHWAYO JCC : I Agree

Matsikidze Attorneys at Law, applicant's legal practitioners

Makuwaza & Gwamanda Attorneys, respondents' legal practitioners