JUDICIAL SERVICE COMMISSION

"SECTION 93(5) OF THE LABOUR ACT [*CHAPTER 28:01*] REVISITED: *ISOQUANT* v *DARIKWA* UNPACKED"

A PRESENTATION BY THE HONOURABLE MR JUSTICE L MALABA, CHIEF JUSTICE,

AT THE JUDGES' SYMPOSIUM

HELD FROM 17-20 SEPTEMBER 2020 AT TROUTBECK INN, NYANGA

INTRODUCTION

The recent judgment of the Constitutional Court in *Isoquant Investments (Pvt) Ltd t/a ZIMOCO v Darikwa* CCZ 6/20 has undoubtedly been eagerly awaited. It is a decision that has had the legal system in Zimbabwe on tenterhooks, especially with regard to the meaning of s 93 of the Labour Act [*Chapter 28:01*] ("the Act") in as far as it relates to confirmation proceedings in the Labour Court.

Recently, the Constitutional Court has been inundated with matters seeking to challenge the legality of the aforementioned provision. Similarly, the Supreme Court has also been seized with matters whose fate depended on the outcome of the *Darikwa* case. The written reasons for the decision having been availed, it is vital to unpack the meaning and content of the judgment. This necessarily involves an exposition of

the major highlights of the judgment, whilst at the same time addressing any misconceptions regarding its interpretation and effects.

BACKGROUND

The background to the matter is that the applicant terminated on notice the contracts of employment of several of its employees. 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"). The applicant did not respond to the request. This prompted the aggrieved former employees to approach 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.

It was the employees' claim 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 demand. Conversely, the applicant 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 contended 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 as illegal. The applicant indicated that it would seek to have the matter referred to the

Constitutional Court for a determination of the question whether s 18 of the Labour Amendment Act (No. 5) 2015, which gave s 12C(2) of the Act retrospective effect, was constitutional.

The respondent conducted a hearing of the dispute before her and made a determination to the effect 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.

The respondent proceeded to apply to the Labour Court, in terms of s 93(5a) of the Act, for confirmation of the order that she made against the applicant. The applicant opposed the application, arguing that s 93(5a) and s 93(5b) of the Act violated its rights to equal protection of the law and to administrative justice, as contained in s 56(1) and s 68(1) of the Constitution. The applicant's main

argument 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. It was also contended that allowing the designated agent to institute process on behalf of the opposing party is discriminatory in effect. Consequently, the applicant requested that the matter be referred to the Constitutional Court for determination of whether the impugned provisions of the Act violated its constitutional rights. The court *a quo* granted the request, stating that "the application" was not frivolous or vexatious.

THE ISSUES ARISING

THE PROPRIETY OF THE PURPORTED REFERRAL BEFORE THE COURT

It being common cause that what was before the Labour Court was an application for referral to

determine the constitutionality of s 93(5a) and s 93(5b) of the Act, the first port of call was to determine whether or not the application for referral was properly before the Constitutional Court.

In making that finding, the Constitutional Court made reference to s 175(4) of the Constitution, which makes provision for referrals to the Court. It provides:

> "(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 subject matter of any application for referral to the Constitutional Court made before any subordinate court must be validly before that court. In this

regard, the Constitutional Court, pursuant to quoting s 175(4) of the Constitution, identified this issue in the following words at p 8 of the cyclostyled judgment:

> "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."

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.[1]

It is trite that the Labour Court is a creature of statute. The nature, content and scope of that 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. This interpretation accords with the sentiments that were expressed by the Constitutional Court in ***Sadziwani v Natpak (Pvt) Ltd and Ors CCZ* 15/19**, where it stated that jurisdiction is the power or competence of a court to adjudicate on, determine and dispose of a matter. As such, proceedings in a court would be those formal steps that relate to a matter falling within the jurisdiction

[1] The *ratio decidendi* in *Tsvangirai* v *Mugabe and Anor* 2006 (1) ZLR 148 (S)

of the court and brought before it in accordance with the procedure prescribed for bringing such a matter for hearing and determination.

It is in the context of the above considerations that the Constitutional Court held that the referral was improperly before it owing to the defective proceedings that obtained in the Labour Court, as shall more fully appear below.

CONCILIATION

The process of conciliation is one of the major highlights of the judgment. The judgment goes to great length to elucidate the meaning, nature and content of the process of conciliation before a labour officer. Conciliation as a method of dispute resolution is made provision for in s 93(1) of the Act. 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.

Conciliation simply means the settling of the disputes without litigation. It is a process in which an independent person or persons are appointed by the parties by mutual consent to bring about a settlement of their dispute through consensus. The process of 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.

The importance of conciliation was underscored by Dr Ujwala Shinde[2] in the following words:

> "The importance of conciliation is that in other proceedings decision is given by the presiding authority and it is binding accordingly. But in conciliation there is amicable settlement where parties themselves have reached to the decision i.e. settlement and which is binding as per their decision. Third party i.e. conciliator is just helping to arrive at settlement and not dictating the term or decision."

[2] Dr Ujawala Shinde "*Conciliation as an Effective Mode of Alternative Dispute Resolving System*" OSR Journal Of Humanities And Social Science (JHSS), ISSN: 2279-0837, ISBN: 2279-0845.Volume 4, Issue 3(Nov.-Dec. 2012), PP 01-07, available at www.Iosrjournals.org

Before a dispute is referred to a labour officer for conciliation in terms of s 93(1) of the Act, certain jurisdictional facts must exist and these are -

(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 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. In that respect, it is important to emphasise that a conciliator is not a judge. Instead, he or she should assist the parties to resolve the dispute by agreement without imposing the solution on them. Though the Act does not specify the actual method of conciliating a dispute, the overriding duty bestowed upon the labour officer is to settle the dispute through conciliation, meaning that he or she has the discretion to choose the steps and procedures ordinarily associated with the process of conciliation as a method of dispute resolution.

Above all else, the labour officer ought to have an understanding of the dispute before him or her. As a

way of trying to achieve peaceful resolution of the dispute, the labour officer must ensure that there are facilities that can keep the parties to the dispute apart from each other in separate rooms to give them the opportunity to let off steam. This necessarily means that 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 and also be break-away rooms large enough to accommodate each party for side-meetings. In conducting the conciliation proceedings, the labour officer may conduct joint proceedings or adopt the use of side-meetings. 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.

The judgment goes to great length to explain the process of conciliation. Great detail is provided in as far as it relates to the conciliator's role of obtaining information from the parties, use of effective inter-personal skills, ascertaining confidential information, obtaining admissions where necessary, analysing the dispute, facilitating alternative solutions, exploring options for settlement, and finally facilitating an agreement between the parties.

The above exposition clearly shows that the process of conciliation which is undertaken by the labour officer to achieve the purpose which is prescribed under s 93(1) of the Act is not a mechanical process. 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.

CERTIFICATE OF NO SETTLEMENT AND ITS IMPORTANCE

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 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 importance of a certificate of no settlement cannot be overemphasised. It is not just a document issued by the labour officer which carries no legal effect. On the contrary, 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 is therefore important that the labour officer faced with a dispute issues a certificate of no settlement after carrying out the process of conciliation as outlined above, because any other process preceding the issuance of a certificate of no settlement, other than that of conciliation as provided for in s 93(1) of the Act, would mean that the certificate of no settlement is a nullity. That certificate of no settlement would not have been issued in terms of the law and after a process required by the law.

The effect of a certificate of no settlement is to establish the fact that the attempt to settle the dispute through conciliation has failed. 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 subject of the process of adjudication. More importantly, the certificate of no settlement provides the rationale for the adoption of adjudication as the next stage in the dispute resolution process.

ADJUDICATION

The adjudication process is marked by procedures necessary for the proper exercise of judicial power by the Labour Court and this is in terms of s 93(5)(c) of the Act. Section 89(1)(a) of the Act provides the powers of the Labour Court. That the Labour Court is a creature of statute and can only exercise those powers that the Act makes provision for is a matter

of settled law. (See ***Eastern Highlands Plantations v Mapeto and Ors SC 43/16***)

Where a labour officer makes a draft ruling in terms of s 93(5)(c) of the Act, s 93(5a) outlines the matters to be brought before the Labour Court and the procedure to be followed.

It is crucial to point out that, in terms of s 93(5)(c) of the Act, the labour officer is only tasked with making a draft ruling. That draft ruling is not preceded by a process which is entirely party driven, unlike in conciliation proceedings. In the draft ruling, 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.

Where a labour officer makes a draft ruling as stated above, he or she can make an application to the Labour Court for confirmation of that draft ruling in terms of subss (5a) and (5b) of s 93 of the Act. These provisions are very important because they provide the connection between the processes of conciliation and adjudication, whose collective aim is the just and fair resolution of the dispute between the parties.

JOINDER OF EMPLOYEE TO CONFIRMATION PROCEEDINGS *VIS-A-VIS* MISCONSTRUCTION OF *DRUM CITY (PVT) LTD V BRENDA GARUDZO* SC 57/18

Where a labour officer makes a draft ruling in favour of an employee, the employee has the right to be joined as a party to the confirmation proceedings before the Labour Court because he or she would have a vested legal interest in the matter. In making this

point, the Constitutional Court cited the case of ***Drum City (Pvt) Ltd v Brenda Garudzo SC 57/18***.

The Constitutional Court also took time to dispel the misconception regarding the interpretation of ***Drum City (Pvt) Ltd v Brenda Garudzo*** *supra.* The misconception 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.

In disposing of that issue, the Constitutional Court stated that 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 therefore 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.

This effectively means that any misconstruction of the provisions of s 93(5)(c) (i) and (ii) which is based on a further misconstruction of ***Drum City (Pvt) Ltd v Garudzo*** *supra* is ill-conceived. As stated above, the rationale in that case related to the crucial need to join an employee to confirmation proceedings because he or she would have a vested legal interest in the outcome of those proceedings.

It was further stated that the element of vagueness lurking behind the use of the words "employer or other person" in s 93(5)(c) of the Act ought not to affect the constitutional validity of the Act because, 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.

CONFIRMATION PROCEEDINGS/PROCESS

It is important to understand the fact that a draft ruling has no legal effect until it is confirmed by the Labour Court. It is only through an application for confirmation of the draft ruling that it can be given legal recognition and consequently enforced. Confirmation of a draft ruling is a legal process and the judicial officer in the Labour Court is tasked with applying the principles of the law to the facts. More importantly, a reading of s 93(5b) of the Act shows that the Labour Court may grant the application for confirmation with or without amendment. The process of confirmation is therefore not meant to rubberstamp the labour officer's draft ruling.

The term "hearing" appears for the first time in the section in terms of which the matter is brought to the Labour Court for confirmation, that is s 93(5b) of the Act. 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. That is unlike conciliation proceedings which are less formal than a hearing and are designed to settle the dispute between the parties in a quicker and friendlier manner. In that regard, a draft ruling is not a determination, for the simple reason that it is not preceded by a hearing. The purpose of making an application for confirmation supported by an affidavit is to place the matter in dispute and the evidence before the Labour Court for hearing and determination.

THE ROLE OF A DESIGNATED AGENT

In terms of s 62(1(a) of the Act, national employment councils have the power to settle disputes that have arisen or may arise between employers and employees within the undertaking or industry in respect of which they are registered. That power is exercised through their designated agents.

The powers of a designated agent are contained in s 63(3a) of the Act which allows him or her, 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. In the same vein, s 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. This would therefore mean that 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.

Where a designated agent redresses any dispute within the meaning of s 63(3a), as read with s 63(3b), of the Act, he or she makes a final decision as to the rights of the parties. 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.

Where, however, the designated agent has not redressed the dispute but has attempted to redress it through conciliation, he or she can proceed in terms

of s 93 of the Act to apply for confirmation. 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".

It is therefore important to distinguish the roles of a labour officer and a designated agent in as far as their powers in relation to disputes are concerned and the effect of the steps they would have taken in order to bring the dispute before them to finality.

CONCLUSION

As has been said above, the Labour Court is a creature of statute and it may only determine that which it is prescribed by law to determine. 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 s 93(1), s 93(3) and s 93(5)(c) of the Act. The procedure in s 93(5a) of the Act is not to be read independently of the preceding procedures provided for in these subsections.

In other words, it would not be compliance with the law for a labour officer to conduct a hearing in conciliation proceedings and thereafter seek the confirmation of the resultant "draft ruling" in the Labour Court. Bringing such a matter to the Labour Court, under the guise of invoking the procedure set out in subss (5a) and (5b) of s 93 of the Act, would not validly institute proceedings in that court in terms of the Act. The Labour Court would not have a valid matter over which to exercise jurisdiction.

In the instant matter, a final decision was made by the respondent (a designated agent) after hearing evidence on the dispute from the parties. The decision disposed of the issue for determination and consequently 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. At the point the final decision was made by the designated agent, no dispute remained to be resolved by way of conciliation. It was on that basis that the Constitutional Court found that the subsequent proceedings before the Labour Court were a nullity.

The *Darikwa* judgment represents a welcome interpretation of the provisions of the law that has vexed litigants and legal practitioners alike. Though the provisions of s 93(5)(c) of the Act are afflicted by an element of vagueness, that would not necessarily lead to the unconstitutionality of the provisions owing

to the presumption of constitutionality principle. The judgment is also extremely informative in as far as the roles of the labour officer and the designated agent are concerned and the procedures that they ought to follow.