REPORTABLE (9)

SIMON SHONHAYI DENHERE

v

(1) MUTSA DENHERE (nee MARANGE)

(2) ATTORNEY-GENERAL OF ZIMBABWE

CONSTITUTIONAL COURT OF ZIMBABWE
HARARE, NOVEMBER 17, 2017 & MARCH 13, 2019

L Madhuku, for the applicant

T Mpofu, with him *H Nkomo*, for the first respondent

No appearance for the second respondent

Before: MALABA CJ, In Chambers

This is a chamber application for an order for direct access to the Constitutional Court ("the Court") made in terms of r 21(2) of the Constitutional Court Rules SI 61/2016, ("the Rules").

FACTUAL BACKGROUND

The applicant was the defendant in a divorce action instituted by the first respondent in the High Court. The action culminated in a judgment in which the High Court granted an order of divorce, coupled with the distribution of the assets of the spouses, maintenance, and an order governing custody of and access to two minor children.

The applicant was aggrieved by the judgment of the High Court on the distribution of property and appealed to the Supreme Court ("the court *a quo*). The first respondent cross-appealed. The applicant's main argument in the main appeal was that the High Court failed to properly exercise its discretion in terms of s 7(4) of the Matrimonial Causes Act [*Chapter 5:13*] ("the Matrimonial Causes Act"), which provides for the circumstances which a court may have regard to when considering the issues of the division, apportionment or distribution of the assets of the spouses and the payment of maintenance. He argued that the High Court failed to act in accordance with the principle laid down in *Takafuma* v *Takafuma* 1994 (2) ZLR 103 (S). In that decision the Supreme Court said:

> "… the court does not simply lump all the property together and then hand it out in as fair a way as possible. It must begin, I would suggest, by sorting out the property into three lots, which I will term 'his', 'hers' and 'theirs'. Then it will concentrate on the third lot marked 'theirs'. It will apportion this lot using the criteria set out in section 7(3) of the Act. Then it will allocate to the husband the items marked 'his' plus the appropriate share of the items marked 'theirs', and the same to the wife."

The court *a quo* found that the High Court had acted in accordance with the provisions of s 7(4) of the Matrimonial Causes Act and, as such, had not erred. It dismissed both the appeal and the cross-appeal on the basis that they had no merit. On the question of the applicability or otherwise of the principle enunciated in the *Takafuma* case *supra*, the court *a quo*, at p 8 of the cyclostyled judgment in *Simon Denhere* v *Mutsa Denhere* SC 51/17, said:

> "… the court in *Takafuma's* case (*supra*) was setting out an approach on the correct way of achieving an equitable distribution. The factors that a court had to take into account in the distribution are set out in the Act. The principle itself is found in the Act. The appellant fails to appreciate that what *Takafuma* prescribes is a formula and it is

> not one that is applicable in every situation. It is erroneous, in my view, to suggest that the court *a quo* should have strictly followed the formula as set out by MCNALLY JA. In this case, the court found that all the property, with the exception of the stand in Chitungwiza, was acquired during the union. In such a case one cannot speak of piles. They do not exist as all the property is matrimonial property and falls for distribution.
>
> The court *a quo* did not create three lots of the matrimonial estate. That is not to say that its approach was incorrect. Having found that theirs was a marriage of equals, there were no baskets in which to place the properties. It became unnecessary to do so."

The applicant was aggrieved by the decision of the court *a quo* and filed the application for an order for direct access to the Court. He seeks to approach the Court in terms of s 85(1) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013 ("the Constitution"), alleging that the court *a quo* breached his right to equal protection of the law enshrined in s 56(1) of the Constitution. The applicant argued that the High Court erred by not following the law as pronounced in the *Takafuma* case *supra*, a judgment binding on it according to the doctrine of *stare decisis*. He argued that the failure to apply the formula enunciated in the *Takafuma* case *supra* imposed on the court *a quo* the obligation to set aside the judgment of the High Court on appeal. The basis of the applicant's argument was that the court *a quo*, in dismissing the appeal, failed to protect his right to equal protection of the law, as it was obliged to correct the error and set aside the judgment of the High Court. The contention was that it was in the interests of justice to grant the order of direct access for the Court to vindicate the rule of *stare decisis*, which is an important aspect of the rule of law.

The first respondent opposed the application and raised three preliminary points. The first point was that the court *a quo* did not decide a constitutional matter. The applicant could not approach the Court to have the judgment of the court *a quo* set aside. The second point was that the applicant sought to appeal against the decision of the court *a quo* on a non-constitutional matter under the guise of an application in terms of s 85(1) of the Constitution. The contention was that the applicant lacked *locus standi* as a result of s 26(2) of the Supreme Court Act [*Chapter 7:10*] ("the Act"), which provides that Supreme Court judgments are final

and no appeal can be noted against them. The third point relates to the alleged incompetency on the part of the applicant in seeking as part of the relief sought the vacation of the whole judgment of the court *a quo,* including the part in his favour. The part of the judgment in his favour relates to the dismissal of the cross-appeal.

On the merits, the first respondent argued that, in the absence of a constitutional matter decided by the court *a quo,* no constitutional remedy is available to the applicant.

At the hearing of the application, Mr *Madhuku* submitted that the determination of the application must be based on the principle that underlies s 167(5)(a) of the Constitution. The principle is to the effect that the Rules of the Constitutional Court must allow a person, when it is in the interests of justice and with or without leave, to bring a constitutional matter directly to the Court. He submitted that the principle should be understood in the context of the Constitution as a whole and the rôle and place of the Court in the constitutional framework.

Mr *Madhuku* conceded that the Court is a specialised court which decides constitutional matters only and that where such a matter is not raised the Court has no jurisdiction. He argued that the applicant's substantive application is intended to be brought under s 85(1)(a) of the Constitution to enforce fundamental rights enshrined in ss 56(1) and 69(2) of the Constitution.

Mr *Madhuku* argued that the making of an allegation of an infringement of a fundamental right enshrined in *Chapter 4* of the Constitution means that a constitutional matter has been raised for the Court to be seized with the matter. He supported the proposition by citing the Court's decision in *Meda v Sibanda & Ors* 2016 (2) ZLR 232 (CC) at 236B. The Court said:

> "It is clear from a reading of s 85(1) of the Constitution that a person approaching the Court in terms of the section only has to allege an infringement of a fundamental human right for the Court to be seized with the matter. The purpose of the section is to allow litigants as much freedom of access to courts on questions of violation of fundamental human rights and freedoms with minimal technicalities."

Mr *Madhuku* also made reference to *Fredericks* v *MEC Education and Training, Eastern Cape* 2002 (2) SA 693 (CC) [11] for the proposition that, for the purposes of the right of access to the Court, a matter is a constitutional matter if the applicant's case stands or falls on the argument that the State's conduct has violated the Bill of Rights. He quoted a portion of the judgment where O'REGAN J stated as follows:

> "Whether the applicants' claim has merit or not can have no bearing on whether their claim raises a constitutional matter."

Mr *Madhuku* cited *Fraser v ABSA Bank Limited* 2007 (3) SA 484 (CC) [40] to the effect that, for the purposes of access to it, an acknowledgement by the Court that an allegation of an infringement of a fundamental right or freedom enshrined in *Chapter 4* of the Constitution is a constitutional matter does not have to result in a finding on the merits that is in favour of the party who raised it.

The contention was that once a constitutional matter is raised, s 167(5)(a) of the Constitution insists on consideration of the existence of the interests of justice as the single criterion in deciding whether or not to grant leave for direct access to the Court. He acknowledged that the "interests of justice" is a concept that is incapable of precise definition, but stated that courts are familiar with the concept and use their discretion to determine, on a case by case basis, what it means. The point made was that the determination of the question whether it is in the interests of justice to grant leave for direct access involves a careful weighing and balancing of all relevant factors. Each case must be considered in the light of its own facts.

Mr *Madhuku* argued that one of the factors to be taken into account in deciding whether it is in the interests of justice to grant leave for direct access to the Court is whether the matter is of general public importance. He argued that, in addressing the question whether the matter

is of general public importance in this case, the Court has to take into account the fact that the State institution whose conduct is under scrutiny is the Supreme Court. The contention was that what was being sought to be constitutionally reviewed made the case an exceptional one and therefore of public importance. He argued that in appropriate circumstances it has been held that the interests of justice require a court to decide a constitutional matter for the benefit of the broader public or to achieve legal certainty. He noted that this may be done even where the decision has no practical value to the litigants themselves. He cited the case of *Radio Pretoria* v *Chairperson, Independent Communications Authority of South Africa and Anor* 2005 (4) SA 319 (CC) para 22.

Mr *Madhuku* then dealt with prospects of success and argued that the applicant is merely required to make out a *prima facie* case on the merits. In respect of s 56 of the Constitution, he argued that the section has a broad sweep and that when properly construed it incorporates "the right to the protection of the law". He took the view that equality before the law is merely a component of the right to the protection of the law. He made reference to *Mudzuru & Anor* v *Minister of Justice & Ors* 2016 (2) ZLR 45 (CC) at 74G where the Court remarked:

> "The purpose of interpreting a provision contained in *Chapter 4* must be to promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom, and in particular, the values and principles set out in s 3 of the Constitution."

Mr *Madhuku* argued that where the State or any of its organs act outside the law the right enshrined in s 56(1) of the Constitution is infringed. He argued that the same principle applies in instances where the Judiciary misconstrues the law. In such a case it acts outside the law. He referred to *Martin* v *Attorney-General & Anor* 1993 (1) ZLR 153 (S) for the proposition that if a court misconstrues the law, or applies it incorrectly, there is a *prima facie* infringement of the right to equal protection of the law. He argued that where that occurs in a

lower court the remedy would be an appeal, and that accords with the doctrine of constitutional avoidance. He contended that where the court is the Supreme Court, the constitutional remedy is always available under s 85(1) of the Constitution when there is an alleged infringement of a fundamental right. He also argued that s 2 of the Constitution is clear that it is the Constitution which is supreme and not the courts or any other arm of the State.

Mr *Madhuku* contended that the court *a quo* patently misconstrued the doctrine of *stare decisis* by failing to hold that the High Court was bound by the decision in the *Takafuma* case *supra*. He argued that the Supreme Court was supposed to correct the High Court. It did not. Mr *Madhuku* read into the case of *Matamisa* v *Mutare City Council (AG Intervening)* 1998 (2) ZLR 439 (S) the proposition that it is trite that where the Supreme Court misconstrues an appeal before it or adopts a wrong approach it infringes the right to a fair hearing. On that basis, he submitted that the substantive application sought to be filed has reasonable prospects of success if an order for direct access to the Court is granted.

Mr *Mpofu*, on the other hand, took the view that the court *a quo* did not decide a constitutional matter. As a result, the Court has no jurisdiction to entertain the question whether it is in the interests of justice to grant an order for direct access to it. He argued that it was not open to a litigant who loses a case in the Supreme Court to simply "whip up a constitutional argument *ex post facto*" to seek audience with the Court. He argued that a jurisprudence which allows such an approach renders the Supreme Court nugatory and negates the principle of finality to litigation. He argued further that nothing would then stop a litigant from alleging that a Constitutional Court judgment is itself a breach of the Constitution. Such a litigant would then bring fresh litigation before the Court.

Mr *Mpofu* cited *Nyamande & Anor v Zuva Petroleum & Anor (Pvt) Ltd* 2015 (2) ZLR 351 (CC) at p 354C where ZIYAMBI JCC said:

> "The applicants have not alleged that s 175(3) of the Constitution applies in their case. Since no constitutional issue was determined by the Supreme Court, no appeal can lie against its decision. The same is provided in s 169(1)."

He also cited the case of *Prosecutor-General v Telecel Zimbabwe (Pvt) Ltd* 2015 (2) ZLR 422 (CC) at 428C-F, where the Court said:

> "… while the applicant did not specifically state so in his application, in reality the matter was an appeal brought to this Court under the guise of an application. This is abundantly evident from the relief that is outlined in his draft order. It is even more evident from his summary of the background to the intended application, as already indicated. He indicated that he wished to approach this Court 'for an order setting aside the Supreme Court judgment on the basis that it interferes with the independence of his office and as such it is *ultra vires* provisions of s 260 of the Constitution of Zimbabwe …'. Like in the case referred to above, the issue that I have underlined, and others that the applicant sought to bring before this Court, similarly 'arose' after the Supreme Court judgment was pronounced. They could not have been, and in fact were not, raised before the Supreme Court and, needless to say, not determined by it as constitutional matters. The issues therefore did not meet the requirement for inclusion into 'matters over which the Constitutional Court has jurisdiction'.
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> On the basis of the authority cited above, and upon a proper interpretation of the relevant provisions alluded to in this context, the judgment of the Supreme Court on these matters, which the applicant sought to have reversed, was final and definitive. It is a decision that may not be interfered with by this Court."

On the strength of the two authorities, Mr *Mpofu* prayed for the dismissal of the application, arguing that the court *a quo's* judgment on the issues between the parties is final and definitive. He argued that the remarks in the *Matamisa* case *supra* on the finality of judgments of the Supreme Court are apposite.

Mr *Mpofu* argued further that both the High Court and the court *a quo* correctly found that the applicant had lied and that the applicant did not dispute such finding even in the court *a quo*. He contended that this application was aimed at finding a way to extricate the applicant from the consequences of his lie. He relied on *Beckford* v *Beckford* 2009 (1) ZLR 271 (S) to argue that a litigant who lies must live with the consequences of his lie. He said the High Court found that the marriage was a marriage between equals and the court *a quo* upheld that position. The contention was that distribution of assets of spouses at the dissolution of marriage by

divorce is a matter of discretion, which takes into account many considerations including the fact that a spouse lied about the assets for distribution. He argued that the applicant had failed to demonstrate that the judgment of the court *a quo* was palpably wrong and constituted a total failure of justice.

Mr Mpofu submitted that the applicant sought an order setting aside the entire judgment of the court *a quo*, while the judgment made findings for both parties. The applicant prayed for the vacation of an order which finds for him. He argued that an application which sought such an awkward relief cannot be said to enjoy prospects of success.

DETERMINATION OF THE ISSUES

WHETHER THE APPLICANT CAN APPROACH THE COURT

The issue for determination is whether a party to proceedings before the Supreme Court which involve a non-constitutional matter may approach the Court in terms of s 85(1) of the Constitution, alleging that the decision of the Supreme Court has violated his or her or its fundamental rights enshrined in *Chapter 4* of the Constitution.

Section 85(1) of the Constitution provides as follows:

"**85 Enforcement of fundamental human rights and freedoms**

(1) Any of the following persons, namely —

(a) any person acting in their own interests;

(b) any person acting on behalf of another person who cannot act for themselves;

(c) any person acting as a member, or in the interests, of a group or class of persons;

(d) any person acting in the public interest;

(e) any association acting in the interests of its members;

> is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this Chapter has been, is being or is likely to be infringed, and the court may grant appropriate relief, including a declaration of rights and an award of compensation."

The provision entitles any person to approach the courts and seek relief where he or she or it alleges that a fundamental right has been violated. It raises three important factors.

The first factor is that the provisions of s 85(1) of the Constitution do not limit the right of approach to vindicate a fundamental right or freedom to a specific court. The present application is based on an allegation of violation of fundamental rights. The applicant correctly approached the Court for appropriate relief.

The second point is that s 85(1) of the Constitution requires that a person with the stated interests in the protection and enforcement of a fundamental right or freedom enshrined in *Chapter 4* only has to allege infringement of the right or freedom to have the right of access to a court to seek appropriate relief. In the *Meda* case *supra* at 236B-D the Court said:

> "It is clear from a reading of s 85(1) of the Constitution that a person approaching the Court in terms of the section only has to allege an infringement of a fundamental human right for the Court to be seized with the matter. The purpose of the section is to allow litigants as much freedom of access to courts on questions of violation of fundamental human rights and freedoms with minimal technicalities. The facts on which the allegation is based must, of course, appear in the founding affidavit.
>
> Whether or not the allegation is subsequently established as true is a question which does not arise in an enquiry as to whether the matter is properly before the Court in terms of s 85(1). In this case, the applicant alleged in the founding affidavit that her right to property had been infringed. Whether her allegation is true or not is not the issue. What matters is that she alleged a violation of a fundamental human right and as such the Court was properly seized with the matter. The question of the veracity of the allegation would have been tested on the basis of evidence placed before the Court."

The third factor is that constitutional provisions are binding and the Court ought to be guided accordingly. Section 2 of the Constitution makes the Constitution the supreme law of the land. In this regard, s 3 of the Constitution provides for the values and principles which

should guide all institutions and persons in Zimbabwe. Section 85(1) ought, therefore, to be understood in the context of s 3 of the Constitution. The most relevant principles to the present matter are the supremacy of the Constitution, the rule of law, and fundamental human rights and freedoms.

These principles are central to the approach that courts ought to take when adjudicating all matters. The Constitution itself protects fundamental rights and freedoms and further provides that all institutions including the Judiciary are bound to comply with its provisions. In this regard, the rule of law demands that there be accountability before the law by all persons and institutions exercising public authority. The requirement for accountability speaks to the need to respect fundamental human rights and freedoms through procedural fairness and regularity in the administration of justice. The Supreme Court is included. Where a decision of the Supreme Court is challenged on the basis that it violated a fundamental right or freedom, a party has the right to approach the Court. If s 85(1) of the Constitution is not interpreted in this way, it would mean that the Supreme Court is put outside the scope of ss 44 and 45 of the Constitution. That would be in violation of the principle of legality by which all bodies and institutions exercising public authority are bound.

In *Lytton Investments (Private) Limited v Standard Chartered Bank Zimbabwe Limited & Anor* CCZ 11/18, the Court noted at pp 6-11 of the cyclostyled judgment that:

> "Consideration of the relevant constitutional provisions supports the view that the validity of a decision of the Supreme Court in proceedings involving non-constitutional matters may be challenged on the ground that it has infringed a fundamental right or freedom enshrined in *Chapter 4* of the Constitution. The basis of the right of a party to the proceedings to challenge the validity of a decision of the Supreme Court in the circumstances is the Constitution itself. The right given to a litigant under s 85(1) of the Constitution to approach the Court for appropriate relief on the allegation stated is correlative to the constitutional obligation imposed on the Supreme Court as a body exercising public authority. …
>
> The scope of the right to approach the Court for appropriate relief under s 85(1) of the Constitution is not limited by specific objects against which the allegations of

> infringement of a fundamental right or freedom can be made. A constitutional complaint provided for under s 85(1) of the Constitution can be lodged against any act of public authority. A decision of the Supreme Court in a case involving a non-constitutional issue would fall within the category of acts, the constitutional validity of which may be challenged on the grounds prescribed under s 85(1) of the Constitution."

In this regard, s 44 of the Constitution falls under the Bill of Rights and provides that everyone must respect, protect, promote and fulfil the rights provided for in the Bill of Rights. Section 45(1) of the Constitution also falls under the Bill of Rights and binds the State and all institutions and agencies, including the Supreme Court. This in turn means that a finding that the present application for an order for direct access on the allegation that the decision of the court *a quo* violated a fundamental right is not properly before the Court would amount to a breach of ss 44 and 45 of the Constitution. The applicant can rightfully seek redress through s 85(1) of the Constitution.

IS IT IN THE INTERESTS OF JUSTICE TO GRANT DIRECT ACCESS?

The requirements for an application of this kind are set out in r 21(3) of the Rules 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 –
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> (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
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> (b) the nature of the relief sought and the grounds upon which such relief is based; and
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> (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."

Further, in elaborating r 21(3)(a), r 21(8) provides as follows:

> "(8) In determining whether or not it is in the interest 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 –
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> (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 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.

In *Liberal Democrats & Ors v President of the Republic of Zimbabwe E D Mnangagwa NO & Ors* CCZ 7/18 at p 11 of the cyclostyled judgment, the Court noted that:

> "It is imperative for an applicant for an order for leave for direct access to indicate that it is in the interests of justice that an order for direct access be granted. Where the affidavit does not satisfy the requirement, the application has no basis. Rule 21(3)(a) requires that the founding affidavit should have regard to the matters that show why the interests of justice would be served if an order for direct access is granted."

In *Zimbabwe Development Party & Anor v President of the Republic of Zimbabwe and Ors* CCZ 3/18 at pp 9-12 of the cyclostyled judgment, the Court remarked that:

> "Absent the grounds on which it is claimed that it is in the interests of justice that direct access be granted, the Court or Judge has no basis on which to decide whether or not to grant direct access. A finding has to be made by the Court or Judge of the existence of the interests of justice requiring that a decision that direct access be granted be made. …
>
> The correct approach in dealing with an application for an order of direct access to the Court is one that accepts the principle that all relevant factors required to be taken into account must be made available for consideration. The Court or Judge must consider all the relevant factors in deciding the question whether the interests of justice would be served by an order granting direct access to the Court. The weight placed on the different factors in the process of decision-making will depend on the circumstances of each case and the broader interests of a society governed by the rule of law."

The Court turns to determine the question whether the applicant has shown that direct access to it is in the interests of justice.

Two factors have to be satisfied. The first is that the applicant must set out facts or grounds in the founding affidavit, the consideration of which would lead to the finding that it is in the interests of justice to have the matter of the complaint against the decision of the Supreme Court placed before the Court directly for determination. The second factor is that the applicant must set out in the founding affidavit facts or grounds that show that the substantive application has prospects of success should an order for direct access be granted.

In the *Lytton Investments* case *supra* at pp 19-20 of the cyclostyled judgment the Court said:

> "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.
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> 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.
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> Arbitrariness and inconsistencies threaten the claim to judicial authority. The remedy under s 85(1) of the Constitution is not for the protection of fundamental rights and freedoms in the abstract. Concrete review requires that there be clear and sufficient evidence of the facts on the basis of which allegations of infringements of fundamental rights or freedoms are made."

At pp 21-22 of the same judgment the Court stated as follows:

> "A litigant who approaches the Court in terms of s 85(1) of the Constitution alleging an infringement of a fundamental right or freedom by the Supreme Court would have to allege and prove that, in the exercise of its jurisdiction, the Court would not be involved in the examination and determination of the non-constitutional issue which was before that court on appeal. The determination of such an issue is reserved exclusively for the Supreme Court by the Constitution."

A finding that the decision of the Supreme Court is on a non-constitutional matter should bring the inquiry to an end. The rationale for this proposition of the law is set out by the *Lytton Investments* case *supra* at p 23 of the cyclostyled judgment. The Court said:

> "The law of finality of decisions of the Supreme Court on non-constitutional matters applies to all litigants equally, whether they become winners or losers in the litigation process. The declaration of finality of a decision of the Supreme Court on a non-constitutional matter is itself a protection of the law. Once a decision is as a matter of fact a decision of the Supreme Court on a non-constitutional matter, no inquiry into its legal effect can arise. There would be no proof of infringement of a fundamental right or freedom as a juristic fact. It is enough for the purposes of the protection of finality and therefore correctness that the decision is on a non-constitutional matter."

The question which was before the court *a quo* for determination was whether or not the decision of the Supreme Court in the *Takafuma* case *supra*, on the formula that a court faced with the task of the division, apportionment or distribution of the assets of the spouses upon dissolution of marriage by divorce can use to secure an equitable distribution, applied in every case regardless of the circumstances.

The court *a quo* considered the wide discretion given to a court faced with the task of the division, apportionment or distribution of the assets of the spouses upon dissolution of marriage by divorce under s 7(4) of the Matrimonial Causes Act. It took into account the fact that the object of the exercise of jurisdiction by the court is to secure equitable distribution of the property. The court *a quo* concluded that the decision in the *Takafuma* case *supra* on the formula enunciated therein applied to similar cases and not to every case.

The effect of the decision of the court *a quo* on the issue before it for determination was that the applicability of the decision in the *Takafuma* case *supra* as a binding precedent in a case depended on the facts of that particular case. It reasoned that the High Court, being faced with a case the facts of which were entirely different from those that formed the basis of the

decision on the point of law in the *Takafuma* case *supra*, was faced with a new controversy calling for a different decision.

The applicant's contention was that the court *a quo's* decision "trashed" the rule of *stare decisis*, which is of fundamental importance to the rule of law. The argument was that the court *a quo* ought to have reached the conclusion that the High Court was bound by the decision of the Supreme Court in the *Takafuma* case *supra* on the formula for the distribution of the assets of spouses upon dissolution of marriage by divorce enunciated in that case. The contention was that failure by the court *a quo* to hold the High Court to the obligation to follow the decision in the *Takafuma* case *supra* on the point of law pronounced upon in that case violated the applicant's fundamental right to equal protection of the law enshrined in s 56(1) of the Constitution.

To show the fallacy in the applicant's contention, it is necessary to consider the content and scope of the doctrine of *stare decisis*.

The words "*stare decisis*" are Latin words which mean that things that have been decided should be left to stay undisturbed. The meaning of the doctrine of *stare decisis* is that when a point of law has been once solemnly and necessarily settled by a decision of a competent court it will no longer be considered open to examination or to a new ruling by the same tribunal or those which are bound to follow its adjudication.

The doctrine of *stare decisis* is therefore a rule of precedent or authority, addressed to lower courts and members of the public who are decision-makers, to the effect that decisions of the higher courts on particular points of law presented to and passed upon by those courts are law. Lower courts are bound to obey them in similar cases in future until they are overruled, even though a rigorous adherence to them might at times work individual hardship.

Cooley "*Constitutional Limitations*" (2 ed) at p 49 sets out the rationale for the rule of *stare decisis*. The learned author says:

> "All judgments, however, are supposed to apply the existing law to the facts of the case; and the reasons which are sufficient to influence the court to a particular conclusion in one case ought to be sufficient to bring it or any other court to the same conclusion in all other like cases where no modification of the law has intervened. There would thus be uniform rules for the administration of justice, and the same measure that is meted out to one would be received by all others. And even if the same or any other court, in a subsequent case, should be in doubt concerning the correctness of the decision which has been made, there are consequences of a very grave character to be contemplated and weighed before the experiment of disregarding it should be ventured upon. That state of things, when judicial decisions conflict, so that a citizen is always at a loss in regard to his or her rights and his or her duties, is a very serious evil; and the alternative of accepting adjudged cases as precedents in future controversies resting upon analogous facts, and brought within the same reasons, is obviously preferable."

The often quoted passage on the reasons which underlie the rule of *stare decisis* is by Chancellor Kent in *Kent's Commentaries* 475, found in Cooley's *Constitutional Limitations* at pp 49-50. Chancellor Kent said:

> "A solemn decision upon a point of law arising in any given case becomes an authority in a like case, because it is the highest evidence which we can have of the law applicable to the subject, and the judges are bound to follow that decision so long as it stands unreversed, unless it can be shown that the law was misunderstood or misapplied in the particular case. If a decision has been made upon solemn argument and mature deliberation, the presumption is in favour of its correctness, and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it. It would therefore be extremely inconvenient to the public if precedents were not duly regarded, and implicitly followed. It is by the notoriety and stability of such rules that professional men can give safe advice to those who consult them, and people in general can venture to buy and trust, and to deal with each other. If judicial decisions were to be lightly disregarded, we should disturb and unsettle the great landmarks of property. When a rule has once been deliberately adopted and declared, it ought not to be disturbed unless a court of appeal or review, and never by the same court, except for very urgent reasons, and upon a clear manifestation of error; and if the practice were otherwise, it would be leaving us in a perplexing uncertainty as to the law."

The importance of the rule of precedent to the rule of law cannot be gainsaid. It is indeed a rule of law, the purpose of which is to ensure uniformity and legal certainty in the decisions of courts, particularly lower courts, and points of law arising for determination in similar cases.

Every decision on a point of law is informed by a set of facts that are distilled into the *ratio decidendi* of the case which controls decisions in future similar cases. The doctrine of *stare decisis* therefore forms the basis of the policy of the courts and the principles upon which rests the authority of judicial decisions as precedents in subsequent litigation.

In *Payne* v *Tennessee* 501 US 808 (1991) at 827 the rule of *stare decisis* was lauded for promoting "the even-handed, predictable and consistent development of legal principles" and contributing to "the actual and perceived integrity of the judicial process". See Daniel A Farber *The Rule of Law and the Law of Precedents* 90 MINN.L.Rev. 1173, 1179 (2006).

The rule of *stare decisis* is subject to certain necessary and proper limitations. On the one hand the limitations secure and enhance its practical utility, whilst on the other they prevent its abuse. The first obvious limitation is that the rule commands obedience to a decision on a point of law in subsequent similar cases. If a decision of a court is in essence merely the determination of a fact, it is not entitled to the same sanction against subsequent decisions of lower courts which, under the rule of *stare decisis*, is accorded to a decision on a point of law.

The rule of *stare decisis* does not require decision-makers to comply with a decision which is a precedent on a particular point of law in every case regardless of the circumstances. The language of the decision is to be construed not as a statement of abstract propositions without limitation. It must be construed in connection with the particular facts of the case and the specific matters that were in view when the language was used. In other words, every rule of precedent has a set of juristic facts which it governs. The rule of *stare decisis* does not require adherence to a decision on a point of law in a case in which the state of facts is entirely different from the juristic facts governed by the precedent.

The court *a quo* took into account the requirements of the rule of *stare decisis*. It concerned itself with the possible results of compliance with the decision in the *Takafuma* case *supra* when the facts of the case were essentially different from the juristic facts at the heart of the precedent. The decision of the court *a quo* that the decision in the *Takafuma* case *supra* was not applicable in the case on appeal was consistent with the rule of *stare decisis*, which demands that lower courts ought to adhere to previous decisions of the higher courts on points of law in similar cases. The conclusion reached by the court *a quo* and the reasons for it had nothing to do with disobeying the rule of precedent. The issue for determination was whether the case on appeal was a similar case for which the precedent in the *Takafuma* case *supra* was intended.

The matter for determination by the court *a quo* was not a constitutional matter. The applicant was aware of the fact that the court *a quo* decided a non-constitutional issue. Had it decided a constitutional matter, the applicant would have appealed to the Court. An application to the Court in terms of s 85(1) of the Constitution, which the applicant intends to place before the Court should an order for direct access be granted, is evidence of acceptance of the fact that the court *a quo* made a decision on a non-constitutional issue. The applicant is seeking to challenge the correctness of the decision of the court *a quo*.

CHALLENGING THE ALLEGED WRONGNESS OF THE SUPREME COURT DECISION

The remarks in *Meda's* case *supra* do not in any way suggest that once a person has alleged the infringement of a constitutional right, all the other provisions governing access to the Court are side-lined. What this entails is that the mere allegation of a violation of a fundamental right has to be considered in conjunction with other principles governing direct access to the Court. The applicant has to show that the Supreme Court, in the process of

determination of 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 a non-constitutional issue it was required to decide. The reason is that a decision on a non-constitutional matter cannot constitute an infringement of the right to equal protection of the law, as it is a decision on a matter within the exclusive jurisdiction of the Supreme Court. The decision is protected by s 169(1) of the Constitution, as read with s 26(1) of the Act.

The applicant claimed that the judgment of the Supreme Court violated his right to equal protection of the law in terms of s 56(1) of the Constitution. In the founding affidavit the applicant said:

> "Where a court makes a determination so wrong that no reasonable court, applying its mind to the facts and the law, could ever have made such a determination, the right to the protection of the law enshrined in s 56(1) of the Constitution is infringed."

The applicant's complaint is that the Supreme Court judgment is not correct at law. This is buttressed by the following critical excerpts from the applicant's main application:

> "15.6 The position by the Supreme Court that *Takafuma* is not applicable in every situation is a new position that was not the law at the time the High Court determined the matter in HC 2951/13. The Supreme Court's new position could only have been utilised by the Supreme Court itself and not to condone a breach of *stare decisis* by the High Court. The Supreme Court was obliged to set aside the High Court judgment.
>
> 16.0 Counsel has advised that where the Supreme Court itself infringes a fundamental right, an aggrieved party has a right under section 85 of the Constitution to approach this Court."

The applicant confirmed the fact that the court *a quo* was not presented with a constitutional matter for determination. The alleged question of the violation of the principle of *stare decisis* arose out of the decision of the court *a quo* on a non-constitutional matter. The issue for determination by the court *a quo* was whether the High Court had erred in not strictly

applying the principles enunciated in the *Takafuma* case *supra* in the distribution of the assets of the spouses.

The issue revolves around the correctness of the judgment of the court *a quo*. The relief sought in the main application is also telling. It reads in part:

> "**IT IS DECLARED:**
>
> 1. That the applicant's right to the protection of the law enshrined in section 56(1) of the Constitution of Zimbabwe was infringed by the Supreme Court of Zimbabwe in Judgment No. SC 51/17 in the matter of *Simon Shonayi Denhere* v *Mutsa Denhere (nee Marange)*, SC 664/14, in that the Supreme Court completely failed to appreciate that it was obliged to set aside the High Court Judgment No. HH 685/14 on the basis of the doctrine of *stare decisis*.
>
> **ACCORDINGLY, IT IS ORDERED:**
>
> 2. That the Judgment No. SC 51/17 of the Supreme Court in SC 664/14 be and is hereby declared null and void and of no force and effect and is set aside.
> 3. That the portion of the High Court Judgment No. 685/14 in HC 2951/13 appealed against in SC 664/14 be and is hereby declared null and void and of no force or effect and is set aside.
> 4. That the Registrar of the High Court be and is hereby directed to set down before a different judge the matter in HC 2951/13 for a distribution of the assets of the parties in accordance with the formula in *Takafuma* v *Takafuma* 1994 (2) ZLR 103 (S).
> 5. That the respondents (if they oppose this application) jointly and severally pay the costs of this application the one paying the other to be absolved."

The former Constitution provided for the right to protection of the law in s 18(1). In *Williams & Another v Msipha NO & Others* 2010 (2) ZLR 552 (S) 567B-E the Supreme Court, sitting as a Constitutional Court, considered the scope of the right in relation to judgments of the courts and said the following:

> "The Constitution guarantees to any person the fundamental right to the protection under a legal system that is fair but not infallible. Judicial officers, like all human beings, can commit errors of judgment. It is not against the wrongfulness of a judicial decision that the Constitution guarantees protection. A wrong judicial decision does not violate the fundamental right to the protection of the law guaranteed to a litigant because an appeal procedure is usually available as a remedy for the correction of the decision. Where there is no appeal procedure there cannot be said to be a wrong judicial decision because only an appeal court has the right to say that a judicial decision is

> wrong. See *Maharaj v A G of Trinidad & Tobago (No. 2)* (PC) [1979] AC 385 at 399 D–H; *Boordman v Attorney General* [1996] 2 LRC 196 at 205i–206b.
>
> It is the failure by the judicial officer to comply with the requirements of the protection provided by the law of the fundamental human right or freedom which results in the violation or likelihood of violation of the right or freedom against which the Constitution guarantees to the litigant the right to the protection of the law. It is, therefore, important in every case of an alleged violation by a judicial officer of a fundamental human right or freedom to understand what it is that the judicial officer was required by the law to do and what he did, in order to decide whether there was failure of judicial protection which caused a violation of the fundamental human right or freedom concerned." (my emphasis)

See also *Rushesha & Others* v *Dera & Others* CCZ 24/17.

The right under s 18(1) of the former Constitution itself did not constitute a right to a correct judicial decision. The same principle applies to s 56(1) of the Constitution. The applicant's rights could not have been violated by the "wrongness" of the decision of the court *a quo*. The Court cannot inquire into the correctness of the decision of the Supreme Court on a non-constitutional matter.

In the *Lytton Investments (Pvt) Ltd* case *supra*, the Court, at pp 23-24 of the cyclostyled judgment, said:

> "The applicant misconceived the effect of the principle of finality of decisions of the Supreme Court on non-constitutional matters enshrined in s 169(1) of the Constitution, as read with s 26(1) of the Act. It believed that the purpose of the principle was to protect 'correct' decisions of the Supreme Court. According to the applicant, 'wrong' or 'outrageously wrong' decisions of the Supreme Court are an infringement of the fundamental right to equal protection of the law. The contention is that s 85(1) of the Constitution provides an aggrieved litigant with the remedy for the redress of such an infringement. The reasoning is flawed because it starts from the premise that there can be 'correct' and 'wrong' decisions of the Supreme Court on non-constitutional matters. …
>
> A principle has developed out of the consideration of applications seeking to attack final decisions of the Supreme Court on the ground that they violate the right to equal protection of the law. The applications have invariably been dismissed on the ground that they are appeals disguised as applications for constitutional review. In that way, the integrity of the jurisdiction of the Court on constitutional matters and that of the Supreme Court on non-constitutional matters is preserved."

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.

The South African courts have also stated that the Constitution does not ensure protection of litigants against wrong decisions. In the case of *Lane and Fey NNO v Dabelstein and Others* 2001 (2) SA 1187 (CC) [4] the court held:

> "Even if the [Supreme Court of Appeal] erred in its assessment of the facts, that would not constitute the denial of the ['right to a fair trial and to fair justice']. The Constitution does not and could hardly ensure that litigants are protected against wrong decisions. On the assumption that section 34 of the Constitution does indeed embrace that right, it would be the fairness and not the correctness of the court proceedings to which litigants would be entitled."

When the Supreme Court, like any other court, sits to decide an appeal, all it is required to do is to dispose of the matter in a manner which is consistent with the law. A judicial decision is the end result of a process that is regulated by law. In other words, a person has a right to a fair judicial process.

The rationale behind the principle of finality of judgment was explained in *Indian Council for Enviro-Legal Action* v *Union of India,* (2011) 8 SCC 161, where DALVEER BHANDARI J noted that this is because, more often than not, one party or the other will always be aggrieved by a judgment of a court. There is only a right to a judgment which is a culmination of a lawful process. HIS LORDSHIP said:

> "114. The maxim '*interest Republicae ut sit finis litium*' says that it is for the public good that there be an end of litigation after a long hierarchy of appeals. At some stage, it is necessary to put a *quietus*. It is rare that in an adversarial system, despite the judges

of the highest court doing their best, one or more parties may not remain unsatisfied with the most correct decision. Opening the door for a further appeal could be opening a floodgate which will cause more wrongs in the society at large at the cost of rights.

115. It should be presumed that every proceeding has gone through filtration several times before the decision of the Apex Court. In the instant case, even after final judgment of this court, the review petition was also dismissed. Thereafter, even the curative petition has also been dismissed in this case. The controversy between the parties must come to an end at some stage and the judgment of this court must be permitted to acquire finality. It would hardly be proper to permit the parties to file application after application endlessly. In a country governed by the rule of law, finality of the judgment is absolutely imperative and great sanctity is attached to the finality of the judgment. Permitting the parties to reopen the concluded judgments of this court by filing repeated interlocutory applications is clearly an abuse of the process of law and would have a far-reaching adverse impact on the administration of justice."

DISPOSITION

In the result, it is ordered that -

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

GWAUNZA DJC: I agree

BERE JCC: I agree

Manase and Manase, applicant's legal practitioners

Mhishi Nkomo Legal Practice, first respondent's legal practitioners