REPORTABLE (08)

ARISTON MANAGEMENT SERVICES LIMITED

v

(1) ECONET WIRELESS ZIMBABWE LIMITED

(2) PETER CARNEGIE LLOYD N.O.

CONSTITUTIONAL COURT OF ZIMBABWE
MAKARAU JCC, GOWORA JCC & HLATSHWAYO JCC
HARARE: 20 FERUARY 2024 & 18 June 2024

T. Magwaliba, for the applicant
T. R. Mafukidze, for first respondent

MAKARAU JCC-

INTRODUCTION

[1] This is an application for direct access to this Court, filed in terms of s 167 (5) of the Constitution as read with R 21 of the Constitutional Court Rules, 2016. It is contested. If the application is granted, the applicant intends to file a substantive application with this Court, alleging that in dealing with a non-constitutional issue, the Supreme Court, (" the court *a quo*"), violated its rights to be heard and to a fair hearing as guaranteed by s 69 (2) and (3) of the Constitution.

BACKGROUND FACTS

[2] The applicant and the first respondent are companies incorporated in accordance with the laws of Zimbabwe. On a date that is not material to this application, the first respondent advanced some monies to the applicant. Whilst the currency of the loan was the Zimbabwean dollar, it was a specific term of the agreement that the loan would be repayable in United States dollars.

[3] On 22 February 2019, the Government of Zimbabwe published the Presidential Powers (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act and Issue of Real Time Gross Settlement Electronic Dollars (RTGS Dollars)) Regulations, 2019, (SI 33/19). As its name implies, the statutory instrument was the legal vehicle through which the Reserve Bank of Zimbabwe was authorized to issue as legal tender, an electronic transfer currency thereafter commonly known as the RTGS dollar. The statutory instrument also provided that, on the effective date, the electronic dollar would be placed at par with the United States dollar.

[4] The statutory instrument also specifically provided in s 4 (1) (d) thereof, that for accounting and other purposes, all assets and liabilities that were expressed in United States dollars were deemed to be values in RTGS dollars at a parity exchange rate. The provision exempted certain assets and liabilities fully set out in section 44C (2) of the Reserve Bank of Zimbabwe Act [*Chapter 22.15*]. For the purposes of this judgment, it is not necessary that I set these out.

[5] A dispute arose between the first respondent and the applicant as to whether or not the obligations of the applicant under the loan agreement were affected by the provisions of the statutory instrument. The applicant contended that it could lawfully discharge its obligations under the agreement by repaying the loan in Zimbabwean currency at the rate of US1 to

RTGS$1. The first respondent contended otherwise. The resulting dispute was placed before the second respondent, a legal practitioner, to arbitrate.

[6] The second respondent found in favour of the first respondent. It was his considered opinion that the Regulations were applicable to the obligations of the parties under the loan agreement. He accordingly issued an award embodying his findings. This prompted the applicant to approach the High Court, seeking to have the award set aside, primarily on the basis that the award was against the public policy of Zimbabwe. The first respondent opposed the application and, under separate cover, filed its own application for the registration of the award. The applicant in turn opposed the application for the registration of the award.

[7] The two applications were in due course set down and heard as a single matter, with the High Court rendering a composite judgment. The High Court registered the award and dismissed the application to have the award set aside.

[8] Unhappy with the turn of events, the applicant noted an appeal to the court *a quo* against the judgment. It raised four grounds of appeal. At the hearing of the matter, the first respondent raised a point *in limine* seeking a review of the proceedings in the High Court. It alleged that the applicant's application before the High Court for the setting aside of the award was fatally defective in that its founding affidavit was not dated. It therefore sought the invalidation of the application and orders for the setting aside of the arbitral award. The court *a quo* obliged and upheld the point *in limine*.

THE DECISION *A QUO*

[9] As stated above, after upholding the point *in limine* raised by the first respondent, the court *a quo* invalidated the proceedings before the High Court relating to the application seeking to have the arbitral award set aside. It then struck the appeal off the roll with no order as to costs. It gave fairly terse reasons for its judgment. These were given on the turn and *ex tempore.* In its judgment, the court *a quo* made the following findings which in my view are worth noting:

9.1 That the judgment of the High Court that was on appeal before it was a composite judgment that gave rise to two separate orders, one dismissing the application to set aside an arbitral award and the other registering the award.

9.2 That the upholding of the preliminary point raised by the first respondent as to the validity of the proceedings regarding the setting aside of the award in the High Court completely nullified such.

9.3 That in view of the fact that the High Court rendered a composite judgment in respect of the two applications that were before it, the invalid application and its outcome were capable of being severed from the valid application which remained extant.

9.4 That absent a valid application for the setting aside of the award in the High Court, there was no valid appeal before the court *a quo*.

[10] As a result of these findings, the court *a quo* struck the matter off its roll with no order as to costs as stated above. I note at this stage that it was in respect of the finding in paragraph 9.4 above that the court *a quo* fell into grave error. Absent a valid application for the setting aside of the arbitral award, it stands to reason that a valid but opposed application for the

registration of the award gave rise to an appeal before the court. Put differently, the appeal against the registration of the award remained extant. I shall return to this point in detail.

[11] Contending that in deciding the non-constitutional issue that was before it, the court *a quo* violated its rights to be heard and to a fair hearing as guaranteed by s 69 (2) and (3) in respect of the appeal against the registration of the arbitral award, the applicant filed this application seeking leave to approach the Court directly.

THE APPLICATION

[12] The application sets out in greater detail the background facts that I have summarized above. Attached to this application is a draft of the application that the applicant intends to file under s 85 (1) of the Constitution if leave is granted. In the draft application, the allegation is made that the striking off from roll of the appeal by the court *a quo* without hearing the appeal against registration of the award is in violation of the appellant's right to be heard and to be afforded a fair hearing. In support of its contentions, the applicant makes extensive reference to the *ex tempore* reasons for the judgment by the court *a quo*. For brevity, I paraphrase the arguments that the applicant makes in its founding affidavit.

1. Firstly, it is argued that two applications that were before the High Court, although related, were separate and distinct one from the other. The two accordingly gave rise to two separate, separable and distinct orders of the court. The two orders were however justified and arrived at for the same reasons that are contained in the composite judgment.

2. Secondly, it is contended that the applicant, as appellant *a quo*, appealed against the composite judgment of the High Court. By this, it is meant that the applicant appealed against both orders that the High Court issued in respect of the two applications that were before it.

3. In the third instance, it is argued that during the hearing of the appeal, the court *a quo* reviewed the application filed before the High Court for the setting aside of the award and did not review the application for the registration of the award, which, together with the resulting order, remained extant and binding on the parties.

4. Finally, it was argued that in view of the fact that the applicant had appealed against the whole judgment, the appeal against the registering of the award remained extant and was not determined. Pointedly, it is observed by the applicant, no reasons are given in the judgment *a quo* explaining why the order registering the award was confirmed when there was an extant appeal against it.

THE OPPOSITION

[13] As indicated above, the application was resisted. In the opposing affidavit, the following arguments were advanced:

1. That no constitutional issue arises from the application;

2. That the application is an appeal in disguise;

3. That the order registering the award was appealed against solely on the very narrow basis that no valid opposing affidavit had been filed with the notice of opposition. It was further and specifically alleged that there was no particular ground of appeal that impugned the actual registration of the award. In fully developing its argument, the first respondent sought to demonstrate how the entirety of the heads of arguments filed on behalf of the applicant before the court *a quo* attacked the alleged failure of the High Court to uphold the public policy of Zimbabwe and did not at any stage advert to and or attack the registration of the award.

THE ORAL SUBMISSIONS

[14] Mr *Magwaliba,* for the applicant reiterated the arguments that the applicant made on its papers. In brief, he drew the attention of the Court to the fact that two separate and distinct applications were before the High Court. These were disposed of in a composite judgment. An appeal was then noted against the entire judgment. Put differently, he argued that the notice of appeal that was filed, although singular, related to both orders of the High Court.

[15] Mr *Magwaliba* further argued that the fact that one of the two applications before the High Court was held by the court *a quo* to be defective did not adversely affect the other application which remained valid for the purposes of the appeal.

[16] He concluded his argument by drawing the Court's attention to the fact that the court *a quo* itself held that the two applications that were before the High Court were severable. Having made that observation, it was *Mr Magwaliba"s* submission that the court *a quo* ought to have

followed through its own reasoning and should have struck off its roll only that part of the appeal that was adversely affected by the invalid proceedings in the High Court and not the entire appeal. It is argued that, in the circumstances, the judgment *a quo* cannot be protected by the concept of finality of judgments of the Supreme Court on non-constitutional matters. It is reviewable.

[17] For the first respondent, *Mr Mafukidze* made two submissions. He submitted, in the first instance, that the appeal against the registration of the award was defective as the ground upon which it was premised was untenable. In this regard he relied on the first ground of appeal a quo in which the applicant alleged that the first respondent's opposing affidavit in the High Court was not validly filed. Upon further engagement with the court, *Mr Mafukidze* submitted, in the second instance, and more pointedly, that there was no appeal whatsoever against the registration of the award. In his own words:

> "*There was no appeal whatsoever against the registration of the award before the Supreme Court. The registration order was not impugned. There* was zero argument on the registration of the *award".*

[18] It is worth noting that the broad submission by *Mr Mafukidze* embodies two distinct legal arguments. Firstly, he argues that there was no appeal noted against the registration of the award at all. In this regard he alleges that there is no ground of appeal directed against the order registering the award. Secondly, he argues that the appeal against the registration of the award was not validly noted. He refers to the fact that the ground of appeal against the order registering the award confined itself to the validity of the affidavit filed in the High Court on behalf of the respondent and did not allege any other error at law or fact by the trial court.

[19] The two arguments were forcefully made. They were however the only arguments advanced for the respondent.

THE ISSUE

[20] The sole issue that arises for determination in this application is whether or not it is in the interests of justice that the applicant be granted leave to approach this Court directly to protect its right to be heard and to be afforded a fair hearing.

[21] Whilst the above denotes the broad inquiry that is always gone into in an application for direct access, in this instance, the issue narrowed down to whether or not the intended application, if filed, has prospects of success.

THE LAW

[21] There was hardly any dispute as to the applicable law in this application. Both parties accepted that the granting of the application is in the discretion of the court, being guided in its consideration of the application by the factors that are set out in r 21 of the Constitutional Court Rules.

[22] It is not necessary that I discuss in detail the considerations that a court must take into account in determining an application for direct access on an allegation that the Supreme Court, in determining a non-constitutional issue, infringed one or more of the applicant's rights. This has been done in a number of authorities from this Court with the *locus classicus* on the law in

this regard being *Lytton Investments Private Limited* v *Standard Chartered Bank and Another* CCZ11/18 which has since been followed by this Court without qualification.

[23] For completeness of the record, I record that the position that appears to be settling in this jurisdiction following *Lytton Investments* v *Standard Bank and Another* (*supra*) is that, in an application for direct access to this Court seeking to review a Supreme Court decision, the applicant has to show that the Supreme Court,

> "*in the process of determining the issues before it, failed to act in accordance with the law governing the proceedings to the extent that it was disabled from rendering a decision on the non-constitutional matter that it was required to decide,* "
> per MALABA CJ in *Denhere* v *Denhere (nee Marange*) CCZ 9/19).

In addition the applicant has to show that in failing to act in accordance with the law governing the proceedings before it, the Supreme Court breached one or more of the applicant's fundamental rights or freedoms. (See also *Russel Mwenye* v *Minister of Justice, Legal and Parliamentary Affairs* CCZ 5/23 and *Qedisani Silas Machine* v *The Sheriff of Zimbabwe and Others* CCZ8/23).

ANALYSIS

[24] I now turn to apply the two pronged test laid out in the authorities to the facts of this application. The first issue to determine is whether or not the court *a quo* was disabled from rendering a decision on the non-constitutional issue that was before it. Put differently, I will proceed to determine whether or not the court *a quo* placed itself in a position where it could not deal with the non-constitutional matter that was before it. In the second analysis, and to the extent that it becomes necessary to do so, I will determine whether or not the judgment of the court *a quo* violated the applicant's rights as alleged.

[25] Regarding the first issue, I find the totality of the argument by *Mr. Magwaliba* unassailable and compelling. It is common cause that two orders were made by the High Court in respect of the two applications that were before it. The two orders were justified in one judgment. The judgment was appealed against. There can be no dispute therefore that the two orders were both on appeal before the Supreme Court. The court a quo itself acknowledges that fact in its judgment. This is also a reflection of the correct position at adjectival law. An appeal against a composite judgment, unless it specifically denotes that it is an appeal against part of the judgment only, is an appeal against all the orders made in that judgment. This is so because of the trite position at law that an appeal against the judgment of a lower court is an appeal against the reasons for the judgment and orders made by that court. Therefore, the appeal that was before the court *a quo* was an appeal against the reasons for the judgment and the two orders that the High Court had made.

[26] The Supreme Court nullified one of the orders that had been appealed against. It stands to reason that the other order remained extant. So did the reasons for that order and, ultimately, so did the appeal against that order. Therefore, following the rules of procedure of the court *a quo*, the appeal against the extant order ought to have been disposed of one way or the other. This is so because the order registering the award was severable from the defective order. Again, this was correctly observed to be the position by the court *a quo* itself.

[27] It is common cause that in its judgment, the court *a quo* does not advert to the appeal against the order registering the award at all and therefore does not dispose of it. This, in my view, marks a patent irregularity in the proceedings of the court.

[28] I make the above findings notwithstanding the arguments by *Mr Mafukidze*. Distilled to their essence, the arguments purport to raise a dispute of fact as to whether or not before the court *a quo* was an appeal against the registration of the arbitral award.

[29] The dispute of fact purportedly raised on behalf of the respondent is not real. It is the trite position of the law that a real or material dispute of fact arises where a material allegation by the applicant in its founding affidavit is denied and traversed by the respondent in such a manner that the court is left with no ready answer and must make recourse to *viva voce* evidence. (See *Muzanenhamo* v *Officer –In- Charge CID, Law and Order and Others* 2013 (2) ZLR 604 (SC)).

[30] That there was an appeal against the two orders made by the High Court is a function of the application of the law regarding composite judgments. Once an appeal was noted against the whole judgment, there was, by operation of law, an appeal against the registration of the award, unless the contrary had been expressed.

[31] Further, and in any event, the court *a quo* itself acknowledges the position that I have detailed above regarding the nature of composite judgments. This acknowledgement, which also amounts to a finding of fact by the apex court, puts the factual debate to rest. The court *a quo*

was clear that the appeal before it was against the whole judgment of the High Court and *ipso facto* included an appeal against the registration of the award. In its own words:

> "*This is an appeal against the judgment of the High Court handed down on 20 July 2023 dismissing the appellant's application to set aside an arbitral award* ***and registering that award".*** (The emphasis is mine).

[32] If any additional evidence is required that the court a quo was keenly alive to the fact that it was dealing with an appeal to a composite judgment, this is to be found in its remarks containing its *ratio decidendi*. It had the following to say:

> *"In view of the fact that the court a quo rendered a composite judgment in respect of the two applications, the invalid application and its outcome are capable of severance. The application for the registration, being a separate application, is not affected."*

[33] The High Court had also put the issue beyond any doubt. The one judgment and reasons for judgment that disposed of the application for the setting aside the arbitral award was the same judgment that disposed of the counter-application for the registration of the award. After observing that the outcome of the one application was a "consequence" of the outcome of the other, it had held:

> "*The application for review having been dismissed, it follows that the application for registration must be granted."*

[34] In the circumstances, it would ordinarily have occurred to the court *a quo* that, having set aside the proceedings relating to the first application seeking the setting aside of the arbitral award, the judgment of the High Court was no longer composite but now disposed of the remaining application, for the registration of the award. That judgment was on appeal before it and remained so.

[34] There is no indication, express or implied, in the judgment *a quo* that the court was under the misconception that before it was an appeal against part of the judgment only. In any event, this was not Mr *Mafukidze's* argument. As stated above, his argument was perched on the very narrow ledge that the appeal against the registration of the arbitral award was invalidly noted. If indeed this was the position that the notice of appeal was defective, still, the applicant should have been heard on that allegation.

[35] It is therefore my finding that the court *a quo* placed itself in a position where it was not able to decide on the non-constitutional issue that was before it is, in the circumstances of this matter, inescapable.

[36] I now turn to consider whether this irregularity had the effect of breaching the applicant's rights as alleged or at all.

[37] As stated elsewhere above, the applicant contends that the decision of the court *a quo* breaches its rights to be heard and to be afforded a fair trial.

[38] The right to be heard and to be afforded a fair trial forms the cornerstone of and affirms the rule of law. The two rights, being the two sides of the same coin, form the bedrock of the administration of justice generally and are derived from the principles of natural justice. So ingrained in our judicial system is the notion that no person can be condemned before he or she has been given an opportunity to defend themselves that no authority for so holding is required. If anything, the right as observed in judicial proceedings has been imported into

administrative decision-making and has given rise to an entire Act, the Administrative Justice Act, [*Chapter 10.28*], in which the various components of the right are provided for. Whilst the Act applies to administrative decision making, the notions informing its provisions on the right are applicable to judicial decision-making with equal force.

[39] In this application, there was no argument between the parties as to the content of the right allegedly violated and to the fact that it is constitutionally guaranteed. There was also no argument that, if the appeal against the registration of the arbitral award was before the court a *quo*, a failure to hear such an appeal would *prima facie* breach the rights of the litigants to be heard and to be afforded to a fair hearing.

[40] In the circumstances, having found that the court *a quo* disabled itself from determining the non-constitutional appeal that was before it and that such failure resulted in denying the parties the right to be heard on that appeal, the application for leave must succeed.

[41] Notwithstanding the conclusion that I have come to above, I am however highly persuaded by the remarks of Garwe JCC in *Gonese* v *Minister of Finance and Economic Development* CCZ 11/23 to resort to the use of the review powers vesting in this Court in the determination of this application. In that matter, after declining to confirm the order of constitutional invalidity issued by the High Court on the basis that the order had been incorrectly made, this Court, using its review powers, set aside the decision *a quo*. In adopting that approach, Garwe JCC had this to say:

> "*In anticipation of unforeseen circumstances in which this Court may need to be clothed with jurisdiction to review the proceedings of other courts subordinate to it, s 19 of the*

> *Constitutional Court Act has granted the power to this Court and every Judge of the Court to review proceedings and decisions of such subordinate courts. The section makes it clear that such power may be exercised at any time whenever it comes to the attention of the Court, or a Judge that an irregularity has occurred in any proceedings or in the making of any decision, notwithstanding that such decision is not the subject of an appeal or application to this Court.*
>
> *There can be little doubt that this is a useful and necessary provision. In the absence of such a power, the Court or judges of the Court would be utterly powerless to act even where it comes to their attention that there has been an irregularity in the making of a decision in a constitutional matter in a lower court"*

[42] As stated above, I am inclined to dispose of this matter using the review powers of this Court. This is so because it appears to me that, in disposing of the appeal before it, inadvertently and perhaps in haste, the court *a quo,* completely overlooked the appeal against the registration of the arbitral award, which it had acknowledged in the opening paragraph of its *ex tempore* judgment. That failure to deal with an extant appeal however has adverse implications on the rights of the parties to be heard and to be afforded a fair hearing by the court *a quo*.

[43] In resorting to the use of the Court's review powers, I am mindful of the caution sounded in *Mamombe and Another* v *Mushure N.O.* and *Another* CCZ 4/22 wherein it was observed that:

> "The Court (however) has legislatively conferred review powers. These are set out in s 19 of the Constitutional Court Act [*Chapter 7.22*]. **Whilst fairly wide, the review powers of this Court are correspondingly and in conformity with the Constitution, limited in scope to constitutional matters only**." (The emphasis is mine.)

[44] I am satisfied that this application raises a constitutional matter as I have detailed above. The intended application to be brought under s 85 (1) of the Constitution *prima facie* raises a breach of the rights guaranteed under s 69 of the Constitution. The breach arises from an irregularity in the proceedings *a quo* which I have detailed.

[45] It is my considered view that the circumstances of this application constitute an instance of the "unforeseen circumstances" referred to in Gonese v *Minister of Finance and Economic Development* (supra) necessitating the use of the review powers of this Court. It is my further considered opinion that where there has been a patent irregularity in the proceedings of the court *a quo* and such irregularity amounts to a denial of the right to be heard, as it does *in casu*, this Court, instead of escalating the redress of the irregularity to a constitutional matter under s 85 of the Constitution, may competently review the irregular proceedings using the powers granted to it under s 19 of the Constitutional Court Act.

[46] In the result, I make the following order:

46.1 Using the review powers granted to this Court by s 19 of the Constitutional Court Act [*Chapter 7.22*], paragraph I of the order *a quo* is set aside.

46.2 The court *a quo* is directed to set down the appeal for its determination.

46.3 There shall be no order as to costs.

GOWORA JCC **:** I agree

HLATSHWAYO JCC **:** I agree

Atherstone & Cook, appellant's legal practitioners.

Mtetwa & Nyambirai, 1st first respondent's legal practitioners.