REWARD KANGAI
versus
TAFADZWA SAKAROMBE
and
MINISTER OF PUBLIC SERVICE, LABOUR & SOCIAL WELFARE
and
NETONE CELLULAR (PVT) LTD

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 24 May 2022

Date of written judgment: 31 August 2022

Constitutional application

Adv *G. Madzoka*, for the applicant
Ms *J. Shumba*, for the second respondent
Adv *E.T. Matinenga*, for the third respondent
No appearance for the first respondent

MAFUSIRE J

[1] This is a constitutional application. It is opposed. The applicant wants s 93(5a) and s 93(5b) of the Labour Act [*Chapter 28:01*] ("***the impugned provisions***") declared unconstitutional, ostensibly because they are inconsistent with s 56(1), s 56(3), s 68(1), s 69(3) and s 71 of the Constitution of Zimbabwe. The draft order is inelegant. The declaration of constitutional invalidity is said to be sought "*on the basis of ...*" those constitutional provisions. What about them? A court order must be complete in itself. The nature and extent of the relief granted must be self-evident on the face of it. It should not require an interpretive process or a reference to the pleadings. Legal practitioners must take heed.

[2] In addition to seeking a declaration of constitutional invalidity as aforesaid, the applicant also seeks an ordinary and substantive relief. Undoubtedly, it is meant to be consequential relief stemming from the declaration of constitutional invalidity. The draft order does not say so. But the intent is evident. The draft order simply asks that the applicant

be given leave and authority to make an application for the registration, as a judgment of this court for execution purposes, the award made by the first respondent on 23 May 2018. Such a draft would require considerable modification to transform it into a meaningful order of court. One is not being pedantic or over fastidious. In court, considerable time is often wasted in argument over technicalities of this nature. This case was no exception. The details emerge from the judgment.

[3] The background facts are largely common cause or uncontroverted. The third respondent ("***NetOne Cellular***") is one of the successor companies of a parastatal that was then known as the Posts and Telecommunication Corporation [PTC]. At some stage this parastatal unbundled. The applicant traces the history of his employment with the PTC through its unbundling stages till he landed with NetOne Cellular. At all times material to this case, he was the Chief Executive Officer for NetOne Cellular. NetOne Cellular has terminated his employment. This did not just happen. There were several processes and efforts undertaken since 2016 to sever the employment relationship. The applicant has challenged every such move.

[4] Effectively, the applicant and NetOne Cellular have been locked in legal combat in different judicial or quasi-judicial fora since 2016. One such forum was the office of the first respondent. At all material times she was a labour officer. Labour officers are employed by the second respondent's ministry. The applicant challenged the termination of his employment. The first respondent proceeded to determine the dispute in terms of s 93(5)(c) of the Labour Act. This is the provision that vests labour officers with the power to, among other things, make rulings on disputes of rights or unfair labour practices. On 23 September 2018 the first respondent upheld the termination of the applicant's employment. However, she also directed NetOne Cellular to pay the applicant certain sums of money in accordance with the terms and conditions of the contract of employment between the parties. Some details are not important.

[5] In terms of s 93(5a) of the Labour Act, once a labour officer makes a determination such as the one the first respondent made herein, he or she is obliged to apply to the Labour Court for its confirmation. According to para (a) of s 93(5a), such a determination is a draft ruling. That position has been confirmed by the Constitutional Court in the case of *Isoquant*

Investments (Pvt) Ltd t/a as ZIMOCO v Darikwa CCZ 6/20 ["***the ZIMOCO judgment***"]. The apex court stated that a ruling by a labour officer made in terms of s 93(5a) is not final. It does not confer any rights. It is not capable of enforcement. It requires confirmation by the Labour Court.

[6] In terms of r 15 of the Labour Court Rules, 2017, SI 150 of 2017, the application to the Labour Court for the confirmation of a draft ruling is made within thirty days of that ruling. *In casu*, the first respondent submitted her application in March 2019. But by that time she was nine months out of time. In June 2019 she applied for condonation for the late submission. As reasons for the delay, she averred that two months after handing down her draft ruling aforesaid, she left employment with the second respondent's ministry. She said she failed to submit the conformation application timeously because she had become overwhelmed by her new employment, trying to familiarize with a new environment and workplace. She also averred that she had assumed that after leaving employment with the second respondent, someone else would take over the matter and submit the application.

[7] NetOne Cellular vigorously opposed the application for condonation. The application was set down for hearing by the Labour Court on 10 September 2020. One of the points taken by NetOne Cellular was that only a labour officer could make the application. The applicant says, faced with that argument, the first respondent withdrew her application, much to his chagrin. Thus, the draft ruling by the first respondent has not been confirmed to this date. The applicant further avers that despite writing numerous letters to the senior labour relations officer asking that a replacement officer be appointed to proceed with the confirmation proceedings, nothing has been done.

[8] The applicant alleges that he is being seriously prejudiced by reason of his inability to execute the judgment given by the first respondent. As one example of such prejudice, he cites the change in the currency situation in the country after the first respondent had made her ruling. Among other things, the multi-currency system that had been in existence at the time of the draft ruling was subsequently abolished and a new local currency incepted as the sole legal tender. The applicant also makes reference to some proceedings instituted in this court by NetOne Cellular for his eviction from the accommodation that had been availed to him as part of his conditions of employment. At the time of filing this application, those

proceedings were pending. However, it seems that the judgment of this court, *per* MUZOFA J, was eventually handed down just before the hearing of this application. It was circulated during the proceedings, towards the end of argument. In that judgment, among other things, NetOne Cellular was granted permission to evict the applicant from the premises in question.

[9] In this constitutional application, the applicant bases his legal standing to approach the court on s 85(1) of the Constitution. This is the provision that grants the right to enforcement of fundamental human rights and freedoms to various persons of various statuses. They include any person acting in their own interests; any person acting on behalf of another who cannot act for themselves; any person acting as a member, or in the interests of, a group or class of persons; or any person acting in the public interest. Any such person is entitled to approach a court, alleging that a fundamental right or freedom enshrined in the Chapter [dealing with the Bill of Rights] has been, is being, or is likely to be infringed. The court may grant appropriate relief, including a declaration of rights and an award of compensation.

[10] The applicant laments that the procedure set out in the impugned provisions whereby after making a draft ruling a labour officer has to apply to the Labour Court for confirmation, is onerous and cumbersome. Incidentally, this procedure was introduced into the Labour Act by an amendment in 2015[1]. Before that amendment, a ruling by a labour officer in such circumstances as were obtaining between the applicant and NetOne Cellular herein was final. It could be registered with the relevant court straightaway. A losing party could appeal. The applicant submits that in the current situation, once a labour officer has made a ruling he or she becomes *functus officio*. The requirement that he or she should submit his or her ruling to the Labour Court for confirmation is unconstitutional for the reason that if the labour officer is incompetent, or for some reason, unable to submit that application, as was the case in his situation, then the successful employee suffers.

[11] The applicant argues that he sees no reason why decisions of labour officers in the present situation should be treated differently from those of their counterparts before the aforesaid amendment, or those of other tribunals such as the Rent Board and the Fiscal Appeal Court. He submits that by reason of the way the law is worded in this regard, he has

[1] Labour Amendment Act No 5 of 2015

been denied equal protection and the benefit of the law as defined by s 56(1) of the Constitution. This is the provision that says that all persons are equal before the law and have the right to equal protection and benefit of the law. The applicant submits that the impugned provisions are also discriminatory as against employers because the obligation to submit draft rulings of labour officers for confirmation by the Labour Court only relates to those made in favour of employees. The Labour Court is conferred with no jurisdiction to confirm rulings against employees. He argues further that the way ss (5b) of s 93 is worded is such that employees like himself are excluded from the confirmation proceedings. This is discriminatory and unconscionable.

[12] The applicant submits that the impugned provisions are contrary to s 68(1) of the Constitution in that the procedure prescribed by them is neither lawful, prompt, efficient, reasonable nor substantially and procedurally fair as required by this constitutional provision. He also suggests that they are contrary to s 69(3) of the Constitution. This is the provision that grants to every person the right of access to courts or some other tribunal or forum established by law for the resolution of any disputes. The applicant feels his access to the courts has been excluded in that despite being the holder of a judgment in his favour, he cannot execute it. Such execution depends on the actions of the labour officer. As such, he has been denied justice.

[13] In regards to s 71 of the Constitution that prohibits the compulsory acquisition of any person's property unless certain conditions are met, the applicant argues that the judgment by the labour officer in his favour was one sounding in money. As such, it is property. But since the law reduces that judgment to a mere draft ruling, a real right or proprietary rights in his favour have been taken away. That is compulsory acquisition of rights to property. That is a contravention of s 71 of the Constitution.

[14] By way of a remedy, the applicant submits that in terms of s 175(6) of the Constitution, this court is given a wide discretion when making a constitutional judgment. This is the provision that empowers a court, when deciding a constitutional matter within its jurisdiction, to declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of the inconsistency, and or to make any order that is just and equitable. Relying on this, the applicant seeks an order that provides that after the declaration of

unconstitutionality of the impugned provisions, the court should go further and restore the old provisions of the Labour Act before the amendment aforesaid, and allow him to register with this court for enforcement purposes the first respondent's ruling on 23 May 2018, with NetOne Cellular retaining the right to appeal to the Labour Court.

[15] The second respondent has opposed this application on the basis that it is incompetent. He says the applicant cannot seek the restoration of a repealed law simply to enable him to register the ruling by the first respondent as an order of this court. Laws are only binding until they have been repealed. According to the doctrine of separation of powers, the power to repeal laws vests with the legislature, not the courts. Regarding the impugned provisions, the second respondent alleges that he has already submitted to the Cabinet Committee on Legislation a Labour Amendment Bill, 2021, inserting a new provision that will allow a labour officer to issue a certificate of settlement that will have the effect of a civil judgment capable of registration with a court. As such, given that the provisions of the Labour Act that the applicant is challenging are in the process of being changed through the legislative process, the relief he is seeking may be academic.

[16] NetOne Cellular contests the application on several grounds. *In limine*, it challenges the applicant's right or capacity to approach the court in terms of s 85(1) of the Constitution. It is argued that this provision is available only in respect of applications in relation to which the court will sit as a court of first instance and not in respect of a matter that is already pending determination in the same court or elsewhere. In this vein, NetOne Cellular argues that the confirmation proceedings of the ruling by the first respondent in May 2018 are still to be conducted before the Labour Court, in spite of the fact that the previous attempt by the first respondent was withdrawn. Thus, the confirmation proceedings are unterminated. They remain a live issue, properly to be pursed before the Labour Court. Until that is done, the applicant cannot invoke s 85(1) of the Constitution for this court to re-hear the same issue.

[17] NetOne argues that in the context of this application whereby the issue in contention is an on-going labour dispute, it is wrong for the applicant to move the court to sit in first instance in terms of s 85(1) aforesaid which requires and empowers a court to determine a constitutional application directly. This is a constitutional matter that must be construed as having arisen in the course of an on-going dispute. As such, the applicant should have sought

the referral of a constitutional question to the Constitutional Court in terms of s 175(4) of the Constitution. This is the provision that requires a person presiding in a court to refer to the Constitutional Court, either *mero motu*, or on the application of a party, a constitutional matter that arises in the course of any proceedings before the court. In this regard, NetOne Cellular argues that in the context of the dispute between the parties, the opportunity for such a referral arose in two instances: firstly, when the first respondent applied for condonation for the late submission of her draft ruling [in June 2019], and secondly, when that application was withdrawn [in September 2020]. It is the Labour Court that would properly have referred the constitutional matter to the Constitutional Court.

[18] NetOne Cellular further argues that the relief sought by the applicant that he be allowed to register the judgment by the first respondent in May 2018 is incompetent in that what the first respondent granted was not a judgment capable of registration by a court, but a mere draft ruling as pronounced upon by the Constitutional Court in the *ZIMOCO* judgment. At any rate, the entire contents of the application in the present proceedings are not in support of the registration of that draft ruling. This court cannot grant relief that has not been pleaded. Finally, a constitutional application cannot be founded on the same papers with an ordinary court application for substantive relief. The right to register the draft ruling by the first respondent cannot flow from the constitutional application as such relief is not contemplated in the constitutional provision via which the applicant has approached the court.

[19] On the merits, NetOne Cellular argues that the constitutionality of the impugned provisions has already been answered by the Constitutional Court. In this regard, NetOne Cellular is referring to the case of *Makumire v Minister of the Public Service, Labour and Social Welfare & Anor* CCZ 1 -20 in which the Constitutional Court declined to confirm the declaration of constitutional invalidity of the impugned provisions made by this court in *Makumire v Minister of the Public Service, Labour and Social Welfare & Anor* HH 6-19. For that reason, it is not competent for the applicant to seek the same relief before this court because it now lacks the jurisdiction to revisit that issue. At any rate, the impugned provisions are not inconsistent with those sections of the Constitution that the applicant has cited, namely, 51(1); s 56(3); s 68(1) and s 69(3).

[20] NetOne Cellular makes further submissions in support of the rationale of reposing in a labour officer, and not the litigants, the right or obligation to approach the Labour Court for confirmation of a draft ruling. The labour officer is a neutral party and is therefore, the person best suited to approach the Labour Court. His or her draft ruling is not a judgment from which legal rights flow. It leaves the employer and the employee standing on a level ground. Thus the arrangement leaves the parties with an equal right to an equal benefit of the law.

[21] Further grounds of opposition by NetOne Cellular can be summarized as follows:

- the applicant cannot complain about the switch from the multi-currency regime because such is a matter for central government and its central monetary policy over which NetOne Cellular has no control and over which, at any rate, the superior courts have since pronounced;
- the issue of NetOne Cellular's right to seek the applicant's eviction from its premises is vindicatory in nature following the applicant's loss of employment and therefore, this court has no jurisdiction to determine issues of unfair labour practices as a court of first instance;
- a labour officer cannot be said to be *functus officio* after issuing a draft ruling because conciliation proceedings are by their nature not adjudicative, and therefore cannot be the subject of an appeal or a review;
- since a labour officer who attempts conciliation of a dispute between the parties in an employment situation does not adjudicate over the dispute, he or she remains detached from it, such that a purposive interpretation of the impugned provisions should lead to the conclusion that the right or power to submit the draft ruling to the Labour Officer is reposed, not only in the particular labour officer that gives the draft ruling, but also, in his or her absence, any other person who is a labour officer, or qualified to be one, or the principal labour officer;
- as the *dominus litis* in the whole matter, it was incumbent upon the applicant to take the initiative to ensure that the first respondent's draft ruling was submitted before the Labour Court for confirmation, even by invoking the common law remedy of *mandamus*;
- by reason of the foregoing, the current application, being founded on constitutional precepts, is baseless because there are other remedies already available to the applicant;
- the applicant has not been denied any rights of access to the court as his right to force the submission of the draft ruling by the first respondent for confirmation by the Labour Court remains intact;
- this court cannot revive statutory provisions which have been repealed.

[22] I now set out to determine the application. I consider that the issue of the capacity of the applicant to approach the court in terms of s 85(1) of the Constitution is inexorably linked to, or encapsulated in, the other argument by NetOne Cellular that it is wrong for the applicant to base his application on constitutional precepts in the face of the existence of other non-constitutional remedies available to him. Therefore, instead of addressing the capacity argument separately, I propose to approach the whole application on the basis of the applicant's competency to bring it in the manner he has. Thus, the first enquiry is whether or not there is a proper constitutional application before the court.

[23] In *Makumire*, *supra*, this court, sitting as a court of instance in a direct approach to it in terms of s 85(1) of the Constitution, declared the impugned provisions unconstitutional for want of consistency with s 56(1) and (3); s 68(1) and s 69(3) of the Constitution. In terms of s 167(3) and s 175(1) of the Constitution, a declaration of constitutional invalidity made by a court in respect of, *inter alia*, any law, has no force unless confirmed by the Constitutional Court. As already been mentioned above, the Constitutional Court declined to confirm the order of unconstitutionality of the impugned provisions made by this court in the *Makumire* matter. The apex court held that no such constitutional matter had been placed before the court *a quo* as would repose it with the right and power to make a declaration of constitutional invalidity of the impugned provisions. The grievance harboured by the litigant in that case which had driven him to seek the declaration of constitutional invalidity, did not fall for determination in terms of those provisions. It fell for determination in respect of other provisions of the Labour Act but which had not been impeached.

[24] In the course of its judgment, the court stated that as a general rule, a court should not decide constitutional matters unless it is necessary to do so. Furthermore, the order of the court should have a practical effect on the parties. One who complains of the invalidity of a legislative provision must be able to demonstrate that they have been harmed by the operation of that provision the constitutionality of which they seek to impeach. They must also demonstrate that the order of the court will have some practical effect on the protection of their rights. In the *Makumire* matter, the apex court found that, due to a misunderstanding of the law, the litigant had pursued the wrong remedies. Because of the nature of the remedy that he sought, the declaration of constitutional invalidity of the impugned provisions would

not in any way benefit him. It would not change the status of his dismissal, which was all that he was challenging. The striking off of the impugned provisions would not provide him with a remedy.

[25] Citing with approval the judgment of the Constitutional Court of South Africa 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, the apex court, in effect, held that even if the order of constitutional invalidity of legislative provisions may, despite the repeal, have some practical effect on the parties or on others, nonetheless, a constitutional court will still exercise its discretion to decide whether or not to deal with the confirmation proceedings of the declaration of invalidity made by a lower court. In doing so, all the circumstances of the case will be taken into account. These include the nature and extent of any practical effect the order may have, the importance of the issue raised and its complexity.

[26] I consider that the same discretion reposed in the apex court when dealing with the confirmation proceedings of the declaration of constitutional invalidity of legislative provisions made by a lower court is also exercised by the lower court when faced with an application for such a remedy in the first instance. Otherwise it would be an exercise in futility for courts of first instance to make declarations of constitutional invalidity only for the apex court to decline confirmation in circumstances where for instance, the lower court would have failed to exercise its discretion, or having done so improperly.

[27] There is a striking similarity between the circumstance of the applicant *in casu* and those of the applicant in *Makumire*. In *Makumire*, what drove the applicant to seek a declaration of constitutional invalidity of the impugned provisions was the termination of his employment, and the frustration of his failure to appeal that dismissal. *In casu*, the motivation to seek the setting aside of the same provisions is the applicant's failure to execute what he considers to be a judgment in his favour. But in *Makumire*, the apex court found that the applicant's pursuit of a constitutional challenge had been misplaced because he had a remedy available to him which did not require tampering with legislative provisions. The same argument is advanced by NetOne Cellular in the present proceedings. According to it, the reason why the first respondent's draft ruling remains unconfirmed to this date is because the applicant has, metaphorically, slept on his rights. That the first respondent had left

employment with the second respondent's ministry was not the end of the matter for him. Any other labour officer, or any person qualified, could be persuaded or compelled to submit the confirmation application to the Labour Court.

[28] I uphold the above argument. I find that there is no proper constitutional application before the court. What grieves the applicant is his apparent inability to enjoy the fruits of his success before the first respondent in March 2018. But this disability is fictional. The state of the law as set out in the impugned provisions is not the source of his plight. The procedure set out in those provisions may be onerous or cumbersome or frustrating as he alleges or implies. But he has identified no inconsistency or conflict between them and s 56(1), s 56(3) s 68(1) s 69(3) and s 71 of the Constitution.

[29] A draft ruling such as was given by the first respondent requires confirmation by the Labour Court as per para (a) of ss (5a) of s 93 and the *ZIMOCO* judgment. That the first respondent left employment with the second respondent does not make the applicant non-suited. Admittedly, ss (5a) of s 93 of the Labour Act provides that a labour officer **who** makes a ruling and order in terms of ss (5)(c) [of unfair labour practice and, *inter alia*, the payment of money or damages] **shall** as soon as possible lodge the application for confirmation with the Labour Court. At first glance, it would seem that such an application can only be made by the particular labour officer who made the draft ruling. However, this cannot be the case. The provision cannot be construed to mean that such an application is the personal obligation or prerogative of the particular labour officer that gave the draft ruling. The world 'shall', ordinarily peremptory, is not in reference to whose obligation it is to submit that application. Rather, it is in reference to the expediency required in making the application. In other words, the confirmation proceedings shall be lodged most expeditiously with the Labour Court, in any event, by not later than thirty days after the draft ruling has been issued.

[30] As was held in the case of *Konjana v Nduna* CCZ 9-22, where a legislative provision has placed an administrative obligation on an administrative official, the right to press on with any proceedings is not taken away from the litigants themselves. In that case, despite the strong merits of the case in applicant's favour, both the Supreme Court and the Constitutional Court found him non-suited in regards to an appeal in an election petition that ought to have

been prosecuted within a certain time frame, but which had been set-down for hearing outside it. A provision of the Electoral Act [*Chapter 2:13*] requires that an appeal in an election petition be determined within three months from the date of lodging the appeal. For the purpose of ensuring that such an appeal is determined within that time-frame, another provision requires the Chief Justice, or the senior presiding judge of the Supreme Court, to give appropriate directions as to the filing of documents and the hearing of evidence and argument. The appeal was set down for hearing after the lapse of the three-month time-frame. It was held that as the applicant was the *dominus litis*, he ought to have been vigilant in monitoring and managing the progress of his case in order to meet the stipulated time limits. He could not sit back and wait for the appeal to be prosecuted in the normal run of things as that would certainly entail the determination of the appeal outside the prescribed three months period.

[31] *In casu*, the applicant says the first respondent withdrew her application for condonation, much to his chagrin. I consider that as the *dominus litis*, or the repository and driver of the cause being pursued, it was incumbent upon him to ensure that the confirmation proceedings were lodged with the Labour Court expeditiously and timeously, whether by the first applicant herself, or by someone else properly qualified to do so. In this case, when the first respondent attempted to lodge the confirmation application, she was a considerable nine months out of time. When she then attempted an application for condonation, her affidavit was executed on 23 March 2019. However, the written application seems to have been executed only on 30 April 2019, thus, more than a month later. What is more, the application was not immediately filed with the Labour Court. It was only lodged on 26 June 2019. There is no information on what the applicant was doing in all these delays to assert his rights. To cap it all, the present application was launched on 9 September 2021, almost 3 ½ years after the draft ruling by the first respondent.

[32] The detail above about time-frames is not about prescription. It is about showing the remoteness or weak causal link of the applicant's perceived source of problem to the impugned provisions. Available remedies have either been ignored or pursed incompetently. The applicant himself avers that he has written several letters to officials in the second respondent's ministry for the re-submission of the confirmation application to the Labour

Court. That shows that he has been conscious of the correct remedy available to him. Having gone nowhere on that front, he could have approached the court for relief. His decision to launch this constitutional application is therefore strange.

[33] The averments by the second respondent that a Bill to amend the impugned provisions awaits Cabinet approval, are perhaps useful only for information purposes. This application is concerned with the state of the law as it presently exists. Incidentally, the second respondent made the same point in the *Makumire* matter above. He said in his opposing affidavit that the impugned provisions were being repealed via an amendment Bill that had already been submitted. But it is now more than three years since this court decided that case.

[34] For the reasons above, the applicant's constitutional application is ill-conceived. There is no constitutional matter before the court. Thus, both the constitutional relief and the consequential substantive remedy sought by the applicant cannot succeed. The application is hereby dismissed with costs.

31 August 2022

Tendai Biti Law, applicant's legal practitioners
Civil Division of the Attorney-General's Office, second respondent's legal practitioners
Matsikidze Attorneys-at-Law, third respondent's legal practitioners