REPORTABLE (1)

WILLMORE MAKUMIRE

v

(1) MINISTER OF PUBLIC SERVICE, LABOUR AND SOCIAL WELFARE

(2) ATTORNEY-GENERAL OF ZIMBABWE

CONSTITUTIONAL COURT OF ZIMBABWE
HARARE, JULY 3, 2019

The applicant in person

Ms O Zvedi, for the respondents

MALABA CJ: After hearing submissions by counsel in the application, the Court made the following order by consent:

"**IT IS ORDERED BY CONSENT THAT**:

1. The order of the court *a quo* given in terms of section 175(1) of the Constitution declaring section 93(5a) of the Labour Act [*Chapter 28:01*] to be in conflict with sections 56(1), 68(1) and 69(3) of the Constitution is not confirmed in terms of section 167(3) of the Constitution.
2. There shall be no order as to costs."

INTRODUCTION

Notwithstanding the fact that the matter was disposed of on the basis of an order by consent, a written judgment was necessary to clarify the law on the issue behind the interpretation of s 93(5a) of the Labour Act [*Chapter 28:01*] ("the Act").

The constitutional matter that was brought before the Constitutional Court ("the Court") was whether s 93(5a) of the Act is in conflict with ss 56(1), 68(1) and 69(3) of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013 ("the Constitution"). The matter came to the Court by way of the procedure laid down in s 175(1) of the Constitution for confirmation of orders concerning the constitutional invalidity of any law or any conduct of the President or Parliament made by another court.

The High Court ("the court *a quo*") made an order declaring s 93(5a) of the Act to be in conflict with ss 56(1), 68(1) and 69(3) of the Constitution and therefore invalid. Section 56(1) of the Constitution entrenches the right of every person to equality and to equal protection and benefit of the law. Section 68(1) of the Constitution protects the right of every person to administrative justice. Section 69(3) of the Constitution safeguards the fundamental right of every person to access the courts, or to some other tribunal or forum established by law for the resolution of any dispute.

In terms of s 175(1) of the Constitution, any declaration of invalidity of any law or any conduct of the President or Parliament made by a competent court has no force until it has been confirmed by the Court. This section is complemented by s 167(3) of the Constitution, which provides that the Court makes the final decision on whether an Act of Parliament is constitutional and must confirm an order of invalidity made by another court. The sections serve distinct yet harmonious purposes, with the emphasis being placed on the express oversight of the Court over orders of constitutional invalidity of legislation made by other courts.

The order of constitutional invalidity of s 93(5a) of the Act made by the court *a quo* had to be reviewed by the Court. The Constitution entrusts the Court with the duty of supervising the exercise by other courts of the power to declare laws inconsistent with it.

The Court is also not bound by the order of constitutional invalidity made by the court *a quo*. In *S* v *Chokuramba* CCZ 10/19, the Court held at p 6 of the cyclostyled judgment as follows:

> "The Court is empowered to confirm an order of constitutional invalidity only if it is satisfied that the impugned law or conduct of the President or Parliament is inconsistent with the Constitution. It must conduct a thorough investigation of the constitutional status of the law or conduct of the President or Parliament which is the subject-matter of the order of constitutional invalidity. The Court must do so, irrespective of the finding of constitutional invalidity by the lower court and the attitude of the parties.
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> Thorough investigation is required, even where the proceedings are not opposed or even if there is an outright concession that the law or the conduct of the President or Parliament which is under attack is invalid. The reason for this strict requirement is that invalidity of the law or the conduct of the President or Parliament is a legal consequence of a finding of inconsistency between the law or the conduct in question and the Constitution. Inconsistency is a matter of fact, on the finding of which the court *a quo* and the Court may differ." (the underlining is for emphasis)

The Court still retains the power to decline an order of confirmation of constitutional invalidity, particularly where it is convinced that the order will have no practical effect or where the party challenging it has failed to show that he or she or it is injured by the operation of the impugned law.

THE BACKGROUND FACTS AND THE PROVISIONS OF THE LEGISLATION, THE CONSTITUTIONALITY OF WHICH IS IMPUGNED

The order of constitutional invalidity of s 93(5a) of the Act was made by the High Court in the following circumstances.

On 10 February 2015 the applicant was suspended from work in terms of the Labour (National Employment Code of Conduct) Regulations, 2006 (S.I. 15 of 2006) ("the Code of Conduct"), on allegations of theft by conversion of US$100 meant to be paid to his employer. A disciplinary hearing was conducted in terms of s 6(4) of the Code of Conduct. The applicant was found guilty of the acts of misconduct with which he was charged. He was dismissed from

employment with effect from the date of suspension. He was advised that he had a right in terms of s 8 of the Code of Conduct to appeal against the decision to dismiss him.

On 12 March 2015 the applicant referred the matter to a labour officer in terms of s 8(6) of the Code of Conduct. The section provides a remedy to a person aggrieved by a decision or manner in which an appeal is handled by an employer or the appeals officer or the Appeals Committee, as the case may be, to refer the case to a labour officer. Section 8(7) of the Code of Conduct provides that the labour officer to whom a matter is referred in terms of subs (6) of s 8 shall process the case as provided for under s 93(1) of the Act, which section deals with the conciliation of disputes.

The labour officer did not dispose of the matter within the 30-day period prescribed under s 93(3) of the Act, leading to the applicant approaching the Labour Court in terms of s 93(7) of the Act. On 24 September 2015 the Labour Court made an order referring the matter back to the labour officer and directing him to appoint an arbitrator. Compulsory arbitration was no longer available as a remedy for the resolution of disputes of right or unfair labour practices which are disputes of right, following the enactment of the Labour Amendment Act No. 5 of 2015.

The matter was referred back to the Labour Court for directions on how to proceed in light of the amendment to the provisions of s 93 of the Act. On 14 March 2016 the Labour Court directed that the matter be heard by the labour officer in terms of s 93(5)(c) of the Act. Section 93(5)(c) of the Act empowers a labour officer, who has issued a certificate of no settlement following a conciliation process relating to a dispute of right or unfair labour practice which is a dispute of right, to make a ruling relating to the matter specified thereunder.

On 10 May 2016 the labour officer declined jurisdiction over the matter on the basis that it was improperly before him. He held that he had no jurisdiction to hear the matter since

it was referred to him from the Disciplinary Authority and not from the appeals officer or the Appeals Committee. In his ruling the labour officer noted that the applicant should have proceeded by way of an appeal to the Labour Court in terms of s 92D of the Act instead of pursuing remedies provided for in s 8 of the Code of Conduct.

On 20 September 2016 the applicant made an application for condonation of late noting of an appeal to the Labour Court. The application was dismissed for failure to exhaust local remedies. The dismissal caused the applicant to file an appeal against the decision of the Disciplinary Authority to the appeals officer/Appeals Committee. He also sought condonation for the late noting of the appeal.

Without referring the matter to the appeals officer or the Appeals Committee, the General Secretary of the applicant's former employer, acting on legal advice, sent a letter to the applicant advising him that his matter could not be heard as there was no provision in the Code of Conduct empowering the employer to hear an application for condonation. The applicant appealed to the labour officer, who upheld the decision of the employer.

When the matter went for confirmation before the Labour Court, it refused to confirm the labour officer's ruling. It instead referred the matter to the employer with a direction to set up an appeal structure to hear the matter, failing which the applicant would be deemed to have been reinstated without loss of salary.

Dissatisfied with the decision of the Labour Court, the employer lodged an appeal to the Supreme Court. It contended that in terms of s 93(5a) of the Act, the labour officer can only approach the Labour Court for confirmation of his or her ruling when he or she has ruled against the employer. The contention was that the Labour Court had entertained a matter over which it had no jurisdiction. The applicant conceded the point. The matter was struck off the roll on the ground that the Labour Court had no jurisdiction over the matter.

The applicant filed an application in the court *a quo* alleging that s 93(5a) of the Act violated his right to equal protection of the law, enshrined in s 56(1) of the Constitution. The contention was that s 93(5a) of the Act affords to the employer access to the remedy of testing the substantive correctness or fairness of a labour officer's draft ruling by subjecting it to confirmation proceedings but deprives an employee of access to the same remedy.

The contentions of the applicant found favour with the court *a quo*. It found that s 93(5a) of the Act violates ss 56(1), 56(3), 68(1) and 69(3) of the Constitution.

The question for determination is whether or not the issue of the constitutionality of s 93(5a) of the Act was properly before the court *a quo*.

WHETHER THE QUESTION OF THE CONSTITUTIONALITY OF SECTION 93(5a) OF THE ACT WAS PROPERLY BEFORE THE HIGH COURT

Confirmation proceedings are in the nature of a review. The Court, as the highest court in constitutional matters, is endowed with the power to review orders of constitutional invalidity made by lower courts in order to control declarations of constitutional invalidity made against the highest organs of State. See *Pharmaceutical Manufacturers Association of South Africa and Anor: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at paras 55-56.

It is a general rule that a court should not decide constitutional matters unless it is necessary to do so and the order of the court will have a practical effect on the parties.

In dealing with confirmation proceedings, the Court is required to firstly establish whether the constitutional question decided by the subordinate court was properly before it. The facts of the case must have justified a challenge to the validity of the legislative provision. In *S* v *Chokuramba supra* at p 5 of the cyclostyled judgment the Court held as follows:

> "The Court must first decide the question whether the constitutional validity of the law or conduct of the President or Parliament in respect of which the order of invalidity was made was a matter properly before the court *a quo* for determination, regard being had to the circumstances of the case: *Zantsi* v *Council of State, Ciskei and Ors* 1995 (4) SA 615 (CC) para 8."

For a matter raising the question of the constitutionality of legislation to have been properly before a court of law, certain principles would have been observed. A party complaining of the invalidity of a legislative provision must be able to demonstrate that he or she or it has been harmed by the operation of the law the constitutionality of which is sought to be impugned, and that the order of the court will have some practical effect on the protection of his, her or its rights.

In *Ashwander v Tennessee Valley Authority* 297 U.S. 288 (1936) at 346-347, the Supreme Court of the United States of America held that:

> "1. The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding, declining because to decide such questions
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> > 'is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.'
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> *Chicago & Grand Trunk Ry.* v *Wellman,* 143 U.S. 339, 143 U.S. 345. Compare 49 U.S. *Veazie,* 8 How. 251; *Atherton Mills* v *Johnston,* 259 U.S. 13, 259 U.S. 15.
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> 2. The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it'.
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> *Liverpool, N.Y. & P. S.S. Co. v Emigration Commissioners,* 113 U.S. 33, 113 U.S. 39; [Footnote 2/5] *Abrams* v *Van Schaick,* 293 U.S. 188; *Wilshire Oil Co.* v *United States,* 295 U.S. 100. 'It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.' *Burton* v *United States,* 196 U.S. 283, 196 U.S. 295.
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> 3. The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' *Liverpool, N.Y. & P. S.S. Co.* v *Emigration Commissioners, supra;* compare *Hammond* v *Schapp Bus Line,* 275 U.S. 164, 275 U.S. 169-172.
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> 5. The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation." (the underlining is for emphasis)

In *Liverpool, New York and Philadelphia Steamship Co* v *Commissioners of Emigration* 113 U.S. 33 (1885) the Supreme Court of the United States of America at p 39 held that:

> "It has no jurisdiction to pronounce any statute, either of a State or of the United States, void because [it is] irreconcilable with the Constitution except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered: one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."

An analysis of the facts of the case shows that the applicant was aggrieved by his dismissal from employment by his former employer in terms of s 6 of the Code of Conduct. While he was advised by his former employer to appeal in terms of s 8 of the Code of Conduct, that provision does not provide for appeals against decisions in disciplinary hearings conducted under s 6 of the Code of Conduct. He ought instead to have appealed to the Labour Court in terms of s 92D of the Act. The section provides that:

> **"92D Appeals to the Labour Court not provided for elsewhere in this Act**
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> A person who is aggrieved by a determination made under an employment code, may, within such time and in such manner as may be prescribed, appeal to the Labour Court."

The facts illustrate that, due to a misunderstanding of the law, the applicant pursued wrong remedies. He referred the matter to the labour officer in terms of s 8(6) of the Code of Conduct. The labour officer correctly decided that the applicant had used a wrong remedy because s 8(6) of the Code of Conduct created a right of appeal in respect of decisions of the employer, the appeals officer or the Appeals Committee. The matter of the complaint would have had to relate to the decision of the body concerned on an issue before it on appeal or the manner in which it handled the appeal. There must have been an appeal before the body concerned.

Section 8(6) of the Code of Conduct reads as follows:

> "(6) A person or party who is aggrieved by a decision or manner in which an appeal is handled by his or her employer or the Appeals Officer or Appeals Committee, as the case may be, may refer the case to a Labour Officer or an Employment Council Agent, as the case may be, within 7 working days from the day of receipt of such decision."

The applicant had not appealed to a body constituted for the purposes of s 8(6) of the Code of Conduct. He could not have approached the labour officer in terms of s 8(6) of the Code of Conduct in respect of a matter not arising from the exercise of powers by any of the bodies referred to in the subsection.

The Labour Court was required to consider the application for condonation of non-compliance with the rules governing the noting of appeals to it and extension of time within which to appeal. It failed to determine an issue that was before it. The failure vitiated the order given. See *PG Industries (Zimbabwe) Ltd* v *Bvekerwa and Ors* SC 53/16, at p 7 of the cyclostyled judgment.

The applicant's matter did not at any time fall within the ambit of the provisions of s 93(5a) of the Act. What is provided for under s 93(5a) of the Act are acts which a labour officer, who would have made a draft ruling and order in terms of subs (5a) of s 93, must do in accordance with the procedure prescribed for reference of the draft ruling and order to the Labour Court for confirmation. Section 93(5a) of the Act cannot be viewed in isolation from the other provisions of s 93 of the Act, particularly subss (3), (5) and (5c), from which it derives the cause for its subject matter. No acts which were performed, or which were required to be performed, by a labour officer fell under the relevant provisions of s 93 of the Act to give rise to the question of the constitutionality of s 93(5a).

It is not apparent how the impugned section injured the applicant, as the root of his grievance stemmed from the decision to dismiss him made by the Disciplinary Authority. A

declaration of constitutional invalidity would not in any way benefit the applicant. It would not change the status of his dismissal. Nor would it provide him with a remedy.

In *Uthukela District Municipality and Others* v *President of the Republic of South Africa and Others* 2003 (1) SA 678 (CC) at paras 11-12 it was held that:

> "If its order will have no practical effect, this Court will not deal with confirmation proceedings. If the order may, despite the repeal of the legislation under consideration, have some practical effect on the parties or on others, the Court will in its discretion decide whether or not to deal with the confirmation. In doing so all the circumstances of the case will be taken into account. Factors that must be taken into account include the nature and extent of any practical effect the order may have, 'the importance of the issue raised, its complexity, and the fullness of the argument on the issue'."

There is no proper order for confirmation in terms of s 175(1) of the Constitution.

GARWE JCC: I agree

MAKARAU JCC: I agree

GOWORA JCC: I agree

PATEL JCC: I agree

GUVAVA JCC: I agree

MAVANGIRA JCC: I agree

MAKONI JCC: I agree

BERE JCC: I agree

Civil Division of the Attorney General's Office, respondents' legal practitioners