

(1) VOEDSEL ENTERPRISES (PVT) LTD (2) VOEDSEL  
TOBACCO ENTERPRISES (PVT) LTD

v

(1) AFC COMMERCIAL BANK LIMITED (2) THE  
MINISTER OF LANDS, AGRICULTURE, FISHERIES,  
WATER CLIMATE AND RURAL DEVELOPMENT (3) THE  
MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY  
AFFAIRS

CONSTITUTIONAL COURT OF ZIMBABWE  
GOWORA JCC, HLATSHWAYO JCC & PATEL JCC  
HARARE: 26 JUNE 2023 & 25 MARCH 2024

*T. Magwaliba with S. Mahuni*, for the first and second applicants

*J. Dondo*, for the first respondent

No appearance for the second and third respondents

**Judgment No. CCZ 06/24**  
**Constitutional Application No. CCZ**

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#### **GOWORA JCC:**

- [1] On 8 December 2022, the High Court, sitting at Harare, dismissed an urgent chamber application for an order of a stay of execution mounted by the applicants in response to an advert for the sale in execution of immovable properties at the instance of the first respondent herein. In determining the matter, the High Court held that the application for an order of a stay of execution of the properties was ill-fated due to the fact that the premise upon which the applicants sought reliance was not in their favour. The court held that the applicants could not allege that s 38(2), (3), (4) and (5) and the Second Schedule to the Agricultural Finance Act [*Chapter 18:02*], hereinafter referred to as the “the Act”, were unconstitutional as the constitutionality and validity of s 38 had been considered both under the Lancaster House Constitution and Constitution Amendment

No 20 of 2013. Accordingly, on the basis of *stare decisis*, the High Court could only find that there was no merit in the application. It proceeded to strike the application off the roll and ordered costs against the applicants. Following this decision, the applicants withdrew the application they had mounted in the High Court seeking an order for the invalidation of the above provisions.

- [2] Consequent thereto, the applicants have filed this application in terms of r 21 (2) of the Constitutional Court Rules 2016. They invoke s 167 (5) of the Constitution and contend that it is in the interests of justice that they be granted leave for direct access to this Court. If granted leave, they intend to bring an application in the main in which they seek to challenge the validity and constitutionality of s 38 (2), (3), (4) and (5) together with the Second Schedule to the Act on the grounds that the impugned provisions are violation of their right to access the courts under s 69(2) and (3) and, in addition, their right to equal protection under s 56(1). They further contend that in as much as the decisions in *John Nyamukusa v Agricultural Finance Company* SC 174/94 and *Chizikani v Agricultural Finance Company*, SC 123/95 are binding authorities, s 38 has not yet been construed in the light of the provisions of ss 56 (1) and 69 (2) and (3) of the current Constitution. For these reasons, they contend that it is not only in the interests of justice that leave for direct access to the Court be granted but that the main application has prospects of success.

### **THE PARTIES**

- [3] The first applicant is a private company with limited liability duly incorporated as such under the laws of the Zimbabwe. The second applicant is its sister company. It appears that the latter is the registered owner of certain immovable properties that have been attached for sale in execution in satisfaction of debts owed by the first applicant to the

first respondent. The properties in question were given as security in compliance with the requirements in respect of the amounts extended to the first applicant by way of lines of credit in its operations.

- [4] The first respondent is the AFC Bank Limited, hereinafter referred to as “the Bank”. It is a statutory corporation set up under the Act. Its purpose and objectives are set out in s 20 of the Act. The second respondent is the Minister assigned the administration of the Act with the third respondent being the Minister responsible for the enactment and promulgation of legislation.

### **FACTUAL BACKGROUND**

- [5] On the 2<sup>nd</sup> December 2020, the first applicant secured and was availed a line of credit in the sum of USD 1 500 000.00 by the first respondent, (the “Bank”). The loan was due to expire on 30 May 2022. The facility was to incur interest at the rate of 9 percent per annum. On 1 April 2021 the applicant secured another line of credit from the first respondent in the sum of USD 2 100 000.00. It was also subject to interest at the rate of 9 percent per annum and was due to expire on 30 September 2022.

- [6] On 4 May 2021, the first applicant secured a line of credit from the first respondent in the sum of ZWL 300 000 000. It was due to expire on 3<sup>rd</sup> November 2022 and was subject to interest at fifty percent *per annum*. On 7 August 2021, the first applicant secured another line of credit from the first respondent in the sum of ZWL 220 000 000.00. It was due to expire on 16 August 2022 and was subject to interest at 37 percent per annum.

[7] The running theme in all the documents detailing the agreements between the parties was the requirement that each of the loans be secured by a note of hand and that the registered owner thereto executes a document as security and co-principal debtor; hence the involvement of the second applicant.

[8] The applicants were unable to pay the debts when they fell due initially. They tendered payment through Treasury Bills. The tender was rejected. It is common cause, however, that the debts denominated in the United States Dollar have been settled. What is outstanding is the debt advanced in local currency. An offer to settle the debt through processed tobacco met with no success. That debt remains unsettled. The parties are wrangling over the exact amount, with the applicants claiming that the amount being claimed violates the *in duplum* rule. The Bank disputes the contention that the loan amount has now exceeded the limits required by the *in duplum* rule and asserts that the claim is legal.

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[9] On 28 November 2022, the properties mortgaged to secure the loans were advertised for sale by public auction scheduled to take place on 9 December 2022 at the instance of the first respondent. The properties comprise the following: a farm in Mhangura measuring 1209,9260 hectares, a residence in Glen Lorne and a house on a property share transfer in Borrowdale. The intended sale by public auction is what precipitated the two applications in the High Court, which applications were stillborn.

[10] There are no disputes of fact in the application before the Court. As a result, the matter may be decided on the issues of law as presented by the parties. The second and third respondents did not file any papers and will abide the decision of the Court.

## THE APPLICANTS' CASE BEFORE THE COURT

[11] Mr *Magwaliba* who appeared on behalf the applicants adopted a two-pronged approach. He argued that it was in the interests of justice that leave for direct access to the Court be granted in this matter. He contended that the High Court could not entertain the application for a stay of execution of the sale of the applicants' properties because it was bound by the decision in *Glens Removal and Storage Zimbabwe (Pvt) Ltd vs Mandala* 2017 (1) ZLR 20 in which the Court determined that *parate executie* was part of the law of the country. He suggested that there was need for clarity in the law as what was at issue in the *Glens Removals* case was concerned with the principle of *parate executie* against movable property. He suggested further that the common law, of which *parate executie* is a principle, had always distinguished the treatment of movable assets and immovable property where such summary execution is concerned. It was his further argument that, given that the issue dealt with in the *Glens Removals* case was solely concerned with movable assets, the remarks of the Court should be considered as being *obiter* thus necessitating a clear statement by the Court on the status of *parate executie* on immovable property. He was of the view that this matter presented the Court with an opportunity to bring clarity and certainty to the law.

[12] He further contended that in as much as the *Glens Removals* matter dealt with *parate executie* there was no direct reference in that matter to the provisions of s 38 of the Act that were in contention in the current dispute. There was, therefore, need for the Court to grapple with the issues having regard to ss 56 (1) and 69 (2) and (3) which were not considered in context in the afore-mentioned authority.

[13] Counsel conceded that, in the *Glens Removals* case, the Court had regard to s 16 (7) and s 18 of the former Constitution. However, it was the view of counsel that in the case of *Nyamukusa (supra)* which is the leading authority on s 38, formerly s 40, the Court therein had considered s 16 (7) of the former Constitution. There is no mention of s 18 in the *ratio decidendi*.

[14] As regards the prospects of success, Mr *Magwaliba* embarked on a foray into history. He contended that in terms of s 192 of the Constitution, the law applicable in our jurisdiction is the law that was in force at the effective date, that is 23 May 2013. That law includes the Roman-Dutch law. He contended that under the common law *parate executie* against immovable property was illegal. He relied for this contention on *Bock and Others v Duruburoro Investments (Pty) Ltd* 2003(4) All SA 103(SCA), *Aitken v Miller* 1951(1) SA 153 (RGD) and *Sakala v Wamambo* 1990(2) ZLR 263(H).

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[15] He suggested that in *Glens Removals* the Court did not attempt to distinguish between *parate executie* against movable and immovable property. His further suggestion was that this omission on the part of the Court has resulted in the subordinate courts in the country believing that the common law on *parate executie* has been altered. He posited that under the common law *parate executie* against immovable property was illegal and urged the Court to find that this position has not been altered by statute. He suggested that, contrary to the stance taken by the Bank in this dispute, s 38 is not a codification of the common law. His view was that the provision was out of sync with long established principles of *parate executie* under the common law and suggested that the authorities relied on by the Bank were distinguishable and that the law should be set out with certainty.

[16] He argued that the debt that the applicants now face is four times the original amount. The applicants are however being denied the opportunity to challenge the extent of the debt. The Bank in this case is the plaintiff, judge and executioner in its own cause. Thus, he maintained, there was merit in the application.

### **THE CASE FOR THE BANK BEFORE THE COURT**

[17] *Per contra*, Mr *Dondo* for the Bank, argued against the relief sought. He contended that it was not in the interests of justice that the application be granted and the applicants be given leave to approach the Court. He argued that the Act in s 38 provided a remedy for the Bank to obtain relief in respect of a defaulting party. There was an elaborate procedure set out in the Second Schedule to the Act.

[18] He indicated that it was necessary to draw a distinction between the Bank and other commercial banks operating within the country. He contended that the Bank only lent to farmers with the objective of promoting and funding agricultural activity and, thus, it was excluded from the necessity for recourse to the courts as a means of recovering outstanding debts owed to it.

[19] He contended that the section was designed to provide a quick and effective remedy against debtors of the Bank to facilitate recovery of funds for on-lending to farmers for agriculture under a scheme to ensure that there was a revolving fund available to enable the objectives of the Act to be met and be complied with. In order for the scheme to be successful, it was necessary that the Bank be not engaged in prolonged disputes before the courts, as this would lead to the objectives of the Act and the Bank being derailed.

[20] He argued further that the applicants had signed contracts in which they agreed to the conditions therein, which included the right of the Bank to resort to s 38 in recovering any outstanding amounts. Having chosen this manner of dealing, he further contended, they cannot now be heard to complain that they are being treated differently from other debtors.

[21] He submitted that any debtor of the Bank has a right to approach the courts for redress. He added that in this instance the applicants could have approached the courts to challenge the manner in which the process was conducted. He did not give an example of the manner of conduct that could be entertained by the courts.

[22] He suggested that s 38 had ousted the common law on *parate executie*. He added that the safeguards provided under s 38 made no distinction between movable and immovable property where *parate executie* was concerned. He submitted that there was no need for the Court to clarify the law. The issues were already settled by previous authorities in this jurisdiction.

[23] He added that the applicants had not demonstrated that the impugned section and the Second Schedule were barbaric in any form or manner.

[24] He was of the view that s 18 of the former Constitution was discussed in *Nyamukusa (supra)*. He was however unable to take the Court to the exact passage where it was discussed and how the court construed the section.

[25] He also suggested that there were disputes of fact which militate against the Court determining the application. He however conceded that the disputes were in relation to



the amount allegedly owed by the applicants and did not relate to the alleged constitutional issues for determination.

### **THE APPLICANTS' RESPONSE**

[26] Mr *Magwaliba* made the following submissions in response. He stated that there was need for clarity on the law. His view was that the authority of *Glens Removals* on which the Bank was relying in its opposition to the application dealt with *parate executie* against movable and not immovable property and that therefore there exists no authority within our jurisdiction on *parate executie* against immovable property under the new constitution. He added that the points *in limine* raised by the Bank before the High Court destroyed the case brought by the applicants. In upholding the objections *in limine*, the High Court was disabled from going into the merits of the dispute. The finding by the High Court left the applicants without any recourse before that court.

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[27] On the Bank's status as a lender for agricultural schemes, Mr *Magwaliba*'s further submission was that the Bank is also empowered to operate as a commercial bank. In that respect it is no different from the other banks that have to approach the courts to obtain redress against defaulting debtors. He argued that the impugned provisions permit the Bank to purchase the property it has executed against and that this was not a power or privilege afforded to the commercial banks which were not covered by the Act. He submitted that the Court must grant leave for direct access due to the inherent unfairness of s 38 and find that prospects of success exist as regards s 56 (1) and s 69 (2) and (3) of the Constitution.

[28] In conclusion, he urged the Court to find that there was need to achieve the lofty aspirations enshrined in ss 56 (1) and 69 (2) and (3) of the Constitution by granting

leave to the applicants to mount an application for the enforcement of the rights enshrined under the stated provisions.

## **THE LAW**

[29] The application is premised on s 167 (5) of the Constitution and brought to the Court under r 21 (2) of the rules of the Constitutional Court 2016. The Court enjoys special and limited jurisdiction under the Constitution and can only hear and determine matters that its jurisdiction permits it to entertain. The requirements that an applicant must comply with in an application for leave for direct access are fully set out in r 21(3) and decisions from the Court have settled what an applicant must allege and establish.

[30] Whilst r 21 (3) sets out what the applicant must allege and establish, the issues that the Court must wrestle with and the factors that it is enjoined to consider are provided for in r 21 (8). It provides as follows:

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“(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.”

[31] In *Lytton Investments (Pvt) Ltd v Standard Chartered Bank Zimbabwe Ltd & Anor* 2018 (2) ZLR 743 (CC) at p.749D, the import of the rule was explained as follows:

“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 state 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 constitutional matter placed before the Court directly, instead of it being heard and determined by a lower court with concurrent jurisdiction. The second factor is that the applicant must set out in the founding affidavit facts or grounds that show that the main application has prospects of success should direct access be granted.”

[32] It is thus settled that the overriding factor as provided in the Constitution and emphasized in the Rules is that an application for direct access to the Court must be in the interests of justice.

[33] At issue for determination in the dispute is the allegation by the applicants that in this country summary execution against immovable property is unconstitutional and that the courts have yet to pronounce on its constitutionality.

[34] The parties herein have adopted diametrically opposing views of the law on *parate executie*. Whereas the Bank takes the view that the law in the jurisdiction is settled, the applicants contend that the law is not settled and the authorities that have dealt with the matter have left a *lacuna* as concerns the law on summary execution against immovable property belonging to a defaulting debtor. This, contend the applicants, has presented a dilemma to debtors such as themselves together with the courts which are disabled from entertaining a challenge to the summary execution process due to the doctrine of *stare decisis*. The controversy before the Court is not new. It has been the subject of disputes presented to the courts within the jurisdiction and there exists a long line of authorities dealing with the question. The most recent is *Glens Removal and Storage Zimbabwe (Private) Limited v Patricia Mandala, supra*, wherein this court was seized with a similar issue.

[35] It seems to me that from an analysis of the position taken by the parties herein, both parties accept that it is not in dispute that *parate executie* against the movable assets of a defaulting debtor is legal and its constitutionality has been pronounced upon in this jurisdiction as well as in South Africa. As a consequence, the position is settled that *parate executie* in respect of movables is valid, provided the creditor does not, in selling the property, act in a manner which prejudices the debtor of his rights. This

principle is stated in a long line of authorities and has been followed both in South Africa and in courts within this jurisdiction. There is, as a consequence, no benefit in traversing this aspect of the principle.

[36] It becomes necessary to examine the principle of *parate executie* against immovable property in detail, commencing with the law as it stands under the common law.

### **PARATE EXECUTIE UNDER THE COMMON LAW**

[37] The default position in any instance of debt enforcement is that the creditor must make use of the formal court processes to enforce his/her/its rights, by obtaining a judgment or order as well as permission to have the relevant assets attached and sold in execution. It is trite that a creditor may not take the law into its own hands by seizing and selling property without following the proper procedures. However, attempts have been made over the years to devise contractual clauses in terms of which the debtor supposedly authorises the creditor to bypass the court processes. This is how the principle behind *parate executie* came into effect. It is trite that at law in the process of collection of a debt a creditor must make use of the formal court processes to enforce his, her or its rights. Therefore, by law, the creditor is obliged to obtain a judgment or order as well as permission to have the relevant assets attached and sold in execution. It therefore stands to reason that a creditor may not take the law into its own hands and resort to self-help by seizing and selling property without following the proper procedures. Under Roman-Dutch law, parties may not by agreement contract to oust the jurisdiction of the courts in the settlement or resolution of disputes arising from the agreement.

[38] However, notwithstanding these well-established principles, attempts have been made over the years to devise contractual clauses in terms of which the debtor supposedly

authorises the creditor to bypass the court processes. This is how the principle behind *parate executie* came into being.

[39] Under the common law the leading authority on *parate executie* clauses in mortgage bonds over immovable property is *Iscor Housing v Chief Registrar of Deeds* 1971(1) SA 613(T). Prior to this judgment, there existed a degree of uncertainty whether the position set out in *Osry v Hirsch, Loubser & Co Ltd* 1922 CPD 531 with particular reference to the validity of *parate executie* clauses in pledges of movable property also applied to mortgage bonds over immovable property. In *Iscor, supra*, the court reviewed and considered numerous decided cases, including *Orsry, supra*, as well as leading authors on Roman-Dutch law. At 622G-623DG, CLAASSEN J stated:

“Then we come to what must be considered as the leading case in the Transvaal which, as far as I know, has never been departed from. The case is *John v. Trimble and Others*, 1902 T.H. 146. The head-note simply states:

“The policy of the Roman-Dutch law is against allowing an agreement between debtor and creditor to the effect that if the debt be not paid at the proper time, the mortgaged property is to become the property of the creditor.”

From what I have quoted earlier out of John's case, it is clear that the learned Judge required that there must in each such case be a judicial sale of the property pledged (mortgaged).

That case has regulated the law in this province for nearly 70 years. It has as far as I am aware been observed over all these years and text-book writers have based their teaching on it. Even if it could be argued that the case was wrongly decided, it has by usage and acceptance become the law of this province and this Court will not after so many years depart from it. The remarks of STRATFORD, J.A., in *Pearl Assurance Co. Ltd. v. Union Government*, 1933 AD 277 at p. 305, about the undesirability of disturbing settled law, are apt in this connection.

The applicant prays for the recognition of *parate executie* pure and simple, that is private execution without reference to the debtor, as to immovable property.

Even in cases where a summons has been served and the defendant is in default, but a considerable time has elapsed before set down, the Court often requires notice of set down to be given to the defendant. See *Herbstein and van Winsen*, Civil Practice, 2nd ed., p. 159. In a *parate executie* matter the

power of attorney may have been given years before the proposed execution. Without notice to the debtor such execution would be most undesirable.

To grant the applicant's prayer and permit execution in respect of immovable property without reference to the mortgagor would in my opinion be contrary to the dignity, equity and spirit of our legal procedure.”

[40] The authorities that have considered the principle of *parate executie* appear to be unanimous in their view that under the common law summary execution against the immovable property of a debtor is illegal. The learned author *R H Christie*, in his book *Business Law in Zimbabwe*, states as follows:

“The mortgagee’s right to foreclose or call up the bond will depend on the terms of the bond, which may permit him to do so at his option on specified notice, or as a result of the mortgagor’s breach, typically of the obligation to repay the capital or to pay interest. *Hare v Garland* 1955 SR 76, 1955(3) SA 306 is an example of a foreclosure clause applicable to any breach of the terms of the bond and enforced due to the mortgagor’s failure to insure the property. Foreclosure must be by way of obtaining judgment for the amount owing and an order declaring the mortgaged property executable and then selling it in execution, as any agreement giving the mortgagee the right to sell without an order of the court (*parate executie*) is void, being a form of self-help which the law will not permit.”

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[41] The same statement on the void nature of a clause permitting *parate* in an agreement can be found in *Willie and Millin’s* book- *Mercantile Law of South Africa*. The learned authors state as follows:

“Lastly, we come to a clause known as the clause for *parate executie*, which authorises the mortgagee, on the default of the mortgagor, to sell the mortgaged property without having recourse to law. The objection to such a clause is that it allows one of the parties to take the law into his own hands, a measure disapproved of by the Roman-Dutch law, as we saw in the similar instance of a clause in a lease agreement allowing the landlord to eject the tenant summarily. There have been a host of conflicting opinions and decisions as to whether a clause for *parate executie* is valid; it is submitted that the position in South Africa is as follows: a distinction is made according as the mortgaged property is movable or immovable. In the case of immovable property, the clause is invalid and cannot be enforced by the mortgagee against the opposition of the mortgagor:

*John v Trimble* 1902 TH 146; *Israel v Solomon* 1910 TPD 1183 at 1186; *Douglas v Douglas & Parkins* 1919 GWLD 117; L E Krause 41 SALJ 20. Even where the mortgagor has granted the mortgagee the power of attorney expressed to be irrevocable and authorising the mortgagee to sell the property without reference to the mortgagor and without obtaining his acquiescence this is simply a means of effecting *parate executie* and is invalid: *Iscor Housing Unity Co & Another v Chief Registrar of Deeds & Another* 1971(1) SA 613 (T).”

[42] Paradoxically, the same passage contains a statement to the effect that *parate executie* in favour of the Land Bank of South Africa is legal in respect of both movable and immovable assets of a debtor. The passage reads as follows:

“It must be noted that by virtue of legislation a clause for *parate executie* is implied in every bond in favour of the Land and Agricultural Bank of South Africa: Land Bank Act 13 of 1944 ss 50(1) and 55(2)(b) and schedule 2, clause 6. As regards movables, the Bank may, without recourse to law, instruct the messenger of the court to sell the hypothecated property: Land Bank Act 13 of 1944 s 34bis (6)(a). The Agricultural Credit Board can likewise sell in execution mortgaged immovable property or movables deemed to be pledged to it: Agricultural Credit Act 28 of 1966 ss 37 and 42.”

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[43] Given the similarities in the legislative instruments between South Africa and Zimbabwe I can only find that the legality of the clauses in the respective Acts established to fund agricultural activities was due to the objectives of the relevant governments of the time to set up schemes that would ensure the availability of adequate funding for agricultural activity.

[44] It seems to me that the courts in South Africa have since departed from the position previously prevailing of upholding the validity of *parate executie* against immovable property where the Land Bank was the lender and holder of mortgage instruments. The reasoning can only be consistent with the adoption of a constitution that is justiciable. Recent authorities on the law of *parate executie* in South Africa now unequivocally express the view that *parate executie* against immovable property is illegal.

[45] In view of the divergent positions of the parties herein, even in relation to the law in South Africa, it is only proper that the Court has regard to decisions from South Africa as the issue has been rigorously under debate.

### **THE SOUTH AFRICAN POSITION**

[46] The principles applicable to contracts incorporating *parate executie* under Roman Dutch law were finally settled in *Bock & Ors v Duburoro Investments (Pty) Ltd* [2003] 4 ALL SA 103 (SCA) where the court said:

"The principles concerning *parate executie* (immediate execution) are trite. A clause in a mortgage bond permitting the bond holder to execute without recourse to the mortgagor or the court by taking possession of the property and selling it is void. Nevertheless, after devout (*sic*) the mortgagor may grant the bond holder the necessary authority to realise the bonded property. It does not matter whether the goods are immovable or movable: in the later instance, to perfect the security, the court's imprimatur is required. It is different with movables held in a pledge: a term in an agreement of pledge, which provides for the private sale of the pledged article and in the possession of the creditor, is valid but a debtor may "seek the protection of the court if, upon any just ground, he can show that, in carrying out the agreement and effecting a sale, the creditor has acted in a manner which has prejudiced him in his rights."

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[47] This authority suggests that the law distinguishes *parate executie* depending on the property which is the subject of the mortgage with *parate executie* against immovable property being illegal. In clarifying the legal position, the Supreme Court of Appeal reaffirmed the authority of *Osry v Hirsch, supra*, and its decision confirmed the validity of *parate executie* clauses in pledge contracts pertaining to movable property.

[48] Prior to the decision in *Bock, supra*, the Constitutional Court of South Africa in *Chief Lesapo v North West Agricultural Bank and Another* 2001 (1) SA 409 (CC) had considered s 38(2) of the North West Agricultural Bank Act No. 14 of 1981 which is identical to the then s 40(2) of our Act. This is now s 38(2) of the Act. The Court held



that s 38(2) of the North West Agricultural Bank Act was in contravention of section 34 of the Constitution of the Republic of South Africa.

[49] The above authority was affirmed and followed in *First National Bank of South Africa Ltd v Land and Agricultural Bank of South Africa*; *Sheard v Land and Agricultural Bank of South Africa* 2000 (3) SA 626 (CC). The judgment in *Findevco v Faceformat SA (Pty) Ltd* 2001 (1) SA 251 (E) relied on these judgments to reason that, basically, a contractual clause cannot permit a sale without court authorisation. These decisions were departed from in *Bock*.

[50] Mr *Magwaliba* suggested that the judgment in *Chief Lesapo v North West Agricultural Bank & Anor (supra)* takes the extreme view by holding that *parate executie* in the case of both movable and immovable property was unconstitutional. He conceded that the authority had been distinguished in later judgments from South Africa. His view was that the correct position under the common law is that *parate executie* against movables is legal as long as the debtor has been afforded protection in the contract underlying the debt.

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### **THE ZIMBABWEAN POSITION**

[51] In Zimbabwe, there are decisions of the court that have shunned resort to *parate executie* at the instance of creditors. In the case of *Changa v Standard Finance Limited* 1990 (2) ZLR 412 (SC) the Supreme Court said the following:-

“It was settled in *Osry v Hirsh, Loubser and Co Ltd* 1922 CPD 531 that, as far as movables are concerned, an agreement for their delivery to the Creditor and sale by him by means of *parate* execution is valid and binding. That decision was approved and followed by BEADLE J (as he then was) in *Aitken v Miller* 1951 SA 153 (SR), 1950 SR 227. The recognition extended under the civil law

to such agreements is subject, however, to the qualifications expressed at p 547 of *Osry's case (supra)* in these terms;

'It is, however, open to the debtor to seek the protection of the court, if, upon any just ground, he can show that in carrying out the agreement and effecting a sale, the creditor has acted in a manner which has prejudiced him in his rights'."

[52] In other words, the creditor, although entitled to *parate executie*, is not entitled to act in a manner that prejudices the rights of the debtor. In the case of *Glens Removal and Storage Zimbabwe (Private) Limited v Patricia Mandala, supra*, this Court was seized with a similar issue. However, the property in question and which was subject to *parate executie* was movable property. In reaching its determination and in its deliberation, the Court did not distinguish between movable and immovable assets as regards the operation *parate executie* at the instance of the judgment creditor. The conclusion reached by the Court was that *parate executie* is simply not unconstitutional and the Court explained its finding. The Court made the following remarks:

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"A party that is aggrieved by the manner in which *parate executie* has been carried out by the creditor has the right to approach the courts to complain about the manner in which he/she has been prejudiced by the application of *parate executie*. The debtor's right of access to the courts remains intact and he is free to exercise it. This approach was highlighted in the case of *Osry v Hirsch, Loubser & Co Ltd* 1922 CPD 531 at 547 where it is stated: (emphasis added)

"It is, however, open to the debtor to seek the protection of the court if, upon any just ground, he can show that, in carrying out the agreement and effecting a sale, the creditor has acted in a manner which has prejudiced him in his rights."

[53] From the above, it is apparent that the Court found that *parate executie* has safeguards insofar as the properties of debtors are concerned. In other words, if *parate executie* is carried out in a manner that prejudices a debtor's rights, he or she has the right to approach the court for recourse. Thus, there is no bar to approaching the courts.

[54] The Court has also pronounced on sections 38(2), (3), (4) and (5) of the Agricultural Finance Corporation Act. Under the Lancaster House Constitution, the right to sell under the provision which now constitutes s 38 of the Agricultural Finance Act was determined to be constitutional in the cases of *John Nyamukasa v Agricultural Finance Company* SC 174/94 and *Chizikani v Agricultural Finance Company*, SC 123/95.

[55] In *Nyamukusa, supra*, the appellant failed to repay a loan advanced to him by the Bank. His farm had, as a consequence, been seized and sold in execution to satisfy the debt. The appellant challenged the validity of the contractual clause permitting summary execution on the premise that it offended the provisions of s 16 and 18(9) of the former Constitution cited above. The respondent in the matter proceeded to execute against the farm pursuant to a contractual clause, which read as follows:

“Should the borrower commit or be in breach of any of the terms and conditions of this agreement the Corporation specifically stipulates, as provided in section 40 of the Act, that it shall have the right to execute, in accordance with section of the Act, after demand by registered letter addressed to the borrower at his last known address or to the address given by him in his application for this loan, and without recourse to a court of law, to enter upon the property hypothecated and to take possession thereof and sell and dispose of the same in whole or in part as the Corporation may determine always in terms of and subject to the provisions of the Act.”

[56] The appellant in that matter had sought to challenge the contractual clause on the basis that it offended the provisions of s 18 (9) of the former Constitution. The appellant sought to rely on the “access to the courts” provision set out in s 18 (9) of the former Constitution, which provided:

**“18 Provisions to secure protection of law**

(9) Subject to the provisions of this Constitution, every person is entitled to be afforded a fair hearing within a reasonable time by an independent and impartial court or other adjudicating authority established by law in the determination of the existence or extent of his civil rights or obligations.”

[57] The Court in that case pronounced on ss 40 (2), and 40 (2a) of the Agricultural Finance Corporation Act [*Chapter 101*]. The appellant challenged the right of the respondent to attach and sell his property in execution without recourse to court. He argued that in proceeding as it had done, the respondent was in breach of ss 16 (1) and 18 (9) of the former Constitution. The court held that the *parate executie* clause was lawful and permissible in terms of s 18 (9), as read with s 16 (7), of the former Constitution. At p 4 of the cyclostyled judgment the court stated:

“In the circumstances where the provisions of the said clause 6 are incorporated in a loan agreement, as was in this case, the respondent is entitled to proceed in terms of s 40 (2) and (2) (a) of the said Act. It is worthy of note that these powers are in addition to those under s 40 (1) of the said Act. I, therefore, associate myself with the following sentiments expressed by the learned judge in the court a quo at p 2 of the cyclo-styled judgment:

‘It is noted that he (appellant) was a signatory to the agreement which gave powers to the respondent to act in the manner it did. My reading of section 40 (2) and (2a) is that the respondent, by virtue of the loan agreement, to the effect that respondent can take possession of the property hypothecated without recourse to law, the respondent is perfectly entitled to proceed either under section 40 (1) or (2) and (2a) of the Act. For obvious advantageous reasons it chose to proceed in terms of the latter subsection in which it is supported by clause 6 of the loan agreement.’

On whether the respondent’s stated seizure of the appellant’s property breached the provisions of s 16 (1) and 18 (9) of the Constitution, I also agree with the submission on behalf of the respondent which was to the effect that such seizure is sanctioned by s 16 (7) (d) of the Constitution which reads: -

‘(7) Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision for the acquisition of any property or an interest or right in any of the following cases-

- (a) n/a
- (b) n/a
- (c) n/a
- (d) as an incident of a contract, including a lease or mortgage, which has been agreed between the parties to the contract, or of a title

deed to land fixed at the time of the grant or transfer thereof or at any other time with the consent of the owner of the land’

In view of the above, I agree with the conclusion of the court *a quo* and the submissions on behalf of the respondent that there is no merit in the appellant’s main ground of appeal.”

[58] This finding has been the cornerstone of the law in this jurisdiction as regards the constitutionality of the exercise by the Bank of the powers bestowed upon it by the Act. The contention by the applicants is that it was *dicta* based upon provisions of the former Constitution which are not contained in the Zimbabwe Constitution of 2013. The further contention by the applicants is that the remarks by the Court in relation to s 69 (3) in the *Glens Removals* matter were *obiter*. This contention is made in the backdrop of the dispute before the Court which was concerned with execution against movable property as opposed to immovable property which is the subject of the dispute *in casu*. The applicants contend that the law has always treated the two differently and that aside from the authority of *Nyamukusa*, Judgment No. CCZ 06/24 and Constitutional Application No. CCZ 2024/001, in a different scenario, the courts have not pronounced on the constitutionality of s 38 as viewed against the new Constitution.

[59] The principle arrived at in *Nyamusuka* was affirmed in *Chizikani v Agricultural Finance Corporation* SC-123-95. In the latter case, the dispute was concerned with an appeal from a decision of the High Court which had dismissed an urgent application for a provisional order calling upon the respondent, that is the Agricultural Finance Corporation to show cause why a final order should not be made, interdicting the attachment of the movable and immovable assets of the appellant. In dealing with the issues before it, the Court affirmed the position made in *Nyamukusa* that, where the provisions of the Act are incorporated in the loan agreement, the respondent was entitled to proceed in terms of section 40 of the Act which permitted summary

execution. In this matter, the court did not delve into the constitutionality of the procedure in question. It simply related to the provisions of the loan agreement and the Act.

[60] Similarly, in *Changa, supra*, the court held:

“An agreement for the delivery of movables by a debtor to a creditor and their sale by the latter by means of *parate executie* is valid and binding subject to the qualification that the creditor is not entitled to act in a manner so as to prejudice the debtor in his rights.”

[61] From the above, it is apparent that the Court found that *parate executie* has safeguards insofar as the properties of debtors are concerned. That is, if it is carried out in a manner that prejudices a debtor's rights, he or she has the right to approach the court for recourse. Thus, it can be said that there is no bar from approaching the court.

[62] Given the position assumed by the applicants, it becomes imperative to state that in *Glens Removal and Storage Zimbabwe (Pvt) Ltd v Mandala, supra*, the Court deliberated on s 69 of the Constitution vis-à-vis the *parate executie* principle and its constitutional validity in this jurisdiction. In arriving at its decision, the Court also considered South African judgments on the same subject matter which have held that the *parate executie* is both unlawful and unconstitutional. The Court however, came to the conclusion that *parate executie* is part of our common law and further, that it does not contravene section 69. It therefore stands to reason that based on decided authority, presently, in Zimbabwe, the position is that *parate executie* has been held to be valid and constitutional.

[63] The position as regards movable property sold in execution is thus settled. In order to place the dispute in its proper context the Court must undertake an analysis of the law

on the issue both in Zimbabwe and in South Africa. An excerpt from the judgment in the *Glens Removals* matter is instructive. Writing for the Court, CHIDYAUSIKU CJ stated:

“The above South African cases were interpreting s 34 of the South African Constitution, which provides as follows:

**“Access to courts**

34. Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

A comparison of s 34 of the South African Constitution and s 18 (9), as read with s 16 (7), of the former Constitution reveals that the two provisions are very different. The South African provision is much wider than the provisions of the former Constitution. Thus, in terms of the former Constitution, *parate executie* was expressly permitted. Accordingly, the above cited South African cases are of no assistance when interpreting s 18 (9), as read with s 16 (7) of the former Constitution.”

[64] In my view, the above crystallises the bone of contention between the parties before the Court. As I understand the case for the Bank, the **Judgment No. CCZ 06/24 Constitutional Application No. CCZ** is sanctioned by the Constitution as in its view, which I agree with, the former Constitution permitted *parate executie*. Therefore, the Bank contends, what was determined as being constitutional and in accordance with the law under the previous Constitution cannot be illegal and unconstitutional now.

[65] As matters stand there have not been any conflicting judgments on the subject in Zimbabwe. The existing court decisions held *parate executie* as valid. The judgment of the apex Court on the subject has held that it is not unconstitutional. It is worth noting that in *Glens Removals Zimbabwe, supra*, the court concluded that *parate executie* was permissible in terms of s 16(7) of the former Constitution hence the “access to the courts” provision enshrined in s 18(9) of the former Constitution applied, except as curtailed by s 16(7) of the former Constitution. It therefore appears that, based on

decided authority, presently in Zimbabwe, the position is that *parate executie* has been held to be valid and constitutional.

[66] Unfortunately for both the Court and the parties herein the question remains whether indeed the Court has pronounced on the constitutional validity of the impugned section especially as it pertains to ss 56 (1) and 69 (2) and (3) of the current Constitution. In its remarks the Court was clear that it could not apply the two sections to the dispute because to do so would operate against the doctrine of the non-retrospective application of legislation. In *Glens Removals (supra)* the Court said:

“The issue of whether s 69 (3) of the Constitution renders *parate executie* unconstitutional, of necessity raises the issue of whether or not s 69 (3) of the Constitution has retroactive effect and applies to the clause of *parate executie* that was entered into, executed and adjudicated upon by the High Court before the Constitution came into operation. Put differently, does s 69 (3) of the Constitution have retroactive effect?

I have no doubt in my mind that s 69 (3) of the Constitution has no retroactive effect.”

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And later:

“There is nothing in the language of s 69 (3) of the Constitution which suggests that it is to be applied retrospectively, thus overriding the presumption. Since s 69 (3) of the Constitution is not retroactive, it does not apply to the contract between the defendant and the plaintiff, which was concluded before the Constitution came into operation. Therefore, the constitutional issue is determined in favour of the defendant.”

[67] Notwithstanding the above, the applicants suggest that in this jurisdiction our courts must consider *parate executie* in a manner that distinguishes its applicability against movable and immovable assets. They contend that in South Africa the position as regards immovable property sold in execution is settled. They contend that in order to place the dispute in its proper context, the Court must undertake an analysis of the law



on the issue both in Zimbabwe and in South Africa. It is therefore on this premise that they approach the Court seeking leave for direct access for the determination of the allegations of invalidity of the provisions impugned.

### **DIRECT ACCESS TO THE COURT FOR RELIEF PURSUANT TO SECTION 85(1)**

[68] Any person who alleges that a right granted and enshrined under Chapter 4 of the Constitution has been, or is being, violated is entitled to approach a court under s 85 for appropriate relief. An application seeking the enforcement of a fundamental right may be brought before the Constitutional Court or any other court for the determination of the allegations and the enforcement of the enshrined rights. In view of this position, any party wishing to approach the Court directly must establish that it is in the interests of justice that direct access be granted. The Court must grant leave upon an application being determined by it, if the Court considers that it is in the interests of justice that leave for direct access to the Court be granted.

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[69] The Court is a specialised court with limited jurisdiction and can only hear and determine those matters that the Constitution allows it. As a consequence, direct access to the Court has been determined as constituting an extraordinary remedy that is granted only to deserving cases. As a result, it has been afforded on very rare occasions and the rules of court governing its procedures have set out strict requirements in an effort to regulate access in compliance with the restricted jurisdictional ambit of the Court. The applicant must set out the following:

- “(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”

As a consequence, leave to access the Court directly should be granted when it is shown that it is in the interests of justice to do so. Having chosen to apply for direct access the applicants needed to satisfy the Court that they have met the stringent requirements provided for in r 21 (3) above.

[70] *In casu*, it is common cause that when the immovable properties were advertised for a sale in execution the applicants immediately filed two applications with the High Court. The first was an application in which the applicants invoked s 85 (1) of the Constitution for declarations of invalidity of s 38 (2), (3) and (4) as well as the Second Schedule thereof on the premise that the provisions cited violated ss 56 (1) and 69 (2) and (3) of the current Constitution. The second was an application on a certificate of urgency for an order staying the sale of the immovable properties pending the determination of the application for declarations of invalidity. The latter matter was set down and determined by the High Court.

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[71] During the hearing, two points *in limine* were raised on behalf of the Bank. Only one is germane for the purposes of this discourse. The Bank contended that the High Court was bound by the decisions of the Supreme Court in *Nyamukusa (supra)* and *Chizikani (supra)* in which the impugned provisions had been found to be consistent with the former Constitution. It was argued further that, as regards the current Constitution, in *Glens Removals (supra)*, the decision of the Court therein to the effect that section 38 did not violate ss 69(2) and (3) of the Constitution was dispositive of the issue intended to be placed before the High Court by the applicants. The Bank contended that, in view of the decisions in those authorities, the High Court could not make a contrary pronouncement on the alleged invalidity of the provisions and ultimately the Bank moved for the matter to be struck off the roll.

[72] The learned judge reasoned as follows at p 4 of the judgment:

“The doctrine of *stare decisis* prevents courts from traversing decided issues. In addition, it (*sic*) ensures that lawyers are in a position to advise their clients regarding specific issues with certainty and predictability thereby preventing parties from incurring unnecessary expenses by coming to court to seek legal redress where there is already a clear legal principle on the issue by the highest court. It further allows like cases to be treated alike.

Granted *stare decisis* is not always a stifling phenomenon due to distinguishable elements in many cases. However, if precedent is fact specific, and, if there is already a precedent in plain sight from the Constitutional Court which attaches legal consequences to a similar set of facts, then a party would be perfectly in line in arguing that a lower court has no powers to deviate from a rule pronounced in such a judgment. To lodge a similar matter in a lower court, seeking a constitutional pronouncement on what has already been decided, would, in reality, have been done purely for the tactical purposes of delay. This is so given that it is trite that the lower court would be bound by what was decided in such a similar fact situation. There would be no need to file an urgent application seeking provisional stay of execution on the basis of awaiting constitutional pronouncement for similar facts that have already been decided upon at the highest level.” (the underlining is mine)

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[73] The learned judge went on to state at p5:

“Barring that aspect, the *Glens Removal* case dealt with like factual situations where the contractually (*sic*) sales are permissible for breach without further recourse to the debtor where a debt has been claimed. Indeed, what the applicant herein stated as the basis of the chamber application was that the applicants had approached the court under HC 8241/22 “seeking to declare the legal provisions in terms of which the first Respondent is acting as unconstitutional” and that the balance of convenience favours its granting. In other words, it is the constitutionality of the conduct just as in *Glens Removals* case which they seek to impugn. This is the same issue which the *Glens Removal* case sought to address.” (the underlining is mine)

[74] Mr *Magwaliba* submitted that, in reaching its determination and in its deliberation, the Court in the *Glens Removals* case did not distinguish between movable and immovable assets as regards the operation of *parate executie* at the instance of the judgment

creditor. The contention by the applicants is that the case expresses *dicta* based upon provisions of the former Constitution which are not contained in the Zimbabwe Constitution of 2013 and that the validity of the right of the creditor to effect summary execution of a debtor's immovable property under the aegis of the impugned provisions must be re-examined in the light of the enshrined rights to access the courts and protection against discrimination now found in the current Constitution. The question for determination is whether his contention is correct and sustainable.

[75] The further contention by the applicants is that the remarks by the Court in relation to s 69 (3) in the *Glens Removals* matter were *obiter*. This contention is made against the backdrop of the dispute before the Court which was concerned with summary execution against movable property as opposed to immovable property which is the subject of the dispute *in casu*. The applicants contend that the law has always treated the two differently and that, aside from the authority of *Nyamukusa (supra)* which dealt with a different scenario, the courts have not pronounced on the constitutionality of s 38 as viewed against the new Constitution.

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**WHETHER IT IS IN THE INTERESTS OF JUSTICE THAT THE APPLICANTS BE GRANTED DIRECT ACCESS TO THE COURT**

[76] The applicants contend that due to the nature of the relief being sought and regard being had to the decisions of the Court, the Supreme Court and the High Court on the issue of the constitutionality of the impugned provisions of s 38, it is not in the interests of justice that the applicants approach the High Court before applying for leave for direct access to the Court. They suggest that both the High Court and the Supreme Court have already expressed the view that the provision is not invalid and that this position

was based on the provisions of the former Constitution which is materially different from the current Constitution. They contend that any such approach would be a foregone conclusion in view of the manner that the High Court dealt with the application they mounted to stay the execution of the mortgaged properties. This background, the applicants argue, is the foremost reason why it is in the interests of justice for leave for direct access to be granted.

[77] A perusal of the judgement of the High Court that sparked this application makes it evident that the court did not consider the matter before it. Although the High Court was seized with an application for a stay of execution premised on an application attacking the validity of s 38 of the Act, the High Court proceeded to determine the issue of the validity of the provision despite objections from the applicants to the effect that it was, by so doing, determining a matter that was not before it. In other words, instead of considering and determining the application to have the sale in execution stayed on its merits, it made a foray into the application in which the applicants sought to challenge the validity of s 38 of the Act. It then pronounced on the merits of that application and concluded that the applicants were non-suited. The court said:

“Since the doctrine of *stare decisis* essentially ensures that that which is settled is not disturbed, it is thus imperative in terms of the court regulating its proceedings that a decision be made at this point as to whether the case alluded to has in fact addressed the issue in a manner which prevents the applicant from seeking to re-hash the matter as a constitutional issue. This can be done by looking at the factual matrix of the decided case and that *in casu*. Therefore, the key issue at this point, where what is before me is a provisional order seeking stay of execution pending the determination of a lodged constitutional matter, and where a preliminary point has been raised that the issue has been decided, is whether the facts at hand speak similarly to what has already been pronounced upon by the Constitutional Court as alleged by the first respondent. If so, there would indeed be justification for striking this

matter off the roll as sought by the first respondent since the balance of convenience would certainly not favour any stay.”

[78] The learned judge agreed with the submissions made on behalf of the Bank and upheld the point *in limine* and proceeded to strike the matter off the roll with costs. The High Court evidently withheld its jurisdiction in respect of the urgent application but commented unfavourably on the substantive application that was not before it. In the light of this, the applicants were denied recourse to court. Not only did the court refuse to consider the application for interim relief, by commenting on the substance of the intended application and on that premise, striking it off the roll, it also denied the applicants an opportunity to be heard on the substance of the main application. It seems to me that the High Court withheld its jurisdiction in circumstances where it was the correct forum for determining the issues pertaining to the disputes between the parties. The applicants were fully entitled to approach the High Court for relief and it was duty bound to hear and determine the application on the merits. The declination of jurisdiction without a determination on the merits was without legal basis. It acted in an irregular manner.

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[79] The Court, *in casu*, is being asked to consider whether or not the interests of justice require it to grant leave to the applicants to approach it directly for relief under s 85 (1). R 21(8) spells out the factors that the Court may take into consideration when assessing the interests of justice in an application for leave.

[80] Ordinarily, the Court would embark on an inquiry of all the factors set out in r 21(8), viz, the prospects of success, whether the applicant has any other remedy available to him or her and whether there are disputes of fact attaching to the matter above.

Critically, one of the most important and compelling factors is whether or not the application carries prospects of success on the merits. However, in the circumstances prevailing in the present case given that the application started in the High Court, it is only appropriate that the inquiry commence with the question as to whether the applicants have established the absence of an alternative remedy or procedure. Within this jurisdiction, the High Court, sitting as a court of instance, is fully empowered by the Constitution to hear and determine constitutional matters, with the exception of those matters reserved for the exclusive jurisdiction of the Court. The record shows that the applicants approached the High Court for relief on two bases. The first was for an order staying the intended sale of their properties, together with an interdict against the sale, pending the final determination of a challenge to the validity of the impugned statutory provisions. The second was the challenge to the law itself on alleged violations of the applicants' enshrined rights. The High Court determined neither of the applications.

[81] The learned judge concluded by saying:

**“Given that what is before me is essentially an urgent application which seeks stay of execution to argue in the High Court whether the Bank violated applicants’ constitutional rights to a fair hearing in terms of s 69 (2) and (3), the conclusion is resoundingly that this ground has been traversed and it matters not that the applicant seeks to split hairs by arguing that the Constitutional Court addressed only the right of access to court. Materially the court outlaid the entire s 69 which relates to the right to a fair hearing and access to court and concluded that there was nothing in the wording of the provision as a whole which explicitly or by necessary implication renders *parate executie* unconstitutional. This is the same principle captured in the Agricultural Finance Act.**

The second point *in limine* raised by the first respondent holds merit that the High Court is bound by precedent and would be essentially traversing ground where the core principle at stake, which is essentially the legality of the nature of actions to be taken by the first respondent, has been clearly addressed by the Constitutional Court.” (the emphasis is mine)

[82] It seems to me that the High Court, *in casu*, misconstrued the principles underlining the doctrine of *stare decisis*. It cannot be a correct application of the principle to decline jurisdiction on the premise that the issue sought to be placed before the court has been decided without first hearing the parties as to the merits. The authorities within the jurisdiction do not state that the door is closed to debtors in the position of the applicants. The correct position is stated in the case of *Glens Removal and Storage Zimbabwe (Private) Limited v Patricia Mandala, supra*, which is the authority that the High Court relied on in its determination, wherein this Court spelt out that a debtor was entitled to seek the protection of the courts if he could show on any ground that the creditor, either in the implementation of the contract or in the execution against the debtor's property, had acted in a manner which has prejudiced him in his rights. In other words, the creditor, although entitled to *parate executie*, is not entitled to act in a manner that prejudices the rights of the debtor.

[83] The principles upon which the Court relies in such an application are settled. Due to the status of the Court as a specialized court with limited jurisdiction set by the Constitution itself, access to approach it directly must be shown to be justified after all the factors have been considered. The Court does not have the capacity to hear and consider issues of fact and in that regard should not be placed in the invidious situation of determining those issues that a subordinate court ought to determine. One of the determining factors for consideration is that an applicant must show that the applicant has exhausted all other remedies or procedures that may be available.

[84] De Waal and Currie opine as follows:



“The second factor is whether an applicant can show that he or she has exhausted all other remedies or procedures that may have been available. This is for obvious reasons. If any other remedy or procedure is available, it cannot be said that urgency or the interests of justice necessitate circumventing the ordinary procedures and requiring the Constitutional Court to adjudicate the matter at first instance. Under the 1996 Constitution, High Courts and the Supreme Court of Appeal have constitutional jurisdiction including the jurisdiction to make orders concerning the validity of the provisions of an Act of Parliament. In the case of an order of invalidity requiring confirmation by the Constitutional Court, the court making the order may grant a temporary interdict or other temporary relief pending the decision of the Constitutional Court. This means that compelling reasons will be required to justify a different procedure and to persuade the Constitutional Court that it should exercise its discretion to grant direct access and sit as a court of first instance.”

[85] Having gone on a frolic of its own, and departing from considering the matter that was before it, the High Court proceeded to find that, due to precedent, it had no power to deviate from set precedent and that it was, as a consequence, precluded from making a determination that was contrary to decided authority. It concluded, therefore, that there was no merit in the application challenging the constitutionality of s 38. In my view, the contention by the applicants that, by determining the pending application on its merits, the High Court effectively destroyed their main application, cannot be gainsaid. However, in the particular circumstances of this case, it can only be said that the High Court remains seized with the matter. It has not exercised its jurisdiction by hearing the matter on its merits and rendering a decision thereon. Moreover, as already noted, the court merely struck the matter off the roll. What this means is that the applicants are at large, if they are so inclined, to revive the matter in the High Court.

[86] From the afore-going and given the *dicta* by the High Court *in casu*, I venture to suggest that the Court is disabled from entertaining the application for leave to access it directly. This Court, structured as it is, cannot assume the role of a court of first

instance in an inquiry where issues pertaining to factual disputes might arise. An applicant seeking such leave is duty bound to show that he or she has exhausted all other remedies or procedures available to him or her. Due to the fact that the matter is still before the High Court, where it has not been argued and determined on its merits, this Court cannot proceed to consider the other very pertinent factors, viz, the prospects of success or the absence of any other remedy, as to do so would pre-empt any decision that that court would arrive at. For this reason, it would not be in the interests of justice for the Court, sitting quorate, to hear and determine, at first instance, a dispute which the High Court is fully capable of hearing and concluding. Apart from stating that the High Court declined jurisdiction based on *stare decisis* the applicants have not suggested any other legal impediment that disables the High Court from hearing and determining the application for the declarator of invalidity mounted in the High Court which was withdrawn by them.

## **DISPOSITION**

[87] It is not ordinarily in the interests of justice for a court to sit as a court of first instance in circumstances like the present, where there would be no possibility of an appeal against that court's determination. The applicants have not justified, on the papers before the Court, why this Court should assume jurisdiction in this matter as a court of first instance in the absence of a properly reasoned analysis of the facts and legal issues arising in the High Court. The law has imbued the High Court with the appropriate jurisdiction to determine those constitutional matters that the applicants seek to place before the Court. I am unable to find any justification for jumping that critical procedural step for the Court to assume jurisdiction. The Court must and will withhold its jurisdiction *in casu*.

[88] In the premises the following order will ensue:

IT IS ORDERED AS FOLLOWS:

1. The application for leave is refused.
2. There shall be no order as to costs.

**HLATSHWAYO JCC** : I agree

**PATEL JCC** : I agree

*Mahuni and Mutatu*, applicants' legal practitioners

*Dondo & Partners*, first respondent's legal practitioners

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