REPORTABLE (5)

ISOQUANT INVESTMENTS (PRIVATE) LIMITED t/a ZIMOCO

v

MEMORY DARIKWA

CONSTITUTIONAL COURT OF ZIMBABWE
MALABA CJ, GWAUNZA DCJ, GARWE JCC, MAKARAU JCC, GOWORA JCC, HLATSHWAYO JCC, PATEL JCC, GUVAVA JCC & BHUNU JCC
HARARE, MAY 30, 2018

O Shava, with him *J Bamu*, for the applicant

J Mambara, for the respondent

MALABA CJ: At the end of hearing argument for both parties, the Constitutional Court ("the Court"), with the consent of the parties, dismissed the application with each party bearing its own costs. It was indicated that reasons for the decision would follow in due course. These are they.

This is a purported referral of constitutional questions by the Labour Court ("the court *a quo*") in terms of s 175(4) of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013

("the Constitution"). Section 175(4) provides that if a constitutional matter arises in any proceedings before a court, the person presiding over that court may, and if so requested by any party to the proceedings must, refer the matter to the Court unless he or she considers that the request is merely frivolous or vexatious.

Some time during the period between 21 July 2015 and 14 August 2015, the applicant terminated on notice the contracts of employment of seventeen of its employees. Through the Automotive and Allied Workers Union of Zimbabwe, the aggrieved former employees demanded from the applicant payment of retrenchment packages in terms of s 12C(2) of the Labour Act [*Chapter 28:02*] ("the Act").

Section 12C(2) of the Act provides that, unless better terms are agreed between the employer and the employees concerned or their representatives, a package ("the minimum retrenchment package") of not less than one month's salary or wages for every two years of service as an employee (or the equivalent lesser proportion of one month's salary or wages for a lesser period of service) shall be paid by the employer as compensation for loss of employment (whether the loss of employment is occasioned by retrenchment or by virtue of termination of employment pursuant to s 12(4a) (a), (b) or (c)), by no later than the date when the notice of termination of employment takes effect.

The applicant did not respond to the request. The aggrieved former employees approached the National Employment Council for the Motor Industry with a complaint that the applicant had failed to pay their retrenchment packages and their long service awards in line with company policy. On 22 September 2015 the National Employment Council for the Motor Industry requested the respondent, a designated agent, to redress the dispute.

On 12 October 2015 the aggrieved former employees filed a statement of claim before the respondent, who at that point was referred to as "the conciliator". The aggrieved former employees claimed that, although their contracts of employment had been terminated in terms of s 12(4)(a) of the Act, the applicant had failed to pay their retrenchment packages despite demands having been made to that effect. They jointly claimed the sum of US$139 896.13, being the total of their various retrenchment packages.

The applicant opposed the claims. It stated that when it terminated the aggrieved former employees' contracts of employment on notice, it exercised its common law right to do so following the Supreme Court decision in *Nyamande and Anor v Zuva Petroleum (Pvt) Ltd* 2015 (2) ZLR 186 (SC). The applicant argued that s 12C(2) of the Act was unconstitutional, as it took away its vested right. In that regard, the applicant stated that the aggrieved former employees could not have made a claim for packages that the applicant viewed to be illegal. The applicant indicated that it would seek to have the matter referred to the Court for a determination of the question whether s 18 of the Labour Amendment Act (No. 5) 2015 was constitutional. Section 18 gave s 12C(2) of the Act retrospective effect. In view of that position the applicant stated that the respondent could not grant the claim that its former employees sought.

A designated agent exercising his or her jurisdiction in terms of the Act would have no power to determine a constitutional matter. The disputes of rights that fall within his or her jurisdiction arise from employment relationships. They are not constitutional matters.

The applicant appreciated the fact that the constitutionality of s 12C(2) of the Act was not a matter the respondent had to concern herself with. It accepted the fact that the dispute before the respondent was over the quantum of the retrenchment packages payable to the former employees

in terms of s 12C(2) of the Act. The applicant did not raise the question of the constitutionality of s 12C(2) of the Act before the court *a quo*.

The respondent found that, since no better terms had been agreed between the applicant and its former employees, the applicant had to pay the minimum retrenchment packages as stipulated in s 12C(2) of the Act. Although contained in a decision dated 8 April 2016, the respondent "ordered" the applicant to pay its former employees the various amounts that she had specified as retrenchment packages for each of them by 31 July 2016. It is important to emphasise the fact that the respondent conducted a hearing of the matters raised by the parties in the proceedings before her and produced a determination of those matters.

On 5 July 2016 the respondent applied to the court *a quo* on affidavit, purportedly acting in terms of s 93(5a) of the Act. She prayed that her order against the applicant to pay its former employees' retrenchment packages be confirmed.

In opposition, the applicant challenged the constitutionality of s 93(5a) and s 93(5b) of the Act, alleging that the provisions violated its rights to equal protection of the law and to administrative justice, as contained in ss 56(1) and 68(1) of the Constitution respectively.

The applicant's case was that by virtue of s 93(5a) and s 93(5b) of the Act, the designated agent becomes an active litigant in a matter where the aggrieved former employees stand to benefit. The applicant contended that allowing the designated agent to institute process on behalf of the opposing party is discriminatory in effect. The argument was that the aggrieved employees were accorded, directly or indirectly, a privilege or advantage which the applicant did not stand to enjoy.

The applicant alleged that its right to equal benefit of the law, as provided for in s 56(1) of the Constitution, had been violated.

The applicant further contended that it would bear the costs of the proceedings in the court *a quo* whilst the former employees would not need to pay the same costs, as the designated agent's costs are payable by the Government as her employer. It was further alleged that s 93(5a) and s 93(5b) of the Act created a situation where the designated agent, who is expected to be impartial, ends up descending into the arena and taking sides with one of the parties. In this regard, it was alleged that s 93(5a) and s 93(5b) of the Act violated the applicant's right to equal protection of the law.

It is for these reasons that the applicant requested that the matter be referred to the Court for determination of the question whether or not s 93(5a) and s 93(5b) of the Act violate its rights to equal protection and benefit of the law and the right to administrative justice, as protected by ss 56(1) and 68(1) of the Constitution respectively. The applicant sought an order striking down s 93(5a) and s 93(5b) of the Act should the application be successful.

The court *a quo* granted the request, stating that "the application" was not frivolous or vexatious.

Section 93 of the Act provides as follows:

"**93 Powers of labour officers**

(1) A labour officer to whom a dispute or unfair labour practice has been referred, or to whose attention it has come, shall attempt to settle it through conciliation or, if agreed by the parties, by reference to arbitration.

(2) If the dispute or unfair labour practice is settled by conciliation, the labour officer shall record the settlement in writing.

(3) If the dispute or unfair labour practice is not settled within thirty days after the labour officer began to attempt to settle it under subsection (1), the labour officer shall issue a certificate of no settlement to the parties to the dispute or unfair labour practice.

(4) The parties to a dispute or unfair labour practice may agree to extend the period for conciliation of the dispute or unfair labour practice referred to in subsection (3).

(5) After a labour officer has issued a certificate of no settlement, the labour officer, upon consulting any labour officer who is senior to him or her and to whom he or she is responsible in the area in which he or she attempted to settle the dispute or unfair labour practice —

(*a*) shall refer the dispute to compulsory arbitration if the dispute is a dispute of interest and the parties are engaged in an essential service, and the provisions of section 98 shall apply to such reference to compulsory arbitration; or

(*b*) may, with the agreement of the parties, refer the dispute or unfair labour practice to voluntary arbitration if the dispute is a dispute of interest; or

(*c*) may, if the dispute or unfair labour practice is a dispute of right, make a ruling that, upon a finding on a balance of probabilities that —

(i) the employer or other person is guilty of an unfair labour practice; or

(ii) the dispute of right or unfair labour practice must be resolved against any employer or other person in a specific manner by an order —

A. directing the employer or other party concerned to cease or rectify the infringement or threatened infringement, as the case may be, including the payment of moneys, where appropriate;

B. for damages for any loss or prospective loss caused either directly or indirectly, as a result of the infringement or threatened infringement, as the case may be;

whereupon the provisions of subsections (5a) and (5b) shall apply.

(5a) A labour officer who makes a ruling and order in terms of subsection (5)(*c*) shall as soon as practicable —

(*a*) make an affidavit to that effect incorporating, referring to or annexing thereto any evidence upon which he or she makes the draft ruling and order; and

(*b*) lodge, on due notice to the employer or other person against whom the ruling and order is made ('the respondent'), an application to the Labour Court, together with the affidavit and a claim for the costs of the application (which shall not exceed such amount as may be prescribed), for an order directing the respondent by a certain day (the 'restitution day') not being earlier than thirty days from the date that the application is set down … for hearing (the 'return day' of the application) to do or pay what the labour officer ordered under subsection (5)(*c*)(ii) and to pay the costs of the application.

(5b) If, on the return day of the application, the respondent makes no appearance or, after a hearing, the Labour Court grants the application for the order with or without amendment, the labour officer concerned shall, if the respondent does not comply fully or at all with the order by the restitution day, submit the order for registration to whichever court would have had jurisdiction to make such an order had the matter been determined by it, and thereupon the order shall have effect, for purposes of enforcement, of a civil judgment of the appropriate court."

ISSUE FOR DETERMINATION

The sole issue for determination was whether there was a proper referral of the matter to the Court by the court *a quo*. The Court found that the court *a quo* erred by referring a matter which arose in proceedings that were improperly before it. The starting point is the construction of s 175(4) of the Constitution.

THE IMPORT OF SECTION 175(4) OF THE CONSTITUTION

Referrals to the Court are made in terms of s 175(4) of the Constitution. For ease of reference, the section provides as follows:

"(4) If a constitutional matter arises in any proceedings before a court, the person presiding over that court may and, if so requested by any party to the proceedings must,

refer the matter to the Constitutional Court unless he or she considers the request is merely frivolous or vexatious." (the underlining is for emphasis)

The case before the Court necessitates an explanation of the importance of the phrase "in any proceedings before a court" as emphasised above. The reason is that a proper interpretation of s 175(4) of the Constitution leads to the conclusion that the proceedings in which a constitutional matter arises in respect to which a request for referral of the question to the Court is made would have to be validly before the subordinate court.

In *Tsvangirai* v *Mugabe and Anor* 2006 (1) ZLR 148 (S) the Supreme Court, sitting as a Constitutional Court, considered the meaning of the phrase "in any proceedings" as used in s 24(2) of the former Constitution. At 158D-159A the court said:

> "The words 'in any proceedings in the High Court' mean proceedings that have come to or have been instituted in the High Court. They are proceedings that have found existence in the High Court, in the sense that that court has been called upon, through a method prescribed by law, to exercise the judicial functions of the State over the matter in dispute between the parties and it is in control of the conduct and progress of the proceedings.
>
> The word 'proceedings' has a wider meaning in s 24(2) of the Constitution than 'goings-on' in court. There are no proceedings without an action or case. Proceedings ordinarily progress in steps. The word is, therefore, a general term, referring to the action or application itself and the formal and significant steps taken by the parties in compliance with procedures laid down by the law for the purpose of arriving at a final judgment on the matter in dispute. There are proceedings in being in the High Court from the moment an action is commenced or an application made until termination of the matter in dispute or withdrawal of the action or application. See *Re Appleton French & Scrafton Ltd* [1905] 1 ChD 749 at 753; *Mundy* v *The Butterley Co Ltd* [1932] 2 ChD 227 at 233; *Muzuva* v *United Bottlers (Pvt) Ltd* 1994 (1) ZLR 217 at 219.
>
> There is, therefore, no need to limit the very general words of s 24(2) of the Constitution and say that the question as to the contravention of the Declaration of Rights arises only when the court is actually sitting. The words 'if in any proceedings in the High Court any question arises as to the contravention of the Declaration of Rights' imply that proceedings may take place in the High Court without any such question arising.
>
> In this case, the proceedings commenced in the High Court on 12 April 2002 when the election petition was presented. The election petition, as the special procedure required

> by the statute to be used, defined the stages of the proceedings in the High Court in that it set out the relief sought and the grounds for it. Until the question whether the President was duly elected or not duly elected was determined, the proceedings were pending in the High Court."

The *ratio decidendi* of the *Tsvangirai* case *supra* is that the action or application by which proceedings are commenced before a court of law must be a process in respect of which the law provides that it may be used to bring the matters in dispute before the court concerned for it to exercise its jurisdiction to hear and determine them.

The Labour Court is a creature of statute. The nature, content and scope of the court's jurisdiction are determined by reference to the specific provisions of the statute creating the court. It would be those provisions which confer on the court the necessary powers to hear and determine the class of matters brought before it in accordance with the prescribed procedure.

The creating statute ordinarily prescribes a court's jurisdiction by reference to subject matter and procedure for bringing the matters to the court. A court can have and exercise jurisdiction over a matter prescribed by statute as falling within its competence, provided the matter is brought before it in accordance with the prescribed procedure.

Proceedings in a court would be those formal steps that relate to a matter falling within the jurisdiction of the court and brought before it in accordance with the procedure prescribed for bringing such a matter for hearing and determination.

Section 93(1) of the Act makes provision for conciliation. It is the statutorily compulsory method for the resolution of all disputes and unfair labour practices referred to a labour officer. The adoption of compulsory conciliation as the procedure for the resolution of disputes arising from employment relationships referred to a labour officer underscores its importance. It is an

expression on the part of the Legislature of faith in conciliation as an effective process for consensus–seeking as a first step before the disputes become subjects of arbitration or adjudication. In terms of s 93(1) of the Act all disputes properly referred to a labour officer must first be subjected to the process of conciliation before they are referred to arbitration or adjudication, depending on the nature of the dispute.

Although the Act does not require a party to allege a cause of action, it is necessary to allege a dispute within the jurisdiction of the labour officer. The following jurisdictional facts must be asserted or must appear when referring a dispute in terms of s 93(1) of the Act to a labour officer –

(a) there must be a dispute;

(b) the dispute should have arisen within an employment relationship;

(c) the dispute should fall within the powers of a labour officer;

(d) the issue in dispute should not be subject to proceedings under the employment code (s 101(5), as read with s 101(6) of the Act);

(e) the parties should not be subject to an employment council with jurisdiction. In other words, a designated agent should not be seized with the dispute (s 63(3b) of the Act); and

(f) the referral should be timeous (s 94(1) of the Act).

The jurisdictional facts must actually exist. They cannot be created by consent of the parties.

Employment relationships are based on contracts. Conciliation is a process that does not involve the use of power in the resolution of a dispute between parties, as adjudication does. The purpose of the procedure of conciliation is to afford the parties to the dispute the opportunity to resolve the dispute by agreement. The settlement of the dispute must be reached through voluntary participation in the discussion and consideration of the matters in dispute with the assistance of a third party.

Conciliation enables the parties to be in control of the outcome of the dispute resolution process. It ensures expeditious resolution of disputes relating to and arising from employment relationships. It is an ideal objective method of dispute resolution where the parties have no desire to talk to one another or where the parties cannot find a solution to the dispute themselves.

Compulsory conciliation, provided for under s 93(1) of the Act, is based on the presumption that the labour officers and the parties will appreciate the obligation placed on them to act in accordance with the procedure of conciliation. The parties are required to act in good faith and to do everything within their capacities to resolve the dispute by agreement.

The first duty of a labour officer in conciliation proceedings is to attempt to resolve the dispute within thirty days after he or she began to attempt to settle it. The labour officer must determine a process to attempt to resolve the dispute. The process may include mediation of the dispute, conducting a fact-finding exercise, and making proposals to the parties on how the dispute may be resolved. The labour officer should, however, generally undertake the process of fact-finding and recommend proposed solutions to the parties in order to guard against perceptions of bias. A conciliator should not judge.

The labour officer is under an obligation to do all that can reasonably be done by a conciliator to assist the parties to resolve the dispute by agreement without imposing the solution on them. The parties remain the masters of the process. The terms of any settlement must remain the responsibility of the parties. That entails acquisition of the necessary skills in conducting conciliation. The process of conciliation itself is largely dependent on the parties' willingness to settle. There must be evidence that the parties engaged in serious and *bona fide* discussion of matters over which they disagreed. There must be evidence that the labour officer understood his or her rôle as a conciliator and actively exercised his or her functions. If a labour officer engages in anything that is not conciliation, it is a nullity.

The Minister has power under s 127(2) of the Act to make rules regulating the practice and procedure for the resolution of disputes through conciliation.

A labour officer engaged in conciliation must follow a systematic approach in the process in seeking consensus between the parties on the matters in dispute.

It is important for the labour officer to remember that under s 93(1) of the Act he or she has a duty to attempt to resolve the dispute between the parties through conciliation. That means that he or she must adopt measures which are conducive to the resolution of the disputes through conciliation. As a statutory conciliator under s 93(1) of the Act, the labour officer has the power to hold the parties in the conciliation process for at least thirty days.

It must be clear that within the thirty days the labour officer has been engaging the parties in an attempt to resolve the dispute through conciliation. During that period the parties are expected to attend conciliation proceedings and participate in the process by answering questions put to

them by the labour officer and giving the information he or she would have asked for. This means the labour officer and the parties must prepare adequately for the conciliation process.

Conciliation is the statutorily prescribed method by which the labour officer must attempt to settle the dispute referred to him or her in terms of s 93(1) of the Act. The Act does not specify the acts the labour officer has to do to facilitate the conciliation process. The duty to attempt to settle the dispute through conciliation imposed on the labour officer by s 93(1) of the Act is wide enough to be interpreted to mean that it confers on the labour officer powers which are necessary to enable him or her to discharge the duty imposed on him or her.

The duty on the labour officer to attempt to settle the dispute through conciliation means that he or she is at large with regard to the choice and use of the steps and procedures ordinarily associated with the process of conciliation as a method of dispute resolution.

The conciliation process which a labour officer may follow may be divided into distinct steps. The following of the steps will depend on the circumstances of the case. The overall process, however, usually involves four broad stages. These are introduction, story-telling, dispute analysis, and problem solving.

The labour officer must take time before commencement of the conciliation process to have a preliminary understanding of the nature and possible causes of the dispute between the parties. The duty imposed on the labour officer by s 93(1) of the Act is premised on the fact of the existence of a dispute relating to or arising from an employment relationship. The Labour Court may not adjudicate a different dispute from the one which was conciliated by the labour officer. The reason is that no attempt to settle such a dispute through conciliation would have been made. The requirement that the labour officer must be clear in his or her mind of the nature of the dispute to

be conciliated is important. A dismissal dispute, for example, cannot be referred to the labour officer as an unfair labour practice and an attempt to resolve it through conciliation made. The issue in dispute would be unfair dismissal. It must be a dispute covered by the Act. A labour officer would have no jurisdiction to attempt to settle a dispute not covered by the Act through conciliation.

The labour officer as conciliator must ensure that there are facilities that can keep the parties in the dispute apart from each other in separate rooms to give them the opportunity to let off steam. The separation is important whether the parties are able to talk to each other directly or not.

The venue for the conciliation should be appropriate. There should be a single room large enough to comfortably seat the parties and the conciliator in joint proceedings. There should also be break-away rooms large enough to accommodate each party for side-meetings. The rooms must be at a distance apart or well insulated to ensure that parties do not overhear one another when in side-meetings.

Throughout the conciliation the labour officer should consider separating the parties into side-meetings if he or she considers that a joint meeting is not conducive to securing consensus. Under normal circumstances, the labour officer may commence the process by having the parties in a joint meeting. Choice of the most effective procedure to be employed is an important aspect of conciliation. The labour officer must choose procedures which would enable him or her to resolve the dispute as quickly as is practical in the circumstances without jeopardising fairness, effectiveness and perceptions of independence.

It is important for a labour officer who is involved in a statutorily compulsory conciliation process to appreciate that the parties would not have contributed to his or her appointment as the conciliator in their dispute. He or she must therefore take time to introduce himself or herself to the parties. The purpose of this step of introduction is for the labour officer as the conciliator to begin to develop trust and rapport with the parties and to deal with all essential preliminary matters. The labour officer must make the parties feel confident that he or she is independent of them and has no interest in the matters in dispute.

The side-meetings with each party at the initial stage of the conciliation are very important. After introducing himself or herself to the party in the side-meeting, the labour officer must explain the conciliation process to the party to ensure that he or she or it has a basic understanding of the process. In particular, the parties need to understand the difference between conciliation as a consensus building process and adjudication process.

The parties need to understand that the labour officer will not impose the outcome upon them. He or she must explain that his or her role is primarily to help the parties reach a mutually acceptable agreement. He or she must lay down the ground rules for the conciliation process. For the conciliation process to be successful, the parties need to have sufficient confidence in the labour officer to raise issues or to make concessions. See *National Union of Metalworkers of SA and* Ors v *Cementation Africa Contracts (Pty) Ltd* (1998) 19 ILJ 1208 (LC) at para 21 (the "*NUMSA*" case).

During the side-meetings the labour officer must endeavour to get as much information from the parties as possible. He or she must let the party give his or her or its side of the dispute in detail and probe the party concerned to get the relevant information. In a conflict situation parties are usually eager to state their case. The sooner that this opportunity is given and anger and emotion

is released the better for effective dispute resolution. The labour officer should thereafter invite each party to address him or her on the dispute to be conciliated by stating as much about the dispute as the party is comfortable to disclose at this stage. This should include the background to the dispute, the issues that each party considers to be in dispute and its position in each issue.

The labour officer must try to use the effective inter-personal skills, such as building rapport, listening, paraphrasing, summarising, dealing with emotion including anger and threats, and helping people save face. See Grogan "*Labour Litigation And Dispute Resolution*" 1 ed Juta p 113; Brand *et al* "*Labour Dispute Resolution*" 5 ed Juta pp 122-123; and Darcy du Toit *et al* "*Labour Relations Law A Comprehensive Guide*" 6 ed LexisNexis pp 117-146.

The labour officer may use the side-meeting to promote the settlement-seeking process. He or she may use the meeting to explore options, develop propositions, and to challenge the parties.

Once he or she has obtained information from one party on the matters in dispute in a side-meeting, the labour officer should move to the other party and do the same. He or she may move from one party to the other extracting information with which he or she confronts the parties in side-meetings until he or she is satisfied that the parties can be brought together in a joint-meeting.

In the process of discussing matters in dispute in side-meetings, the labour officer must ascertain from the party which information he or she has been given is intended by the party to be strictly confidential. He or she should ascertain what information can be conveyed from one side-meeting to another. He or she must obtain clear authority in this regard before making disclosure from one side-meeting to another. Parties are more likely to be prepared to disclose information to the labour officer purely for purposes of resolving the dispute if they are confident that the process

is confidential. The process has to be confidential in order for the labour officer to be able to assist the parties to resolve the dispute.

During conciliation proceedings, the conciliator must assist the parties obtain admissions of fact and of documents relevant to the dispute. He or she must assist the parties in holding any necessary inspections or examinations and exchange reports or other useful and relevant documents, if any. If further particulars pertaining to the dispute or unfair labour practice are required, the conciliator should ensure that the parties give these to each other and also share them with the conciliator.

Once the labour officer has collected preliminary information from the parties, he or she must analyse it to further understand the dispute. He or she must seek to appreciate the underlying causes of the dispute. He or she must be clear in mind as to what the real issues between the parties are, the position of the parties on each issue, and their expectations. He or she must ascertain the real fears, concerns and interests underpinning the parties' positions and expectations. Understanding these matters is often the key to a resolution of a dispute. At the same time, it is important for the labour officer to ascertain the value that the parties place on their positions and needs and what priority they attach to each issue.

The labour officer should then bring the parties together in a joint-meeting where he or she goes through the analysis of the dispute in the context of the information gathered from them.

The analysis of the dispute is probably one of the most important steps in conciliation. If the labour officer and the parties do not have a detailed understanding of these aspects of the dispute, it is difficult to break deadlocks creatively. What often happens instead is that the parties and the conciliator become trapped in a superficial and adversarial exchange of demands and

concessions. Much conflict is occasioned by misunderstanding and posturing. See Brand *et al supra* at p 127.

At this stage the labour officer may challenge the parties to state what best alternatives to a mutually agreed resolution of the dispute there are. It is often only when the parties really appreciate what the real prospects of a failure to settle a dispute may be that they realise the limitations of their bargaining positions. Confronting the reality of adjudication frequently encourages parties to be more flexible than initially indicated.

This stage seeks to get to the essence of the dispute. To achieve this purpose, the labour officer should ask the parties probing and testing questions to establish the causes, positions, expectations, needs, values and priorities which the parties place on the position.

The labour officer may, however, not pressurise a party to settle by warning him or her or it of the consequences of losing the case in the Labour Court. He or she may ask the parties to think of the consequences of not settling the dispute by agreement. At the end of the day, the parties are the masters of the conciliation process.

The next step is for the labour officer to explore options for settlement. The purpose of the step is for the labour officer to assist the parties develop and consider a wide and creative range of options for a possible agreement. He or she assists the parties to consider moderation of their positions and expectations, harmonise their needs, and to find joint gains and mutually beneficial needs. The aim is to make the parties achieve win/win outcomes. These are those which meet the respective needs of the parties as much as is practically possible.

The labour officer should then assist the parties to agree to a solution of the dispute which is practical, cost-effective and maximises the mutual satisfaction of the parties' needs. As a result

of the pursuit of such options, the parties reach an agreement as the settlement of their dispute through conciliation.

The primary function of a conciliating labour officer is to assist the parties in a dispute to reach agreement. As a conciliator, the labour officer is entitled to offer advice to the parties. He or she should, however, avoid browbeating the parties into a settlement of the dispute. He or she should not pronounce on the merits of the respective cases of the parties, even if the pronouncement is in the form of advice. All he or she should do is to seek to steer the parties to a mutually agreed outcome. Whilst he or she must be flexible in approach, he or she must remain impartial.

It is clear that the conciliation to be embarked upon by the labour officer to achieve the purpose which is prescribed under s 93(1) of the Act is not a mechanical chairing of the meetings between the parties in dispute by an independent third party. It is a process which involves active participation by the labour officer, who has to intervene in the thought processes of the parties in an attempt to resolve the dispute. See the *NUMSA* case *supra* at para 21.

After properly discharging his or her functions as a conciliator in terms of s 93(1) of the Act, a labour officer can issue a certificate of no settlement to the parties to the dispute or unfair labour practice in terms of s 93(3) of the Act. A certificate of no settlement is issued to the parties to the dispute or unfair labour practice when conciliation has failed or at the end of the thirty-day period or any further period agreed between the parties. The expiry of the period of thirty days from the date of referral of the dispute or the agreed extension thereof automatically terminates the labour officer’s conciliation jurisdiction. The certificate of no settlement should be issued within a reasonable time of the expiry of the period of thirty days or the agreed extension thereof.

It is important that labour officers appreciate the legal effects of a certificate of no settlement issued to the parties. The issuance of the certificate is evidence that the parties engaged in a genuine process of conciliation with the active assistance of the labour officer.

It would not be compliance with the requirements of a compulsory process of conciliation, provided for under s 93(1) of the Act as a pre-condition for the issuance of a certificate of no settlement, to call upon the parties to submit statements of claims and responses followed by submission of heads of argument before a certificate of no settlement is issued. Such a certificate of no settlement is not in accordance with s 93(3) of the Act. No attempt would have been made by the labour officer to settle the dispute between the parties through conciliation.

A properly issued certificate of no settlement has legal effect. The law prescribes the next method of resolution of the dispute or unfair labour practice to be employed on the basis of the presumption of the existence of a validly issued certificate of no settlement. The effect of a certificate of no settlement is to establish the fact that the attempt to settle the dispute through conciliation has failed. In other words, it certifies that on the date it was issued the dispute referred to the labour officer for conciliation remained unresolved. Once a certificate of no settlement is issued to the parties to a dispute of right or unfair labour practice involving a dispute of right, the matter cannot be referred to arbitration. It must be the subject of the adjudication process before the Labour Court. The certificate of no settlement is the legal document that determines by its nature the disputes to be the subjects of the process of adjudication. It also provides the rationale for the adoption of adjudication as the next stage in the dispute resolution process.

Only disputes of interest are referable to arbitration after a certificate of no settlement has been issued in terms of s 93(3) of the Act. Where the parties in a dispute of interest are engaged in

an essential service, the labour officer must refer the dispute to compulsory arbitration. Where the parties in a dispute of interest are not engaged in an essential service, the labour officer may refer the dispute to voluntary arbitration with the agreement of the parties.

The rule prescribed by s 93(3), as read with s 93(5), of the Act is therefore that the only methods for the resolution of disputes of right and unfair labour practices involving disputes of right referred to a labour officer in terms of s 93(1) of the Act are conciliation and adjudication.

The decision to base the system of resolution of disputes of right or unfair labour practice involving disputes of right on the two methods of conciliation and adjudication to the exclusion of arbitration is a matter of policy determined by the Legislature. Courts would not seek to question the wisdom of the decision.

The adjudication process is marked by procedures necessary for the proper exercise of judicial power by the Labour Court. Section 89(1)(a) of the Act provides that the Labour Court shall exercise the function of hearing and determining "applications" and appeals "in terms" of the Act.

The procedures necessary for the exercise of judicial power by the court *a quo* in the process of adjudication are prescribed for the first time under the system for dispute resolution enacted by s 93 of the Act in s 93(5)(c).

Section 93(5a) of the Act prescribes the matters to be brought before the court *a quo* and the procedure to be followed in bringing them to the court after the making of the draft ruling and order in terms of s 93(5)(c) of the Act.

Parties cannot agree to have a dispute of right dealt with other than in terms of s 93(5)(c) of the Act. The reason is that s 93(5)(c) of the Act places the responsibility of making a "draft ruling" on the labour officer. He or she is required to make a "draft ruling" on the merits of the dispute as gathered from the conciliation process and after issuing a certificate of no settlement. At that stage the matter would no longer be entirely in the hands of the parties whom the labour officer would have been assisting to reach a settlement of the dispute by agreement.

At this stage, the labour officer directs that the employer or anyone who is found guilty of an unfair labour practice must cease or rectify the infringement by paying a certain amount of money. The ruling has no legal force at this stage. An employee cannot enforce a "draft ruling". Both the employer and the employee cannot seek a review or appeal against the ruling at this stage since it will still be a "draft". It is a suspended ruling, which must not be taken as a direction that the money be paid there and then. It is an interlocutory ruling in abeyance and not a final ruling. It is a ruling that is made pending the decision of the court *a quo*, which may subsequently give final legal effect to the "draft ruling".

The matters in issue remain open, depending on the conduct of the party at whom the "draft ruling" is directed. The court *a quo* also gives the return date in the event that there is non-compliance with the labour officer's ruling on the restitution day. If on or before the restitution day the respondent complies with the order, then the matter ends there.

It is only where a labour officer's "draft ruling" is made in terms of s 93(5)(c) of the Act that the provisions of subss (5a) and (5b) of s 93 of the Act apply. It is these two subsections that provide for the procedures for the institution of proceedings in the Labour Court by a labour officer for the confirmation of a "draft ruling" that would have been made in terms of s 93(5)(c) of the

Act. They are the provisions that reflect the rationale for the connection between the process of conciliation, on the one hand, and that of adjudication on the other. The provisions of subss (5a) and (5b) of s 93 of the Act underscore the fact that both processes of conciliation and adjudication aim at delivering a just and fair resolution of the dispute between the parties.

The prescription of "application" as the process for bringing the matters for determination by the court *a quo* is consistent with the provisions of s 89(1)(a) of the Act.

The ability of a labour officer to comply with the provisions of s 93(5)(c) of the Act and do what is prescribed for the purpose of the adjudication process before the Labour Court will depend on the conduct of the parties and the labour officer. If they all engaged in a genuine conciliation process as envisaged in s 93(1) of the Act, leading to a certificate of no settlement being issued to the parties and a "draft ruling" made, the application for confirmation of the "draft ruling" would institute valid proceedings. A certificate of no settlement as evidence of compliance by the labour officer with the provisions of s 93(3) of the Act would be sufficient proof that an attempt has been made to settle the dispute through conciliation.

An employee in whose favour a draft ruling is made by a labour officer has a legal right to be joined as a party to an application before the court *a quo* for confirmation of that draft ruling by a labour officer because he or she has a vested legal interest in the matter. See *Drum City (Pvt) Ltd* v *Brenda Garudzo* SC 57/18.

Conciliation as a method of dispute resolution is different from adjudication, which involves the use of power by the third party to resolve the dispute between the parties. Procedures such as the hearing of oral submissions or the production of written submissions by the parties,

and determination of the matters in dispute, typical of the adjudication process, are alien to the conciliation process.

During the conciliation process the labour officer collects information and attempts to settle the dispute between the parties in a friendly manner. It is neither a trial nor a hearing.

The court *a quo* referred to a labour officer who performs the functions under s 93 of the Act as an "adjudicator". It said:

> "The respondent's submissions were that the dispute was between the respondent and its employees, the applicant being the adjudicator. However, after making a ruling in terms of s 93 (5a) and (5b) she becomes an applicant in a matter she was an adjudicator. The adjudicator becomes a litigant who fights in one party's corner against the other party against whom she made a ruling."

A correct reading of the provisions of s 93 of the Act shows that they do not give the labour officer any powers of adjudication. A labour officer cannot be referred to as an adjudicator when he or she performs the functions of conciliation in accordance with the procedures prescribed for the process. He or she cannot be referred to as an adjudicator when he or she makes the "draft ruling" in terms of s 93(5)(c) of the Act.

A misconception of the nature and scope of the functions of a public officer under a statute cannot found a valid application to a court alleging that the statute infringes a fundamental right.

The judgment of the Supreme Court in the *Drum City* case *supra* has been used as authority for the proposition that s 93(5)(c) (i) and (ii) violates the right of an employee to equal protection of the law enshrined in s 56(1) of the Constitution. The allegation is that the Supreme Court held in the case that a "draft ruling" in terms of s 93(5)(c) (i) and (ii) cannot be made against an employee.

The passage relied on in the judgment in the *Drum City* case *supra* reads:

> "[12] It is to be noted from the above, that only if the labour officer rules against the employer or any person will he or she be required to take the steps outlined in ss (5a) and (5b). In other words, the provisions do not confer on the Labour Court the jurisdiction to confirm a draft ruling made against an employee. That this is the case is left in no doubt by the wording of s 93(5)(c)(ii) which specifically provides for a ruling like the one *in casu* in circumstances where the labour officer finds that the dispute of right in question **'must be resolved against any employer or other person in a specific manner …'**."

A "draft ruling" within the meaning of s 93 of the Act can only be made in terms of s 93(5)(c). One would have thought that, once a finding of the fact that a "draft ruling" has been made against an employee, compliance by the labour officer with the procedure of making an application for confirmation of the "draft ruling" would follow as a matter of obligation.

The critical words at the end of s 93(5)(c) of the Act connecting the making of the "draft ruling" and the remedy of application for confirmation are "whereupon the provisions of subsections (5a) and (5b) shall apply". Subsection (5a) then opens with the following provision, which imposes an obligation:

> "(5a) A labour officer who makes a ruling and order in terms of subsection (5)(c) shall as soon as practicable …". (the underlining is for emphasis)

A "draft ruling" does not determine the dispute between the parties. Whether made against an employer or employee, it does not confer any right until it is confirmed by the Labour Court. It is not clear why a procedure providing access to the Labour Court should by construction be made available to one party in a dispute of right which has not been resolved and not to the other party.

The best that may be said of s 93(5)(c) of the Act is that there is an element of vagueness lurking behind the use of the words "employer or other person". Statutory ambiguity or vagueness is a matter of interpretation of the statute. It is not a matter of constitutional validity of the statute

concerned. The principle which has found expression in s 46(2) of the Constitution is that, when interpreting a statutory provision, a court must promote fundamental human rights. The elementary rule is that every reasonable construction must be resorted to in order to save a statute from unconstitutionality. A statute must, where possible, be construed in conformity with fundamental human rights.

One cannot interpret the *Drum City (Pvt) Ltd* case *supra* as authority for the proposition that it would only be cases where a "draft ruling" has been made against the employer that confirmation proceedings would ensue. The remarks were made as an *obiter dictum*. The *ratio decidendi* of that case is that an employee must be joined in confirmation proceedings. At para [30] of the cyclostyled judgment the court said:

> "When all is said and done and in view of the foregoing, it is my finding that there was a fatal non-joinder of the employee, Ms Khan, to the proceedings *a quo*. Such proceedings can therefore not be allowed to stand."

Section 93(5a) gives the protection and benefit of the law, as the labour officer's ruling has no force until it is confirmed by the Labour Court. All parties appearing before the labour officer are protected.

Confirmation of a draft ruling is a legal process. The judicial officer in the Labour Court is tasked with applying the principles of the law to the facts. He or she is not merely rubberstamping the "draft ruling" of the labour officer. The judicial officer is required to thoroughly investigate the matter. A judicial officer is bound by the law of confirmation. He or she must research the procedure and the applicable law.

It has been contended that s 93(5a) of the Act violates the right of access to the courts, enshrined in s 69(3) of the Constitution. Conciliation does not contemplate a hearing as envisaged

in adjudication. The term “hearing” is a familiar term, generally understood to mean a judicial examination of the issues between the parties, whether of law or of fact.

Conciliation is less formal than a hearing and is designed to settle the dispute between the parties in a quicker and more friendly manner. Once a hearing is conducted, there must be a determination which is capable of execution or enforcement. A determination is a decision on an issue in favour of one party and against the other party, with the effect of bringing an end or finality to the cause of action or controversy between the parties by the authority to whom it is submitted under a valid law for disposal. If what is done by the authority concerned does not have the effect of bringing the dispute to an end as between the parties, their rights and obligations remain undetermined.

The procedure provided for in s 93(5a) of the Act is based on the making of a “draft ruling” by the labour officer. The “draft ruling” is not capable of enforcement until it has been confirmed by the Labour Court. A “draft ruling” is not a determination, as it is not preceded by a hearing. The purpose of making an application supported by an affidavit is to place the matter in dispute and the evidence before the Labour Court for hearing and determination.

A perusal of s 93(5b) of the Act is reflective of the fact that a hearing commences when the matter goes for confirmation before the Labour Court. It is not coincidental that the term “hearing” appears for the first time in the same section in terms of which the matter is brought to the Labour Court for confirmation.

The exercise of judicial power ordinarily does not begin until some tribunal which has to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take

action. Adjudicative facts of the dispute of right or unfair labour practice involving a dispute of right can be gathered only by judicial process.

The labour officer would not have ascertained the facts which could be ascertained only by resorting to judicial process. Only by being first ascertained through legal procedure are facts brought into the sphere of law. The Labour Court, as the competent organ under the statutory scheme for the resolution of the type of disputes prescribed under s 93(3) of the Act, is the organ to legally create the adjudicative facts.

It is clear from the provisions of s 93(5a) of the Act that the matters over which the Labour Court would have jurisdiction if they are brought to it in terms of the requirements of the prescribed procedure are products of strict compliance by the labour officer with the procedural and substantive requirements of ss 93(1), 93(3) and 93(5)(c) of the Act. The procedure in s 93(5a) is not to be read independently of the preceding procedures provided for in these subsections. This means that a matter that is not a product of compliance with the procedural and substantive requirements of these provisions would not fall within the class of matters over which the Labour Court would have jurisdiction in terms of s 93(5a) of the Act. It would not be a matter which would be the subject of the procedure for bringing such matters to the court *a quo*, as prescribed under s 93(5a) of the Act. Bringing such a matter to the court *a quo*, under the guise of invoking the procedure prescribed in the subsection, would not validly institute proceedings in that court in terms of s 93(5a) of the Act. The court *a quo* would not have a valid matter over which to exercise jurisdiction.

Where the intention of the Legislature is to confer on a labour officer the power to determine a matter referred to him or her, the empowering provision does so in express terms.

Section 101(1c) of the Act, for example, provides that where an employment council refuses to approve an employment code drawn up by a works council, the works council may refer the matter to a labour officer, and the determination of the labour officer on the matter shall be final unless the parties agree to refer it to voluntary arbitration.

Section 101(6) of the Act provides that where disciplinary proceedings instituted under the employment code are notified to a person alleged to have breached the code are not determined within thirty days of the date of notification, the employee or employer concerned may refer such matter to a labour officer. The labour officer may then determine the matter or otherwise dispose of the matter in accordance with s 93 of the Act (the underlining is for emphasis).

These provisions show that the power to determine a matter is different from the power to attempt to settle a dispute in terms of s 93(1) of the Act.

THE RÔLE OF THE DESIGNATED AGENT

As indicated earlier, the National Employment Council for the Motor Industry requested the respondent to redress the dispute of non-payment of retrenchment packages. Section 62(1(a) of the Act gives an employment council the power to settle disputes that have arisen or may arise between employers and employees within the undertaking or industry in respect of which it is registered. The registered employment council exercises the power and performs the function to settle disputes referred to in s 62(1)(a) of the Act through its designated agents, appointed and authorised by the Registrar of Labour in terms of s 63(3a) of the Act.

Section 63(3a) of the Act allows a designated agent, upon authorisation by the Registrar of Labour, to either redress or attempt to redress any dispute which is referred to the designated

agent or has come to his or her attention. That is the case where such dispute occurs in the undertaking or industry and within the area for which the employment council is registered. Section 63(3b) of the Act expressly ousts the jurisdiction of a labour officer where a designated agent is authorised to redress any dispute or unfair labour practice in terms of s 63(3a) of the Act. A labour officer has no jurisdiction to conciliate a dispute which should have been referred to a designated agent in terms of s 63(3a) of the Act. The labour officer must not simply decline to entertain the dispute. He or she must redirect the dispute to the correct forum.

What is key in understanding what a designated agent can or cannot do is to understand the meaning of the phrase "redress any dispute", used in s 63(3a) of the Act. When used as a verb, the word "redress", according to the *Oxford English Dictionary* means to remedy or set right an undesirable or unfair situation. A designated agent authorised by the Registrar of Labour redresses a dispute referred to him or her. He or she offers a remedy or sets right an unfair situation.

The meaning of s 63(3a), as read with s 63(3b), of the Act is that where the designated agent redresses a dispute by making a final decision as to the rights of the parties, s 93 of the Act does not apply. The decision of the designated agent at that stage is final. There is no need for it to be confirmed in terms of s 93(5a) and s 93(5b) of the Act for purposes of execution. The party that is aggrieved by the decision made in terms of s 63(3a) of the Act can only appear before the Labour Court by way of an appeal or review. The Labour Court can then exercise its powers over that matter in terms of s 89(1) of the Act.

A designated agent may only exercise one power over a dispute. He or she may redress the dispute or attempt to redress it. He or she cannot do both. If he or she chooses to redress the dispute by hearing and determining the issues in dispute, he or she cannot at the same time attempt to

redress the dispute. It is clear from the provisions of s 63(3a), as read with s 93(1), of the Act that a designated agent can only proceed in terms of s 93 of the Act if he or she has not redressed the dispute. He or she would be attempting to settle the dispute through conciliation. There can be no attempt to settle a dispute which has been redressed.

The provisions of s 93 of the Act would apply when the power to be exercised by the designated agent is an attempt to redress the dispute through conciliation. The designated agent does not have to consult a senior, as is required by s 93(5) of the Act in the case of a labour officer. Section 63(3a) of the Act provides that the provisions of s 93 of the Act would apply to a designated agent "with the necessary changes".

The process explained above was, however, not what caused the parties to appear before the court *a quo*. A final decision was made by a designated agent after hearing evidence on the dispute from the parties. It was a decision made by an impartial arbiter after hearing evidence from both parties. It disposed of the issue for determination. A certificate of no settlement, which is an essential step in the procedure provided for under s 93(3) of the Act, could not be issued. It is on the basis of the certificate of no settlement that the "draft ruling" made under s 93(5)(c) of the Act is endowed with validity. At the point the final decision was made by the designated agent, no dispute remained to be resolved by way of conciliation. On that basis alone, the subsequent proceedings before the court *a quo* were a nullity.

Section 93 of the Act does not create an avenue for the validation of a final decision that is made by a designated agent in terms of s 63(3a) of the Act. It only creates an avenue where a designated agent adopted the process of attempting to settle the dispute through conciliation in accordance with the provisions of s 93 of the Act.

Be that as it may, no conciliation proceedings were conducted. As already indicated, it is necessary that conciliation be attempted in the first instance for the procedure in s 93(5a) and s 93(5b) of the Act to be properly adopted. This is so because in conciliation proceedings the labour officer, acting in terms of s 93(1) of the Act, helps the parties to a dispute to reach a settlement.

It is common cause that the dispute between the applicant and its former employees was a dispute of right. The aggrieved former employees claimed their retrenchment packages in terms of s 12C(2) of the Act. The provision enjoins an employer who terminates contracts of employment on notice to pay the affected employees a minimum retrenchment package. The respondent ought to have first attempted to settle that dispute through conciliation if that was the method by which she would have decided to resolve the dispute referred to her.

According to the respondent's determination, the applicant was under an obligation to pay the sums claimed by the former employees whose contracts were terminated on notice. No certificate of no settlement was issued by the respondent. Absence of the certificate is evidence of the allegation that she did not preside over a conciliation process. However, s 93(5) of the Act makes it clear that it is upon the issuing of a certificate of no settlement that a labour officer, acting in terms of s 93(1) of the Act, may direct that there be payment of money by an employer in order to rectify an unfair labour practice. At that point, the labour officer merely makes a "draft ruling", which has no legal effect until it is confirmed by the Labour Court. Without the certificate of no settlement, a labour officer cannot purport to act in terms of s 93(5)(c) of the Act. To that end, the respondent could not have approached the court *a quo* in terms of s 93(5a) of the Act. The court *a quo* could not have assumed jurisdiction over the matter in terms of s 93(5b) of the Act.

The respondent's determination ordered the applicant to pay retrenchment packages to the affected former employees by 31 July 2016. That order was not based on any of the provisions of s 93 of the Act. Section 93(5a) and s 93(5b) state that the exercise of such power is the prerogative of the Labour Court upon application for confirmation of a "draft ruling" by the labour officer.

Where a final decision has already been made on the dispute in question, there cannot be any conciliation to speak of in terms of s 93 of the Act. Conciliation by nature is an alternative form of dispute resolution, which cannot be resorted to once the dispute has been resolved.

The analysis shows that there is a difference in the legal treatment of a party who has already obtained a final decision on a claim and one who has obtained "a draft ruling" in terms of s 93(5)(c) of the Act. The two parties are not similarly situated. The difference in the remedy available to them is justified by the nature and effect of the procedure adopted for the resolution of the dispute of right or unfair labour practice involving a dispute of right.

There were no proceedings before the court *a quo* in terms of s 93(5a) of the Labour Act [*Chapter 28:01*] which would have entitled the court *a quo* to exercise its jurisdiction under s 175(4) of the Constitution in respect of questions of the constitutionality of s 93(5a) and s 93(5b) of the Act.

GWAUNZA DCJ: I agree

GARWE JCC: I agree

MAKARAU JCC: I agree

GOWORA JCC: I agree

HLATSHWAYO JCC: I agree

PATEL JCC: I agree

GUVAVA JCC: I agree

BHUNU JCC: I agree

Mbidzo, Muchadehama & Makoni Legal Practitioners, applicant's legal practitioners
J Mambara & Partners, respondent's legal practitioners