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Foreword

The quest to develop transformative and transparent jurisprudence continues to underscore the development of compendia subsequent to symposia and colloquia. As such, it is with an unfathomable sense of achievement that we introduce Volume 2 of the Judges Symposia and Colloquia Compendium. This volume demonstrates our enduring will and dedication to memorialise and institutionalise our knowledge products for the collective benefit of all our diverse stakeholders. The topics covered in this volume include the crafting of court orders, the equitable jurisdiction of the Labour Court, the applicability of the subsidiarity principle, the limitation of the interaction between the court and the employees' representatives, trade unions and unionists and striking a balance between formalism and access to justice when dealing with self-actors. It is our fervent hope that these knowledge products will contribute to improved quality of justice through use and application by judicial officers as they discharge their constitutional mandate.

W. T CHIKWANA

SECRETARY, JUDICIAL SERVICE COMMISSION, ZIMBABWE

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HOW TO CRAFT COURT ORDERS[1]

Honourable Mr. Justice L. Malaba

Chief Justice of the Republic of Zimbabwe

Abstract

The crafting of court orders is an indispensable and invaluable juridical skill that undergirds the delivery of justice. It symbolises the culmination of the judicial process by disposing of the disputed issues through the rule of law. It calls for a judicious examination of the facts, careful interpretation, and application of the law, and an unequivocal determination of the rights and duties of the parties involved. Court orders must pass the legal muster of clarity, precision, enforceability, and legality.

1. INTRODUCTION

One of the most important tasks performed by a judicial officer is crafting a court order. The process of drawing up and pronouncing a court order signifies the culmination of the judicial process. It represents the moment when a judicial officer, after making findings of fact and the law on the matter before him or her, issues a disposition that operationalises his or her view on the matter. Given that the just, efficient, and effective disposition of a matter is central to judicial adjudication, attention must be drawn to the legal considerations that come into play in the crafting of court orders as the means by which a

[1] A paper presented at the End of Second Term Judges Symposium 2023 held at Village Lodge Gweru in August 2023.

judicial officer finally disposes of a matter and gives effect to his or her judgment. In this regard, the presentation addresses the question of "how to craft a court order". It not only borrows from but also builds upon a previous presentation on "court orders".[2] The paper discusses the definition, purpose, and requirements for a court order. In doing so, weight is placed on the legal principles that ought to be taken into account in the crafting of court orders.

A discussion on court orders is not complete without an exposition of the constitutional background. Section 162 of the Constitution of Zimbabwe 2013 ("the Constitution") confers judicial authority upon the courts. It provides that judicial authority derives from the people of Zimbabwe.[3] This section must be read with the supremacy provision of the Constitution contained in section 2 thereof. The Constitution further enjoins all organs of the State to assist and protect the courts to ensure, among other things, their dignity and effectiveness. To ensure that the authority of the courts is effective, section 164 (3) of the Constitution makes orders of court binding on the State and all persons and governmental institutions[4]. Orders of court must be obeyed by all.

2. WHAT IS A COURT ORDER?

A court order is an official pronouncement by a court which has the effect of determining matters of rights and obligations in dispute between parties. It is generally reduced to writing and becomes binding once the judicial officer who issues it affixes his or her signature to the

[2] See Hon. Malaba CJ, "Court Orders and Provisional Orders" – A presentation made on the occasion of the Judges Symposium 2020.
[3] Section 162 of the Constitution of Zimbabwe, 2013.
[4] Section 164 of the Constitution of Zimbabwe, 2013.

document. John Bouvier defines "orders" as rules made by a court or other competent jurisdiction. [5] According to this author, the formula is generally in these words: "*It is ordered, etc …*".[6]

In *R* v *Recorder of Oxford, ex p Brasenose College* [1969] 3 All ER 428 at 431, in considering the meaning of the word "order", BRIDGE J said:

> *"The word 'order' in relation to legal proceedings in itself is ambiguous; clearly it may mean, perhaps, a linguistic purist would say that its most accurate connotation was to indicate, an order requiring an affirmative course of action to be taken in pursuance of the order, but it is equally clear that the word may have a much wider meaning covering in effect all decisions of courts."*

PHILLIPS JA in *McPherson* v *The General Legal Council* [2016] JMCA App 19 held as follows: -

> *"In legal parlance 'order' is used in a number of ways and based on the context will take on a different meaning. Further, these words are often used interchangeably. 'Order' is also used to mean, based on the context, directions, or directives given in legal proceedings, as well as the judgment handed down when a matter is finally disposed of."*

It is evident from the above that court orders are directions or commands made by a court of law, and directions or commands termed "rules" are included in "orders". In most cases, an order which is granted by a court is based on a "draft order" which is drawn up by the party who approaches the court for relief. A draft order embodies the exact nature and type of relief which a party seeks. A draft order remains a

[5] John Bouvier, *Bouvier's Law Dictionary,* Vol II, (London: Sweet and Maxwell Limited) at p. 555.
[6] See note 4 above.

proposition and only becomes a court order if granted by the court. A court may endorse the draft order with or without variations.

3. THE NATURE OF COURT ORDERS

It is important to note that no court order can be made except upon application to the court for a particular specific relief. The term "order" implies that there must be a distinct application by one of the parties for definitive relief. These sentiments were echoed in *Dickenson* v *Fisher's Executors* 1914 AD 424 at 427, where INNES ACJ (as he then was) had this to say: -

> *"The relief prayed for may be small, as in an application for a discovery order, or it may be of great importance, but the court must be duly asked to grant some definite and distinct relief, before its decision upon the matter can properly be called an order."*

It flows from the above that court orders vary in content, depending on the type of proceedings, the stage of proceedings, and the procedural and evidentiary rules governing those proceedings. The simplest of orders is one embodying instruction as to how to proceed in a legal suit, for example, a court order directing the defendant to file certain documents by a specific date. Another species of court orders reflects the several divisions of the law; for example, a protection order, a custody order, a maintenance order in family law, an order for eviction under the broad spectrum of property law, or an order for committal in criminal law.

The more significant division relates to the stage of the proceedings, thus the distinction between interim and final orders. An interim order is

an order which is made in the course of the proceedings and a final order is an order which concludes the action. In some cases, it determines the validity of subsequent proceedings which may flow from either a grant or a refusal of the order. For example, an aggrieved party cannot appeal against an order of court which does not have a final and definitive effect without leave of the court. See *Blue Rangers Estate (Pvt) Ltd* v *Muduviri and Anor* [7] and section 43 of the High Court Act [*Chapter 7:06*].

A court order may also be an order for the payment of a sum of money - *ad pecuniam solvendum* - or an order *ad factum praestandum* - that is, an order to do, or abstain from doing, a particular act, or to deliver a thing.

The various divisions into which court orders are classified are significant. The nature of a court order, among other things, determines how it is executed. For good measure, once an order is classified as *ad factum praestandum*, the general remedy for non-compliance with such an order would be committal for contempt of court. See *Evans & Anor* v *Surtee & Os.*[8] In addition, the categories of court orders also operate as a signal to a court to take into account the underlying principles of the law in the crafting of an order. Thus, for example, a court petitioned to award interim or provisional relief will, by virtue of the classification of the order sought as interim, necessarily engage the principles relating to the granting of interim relief.

[7] 2009 (1) ZLR 368 (S).
[8] 2012 (1) ZLR 202 (S).

4. THE PURPOSE OF A COURT ORDER

The primary purpose of a court order is to authoritatively determine the rights, duties, and obligations of parties per the court's mandate in respect of the issues placed before it. The Supreme Court in *Nzara and Ors* v *Kashumba N.O. and Ors*[9] held that: -

> *"The function of a court is to determine the dispute placed before it by the parties through their pleadings, evidence and submissions. The pleadings include the prayers of the parties through which they seek specified orders from the court…This position has become settled in our law. Each party places before the court a prayer he or she wants the court to grant in its favour. The Rules of court require that such an order be specified in the prayer and the draft order. These requirements of procedural law seek to ensure that the court is merely determining issues placed before it by the parties and not going on a frolic of its own. The court must always be seen to be impartial and applying the law to facts presented to it by the parties in determining the parties' issues. It is only when the issues or the facts are not clear that the court can seek their clarification to enable it to correctly apply the law to those facts in determining the issues placed before it by the parties."*

On this point it is appropriate to refer to what was said by BHAGWATI J (as he then was) in *M. M. Pathak* v *Union*[10] in relation to the practice of the Supreme Court of India:

> *"It is the settled practice of this Court to decide no more than what is absolutely necessary for the decision of a case.*[11]*"*

Therefore, it is clear from the above that the function of a court order is to determine issues between contesting parties and not to go beyond the scope of the parties' dispute. Where an order is made in favour of one party, the other party bears a correlative obligation to comply with

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[9] 2018 (1) ZLR 194 (S).
[10] *M. M. Pathak v Union* (1978) 3 SCR 334.
[11] See note 9 above.

the court's order. In *Artkinson* v *Artkinson,*[12] the court made the following remarks:-

> *"It is a plain and unqualified obligation of every person against, or in respect of whom, the order is made by the court of competent jurisdiction to obey it, unless and until that order is discharged; and those two (2) consequences flow from that obligation. The first is that anyone who disobeys an order of court is in contempt and may be punished by committal or attachment or otherwise. The second is that no application to court by such a person will be entertained unless he has purged himself of his contempt."*

A court order, in essence, addresses and disposes of live and concrete issues of dispute between the parties. In most cases it is the basis upon which a successful party to a suit enforces its rights; for example, a creditor can get an order declaring a debtor's immovable property specially executable in order to satisfy the judgment debt.

Disregard of a court order not only deprives the other party of the benefit of the order but also impairs the effective administration of justice, in that the dignity, repute and authority of the court, whose judicial authority is derived from the people and is constitutionally protected, is called into question. In *Matjhabeng Local Municipality* v *Eskom Holdings Limited and Others*; *Shadrack Shivumba Homu Mkhonto and Others* v *Compensation Solutions (Pty) Ltd*[13] the court stated: -

> *"In some instances, the disregard of a court order may justify committal, as a sanction for past non-compliance. This is necessary because breaching a court order, wilfully and with mala fides, undermines the authority of the courts and thereby adversely affects the broader public interest. In the pertinent words of CAMERON JA (as he then was) writing for the majority in Fakie:*
>
> > *'[W]hile the litigant seeking enforcement has a manifest private interest in securing compliance, the court grants enforcement also*

[12] [1952] 2 All ER 567 (CA).
[13] [2017] ZACC 35.

> *because of the broader public interest in obedience to its orders, since disregard sullies the authority of the courts and detracts from the rule of law.'"*

5. CHARACTERISTICS OF A COURT ORDER

There are a number of characteristics expected of a court order by the law. Of these, one of the foremost is that an order of a court must be sufficiently clear and specific as to allow a party to determine with reasonable certainty what he, she or it is required to do. In *Eke* v *Parsons*[14] the South African Constitutional Court highlighted the essential features of a court order as follows: -

> *"A court order must bring finality to the dispute or part of it, to which it applies. The order must be framed in unambiguous terms and must be capable of being enforced, in the event of non-compliance … If an order is ambiguous, unenforceable, ineffective, inappropriate, or lacks the element of bringing finality to a matter or at least part of the case, it cannot be said that the court that granted it exercised its discretion properly. It is a fundamental principle of our law that a court order must be effective and enforceable, and it must be formulated in language that leaves no doubt as to what the order requires to be done. The order may not be framed in a manner that affords the person on whom it applies, the discretion to comply or disregard it."*

In line with the sentiments expressed above, a court order must satisfy the following.

5.1. Clarity

A court order's wording must be unambiguous and must clearly convey the decision of the court. It must not be subject to subsequent

[14] [2015] ZACC 3.

clarifications. A party must know with certainty what is required of him or her or it. In *Lujabe* v *Maruatona,*[15] the court held that:-

> *"The issue that arises in a case where the settlement agreement has been made an order of Court and in the context of contempt proceedings is whether such an order is executable or enforceable. The basic principle is that for an order to be executable or enforceable, its wording must be clear and unambiguous. An order that lacks clarity in its wording or is vague is incapable of enforcement. The other basic principle is that the order should, as soon as it is made, be readily enforceable. In other words, the order must give finality to the dispute between the parties and not leave compliance therewith to the discretion of the party who is expected to comply with such an order." (Emphasis added)*

5.2. Precision

A court order must be marked by exactness and accuracy. It must be a stand-alone determination that addresses the salient issues of a case. The precision requirement also requires that the order should set out the logical process behind the court's ruling. Hence, the order must inform the litigating parties of the competing facts and arguments used as a basis for the decision for the purpose of review or appeal. Where the litigants have presented their competing facts and arguments before the trial court, they have a legitimate expectation to know whether their version of the facts and argument have been accepted, and if not why.

The Supreme Court of North Carolina in *Coble* v *Coble*[16] held as follows in this regard:

> *"Effective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by which the order's rationale is articulated. Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each*

[15] [2013] ZAGPJHC 66.
[16] 268 S.E. 2d 185 (1980) 300 N.C. 708.

> *step of the progression must be taken by the trial judge, in logical sequence; each link in the chain of reasoning must appear in the order itself. Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto."*

5.3. Enforceability

A court will not make an order that cannot be enforced. In *Administrator, Cape* v *Ntshwaqela*[17] the court noted that: -

> *"It is trite that a Court will not engage in the futile exercise of making an order which cannot be carried out. So, an order for specific performance of a contract will be refused where performance is impossible; and an order ad factum praestandum will similarly be refused in such circumstances (e.g., an order for maintenance where the defendant is destitute)."*

An order must be capable of being imposed for purposes of compliance. It must be capable of being made effective or, put differently, it must be executable. In other words, the order must give finality to the dispute between the parties and not leave compliance therewith to the discretion of the party who is expected to comply with such an order. This requirement is closely related to the aforementioned features of a court order. An order that lacks clarity and preciseness is incapable of enforcement. If the order issued does not have the critical elements of an order aforementioned, the court would have failed to exercise its discretion correctly.

In conclusion, the requirements that a court order must be clear, specific, and capable of being enforced ensure effective case disposition and good administration of justice. A court ought to be

[17] 1990 (1) SA 705 (A).

mindful of these requirements when considering whether to grant an order, particularly where the order sought is based on the parties' settlement agreement. It must ensure that the order it issues has all the requisite features. If the order issued does not have the key elements of an order, the court will have failed to exercise its discretion properly. See *Lujabe* v *Maruatona supra.*

5.4. Legality

The legality of an order is another important characteristic of a court order to be taken into account in its crafting. Legality refers to the lawfulness of an order. Courts are enjoined to issue lawful orders. The underlying principle beneath the requirement of legality is that courts must always uphold the rule of law. Section 164(1) of the Constitution spells out that "the courts are independent and are subject only to this Constitution and the law, which they must apply impartially, expeditiously and without fear, favour or prejudice"[18]. One element of s 164(1) of the Constitution is that courts must apply the law. In the case of *Minister of Lands and Others* v *Commercial Farmers Union*[19] had this to say about the rule of law: -

> *"There are many facets in the meaning of the expression, but its essence is that the law is supreme over decisions and actions of government and private persons. There is, in short, one law for all. The concept postulates that the exercise of all public power must find its ultimate source in a legal rule. In other words, the rights enjoyed, and powers exercised must derive from duly enacted or established law."*

[18] Section 164 of the Constitution of Zimbabwe, Act of 2013.
[19] 2001 (2) ZLR 456 (S).

The above position must be understood within the context of a judicial officer who is called upon to grant judicial relief. The principles of the rule of law require the judicial officer to bear in mind that the exercise of his or her judicial power to grant positive relief is undergirded by the law. If the relief sought is not justifiable on legal grounds, then it must not be granted. The position that an order must be justifiable on legal grounds necessarily delineates the legal parameters within which court orders are crafted. It means, for example, that there is very limited scope for equitable considerations in the granting of court orders. Thus, in *Madyegaswa* v *Kingdom Bank Limited and Others*[20] the court stated:

> *"Equity has been said to be not part of our law. In David Phillp Dzirutwe v Grabroc Enterprises (Private) Limited & Others HH–70–04 the position was explained by GOWORA J (as she then was) as follows:*
>
> > *'Equity as a system of law distinct from and opposed to the common law and is not part of our law. In their book* ***Wille's Principles of South African Law*** *8 ed, the learned authors van Heerden Visser and van der Merwe state as follows at page 18:*
> >
> > > *"The incorporation of these equitable principles in our law has made it well fitted to deal fairly and justly with virtually all cases of hardship that are likely to arise, and there is no need for the courts to have recourse to arbitrary rules of 'equity' in order to mete out substantial justice. It is true that Paulus lays down that equity is to be sought in all things, and particularly in law, and also that Voet says that a judge is bound to esteem equity and fairness above strict law, but the actual position in South Africa is that our courts can administer equity only in so far as is consistent with the fixed principles of the Roman-Dutch law. Equitable principles are only of force in so far as they have become authoritatively incorporated and recognised as rules of positive law. It follows that equity cannot, and does not, override a clear provision of our law. 'The court cannot therefore grant equitable relief', said Sir James Rose Innes, 'if by so doing it would be going contrary to a well-defined principle of the Roman-Dutch law, or to some statutory provision. It has*

[20] HH–164–22.

> *been held, for example, that the court has no authority to grant what is known in English law as "equitable relief against the forfeiture of a lease"'. (Emphasis added)*

The principle that orders may not be based on equitable considerations but on legal considerations was also set out in the case of *Nzara supra* where the court held:

> *"Such orders cannot be sustained at law. They seem to have been motivated by equity and sentiments of justice rather than the law and the facts, as demonstrated by the court a quo's narration of the exploits of the legendary 'judge jackal' in setting free a man who was about to be eaten by a leopard he had rescued from a trap. Where a court is of the view that an order not sought by the parties may meet the justice of the case, it must put that possible relief to the parties and allow them an opportunity to address it on such an order."*

It must be noted, however, that although the Labour Court enjoys considerable equitable jurisdiction in terms of the Labour Act [*Chapter 28:01*], such jurisdiction is also exercised within the confines of the law. Thus, in *Zimbabwe Platinum Mines (Pvt) Ltd* v *Phuti*,[21] it was held that:

> *"It is trite that the Labour Court is entitled to dispense equity in its duty to do substantial justice between the parties. However, it cannot do so outside the confines of the law. Although s 49(1)(b) of the Labour Act allows for flexibility and latitude in the exercise of the court's functions, it is still required to act subject to such procedures as may be prescribed, that is in accordance with the Labour Act and the Labour Court Rules."*

The above-cited cases all have a bearing on considerations of legality in the crafting of court orders. Further application of the principle of legality in respect of court orders is also brought out in the case of

[21] 2016 (1) ZLR 490 (S).

SEDCO v *Guvheya.*[22] In that case, the applicant issued a summons for the payment of a sum of money which it had loaned to the respondent. In terms of the loan agreement, the respondent was liable to pay all costs, charges, and expenses which SEDCO would incur in enforcing or obtaining payment of the sums or sum of money due to it by the respondent. The respondent also executed a notarial bond in favour of the applicant in which he agreed to pay all legal fees and stamp duties incurred in the preparation of documents related to the loan and "the costs of any legal proceedings which may be taken by the Mortgagee to enforce its claim ... including costs on a legal practitioner and client scale, collection charges and any costs incurred by the Mortgagee in tracing the whereabouts of the Mortgagor". While the applicant had already obtained judgment on the principal debt, it was now claiming, among other things, costs on the higher scale and collection commission for the recovery of the sum of money loaned. After hearing the matter, the High Court declined to grant the applicant's prayer for collection commission as it was not supported by law. At p 312, it was stated that:

> *"However, can the applicant claim collection commission where it has applied to court for judgment and obtained an order for its costs of suit? I considered that it was not appropriate to order that collection commission be paid. I accordingly issued the order, suitably amended so as to exclude collection commission ..."*

The High Court, at p 316 of the *SEDCO* decision *supra* justified the position it took as follows:-

> *"The Law Society of Zimbabwe has, in its by-laws which were promulgated in SI 314 of 1982, laid down the rate of collection*

[22] 1994 (2) ZLR 311 (H).

> *commission which a legal practitioner who is instructed to collect an uncontested claim (which term is defined) for trade debt (also defined) shall be entitled and obliged, in lieu of any other fees and charges, save for disbursements, to charge his client. In my view, having regard to the views expressed by DAVIES J, with which I respectfully concur, collection charges at the rate so prescribed may be recovered but only in respect of payments obtained through services prior to judgment, unless, however, there has been a judgment and the debtor is unable to satisfy the judgment debt at once and he agrees to pay the judgment debt in instalments together with collection charges.*
>
> *To sum up, therefore, once summons has been issued for any debt, the legal practitioner is entitled to claim his costs but not collection commission unless subsequent to the service of the summons the debtor has agreed to pay collection commission. Collection commission can only be charged on moneys actually collected by the legal practitioner."*

Against the above legal exposition, the High Court did not grant the order that had been sought from it on the basis that it would have been illegal. It follows, therefore, that in the crafting of an order a judicial officer must also consider whether the order would be legal.

6. DOCTRINE OF EFFECTIVENESS

In contextualising the importance of properly crafting a court order, it is impossible not to refer to the doctrine of effectiveness. The doctrine of effectiveness is commonly applied in cases where the territorial jurisdiction of a court is put in question. It is related to the characteristic expected of court orders that they must be enforceable. The learned authors Herbstein and van Winsen, *The Civil Practice of the High Courts and Supreme Court of Appeal of South Africa*, 5th Ed, (2009), take note of several decisions underpinning the doctrine of effectiveness. They state:

> *"... jurisdiction depends upon the power of the court to give an effective judgment. Thus, in Steytler NO v Fitzgerald it was said that 'a Court can only be said to have jurisdiction in a matter if it has the power not only of*

> *taking cognisance of the suit, but also of giving effect to its judgment'. In Forbes v Uys the court remarked,*
>
> > *'The guiding principle is that [a court] will not exercise jurisdiction unless effect can be given to the judgment …'"*

The underlying normative principle behind the doctrine of effectiveness is that court judgments – orders – must be capable of enforcement and execution. In this jurisdiction, there are several decisions that elaborate the principle. The seminal observations were made by BECK J in *African Distillers Limited* v *Zietkiewicz and Others*[23]: -

> *"The well settled common law, for which there is no dearth of judicial authority, is that for claims that sound in money brought by an incola, or a peregrinus against a peregrinus, there must be an arrest of the person of the defendant peregrinus or an attachment of his property within the territorial jurisdiction of the Court ... Such arrests or attachments are necessary in order to satisfy, albeit only partially and imperfectly in some cases, the doctrine of effectiveness, for the Court will not concern itself with suits in which the resulting judgment will be no more than a brutum fulmen.[24]"*

In *Tiiso Holdings (Pty) Ltd* v *ZISCO*,[25] it was held that:

> *"The principle of effectiveness that underlies the law of jurisdiction, in its absolute sense, is that the court will only have jurisdiction if it controls the person or property of the defendant, as the mere consent or submission of the defendant to the jurisdiction of the court affords no absolute guarantee that the court's judgment will be effective."*

The two decisions cited above underline the effectiveness of a court's judgment as a prerequisite for jurisdiction. What can be deduced is that an effective judgment, which, needless to say, is in essence the court's

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[23] 1980 ZLR 135 (GD).
[24] *African Distillers Limited v Zietkiewicz and Others* 1980 ZLR 135
[25] 2010 ZLR (2) 100 (H).

order, is one of the most significant aspects of the exercise of jurisdiction by a court. If significance is placed upon the effectiveness of a judgment granted by a court, it follows that significance must also be placed on how the order is crafted. The order must be crafted to ensure that it fulfils its primary objective of being effective on the parties in respect of whom it is given.

It must be added that the corresponding phrase "*brutum fulmen*" mainly features in contexts where the doctrine of effectiveness is discussed. According to *Black's Law Dictionary*, 8 ed (2004), "*brutum fulmen*" means "an empty noise; an empty threat; something ineffectual. ... a judgment void on its face; one that is, in legal effect, no judgment at all". Courts are discouraged from making orders which are a *brutum fulmen*; in other words, orders which are ineffective. A court order must be effective. The point that courts eschew granting orders which will be a *brutum fulmen* was made in *Nyakudya* v *Goromonzi Rural District Council and Others*.[26]

It follows that the question of whether a court order will be effective must always be answered during the process of crafting court orders. A court order must be effective on the parties. Unclear, ambiguous, and poorly drafted orders are difficult to enforce and consequently rendered ineffective.

7. THE PROCESS OF CRAFTING A COURT ORDER

[26] S–126–22.

The overarching principles above regulating court orders are capable of being synthesised into a process for crafting a court order. There is, therefore, a need to canvass the process of crafting a court order. This refers to "how" the court order is drawn up by the court. The process of crafting a court order is, in fact, a practical expression of the principles of law applicable to court orders.

The order should be crafted after the judicial officer has made conclusions on the issues of fact and the law before him. An Australian Judge, the Honourable Dennis Mahoney AO QC, in an article on "Judgment Writing: Form and Function", explained that the orders must be made after the Judge has made conclusions on the case before him or her. He wrote:

> *"At the end of the judgment or otherwise, the orders to be made must be stated. There will frequently be no difficulty in determining the form of the orders; sometimes there will be. ...*
>
> *However this be, the orders to be made should, except in special cases, bring the litigation to an end. A judge will have in mind when the order is made that what he then does will essentially constitute the end of his function and therefore the order itself should be, as far as possible, self-executing and self-contained."*[27]

The judicial officer must familiarise himself or herself with the standard format of the order that he or she intends to grant. Most types of orders have, as a matter of practice, standardised formats. There are common phrases used to set out the terms of the order. Where an order has more than one paragraph, the rules of procedure and practice may also determine which paragraph comes first and which paragraph comes

[27] Hon. Dennis Mahoney AO QC, "Judgment Writing: Form and Function" in Ruth Sheard (Ed), *A matter of Judgment: Judicial decision-making and judgment writing*, (Judicial Commission of New South Wales, 2003) at p. 114.

last. For example, in appeal proceedings, the standard format of the order is that the first paragraph must always state whether or not the appeal has been allowed or dismissed. If the appeal is allowed, the standard format is that the substitutionary relief comes after the paragraph allowing the appeal. In matrimonial proceedings, the paragraph granting the decree of divorce always precedes the consequential orders on the custody of the children and the distribution of the property. Similar considerations apply in confirmation proceedings before the Constitutional Court or in appeals against the death sentence in the Supreme Court. The Courts are required, as the case may be, to decide whether the declaration of constitutional invalidity by the subordinate court is confirmed or whether the death sentence is confirmed.

The standard formats of orders are often prescribed by rules of courts or practice directions. The nearest example of this is Form No. 26 and 26A scheduled to the High Court Rules, 2021 [S.I. 202 of 2021]. The Form provides for the standard format of a provisional order. Provisional orders must follow the standard format prescribed in that form. Similarly, an order granted pursuant to an application for the condonation of non-compliance with rules and an extension of time within which to perform a particular act in the Supreme Court is also prescribed. Form 3 of Practice Direction 1 of 2017 prescribes the format of an order in a chamber application granting condonation and extension of time as follows:

> *"**WHEREUPON**, after reading documents filed of record and/or hearing the parties:*
>
> ***IT IS ORDERED THAT:-***

> 1) *The application for condonation for non-compliance with rule ... of the Rules of the Supreme Court, 2018 (S.I. 84 of 2018) be and is hereby granted.*
> 2) *The application for extension of time within which to file and serve a notice of appeal in terms of the Rules be and is hereby granted.*
> 3) *The notice of appeal shall be deemed to have been filed on the date of the date of this order (or on such date as may be fixed by the Judge)*
> 4) *(order as to costs).”*

In the interests of brevity, the presentation has only reproduced the portion of Form 3 of Practice Direction 1 of 2017 which includes the operative part of the order. However, a judicial officer crafting an order must be diligent enough to ensure that he or she follows the complete prescribed format of the order if there is any.

The judicial officer must consider the draft order placed on record by the parties. A good draft order is grounded in the law and the pleaded facts, unambiguous, clear, specific, and based on standardised formats of crafting court orders. An astute judicial officer crafting a court order must apply his or her discretion and consider whether the draft order conforms to his or her findings of the law and facts found proven. Where this is the case, the judicial officer may proceed to grant an order in the same terms as the draft. If the draft order contains minor errors, such as typographical errors, the judicial officer must correct them. The corrections made to the draft order are effected against an understanding that the eventuating order will be that of the court and not of the parties. Any errors contained in the order will be ascribed to the Court.

If, however, the draft order is ambiguous, unclear, incoherent, and detached from the law or facts found to have been proven, the judicial

officer cannot grant it. The observation was made in the case of *Zimbabwe Human Rights Association* v *Parliament of Zimbabwe and Others*[28]:

> *"The relief sought by the applicant is twofold. ... I note in passing that the draft order erroneously refers to the 'Constitutional Amendment (No. 2) Act of 2021', instead of the 'Constitution of Zimbabwe Amendment (No. 2) Act, 2021'. The draft relief sought is thus imprecise to the extent that it incorrectly cites the impugned Act in question. Consequently, inasmuch as the relief sought is imprecise and defective, it is susceptible to being denied, even if the application were to succeed. See in this regard Ahmed v Docking Station Safaris (Pvt) Ltd t/a CC Sales S-70-18, at p 5."*

A court must be careful not to substitute its order for defective draft relief. The reason why the courts shun granting relief based on defective draft orders was articulated in the case of *Nyakudya* v *Goromonzi Rural District Council and Others supra*:

> *"Imprecise draft orders beget imprecise court orders which are incapable of enforcement. Courts eschew granting orders that, as is often said, are brutum fulmen. Such orders are not enforceable and may result in further litigation between the parties which undermines the need for finality in litigation."*

The above passage summarises the rationale behind the rule discouraging reliance on defective draft orders in the crafting of court orders. Judicial officers must always be mindful of the objectives of court orders and the accepted attributes.

Where the draft order requires amendments or cannot be relied on, the judicial officer must proceed to craft the court order. A judicial officer must always take care to ensure that the order that he or she grants is

[28] CCZ–6–22.

consistent with the findings and the conclusions made on the law and facts found proven. In the past, it has happened that a judicial officer has issued an order that is at variance with his or her findings of fact and the law. In the case of *Chivero Quarries (Pvt) Ltd* v *Velocity Motors (Pvt) Ltd*,[29] the High Court was approached for an order evicting the respondent from a quarry site known as Hunyani 159 Idaho Farm. The applicant was the holder of a certificate of registration over the mining claim. The court formulated the issue that fell for determination before it as being "whether Chivero has the *locus standi* to evict Velocity and if so whether Velocity has a valid defence to resist eviction". Having discussed the applicable law and the facts, the court concluded, at p 7, that:

> *"Only a valid permit can give Velocity rights over the claim it does not have. Therefore, it has no valid defence to the application.*
>
> *It is unnecessary to determine the issue raised by Velocity that it was the first to be issued with a permit therefore it is entitled to remain on the claim. This is because at the time of litis Velocity's rights over the claim had been terminated by expiration of the permit. Technically speaking there is no right that Velocity can ground its claim to remain on the claim. Secondly the rights that the parties held are not equal; Chivero held a superior right.*
>
> *From the foregoing, the following order is appropriate. ...*
>
> *The application for eviction be and is hereby dismissed with costs."*

A close analysis of the issue that fell for determination in the foregoing case and the findings of the court on the issue shows that the court effectively found that the respondent had no defence to the claim for eviction. Despite finding that the respondent had no defence to the

[29] HH–666–18.

claim for eviction and that the applicant had a real right over the mining claim, the court still dismissed the application. Had the court taken care, it would have granted an order consistent with its findings of the law and facts found proven.

Where matters have been consolidated for the purposes of the hearing, it is always prudent to ensure that the terms of the order are clear regarding the disposition of each of the consolidated matters. One of the final steps in the crafting of an order is proofreading the order. A judicial officer must always ensure that the order is clear, grounded in the law and the facts found proven and free of any grammatical and formatting errors. The order must be unambiguous. All the parts of the order must be verified for accuracy including the case references as well as the caption of the case. The date of the order must also be proofread for accuracy and the names of the counsel who appeared at the hearing must also be correctly captured.

Where all the parties' consent to an order or have settled the case, the judicial officer must review the order submitted to him or her for signature. He or she must proofread all the parts of the order for accuracy. The terms of the order must be closely reviewed to ensure that they conform to the agreement between the parties or the determination by the court on the matter. It is pertinent for the judicial officer to confirm with all the parties that they consent to the terms of the order submitted.

The final step in the crafting of an order is the authentication of the order. The judicial officer must append his or her signature to the order

to validate it as the sole and binding order issued by him or her in the disposition of the matter.

8. GRANTING ORDERS NOT SOUGHT

It is necessary to draw attention to the subject of granting orders not sought. One of the common errors made by courts in the crafting of court orders is the granting of orders not sought. A court grants an order that has not been sought when the order is different from and unrelated to the draft order or when the order granted goes beyond what the parties actually prayed for.

The rule against the granting of orders that have not been sought is related to the purpose of a court order. Earlier in the presentation, it was stated that a court order must authoritatively determine the rights, duties, and obligations of the parties in accordance with the court's mandate in respect of the issues placed before it. It follows that if a court order authoritatively determines rights, duties, or obligations other than those relating to the issue(s) placed before the court, a court would have exceeded its mandate. The court's determination would not be necessary for the disposition of the matter before it.

A number of decisions discourage the granting of orders not sought. In the *Nzara* case *supra*, UCHENA JA made the following pertinent observation:

> *"It is clear from the court a quo's orders that some of the orders it granted had not been sought by either party. It is also clear that parties had not made submissions for or against those orders. They were granted mero motu by the court a quo. It did so without seeking the parties' views on those orders. There is no doubt that the court a quo exceeded its*

> *mandate which was to determine the issues placed before it by the parties through pleadings and proved by the evidence led."*

In addition, the facts in the case of *Lonrho Logistics (Pvt) Ltd* v *Ram Petroleum (Pvt) Ltd*[30] are relevant. In that case, the appellant had issued out a summons in the High Court seeking an order directing the respondent to deliver outstanding diesel to it in terms of a contract of sale. The respondent defended the action and filed a plea in which, among other averments, it pleaded that it had tendered delivery of the diesel claimed, which tender had been refused by the appellant. The respondent went further to plead that the appellant had repudiated the contract, and it (the respondent) was accordingly entitled to cancel the contract and tender the sum of $159 300.00.

Although there was no counterclaim by the respondent, the High Court proceeded to endorse the tender that had been made by the respondent in its plea of a sum of money. It considered the tender equivalent to the value of the diesel that was yet to be delivered. The High Court, therefore, granted positive relief to the respondent of the cancellation of the contract and the return of the purchase price paid by the appellant. On appeal, the Supreme Court frowned upon the procedure followed by the High Court in granting a defendant positive relief based on averments in a plea. At p 13 of the *Lonrho* decision *supra*, it was observed as follows:-

> *"It is curious that the court a quo granted an order in favour of the respondent cancelling the sale and directing the respondent to refund the balance of the purchase price. That relief was granted on the strength of a plea and nothing more. The respondent had not filed a counterclaim.*

[30] S–50–22.

> *The point is made in Indium Investments (Pvt) Ltd v Kingshaven (Pvt) Ltd & Anor 2015 (2) ZLR 40 (S) at 44F that:*
>
> > *'A plea is a defence and as such can be likened to a shield. It is not a weapon or a sword. No relief can attach to a party through a plea.'*
>
> *Unfortunately, that is precisely what the court a quo granted in this case. However just the court a quo may have considered the respondent's tender of the sum of $159 300.00 to be, it was plainly incompetent for it to ratify it through an unsolicited court order. Doing so was a gross misdirection."*

More recently, in the case of *Nyambuya* v *Sakunda Holdings (Pvt) Ltd and Anor*; *Mutare Toyota* v *Sakunda Holdings (Pvt) Ltd and Anor*[31] the Supreme Court also passed judgment upon another case in which the High Court had granted an order that had not been sought. To be precise, the High Court had granted a plaintiff an award of damages that had not been sought. The Supreme Court, at p 26 of its decision, castigated that order thus:

> *"In the present case, no claim for the amount awarded by the court a quo was contained in the plaintiff's pleadings and prayer. The record of proceedings does not bear testimony that such amount was formulated, proved, and quantified by evidence. The court a quo had no basis for granting the order for damages, which in all honesty, was a thumb suck figure of sorts. Accordingly, the concession made by Mr Sena that the court a quo misdirected itself in this regard was proper. The third ground of appeal in SC 661/22 must succeed."*

9. ORDERS AS TO COSTS

Orders as to costs are typically the last part of a court order. Attention must also be paid to them. For a court to grant an order as to costs which is legally sound and appropriate, it must know the principles

[31] S–92–23.

regulating the award of costs. One of the most important aspects in this regard is understanding the purpose of an award of costs. According to Herbstein and van Winsen, *The Civil Practice of the High Courts and Supreme Court of Appeal of South Africa*, *op cit.* at pp 951-952: -

> *"The purpose of an award of costs to a successful litigant is to indemnify him for the expense to which he has been put through having been unjustly compelled to initiate or defend litigation, as the case may be. ... A costs order is not intended to be compensation for a risk to which a litigant has been exposed, but a refund of expenses actually incurred. Costs belong to the litigant, and the attorney has no lien in respect thereof."*

The decision as to whether costs should be awarded to or against a party is made in light of the outcome of a matter or in special circumstances such as the conduct of a party in the course of the litigation. Generally, the principle is that costs follow the cause. See, for example, *Ndewere* v *President of Zimbabwe and Others* S–57–22 at page 23, paragraph 66; *Mbatha* v *Ncube and Another* S–109–22 at p 13, paragraph 31; *Marange Resources (Pvt) Ltd & Another* v *Muchengwa* S–155–21 at page 14; and *Gwatidzo N.O.* v *Willdale Limited and Others* S–119–22 at page 14. The rule that costs follow the cause, in other words, success generally carries costs, is not ordinarily departed from except on good grounds.[32]

In this jurisdiction, costs may generally be on the ordinary scale, that is party-and-party costs, or on the punitive scale, that is attorney-and-client costs. Costs may also be granted *de bonis propriis*, usually against a legal practitioner. Persons acting in an official capacity such

[32] Cilliers, Loots, & Nel**,** *Herbstein and Van Winsen,* "The Civil Practice of the High Courts and the Supreme Courts of Appeal of South Africa" 5th Ed. (Cape Town: Juta & Co Ltd, 2009), Vol 1 at p. 957.

as executors may also be ordered to pay costs *de bonis propriis* in appropriate cases. In the case of *Pasalk and Anor* v *Kuzora and Others*[33] the Supreme Court cautioned legal practitioners thus:

> *"Legal practitioners are warned that they risk not only being non-suited but also being ordered to pay costs de bonis propriis in cases where they have failed, as in this case, in their duty to advise their clients correctly or in the correct presentation of applications to the Courts to the detriment of their clients."*

Before an award of costs *de bonis propriis* is made, the person against whom they are sought ,or they are to be ordered against must be given an opportunity to be heard. See *Master of the High Court of Zimbabwe* v *Takaendesa and Others*; *Mandima N.O.* v *Takaendesa*; *House of Sari (Pvt) Ltd* v *Takaendesa.*[34]

Herbstein and Van Winsen, cited above, set out basic principles that operate as guidelines in deciding on questions as to costs. They state: -

> *"Briefly, then, the principles that should guide the court are as follows:*
>
> *(1) As a general rule, the successful party is entitled to costs.*
> *(2) In determining who is the successful party, the court should look to the substance of the judgment and not merely its form.*
> *(3) The court can, for good reason, deprive a successful party of costs, in whole or in part.*
> *(4) The court can, for good reason, order a successful party to pay the whole or portion of the costs of the other party.*
> *(5) The court can, in special cases, make an order that the unsuccessful party must pay the costs of the successful party on an attorney-and-client basis. ...*
>
> *Wasted costs fall into a category of their own."*

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[33] 2003 (1) ZLR 287 (S); *Tamanikwa and Anor v Zimbabwe Manpower Development Fund and Anor* S–73–17 and *Matamisa v City of Mutare (A-G Intervening)* 1998 (2) ZLR 439 (S) at 447.

[34] S–101–22.

The granting of costs is at the discretion of a court. A court must judiciously exercise its discretion in accordance with settled principles regulating costs in legal proceedings. What discretion entails was discussed in the case of *Mbatha* v *Ncube and Anor*:

> *"Invariably, discretion involves the judicial power to make a just decision or reach a judgment, which power is exercised within the bounds of the principles of the law. The nature of judicial discretion was aptly set out by LORD COKE in Black's Law Dictionary, 4 ed (1968), thus:*
>
> > *'Judicial discretion … "discernere per legem quid sit justum", [is] to see what would be just according to the laws in the premises. It does not mean a wild self-wilfulness, which may prompt to any and every act; but this judicial discretion is guided by the law, (see what the law declares upon a certain statement of facts, and then decide in accordance with the law,) so as to do substantial equity and justice.'"*

Herbstein and van Winsen *supra*, at pp 954-955 state the following on the exercise of discretion in questions relating to the award of costs:

> *"The award of costs is a matter wholly within the discretion of the court, but this is a judicial discretion and must be exercised on grounds upon which a reasonable person could have come to the conclusion arrived at. In leaving the magistrate (or judge) a discretion,*
>
> > *'... the law contemplates that he should take into consideration the circumstances of each case, carefully weighing the various issues in the case, the conduct of the parties and any other circumstance which may have a bearing upon the question of costs and then make such order as to costs as would be fair and just between the parties. And if he does this and brings his unbiased judgment to bear upon the matter and does not act capriciously or upon any wrong principle, I know of no right on the part of a court of appeal to interfere with the honest exercise of his discretion.'*
>
> *Even the general rule, namely that costs follow the event, is subject to the overriding principle that the court has a judicial discretion in awarding costs."*

It follows from the above that the provision of reasons for an exercise of discretion in awarding costs is imperative. Where reasons for

judgment are provided, the basis for the order as to costs must also be made apparent in those reasons. In the case of *Trustees of the Mukono Family Trust & Anor* v *Karpeg Investments (Pvt) Ltd & Ors*,[35] it was held that: -

> *"Whilst it is within the court a quo's discretion to award costs as it deems necessary, the question is whether it judicially exercised its discretion in awarding such costs. See Norwich Union Fire Insurance Society Ltd v Tutt 1960 (4) SA 851(A) at 854D. The answer to that question can only be found in the court a quo's reasons."*

A judicial officer must be cautious not to award costs when they are not warranted by the law. This includes prescriptions in respect of types of litigation in which costs are generally not to be awarded. In the jurisdiction of Zimbabwe, costs are generally not awarded in some of the following types of litigation -

Criminal matters — The general rule is that costs are not to be awarded in criminal matters. Thus, in *Bull* v *Attorney General and Anor*[36] the following general rule was discussed:

> *"In the absence of specific statutory authority, the rule in this jurisdiction is that in criminal cases a court has no power to order either the State or the accused person to pay the costs. (See the exceptions provided in sections 26(1) and 341 (5) and (6) of the Criminal Procedure and Evidence Act.) If the originating court lacked the power any further proceeding by way of review or appeal would not be such as to permit the higher court to award costs against the unsuccessful party. Such an order would be incompetent. See Paweni & Anor v Attorney-General 1984 (2) ZLR 39 (SC) at 48H; 1985 (3) SA 720 (ZS) at 727F; compare Lawrance v Assistant Resident Magistrate, Johannesburg 1908 TS 525 at 527; Goncalves v Assisionele Landdros, Pretoria en 'n Ander 1973 (4) SA 587 (T) at 603A."*

[35] SC-45-21.
[36] 1987 (1) ZLR 36 (SC).

To be able to apply this rule, a court must, of necessity, be able to distinguish between a criminal matter and other types of matters. Thus, in *Bull's* case *supra* the Supreme Court held that: -

> *"But the form of the procedure adopted, and the nature of the relief sought does not, in my view, determine the character of the proceedings as either civil or criminal. It is the essential subject matter of the proceeding which does so. The question is whether in substance the proceeding is civil or criminal, and what is relevant to the answer is the forum in which the subject matter in dispute in the subsequent proceeding first arose. One must be wary of allowing the form of a subsequent proceeding to disguise or transform the nature of the original proceedings. See Sita & Anor v Olivier NO & Anor 1967 (2) SA 442 (AD) at 449C-E; S v Mohamed 1977 (2) SA 531 (AD) at 539 in fine-540A."*[37]

Constitutional matters – the general rule is that costs are not awarded in constitutional matters.[38] There are, however, exceptions to the general rule that costs are not to be awarded in constitutional matters. The exceptions were discussed in the case of *Liberal Democrats and Others* v *President of the Republic of Zimbabwe and Others*[39] where the following passage appears: -

> *"The above authorities show that costs would be awarded in constitutional litigation in any of the following circumstances –*
>
> *i. Where the litigation is conducted in a frivolous or vexatious manner;*
> *ii. Where the litigation amounts to an abuse of court process;*
> *iii. Where the litigation is motivated by improper motive;*
> *iv. Where there is non-compliance with the rules of court;*
> *v. Where unwarranted attacks are made on other litigants, witnesses, or judicial officials; or*
> *vi. Where the claim is pursued with mala fides.*

[37] *Sibanda v Attorney-General of Zimbabwe and Anor* S–44–07 at 24.
[38] *Sadiqi v Muteswa; Sadiqui v Muteswa and Others* CCZ–14–21 at 14 and *Kasukuwere v Mangwana and Others* S–78–23.
[39] CCZ–7–18.

> *The list is not exhaustive as cost orders must be made on a case-by-case basis if there is to be justice in constitutional litigation."*

Fiscal matters – It has been held in a number of fiscal matters that costs are generally not to be awarded. This is regarded as a statutory position. The *dicta* per MATHONSI JA in *Triangle Limited and Anor* v *Zimbabwe Revenue Authority and Others*[40] is relevant:

> *"It remains for me to deal with the question of costs. The court a quo granted costs against the appellants in favour of those respondents who participated in the proceedings. It premised its decision on the general rule that costs follow the result. Its attention was not drawn to the widely held principle in tax cases that the High Court or the Special Court is loathe to make an order as to costs save where the claim is held to be unreasonable, or the grounds of appeal are frivolous. See s 65(12) of Income Tax Act [Chapter 23:06]."*[41]

Matters of public importance – In matters of public importance or matters requiring a court to clarify the position of the law, courts are reluctant to award costs.[42]

The legal identity of the party against whom an order as to costs is to be made is also a relevant consideration in crafting orders as to costs. There are public officers and persons against whom costs are not ordinarily awarded unless specific legal requirements for the award of costs are existent and have been met. The first category comprises public officers, for example, the Registrar of Deeds, officers of the court such as Registrars and the Sheriff for Zimbabwe, and quasi-judicial bodies. The general rule is that costs are not to be awarded against

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[40] S–82–21.

[41] See section 10 of the Fiscal Appeal Court Act [*Chapter 23:05*] and the case of *Z.S. (Pvt) Ltd v Zimbabwe Revenue Authority* S–165–20.

[42] *Magaya v Magaya* 1999 (1) ZLR 100 (S) and *Nhari v Mugabe* S–151–20.

these public officers except in exceptional circumstances. Herbstein and Van Winsen *supra* at p 977 note that: -

> *"Where a public officer or public body comes to court in good faith, usually in order to oppose proceedings, the court may decline to award costs against such a party, if unsuccessful. The principle on which the court exercises such a discretion is that no undue obstacle should be put in the way of a public officer or body who or which, in the course of performing duties, considers it necessary to engage in litigation."*

The rationale for the above position is, firstly, that a public officer engaging in litigation is acting in the interest of the public and in pursuance of legal duties imposed on him or her by the public office that he or she occupies. Secondly, an award of costs against a public officer is typically a charge on the Consolidated Revenue Fund. Burdening a public officer with costs for his or her *bona fide* participation in litigation is, in fact, burdening the taxpayer. Thirdly, there are prescribed rules by which a public officer is expected to participate in litigation. These were canvassed by the Supreme Court, albeit in a different context, in the case of *Leopard Rock Hotel Co (Pvt) Ltd & Anor* v *Walenn Construction (Pvt) Ltd*,[43] where KORSAH JA set out the rules as follows:-

> *"While it may be contended that an arbitrator or umpire who has made an award is functus officio and can no longer exhibit bias and so may take full part as a party in proceedings to set his award aside for misconduct (Mr Andersen did not so contend and I certainly do not subscribe to that view), the same cannot be said of an arbitrator whose removal as such is sought during the pendency of the proceedings, for whatever reason. ...*
>
> *In my view, in circumstances such as these, an arbitrator, umpire, judge or other adjudicating body has one of two choices. The first is that he could file an affidavit setting out facts which he considers may be of assistance to the court. So long as such facts are stated colourlessly, no*

[43] 1994 (1) ZLR 255 (S).

> *one could object, but if the affidavit should err plainly in support of one of the parties it might expose the adjudicator to the odium of the court. ...*
>
> *The second choice of the arbitrator or umpire when served with notice of motion for his removal, or to set aside his award, is to take no action and abide by the court's decision." (Emphasis added)*

A public officer, officer of the court, quasi-judicial body, *et cetera*, who participates in litigation legitimately by placing any relevant facts before the court or who decides to abide by the decision of the court, must not be mulcted by an order of costs. Fourthly, the courts have authoritatively pronounced that officers of the court such as the Sheriff for Zimbabwe must not be mulcted with costs. In the case of *Augur Investments and Another* v *Fairclot Investment and Others*,[44] it was held that:

> *"Being an officer of the court, the immunity extended to judicial officers and other officers of the court extends to the office of the sheriff. The accepted practice is that where a complaint is raised against the sheriff or proceedings issued against him, the sheriff, not being a litigant, is required to issue a report informing the court and the parties to the dispute, of the facts as known to him, the actions he took and the reasons therefor. The sheriff is not expected to file opposing papers and heads of arguments since he is not a party to the dispute and has no interest in the outcome of the case. Once he has submitted his report, he will do no more than abide by the decision of the court. As an officer of the court, no order of costs should be issued against him. Nor is he required to pay security for costs in the event that he wishes to place his report before any court, notwithstanding promises to that effect in any notice of appeal. The sheriff is there to assist the court. It matters not what label he may give to his papers –'appeal', 'cross-appeal' or 'report' – the purpose of his intervention remains the same – to appraise the appeal court of the contents of his report in the court a quo and to engage counsel to articulate the implications thereof."*

Similar rules apply to orders directing costs to be paid from a deceased person's estate. It is generally accepted that the costs of litigation

[44] S–93–23.

incurred by an executor or executrix participating in litigation in his or her official capacity may be encumbered on the estate that he or she represents. The law in this regard was articulated in the case of *Mandizvidza* v *Nyanyiwa and Others*[45] the court held that:

> *"The general position of the law is that where an executor is cited in his official capacity, the estate may be encumbered with the costs of such litigation. This appears to be the approach followed in the Van Niekerk case (supra). In appropriate circumstances, a person instituting proceedings against a deceased estate may even be entitled to have the costs made payable out of the estate whether or not he is successful, although there is a rider that the estate must not be unjustifiably burdened by costs incurred by a person instituting the proceedings. See Bonsma, NO v Meaker, NO & Ors 1973 (4) SA 526 (R). However, where such special costs are sought against an estate, they must be pleaded. See Mpansi & Ors v Dube & Ors 2015 (1) ZLR 587 (S), at 589F–G."*

The foregoing discussion underscores the point that there are special rules relating to orders as to costs. A court crafting an order as to costs must diligently apply the settled legal principles and ensure that its order complies with the law. An order of costs is not invariably determined by resorting to the outcome of the litigation. Costs must be awarded after careful consideration of all the applicable principles of the law. The order crafted by the court must show that a judicious consideration of the circumstances of the case was embarked upon.

9.1. COURT ORDERS IN SPECIAL TYPES OF PROCEEDINGS

The principles discussed above apply to court orders in general. There are, however, specific orders in respect of which courts have to pay particular attention to settled principles. One species of such orders is provisional orders. The presentation proceeds to discuss the principles

[45] S–128–22.

regulating provisional orders with reference to three decisions, namely, *Blue Rangers Estates (Pvt) Ltd* v *Muduvuri and Anor*;[46] *Airfield Investments (Pvt) Ltd* v *The Minister of Lands, Agriculture & Rural Resettlement and 4 Ors*;[47] and *Jamal Ahmed and 3 Ors* v *Russel Goreraza and 2 Ors*.[48]

The purpose of this part of the presentation is to address the anomaly that has become apparent in the courts of granting provisional orders whose substance and effect are in actual fact final. In Zimbabwe, applications for provisional orders are regulated by rule 60 of the High Court Rules, 2021 ("the Rules"). In terms of rule 60(13) of the Rules, where a provisional order relates to the sequestration of an estate, the winding up of a company or any other matter in which interested parties generally are to be given an opportunity to oppose the granting of a final order, the provisional order shall be in Form 27 of the Rules. Any other provisional order not specified under rule 60(13)(a) shall be in Form 26 as required by rule 60(11)(a) of the Rules.

It is the intention of the presentation to go back to the foundations of the remedy of provisional orders and in the process define what a proper provisional order is, in an effort to equip judicial officers with knowledge of the true nature of what a provisional order is. The object of the presentation is also to emphasise the need to always be aware that a provisional order is temporary by its nature and that granting a final order in the form of a provisional order does not serve that purpose. As reference will be made to decisions of other jurisdictions, the terms

[46] 2009 (1) ZLR 368 (S).
[47] 2004 (1) ZLR 511 (S).
[48] HH–402–17.

"provisional order", "interim relief", "interlocutory order" and "interlocutory injunction" will be used interchangeably.

For a fuller appreciation of the paper, the starting point is to define what a provisional order is.

10. WHAT IS A PROVISIONAL ORDER?

According to the author C B Prest in his textbook titled *The Law and Practice of Interdicts* 9 ed Juta & Co (Pty) Ltd 2014*,* a provisional order is a remedy by way of an interdict which is intended to prohibit all *prima facie* illegitimate activities. By its very nature, it is both temporary and provisional, providing relief which serves to guard the applicant against irreparable harm which may befall him, her or it should a full trial of the alleged grievance be carried out. As the name suggests, it is provisional, as the parties anticipate certain relief to be made final on a certain future date upon which the applicant has to fully disclose his, her or its entitlement to a final order that the interim relief sought was ancillary to.

Having defined what a provisional order is, the next step is to explain the purpose of interim relief *vis-à-vis* the rule *nisi*.

11. WHAT IS THE PURPOSE OF A PROVISIONAL ORDER *Vis-À-Vis* THE RULE *NISI*?

The purpose of a provisional order has been set out in an array of case law. The court in the South African case of *Development Bank of*

Southern Africa (Ltd) v *Van Rensburg NO and Ors*[49] stated that its purpose is to preserve the *status quo* pending the return day.[50]

The purpose remains the same under English law, as was confirmed in the case of *Attorney General* v *Punch Limited and Anor.*[51] The court articulated the purpose of a provisional order, referred to in that jurisdiction as an "interlocutory injunction", as follows:

> *"The purpose for which the court grants an interlocutory injunction can be stated quite simply. In American Cyanamid Co v Ethicon Ltd [1975] AC 396, 405D LORD DIPLOCK described it as a remedy which is both temporary and discretionary. Its purpose is to regulate, and where possible to preserve, the rights of the parties pending the final determination of the matter which is in issue by the court."*

The purpose of an interlocutory injunction in Australia is also defined as follows in the case of *Re Brian Charles Gluestein; Ex Parte Anthony*:[52]

> *"Relevantly, the purpose of an interlocutory injunction is to preserve the position until the rights of the parties can be determined at the hearing of the suit. A plaintiff seeking an interlocutory injunction must be able to show a sufficiently arguable claim to a right to the final relief in aid of which the interlocutory relief is sought. (Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd [2001] HCA 63; (2001) 208 CLR 199 [9] - [11] (GLEESON CJ).) If the application for an injunction cannot show a sufficient colour of right of the kind sought to be vindicated by final relief, the foundation of the claim for interlocutory relief disappears. (ABC v Lenah Game Meats Pty Ltd supra (GLEESON CJ).)*
>
> *To put the same point another way, an interlocutory injunction aims to prevent the injustice to the plaintiff of the refusal of an injunction in support of relief to which the plaintiff may ultimately be held to be entitled. (Twinside Pty Ltd v Venetian Nominees Pty Ltd [2008] WASC 110; Kolback Securities Ltd v Epoch Mining NL (1987) 8 NSWLR 533, 535; Appleton Papers Inc v Tomasetti Paper Pty Ltd (1983) 3 NSWLR 208, 216.) As LORD DIPLOCK explained in American Cyanamid Co v Ethicon Ltd [1975] UKHL 1 'the object of the interlocutory injunction is to protect*

[49] [2002] 3 All SA 669 (SCA).
[50] C B Prest in his textbook titled The Law and Practice of Interdicts.
[51] [2002] UKHL 50; [2003] 1 AC 1046.
[52] [2014] WASC 381.

> *the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial'. As was said in Minister for Immigration v VFAD [2002] FCAFC 390; (2002) 125 FCR 269 [124] the stream (interlocutory relief) cannot rise higher than its source (rights claimed at the final hearing)."*

Incidental to the purpose of a provisional order as defined above is the term "rule *nisi*". In explaining what the rule *nisi* is, the court in the *Development Bank of Southern Africa (Ltd)* case *supra* went on to hold as follows:

> *"… Thus, it was said by CORBETT CJ in Shoba v Officer Commanding, Temporary Police Camp, Wagendrift and Another; Maphanga v Officer Commanding, South African Police and Murder and Robbery Unit, Pietermaritzburg and Others [1995] ZASCA 49; 1995 (4) SA 1 (A) at 18J-19B:*
>
> > *'The term "rule nisi" is derived from the English law and practice, and the rule may be defined as an order by a Court issued at the instance of the applicant and calling upon another party to show cause before the Court on a particular day why the relief applied for should not be granted (see Van Zyl's Judicial Practice 3 ed 450 et seq; Tollman v Tollman 1963 (4) SA 44 (C) at 46H). Walker's Oxford Companion to Law, states that a decree, rule or order is made nisi when it is not to take effect unless the person affected fails within a stated time to appear and show cause why it should not take effect. As Van Zyl points out, our common law knew the temporary interdict and a curious mixture of our practice with the practice of England took place and the practice arose of asking the Court for a rule nisi, returnable on a certain day, but in the meantime to operate as a temporary interdict.'*[53]

From the above case law, it is clear and must be emphasised that an order for interim relief must be confirmed or discharged on a certain future date should the parties be so willing. Even the terms of the mandatory Form 26 of the Rules contemplate that it is only on a certain

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[53] *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission* 1982 (3) SA 654 (A).

return date that a final order can be made. Resultantly, therefore, an order for interim relief can never be final in effect because, should it be final, the confirmation or discharge of the provisional order will no longer be possible.

Once informed on what the purpose of a provisional order is, one has to be guided by the principles surrounding an application for interim relief.

12. GENERAL GUIDING PRINCIPLES IN AN APPLICATION FOR INTERIM RELIEF

The following four principles have been applied in Zimbabwe and are widely accepted as applicable in South Africa, England, and Australia. The principles, which are in effect requirements to be met by an applicant when seeking interim relief, are as follows -

i. that the right which is the subject matter of the main action and which he, she or it seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established though open to some doubt;

ii. that, if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he, she or it ultimately succeeds in establishing his, her or its right;

iii. that the balance of convenience favours the granting of interim relief; and

iv. that the applicant has no other satisfactory remedy.

The above principles, as set out in the South African cases of *Rudolph and Anor* v *Commissioner for Inland Revenue and Ors*[54] and *L F Boshoff Investments (Pty) Ltd* v *Cape Town Municipality*[55] were also relied upon by the Supreme Court in the case of *Airfield Investments (Pvt) Ltd supra*. In the Australian jurisdiction the same principle was upheld.[56]

Zoning in on the principle that a *prima facie* case must be shown, the court in the *Beecham Group Ltd* case *supra* held that the phrase "*prima facie* case" does not mean that the plaintiff must show that it is more probable than not that at trial the plaintiff will succeed. It is sufficient that the plaintiff shows a sufficient likelihood of success to justify, in the circumstances, the preservation of the *status quo* pending the trial. How strong the probability needs to be depends upon the nature of the rights the plaintiff asserts and the practical consequences likely to flow from the orders the plaintiff seeks.

The point was further made in the Australian cases of *Films Rover International Ltd* v *Cannon Film Sales Ltd*[57] and *Madaffari* v *Labenai Nominees Pty Ltd*,[58] where it was held that the grant of an injunction

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[54] 1994 (3) SA 771 (W).
[55] 1969 (2) SA 256 (C).
[56] *Twinside (Pty) Ltd v Venetian Nominees Pty Ltd* [2008] WASC 110; *Re Brian Charles Gluestein; Ex Parte Anthony* [2014] WASC 381; *Castlemaine Tooheys Ltd v The State of South Australia* [1986] HCA 58; (1986) 161 CLR 148; *Heugh v Central Petroleum Ltd* [2012] WASC 155 [17] [22]; *ABC v Lenah Game Meats Pty Ltd* [2001] HCA 63; (2001) 185 ALR 1; and *Beecham Group Ltd v Bristol Laboratories* (Pty) Ltd [1968] HCA 1; (1968) 118 CLR 618.
[57] [1987] 1 WLR 670.
[58] [2002] WASC 67.

involves balancing the injustice which might be suffered by the defendant if the injunction is granted and the plaintiff later fails at trial, against the injustice which might be suffered by the plaintiff if the injunction is not granted and the plaintiff later succeeds at trial.

It must also be highlighted that in considering the balance the court must, as a matter of principle, take into account the nature and consequences of the particular injunction sought.[59]

Fully equipped with comprehensive knowledge of the essence of a proper provisional order which is valid at law, the next stage is to look at the form of provisional orders.

13. WHAT IS THE FORM OF A PROPER PROVISIONAL ORDER?

It is imperative to first highlight the language of the provisional order itself. Like any other order of court, a provisional order must speak for itself. It must be clear and exact as to what it is that is prohibited pending its finalisation/confirmation/discharge on the return date. LORD NICHOLLS OF BIRKENHEAD in *Attorney General* v *Punch Limited and Anor supra* emphasised the point by stating as follows:-

> *"An interlocutory injunction, like any other injunction, must be expressed in terms which are clear and certain. The injunction must define precisely what acts are prohibited. The court must ensure that the language of its order makes plain what is permitted and what is prohibited. This is a well-established, soundly-based principle. A person should not be put at risk of being in contempt of court by an ambiguous prohibition, or a prohibition the scope of which is obviously open to dispute. … An*

[59] *Glenwood Management Group (Pty) Ltd v Mayo* [1991] 2 VR 49; *Todd v Novotny* [2001] WASC 171.

> *interlocutory order ought not to be drawn in terms where it is apparent that such a dispute may arise over its scope."*

Having explained that the language in a provisional order must be clear as to what exactly it is that it prohibits pending the return date, the presentation will in turn deal with the most important aspect of a provisional order. What substance ought to be in a provisional order?

The late Chief Justice, CHIDYAUSIKU CJ, also stated in the case of *1, 2 & 3 Combined Harare Residents Association and Anor* v *Registrar-General & Ors*[60] as follows:

> *"Where the relief sought as interim relief is essentially the same as the relief sought on the return day, the court's correct approach should be to proceed by way of an urgent court application seeking final relief – see Econet v Min of Information HH-58-97."*

In *Kuvarega* v *Registrar General and Anor,*[61] the hounorable judge aired the following sentiments with regard to the form of a provisional order:

> *"The practice of seeking interim relief, which is exactly the same as the substantive relief sued for and which has the same effect, defeats the whole object of interim protection. … If the interim relief sought is identical to the main relief and has the same substantive effect, it means that the applicant is granted the main relief on proof merely of a prima facie case. This, to my mind, is undesirable especially where, as here, the applicant will have no interest in the outcome of the case on the return day. … Care must be taken in framing the interim relief sought as well as the final relief so as to obviate such incongruities."*

In simple terms, therefore, an order for interim relief must be temporary in effect. It must be temporary in nature such that a return date must

[60] 2002 (1) ZLR 83 (H).
[61] 1998 (1) ZLR 188 (H).

become a necessity. Furthermore, the terms of an interim relief order must speak to its title. The term "provisional order" must not only be given lip service, for it is supposed to communicate its true nature to be a proper and valid provisional order at law.

14. WHAT A COURT FACED WITH AN APPLICATION FOR INTERIM RELIEF MUST CONSIDER BEFORE GRANTING OR DISMISSING THE APPLICATION

The role of the court in an application for interim relief is of extreme importance. It is not to be undermined. In the case of *Attorney General* v *Punch Ltd and Anor supra*, the court stated that the purpose of interim relief should not be confused with the court's reasons for deciding that it would be appropriate to grant an interlocutory injunction. It was stated as follows:

> *"The court must of course have a good reason for granting an order of this kind. It must be satisfied in the first place that a sufficient ground has been stated to show that there is a real dispute between the parties. As LORD DIPLOCK put it in American Cynamid Co v Ethicon Ltd supra at p 407, the court must be satisfied that there is a serious question to be tried. It must then consider whether the balance of convenience lies in favour of granting or refusing an interlocutory injunction. But it is in no position to reach a final decision at the interlocutory stage on the matters which are in dispute between the parties. It is no part of the court's function at that stage to resolve conflicts of evidence or questions of law that require detailed argument. All it can do is preserve the status quo in the meantime until these matters can be determined at the trial."*

In the celebrated English case of *American Cyanamid Co supra*, the court's duty when faced with an application for a provisional order was also outlined as follows:

> *"The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried. It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial."*

Indeed, a person drafting an order for interim relief has the duty to make the terms of that order reflect the true nature of the interim relief sought. The duty does not mean, however, that all the applications for an interim relief placed before a judicial officer under the title "interim relief" or "provisional order" are exactly so. It has been noted that most of the interim orders placed before the High Court are in fact final in nature, which has seen most of them being appealed against.

What then does that mean to a judicial officer before whom an application for interim relief is made?

It means that a judicial officer approached with an application for interim relief must not allow himself or herself to be misled by the mere title of a provisional order. The judicial officer has the onerous and unassailable duty to go a step further and ensure that indeed the substance of the terms of the interim relief placed before him or her has an interlocutory effect on the rights of the parties. It is the judicial officer's duty to make sure that the applicant is not granted what he, she or it is not entitled to in a final order couched as a provisional order. The court must protect a defendant from an applicant who disguises a relief for a final order in the form of a provisional order. The judicial officer must be satisfied that should he or she grant the interim relief sought as it is placed before him or her, there remains an issue to

deliberate upon on the return date. The point made in essence is that an application for interim relief is not for the asking.

The court in the case of *Attorney General* v *Punch Ltd and Anor supra* went further to state as follows: -

> *"When proceedings come before a court the plaintiff typically asserts that he has a legal right which has been or is about to be infringed by the defendant. The claim having come before the court, it is then for the court, not the parties to the proceedings or third parties, to determine the way justice is best administered in the proceedings. It is for the court to decide whether the plaintiff's asserted right needs and should have any, and if so what, interim protection. If the court orders that pending the trial the defendant shall not do certain acts the court thereby determines the manner in which, in this respect, the proceedings shall be conducted. This is the court's determination on what interim protection is needed and is appropriate. … The reason why the court grants interim protection is to protect the plaintiff's asserted right. But the manner in which this protection is afforded depends upon the terms of the interlocutory injunction. The purpose the court seeks to achieve by granting the interlocutory injunction is that, pending a decision by the court on the claims in the proceedings, the restrained acts shall not be done."*

As highlighted earlier, interim relief is granted by a court in the exercise of its discretion. However, that discretion must not be abused by way of a court granting a final order couched in the form of a provisional order simply because it has come in the name of a provisional order. The discretion has to be exercised only after a court has fully applied its mind to and scrutinised the substance of the interim relief sought and its subsequent effect on the rights of the parties in the event that it is granted.

The following three questions need to be asked before making the order -

1. *Would there be anything to confirm/discharge on the return date if the interim relief sought as placed before the court is granted?*

2. *Will the defendant be condemned to that provisional order because there remains nothing to determine on the return date due to the finality of the order granted?*
3. *If the interim relief sought is granted, will the aggrieved defendant almost obviously succeed in either setting aside that interim order on appeal or in an application to rescind the order on the basis that it was erroneously sought and granted?*

Where the provisional order is granted *ex parte* the same principles apply. The court in *Phillips and Ors* v *National Director of Public Prosecutions*[62] stated as follows:

> *"It is trite that an ex parte applicant must disclose all material facts which might influence the court in deciding the application. If the applicant fails in this regard and the application is nevertheless granted in provisional form, the court hearing the matter on the return day has a discretion, when given the full facts, to set aside the provisional order or confirm it."*

Having fully explained what a provisional order is, and the principles linked to it, its purpose and substance/form, and the role of the court in granting or dismissing an application for interim relief, the presentation now proceeds to discuss the three decided Zimbabwean cases chosen to highlight the proper course to follow when a court is faced with an application for a provisional order. The principles on provisional orders drawn from each case will thereafter be listed.

14.1. *Blue Rangers Estates (Pvt) Ltd* V *Muduvuri and Anor* 2009 (1) ZLR 368 (S)

This is a judgment where the decision was made to dismiss an urgent chamber application before a single Judge of the Supreme Court for the striking from the roll of an appeal by the first respondent. The

[62] [2003] 4 All SA 16 (SCA).

application was made with the applicant being of the view that the first respondent had not applied for leave to appeal against an interlocutory order. The facts leading to the application were as follows: -

A spoliation order in the form of a provisional order was made in the High Court in favour of the applicant which was for the restoration of peaceful and undisturbed possession of an estate in Chegutu. The same order directed the first respondent and all those claiming possession of the estate through him to vacate the estate. In the event of their failure to vacate the premises, the order authorised the Deputy Sheriff to remove them.

Being a "provisional order", the terms of the final order sought on the return day were that the quiet and undisturbed possession of the estate by the applicant would be confirmed. The final order would also declare the continuation of the applicant's right to remain on the property until a time when the applicant was lawfully evicted by a competent order of court having final effect. It was also a term of the final order that the conduct of the second respondent would be declared to be an unlawful spoliation of the applicant's property.

The first respondent, having been aggrieved by the purported provisional order, filed a valid notice of appeal for its setting aside in the Supreme Court being of the view that, although provisional in form, the High Court order was final and definitive. The applicant then made a chamber application for the striking off of the appeal from the roll because in its view the provisional order made was interlocutory and, in terms of section 43(2)(d) of the High Court Act [*Chapter 7:06*], no appeal lay to the Supreme Court against an interlocutory order without

leave of the court. The applicant asserted that no proper appeal lay before the Supreme Court without leave to appeal being sought by the first respondent.

Relevant to the presentation is the fact that the application was opposed on the merits, the first respondent being of the firm view that the order that it was appealing against was final and definitive although it was in interlocutory form. In essence, the first respondent argued that, because of the nature of the order appealed against, no leave of the court was required for the appeal to be valid.

In arguing against the first respondent on the merits of the application, the applicant relied on two decisions of the High Court in *Chikafu* v *Dodhill (Pvt) Ltd and Ors*[63] and *Nyikadzino* v *Asher and Ors*,[64] where the High Court at some stage had issued spoliation orders in the form of provisional orders, just as in this case.

The applicant in the *Chikafu* case *supra*, believing that the provisional order was interlocutory, approached the High Court for leave to appeal. Leave to appeal was denied by the Judge who, although accepting that a spoliation order had been made, found that the applicant in that case had no prospects of success on appeal.

In the *Nyikadzino* case *supra*, the respondent had instructed the Deputy Sheriff to execute the eviction order, although an appeal had been noted against the provisional order. The applicant's legal practitioners had advised that no appeal was pending before the Supreme Court as no leave to appeal against the "interlocutory order" had been sought

[63] 2009 (1) ZLR 293 (S).
[64] 2009 (1) ZLR 174 (H).

and granted. The learned Judge found that since the spoliation order had been made in the form of an interlocutory order, no valid appeal could have been made without leave of the court.

In determining the merits of the main application before the Supreme Court, the legal issue for determination was whether the order made by the High Court was interlocutory and, if so, whether it was appealable without leave of the court. The Supreme Court found that, although interlocutory in form, the order that was the subject of the appeal was a spoliation order which is final in effect. Therefore, an appeal against it without leave of the court was valid and proper at law. The application was dismissed for lack of merit.

14.1.1. Principles regarding provisional orders as established by the decision in Blue Rangers Estates (Pvt) Ltd v *Muduvuri and Anor supra*

1. The test for considering whether an order is final and definitive or interlocutory is whether the order made is of such a nature that it has the effect of finally determining the issue or cause of action between the parties such that it is not a subject of any subsequent confirmation or discharge.
2. In order to determine whether or not an order is provisional, one has to look at the nature of the order and its effect. Does the aggrieved party anticipate a decision in his, her or its favour on the return day or his, her or its only relief is by way of an appeal because the provisional order is final and definitive in nature?
3. A provisional order is not for the granting simply because it has been titled as such. A court has to go a step further and establish

if at all an order titled a provisional order is indeed provisional in substance.

4. No leave is required to appeal against a final order couched in the form of a provisional order.
5. An order although provisional in form is final and definitive if it has the effect of a final determination of the issues between the parties in respect to which relief is sought from the court.
6. Where the purported provisional order is such that there is no issue for determination on the return day, the order is in actual fact a final order.
7. The fact that a final order is in the form of an interim relief is irrelevant to the consideration of the question of whether it is final or interlocutory. The issue of an order in the form in which it was applied for does not make the order itself a provisional order.
8. For an order to have the effect of interim relief, it must be granted in aid of, and as ancillary to, the main relief which may be available to the applicant on the final determination of his, her or its rights in the proceedings.
9. A spoliation order is a final order, whether or not it is made in the form of a provisional order.
10. A final order cannot be made as a provisional order in the hope that its sustainability at law will be established on the return day. The object of seeking a provisional order pending the return day is of paramount importance.

14.2. *Airfield Investments (Pvt) Ltd* v *The Minister of Lands, Agriculture & Rural Resettlement And 4 Ors*

The Supreme Court was faced with an appeal against the refusal by the High Court to grant an order for interim relief. In summary, the appellant provisionally sought an order that: -

1. The first respondent would be interdicted from further proceeding with the acquisition in terms of the Land Acquisition Act [*Chapter 20:10*] ("the Act") of the property formerly owned by the appellant pending the resolution of the question of whether the acquisition of the appellant's former land was constitutional.
2. The operation of the acquisition order would also be suspended.
3. The appellant would continue its farming activities during the currency of the interim order without disturbance.
4. The third respondent would render any and all lawful assistance to the appellant in ensuring its continued occupation, use and enjoyment of the aforementioned property.

The facts leading to that application are as follows.

After following due process as required by the Act, the first respondent compulsorily acquired agricultural land which was once owned by the appellant for resettlement purposes in terms of the Act. The order of the acquisition of the appellant's property was duly served on its managing director on 9 April 2002. Instead of following legal avenues to legalise its continued stay on the now compulsorily acquired land, the appellant made a deliberate decision to defy the law and continue to occupy the land, proceeding with its farming operations. The land in issue was subsequently offered to the fifth respondent in August 2003.

The appellant refused to give the fifth respondent vacant possession of the land. The appellant made an application in the High Court for an

order declaring to be unconstitutional the legal provisions under which its formerly owned land was acquired. Another application was then made by the appellant as summarised earlier, the dismissal of which became the subject of the appeal.

In dismissing the application, the High Court found that the first respondent was authorised at law to acquire the land for resettlement purposes. Therefore, he could not be interdicted from performing a legal duty. It also found that the appellant had acted in open defiance of valid law that had not, at the time of acting as such, been declared unconstitutional. The learned Judge also correctly declined to grant the interim relief by finding that doing so would give the appellant protection to continue its farming activities on land that no longer belonged to it which would in effect constitute an illegality. It is the decision to deny the relief sought by the appellant in the High Court that became the subject of the appeal.

In dismissing the appeal, the Supreme Court found that an applicant for interim relief has to show a *prima facie* right and that the appellant did not have a *prima facie* right to speak of since its ownership of the land had since been validly taken away at law. It also found that since the first respondent had properly acquired the land, he could not have been interdicted from acting well within the dictates of the law. The Supreme Court, like the High Court, also found that the appellant could not have been allowed to continuously be on the acquired land when it was no longer the owner of it.

14.2.1. *Principles regarding provisional orders as established by the decision in Airfield Investments (Pvt) Ltd v The Minister of Lands, Agriculture & Rural Resettlement & 4 Ors*

1. An interim interdict is an extraordinary remedy, the granting of which is at the discretion of the court hearing the application for the relief.
2. In an application for interim relief, the applicant has to prove a *prima facie* right not a clear right, if proof of that clear right at that stage established that the applicant is entitled to a final order.
3. The *prima facie* right to be established at the time that the interim relief is applied for cannot be on the probability that existing legislation which the applicant has contravened may be altered at some undetermined future time or on the possibility that such existing legislation would be held unconstitutional.
4. An interim interdict is not a remedy for past invasions of rights and will not be granted to a party whose rights in a thing have already been taken from him, her or it by operation of law at the time he, she or it makes an application for interim relief. In other words, the *prima facie* right must be in existence at the time that the application for interim relief is made.
5. A court faced with an application for interim relief must consider whether or not the applicant is likely to succeed in getting a confirmation of the provisional order on the return day. Where a final order is likely to be made as a provisional order, then there

would be no return day. It should follow that interim relief which is likely to have final effect ought not to be granted.

6. An interim interdict is not a remedy for prohibiting lawful conduct.
7. An interim interdict as a remedy for the prohibition of unlawful conduct cannot be granted for the protection of the illegal activities of the applicant who wishes to continue to commit an offence at law.

14.3. *Jamal Ahmed and 3 Ors* v *Russel Goreraza and 2 Ors*

The applicants in the case sought the confirmation or discharge of the following order which they had been granted as interim relief in the absence of the respondents:

"IT IS ORDERED THAT:

1. *The Respondents and all those claiming through them forthwith vacate the premises known as NOS. 409 HARARE DRIVE, POMONA, HARARE; NO. 18 CAMBRIDGE ROAD, AVONDALE, HARARE and NO. 75 KING GEORGE ROAD, AVONDALE, HARARE.*
2. *In the event that the Respondents and their agents do not vacate the said premises within 24 hours of the service of this order at each one of the premises, that the Sheriff be and is hereby authorised to evict the Respondents, their agents at each one of the premises and all those claiming title through the Respondents and to restore and handover the properties and their keys to the applicants' agents and nominees.*
3. *The Respondents restore onto the premises all property removed and taken to the workers' alternative homes.*
4. *Costs to be costs in the cause."*

It was averred that the respondents, having been involved in a misunderstanding with the first applicant, took control and occupation of the first applicant's immovable properties, evicting the first applicant's agents therefrom without following due process and without the first applicant's consent. Having failed to negotiate with the respondents in order to retake possession of the properties, the applicants then made an application for and were granted the "provisional order".

In the confirmation or discharge proceedings, the applicants' argument was that the order was a final order for all intents and purposes although it was titled a provisional order. They further asserted that any person aggrieved by the order had to proceed by way of an appeal, as it could not be subject to any confirmation/discharge proceedings in the High Court which had become *functus officio.* The respondents on the other hand insisted that the order was merely provisional, and the High Court had jurisdiction to confirm or discharge it.

The Judge in the High Court agreed with the applicants that the order was a spoliation order undeniably couched in the language of a final order. It found that the order had finally resolved the dispute between the parties therefore no return date could have been spoken of. However, looking at the import of the "provisional order", the Judge found that it could not be subject to confirmation or discharge because the rights of the parties before it had been finally adjudicated upon. The Judge declined to confirm or discharge the order and went on to rescind the order *mero motu* in terms of rule 449(1)(a) of the Rules, being of the view that the order had been erroneously sought and erroneously granted in default of the respondents.

14.3.1. Principles regarding provisional orders as established by the decision in Jamal Ahmed and 3 Ors v *Russel Goreraza and 2 Ors supra*

1. Once an order is deemed final, the court granting it becomes *functus officio* and the remedy of any party aggrieved by such order lies in an appeal to the Supreme Court or the appropriate intermediate appeal court.
2. Once a court on the return date of a "provisional order" with final effect realises that the provisional order with final effect was granted by another Judge, that court if properly informed is compelled to *mero motu* rescind the erroneously granted provisional order. The aggrieved party in that situation, in addition to the right to appeal, may also apply for rescission of judgment in terms of rule 449(1) of the High Court Rules.
3. If an order is deemed to be interlocutory or provisional, it remains subject to confirmation or discharge by the same court.
4. Where an order is in the form of a provisional order, that in itself does not mean that the order *per se* is necessarily a provisional order. If the order has the effect of finally determining "the issue or cause of action between the parties" it is a final order, regardless of the misleading form in which it is cast and may not be subject to confirmation or discharge.

The above considerations have contributed to various decisions of the Supreme Court that have pronounced on the erroneous practice in which final relief is granted where only interim relief has been sought. The presentation takes note of some of the decisions.

In *Chiwenga* v *Mubaiwa*,[65] the Court made the following findings:

> *"The purpose of a final order is different from that of a provisional order in that a final order is conclusive and definitive of the dispute. ... It is settled law that the standard of proof for a provisional order is different from that of a final order. A provisional order is established on a prima facie basis because it is merely a caretaker temporary order pending the final determination of the dispute on the return date. The parties have an opportunity to argue the matter again on the return date. On the other hand, a final order is obtained on the higher test of a clear right because it is final and definitive as it has no return date. ...*
>
> *The respondent's object and purpose in filing the urgent chamber application was to obtain custody of her minor children, access to the matrimonial home and repossession of the disputed property. It is self-evident that the interim relief she sought was crafted in such a way that if granted she would get the primary relief sought. Through the interim relief she would have obtained access to the matrimonial home, custody of her children and disputed property. Such an order does not fit the definition of an interim order. It is nothing other than a final order disguised as a provisional order.*
>
> *The learned judge a quo, perhaps having realised that the interim order sought fitted the definition of a final order, apparently threw caution to the wind, and granted a final order that had not been sought by the respondent. By going on a frolic of his own and determining issues not placed before him, the learned judge fell into grave error and misdirected himself.*
>
> *The net result was that the respondent was granted a final interdict when she had asked for a provisional order after pleading a prima facie right."*

The decision was followed by another decision in *Movement for Democratic Change (Tsvangirai) and Others* v *Timveos and Others*,[66] wherein it was said:

> *"It is thus important to ascertain whether the order being granted affords the parties that opportunity to argue on the main relief that has to be proved on a balance of probabilities in the proceedings before that court. As the basis upon which the interim and the final order are granted are different it follows that where the relief being sought as an interim interdict has essentially the same effect as the final order, such is generally improper. The grant of an interim relief which is essentially the*

[65] S–86–22.
[66] S–9–22.

> *same as the final relief would lead to that order being set aside. … In casu, the court a quo misdirected itself in granting a relief that had not been sought and which required no return date when all that first and second respondents had established was a prima facie case and not a clear right on a balance of probabilities."*

Finally, in *Nhende* v *Zigora and Anor*,[67] the Supreme Court stated that:

> *"I have had to give a detailed account of the procedure for provisional relief because there appears to be a signal failure or lack of appreciation at the moment at the High Court that when approached on an urgent basis, except where spoliatory relief is sought in which case the court grants final relief, the court is required to issue interim or provisional relief in the form of a provisional order.*
>
> *Given that, by its very nature, an urgent application requires the applicant to establish a prima facie case for the grant of interim relief, the jurisdiction of the court to grant final relief is not triggered.*
>
> *In this case the court a quo completely ignored the draft provisional order that was presented to it by the applicant and related to the matter as if it was an ordinary application, where its jurisdiction to grant final relief would have been triggered. It had not. Doing so was a misdirection which resulted in a gross irregularity."*

To conclude the discussion on provisional orders, it is important to highlight the characteristics of the remedy of an interlocutory or interim interdict/provisional order/interlocutory injunction, which were summarised by C. B Prest in his textbook *The Law and Practice of Interdicts supra* as follows -

i. *It is an order of court, i.e. it is a remedy (like damages); it is neither a procedure nor a cause of action;*

ii. *It is an interim order of court pending the final determination of the principal dispute between the parties;*

iii. *It is directed at the maintenance of the status quo pending final determination of the matter;*

iv. *It is a remedy of an extraordinary nature which is not available to a litigant who is possessed of another or alternative remedy;*

[67] S–102–22.

v. *It does not involve a final determination of rights and does not affect their final determination. See Apleni v Minister of Law & Order and Ors 1989 (1) SA 195 (A) at 201B;*

vi. *It is not a remedy for the past invasion of rights. See Stauffer Chemicals Chemical Products Division of Chesebrough-Ponds (Pty) Ltd v Monsanto Company 1988 (1) SA 805 (T); Philip Morris Inc and Anor v Marlboro Shirt Co SA Ltd and Anor 1991 (2) SA 720 (A); Payen Components SA Ltd v Bovic CC and Ors 1995 (4) SA 441 (A).*

vii. *It is a discretionary remedy dependent upon the weighing up of the balance of convenience between the parties where the right relied upon is prima facie established though open to some doubt; and*

viii. *It is granted in almost any kind of circumstance where there is a well-grounded apprehension of irreparable harm.*

The summary of the principles relating to the remedy speaks for itself as to the true nature of a provisional order. It cannot be over-emphasised that when making a provisional order, that order must anticipate confirmation or discharge of issues on a return date that could not be put to finality on the date of the granting of the interim relief. Further to that, a final order in the form of a provisional order will never be a provisional order. It is the duty of a court to satisfy itself that a provisional order is indeed provisional or interim in effect and thereafter exercise its discretion to either grant or dismiss the application.

15. CONCLUSION

In summation, a court order is an official proclamation by a judicial officer which has the effect of determining the legal issues of a dispute between parties. Court orders vary in content and provisions depending on the type of proceedings and relief sought. As stated above, no order can be made except upon application to the court for relief. There are certain requirements that a court order must satisfy,

and, as discussed above, these include clarity and enforceability. These requirements hinge on the doctrine of effectiveness. Literally, an order must be capable of being imposed for purposes of compliance. A court will not engage in the futile exercise of making an order which cannot be carried out. The presentation, by examining the authorities setting out legal principles relevant to the preparation of a court order, has established that a court order is central to the existence of the court itself. It must, unless it is interim, finally resolve disputes between parties and uphold the rule of law. Court orders have to be self-speaking, self-containing and self-executing. In this regard, adherence to the basic principles governing the crafting of court orders must prevent scenarios in which a court is called upon to interpret an order that it previously issued.

HOW FAR CAN THE LABOUR COURT GO IN THE EXERCISE OF ITS EQUITABLE JURISDICTION?[68]

Honourable Mrs. Justice A. Gowora

Judge of the Constitutional Court of Zimbabwe

Abstract

Although the notion of equity is fraught with difficulty, it is an inherent virtue of the justice delivery system, particularly where the law does not provide an effective remedy. It allows the courts to dispense justice between the parties based on the principles of natural law and judicial discretion. The maxims of equity provide additional jurisprudence to the Labour Court to apply equitable jurisdiction in the resolution of labour disputes as the justice of the case may require. This paper discusses the equity principle and further gives practical guidelines on its application.

1. INTRODUCTION

The topic is linked to the decision of the Supreme Court in *Mapondera & 55 Others v Freda Rebecca Gold Mine Holdings Limited*.[69] Before the court was an appeal from the Labour Court. The Supreme Court upheld the appeal in that matter and remitted it to the Labour Court for determination on the merits.

[68] A paper presented at the End of Second Term Judges Symposium 2023 held at Village Lodge Gweru in August 2023.

[69] SC-81-22.

The background of the matter and the determination by the Court are as follows. The appellants were employed by the respondent in various categories at its Bindura Mine. In 2008 the appellant ceased operations due to harsh economic conditions prevailing in the country. It did not terminate the contracts of the employees.

In 2009 following the adoption of the respondent resumed operations. It requested its employees to enter new contracts. A dispute ensued on the terms of the contracts. The parties failed to settle the dispute and the respondent summarily terminated the appellants' contracts of employment. The appellants approached the designated agent within their industry. He or she referred the dispute to conciliation. This process failed and the designated agent issued a certificate of no settlement. It was referred to the arbitrator who issued an award for the reinstatement of the appellants. The respondent appealed to the Labour Court which found for the respondent and set aside the award. The Labour Court found that the respondent had not been cited properly and some of the appellants were not properly before the court.

The Supreme Court found that the judgment appealed against had a lot of technicalities. The court found that the Labour Court had a very wide discretion under section 90A which the legislature saw fit to bestow on the Court to do simple industrial judgment. The matter was remitted for a hearing *de novo*. Thus, we will not discuss the issues arising out of the judgment.

Therefore, the dispute between the parties is still alive, and until such a time as the Supreme Court has determined the merits of the entire dispute the matter is *sub judice* and it is inappropriate to discuss any

issues or questions relating thereto. Therefore, this paper focuses on the equitable jurisdiction of the Labour Court in general.

The burning question is to what extent may the Labour Court go or put differently can it proceed untrammelled by set legal principles or any rules of procedure or practice. Although it has been described as a court of equity it is also bound by precedent and *stare decisis*. To arrive at a proper perspective of that which the law allows it to do requires a foray into the history of labour law in the country.

The precursor to the Labour Act [*Chapter 28:01*] is the Labour Relations Act, also [*Chapter 28:01*]. It came into being on 15 December 1985. Immediately before its inception was the Employment Act No 13/1980. It was repealed by the Labour Relations Act and is not relevant for purposes of this discussion. The most defining feature of the Labour Relations Act was the establishment of the Labour Relations Tribunal. Section 83 of the Act provided that: -

> *"There is hereby established a tribunal to be known as the Labour Relations Tribunal which shall be a court of record."*

The functions of the Tribunal are set out in s 89 which reads as follows: -

> "*The Tribunal shall exercise the following functions: -*
> *(a) Hearing and determining appeals in terms of any provisions of this Act which provides for an appeal to the Tribunal; and*
> *(b) Hearing and determining appeals from any determination, direction or decisions of the Minister in terms of section twenty-five, fifty-one, seventy-nine or eighty-one; and*
> *(c) Hearing and determining matters referred to it by the Minister in terms of this Act; and*
> *(d) Doing such other things as may be assigned to it in terms of this Act or any other enactment."*

It is axiomatic that the large body of our jurisprudence on labour relations emanate from this period. The Labour Court of Zimbabwe is a court of justice. Being a creature of statute, the Labour Court's power is wholly contained in the Labour Act. In our jurisdiction the key provisions from which the jurisdiction of the court is derived from are: -

a. Section 2A of the Labour Act [*Chapter 28:01*];
b. Section 90A of the Labour Act [*Chapter 28:01*];
c. Rule 12 of the Labour Court Rules; and
d. Rule 32 of the Labour Court Rules.

Section 2A clearly provides as follows: -

> *"2A.* ***Purpose of Act***
>
> *(1) The purpose of this Act is to advance social justice and democracy in the workplace by—*
>
> *(a) giving effect to the fundamental rights of employees provided for under Part (b) ….*
>
> *(c) providing a legal framework within which employees and employers can bargain collectively for the improvement of conditions of employment;*
>
> *(d) the promotion of fair labour standards;*
>
> *(e) the promotion of the participation by employees in decisions affecting their interests in the work place;*
>
> *(f) securing the just, effective and expeditious resolution of disputes and unfair labour practices.*
>
> *(2) This Act shall be construed in such manner as best ensures the attainment of its purpose referred to in subsection (1).*
>
> *(3) This Act shall prevail over any other enactment inconsistent with it".*

In turn section 90A reads as follows: -

> *"90A* ***Procedure and evidence in the Labour Court.***

> *(1) The Labour Court shall not be bound by the strict rules of evidence, and the court may ascertain any relevant fact by any means which the presiding officer things fit and which is not unfair or unjust to either party.*
>
> *(2) Evidence may be adduced orally or in writing in any proceedings in the Labour Court, at the discretion of the presiding officer.*
>
> *(3) The parties or their representatives to any proceedings in the Labour Court shall be entitled to question or cross-examine each other or any witness.*
>
> *(4) It shall be the responsibility of the presiding officer to ascertain the facts in any proceedings in the Labour Court, and for that purpose he or she may—*
>
> *(a) call any party or his or her representative;*
>
> *(b) question or cross-examine any party or his or her representative or witness; and*
>
> *(c) put any question to a party or his or her representative or witness which is suggested to him or her by any party".*

The Labour Court is a court established under section 84 of Act No 17 of 2002, which provided as follows: -

> *"**84 Establishment and composition of Labour Court***
> *(1) There is hereby established a court, to be known as the Labour Court, which shall be a special court for the purposes of section 92 of the Constitution and a court of record."*
> *Section 84 was amended by Act 3/2016 and now reads as follows:*
>
> *"**84 Establishment and composition of Labour Court***
> *(l) The Labour Court established before the commencement of the Constitution shall, subject to this Act, continue in operation."*

Section 172(1) of the Constitution[70] provides that the Labour Court is a court of record. In terms of section 172(2) of the Constitution the court is empowered to exercise such jurisdiction as may be conferred by an Act of Parliament. Thus, there is no change in the powers that it exercises under the Act. I note that there is no provision in the Act

[70] Section 172(1) of the Constitution of Zimbabwe, 2013.

specifying that the court has jurisdiction to operate as a court of equity or that in determining matters before it, it is endowed with equitable jurisdiction. The reference to equitable jurisdiction is found in the Rules of court. However, notwithstanding the absence of the court being bestowed with the jurisdictional ambit in the enabling Act to exercise equity decisions, courts in this jurisdiction have emphasised that over and above its ordinary jurisdiction, the Labour Court is endowed with "equitable jurisdiction." The principle that the Labour Court is empowered to exercise equitable jurisdiction was emphasised in *Madhatter Mining Company v Tapfuma*,[71] in which the court held: -

> "*The principles of equity and social justice as well as the imperative for the Labour Court to secure the just and effective resolution of labour disputes, are all called into question when it comes to determining the basis and formula for computing a debt (e.g., damages) suffered in Zimbabwe dollars but claimed in foreign currency. This is particularly so where such damages, being owed to an employee, can no longer be paid in Zimbabwe currency realistically or in a way that gives due value to the employee. The undeniable fact is that a debt is not wiped out by the mere fact that there has been a change to the realisable currency. Equity would demand that a formula be found to give effect to the employee's entitlement to payment of, and the employer's obligation to pay, the debt in question.*

It is therefore imperative that this paper discusses the principle of equity, whence it has emanated from in this jurisdiction, and its place in our law especially as it pertains to the Labour Court.

2. WHAT IS EQUITY AND WHAT IS ITS GENESIS?

Equity was a centuries-old system of English jurisprudence in which judges-based decisions on general principles of fairness in situations

[71] SC-51-14.

where the rigid application of common-law rules would have brought about injustice. Judges exercised equitable jurisdiction based on a distinct set of procedures and remedies—most notably, without a jury—that allowed them greater flexibility to hear cases and resolve disputes. The exercise of equity jurisdiction periodically led to debate about the power and discretion of federal judges. Equity is an inherent and indispensable part of the law. In other words, the law can never exist without, or ignore equity. I wish to borrow from a paper presented by Agnos Moyo at a symposium wherein he said this about equity: -

> "*The technical meaning is however different and the same has its genesis in English Law.*
>
> 1.1. In English law, equity has a technical meaning as that branch of law that is historically derived from justice administered by the Court of Chancery to alleviate the injustice stemming from the common law.
>
> 1.2. In essence, the Court of Chancery was constituted by the Lord Chancellor, the King's Chief Minister, who dealt with petitions brought to the King by litigants who were dissatisfied with rulings made under the common law.
>
> 1.3. Litigants who felt they had not obtained justice from the common law Courts made direct appeals to the King, who passed them on to the Lord Chancellor.
>
> 1.4. The Lord Chancellor, in these *ad hoc* interventions, acted as the King's conscience and decided matters based on general principles of justice and common sense. It is these general principles of justice and common sense outside the common law came to be called equity.[72]
>
> 1.5. Disputes were resolved according to good conscience and the merits of the case.
>
> 1.6. In essence therefore, the technical meaning of equity is that they are principles of justice that are used to correct laws when these would seem unfair in special circumstances.

[72]Slapper and Kelly in their book THE ENGLISH LEGAL SYSTEM (2004) at 4.

1.7. A normal Court of equity using the technical definition is therefore aware of what the law is but decides to make a decision that is contrary to that law based on the fact that such a decision based on the law would be "unfair".

1.8. It is not difficult to see that the use of equity in the technical sense brings about uncertainty in the delivery of justice as it hugely depends on a judge's own perception of justice. Indeed, at one point in England it was said that the rules of equity 'varied according to the length of the Chancellor's foot'.

The critical question is whether it is part of our law. In his paper above Agnos Moyo was adamant that equity is not part of our legal system. He premises his opinion on the fact that in terms of the former Constitution, the law to be applied in the country was the law applicable at the Cape of Good Hope on 10 June 1891. He contends that the law was Roman-Dutch Law and that the law did not recognise the principle of Equity.

On the other hand, in a paper presented at another symposium, Caleb Mucheche presented a different view. He states that the Supreme Court has always emphasised that the Labour Court is empowered to exercise equitable jurisdiction in labour matters. These divergent views bring into focus the confusion on the system as to whether the Labour Court, specifically, is a court of equity.

3. UNPACKING THE EQUITY PRINCIPLE

a. What is it?

b. Its applicability and its relationship to or with the principles of law in the Labour Court.

3.1. What is the equity principle?

The word 'equity' has a wide range of meanings and to many people, it is a synonym for 'fairness' or 'justice'.[73] The notion of equity is fraught with difficulty and hence should be treated with caution. Equity is an inherent part of the virtue of justice, to be applied where the law is wanting or does not provide an effective remedy, provided always that the application of principles of equity accord with legal principles and based on the circumstances of the case in question. It cannot be applied outside the law. The need for equity arises where the law has failed to provide fair solutions to those particulars cases that may present problematic areas for adjudication by the judges.

In such situations, a judge should consider and adjudicate the case before him, considering all relevant circumstances and ensure that the determination is just and equitable.[74] Equitable jurisdiction is a system of justice designed to supplement the common law by acting in a reasonable and fair manner which results in a just outcome. It is based on a set of legal principles namely equity for achieving natural justice.[75] At its heart, equity is found to be about remedies; a supplementary system which repairs defects in the law. In brief, equity can be summed up as an old English system of jurisprudence in which judges-based

[73] Nigel Stockwell and Richard Edwards "Trusts and Equity" 7th edition.
[74] The equitable foundations of South African labour law: an historical and comparative study https://scholar.ufs.ac.za/handle/11660/5996
[75] Equitable Jurisdiction Law and Legal Definition https://definitions.uslegal.com/e/equitable-jurisdiction/#:~:text=Equitable%20jurisdiction%20is%20a%20system,equity%20for%20achieving%20natural%20justice.

decisions on general principles of fairness in situations where the rigid application of common-law rules would have brought about injustice.

Vaughan Lowe,[76] defines equity as: *general principles of justice as distinguished from any particular system of jurisprudence or the municipal law of any State*. Equity relates to recourse to general principles of justice in order to assist the 'just' application of law. This principle is a feature common to the major legal systems of the world. It allows the decision to be based in part on consideration of all the surrounding circumstances. If a court is applying the equity principle, it is not bound by the strict dictates of the law unlike a common law court like the High Court which is bound to apply the law as it is. A court of equity should look at the law and surrounding circumstances and then apply the general principle of justice in order to do justice to the parties. The principle of equity allows the court to broaden the scope of enquiry by considering all relevant surrounding facts. Equity therefore is there to supplement the defects of common law and correct its rigour or injustice.

In the general juristic sense, equity represents that distinguishable, inherent feature of a judge's authority to adapt the law to meet not merely with universal justice, but individual justice. Its concern is the observance of conscience, fairness, equality and the protection of relationship of trust and confidence. It is in this manner that **Lord Cowper** in *Dudley v Dudley* opined that '*now equity is no part of law, but a moral virtue, which qualifies, moderates and reforms the rigour, hardness and edge of the law, and is a universal truth; it does also*

[76] The Role of Equity in International Law.

assist the law where it is defective and weak in the constitution (which is the life of the law) and defends the law from crafty evasions'.[77]

Switching the argument from law to equity allows a broadening of the scope of the enquiry. Equally, of course, once the relevant factors have been considered the person making the decision is freed from the necessity of making the reasoning consistent with established legal rules and principles. However, the principles of equity do not give a judicial official untrammeled discretion to override the law but, rather, represents a body of norms capable of remedying a lack of subtlety and flexibility which may affect systems of laws.

3.2. Is equity distinct from law?

Equity is distinct from law. Law is simply a body of rules that governs the activities of the community, and which is executed by its political authority. It is a legal system established as a set of rules on how people in a certain community should deal with and behave towards each other. Law is regulated by the government and enforced by the courts. Law is designed to create order, advocating freedom while at the same time enforcing order so that people can live harmoniously with each other.[78]

The traditional differences between law and equity can be summarised in the following terms.[79] Equity allows courts to apply justice based on

[77] *Dudley v Dudley* (1705) Prec Ch 241.
[78] www.differencebetween.info/difference-between-law-and-equity. (Accessed on 30 July 2023).
[79] See note 87 above.

natural law and on their discretion. Whenever there is a disagreement as to the application of law, equity is applied. The other distinct difference between law and equity lies in the solutions that they offer.[80] Law usually awards monetary damages in certain cases, but equity can decree for someone to act or not to act on something. In cases wherein the aggrieved party does not want monetary damages, the defendant can be ordered to return what he has taken. Law courts can order writs which are harder to obtain and are less flexible than injunctions which are ordered by equity courts. In terms of the distinction between equity and law, reasoning based on equity can be regarded as practical reasoning and so distinct from legal reasoning.

As seen from the general juristic sense, the origins of equity lie in the deficiencies of the common law. The common law had gaps where a remedy was not available or where a remedy was available but was not appropriate to the loss of a plaintiff.

3.3. What is the manner in which law and equity relate to each other?

Indeed, it may be said without impropriety that equity is a great legal system, which has grown up by the side of the law, and which, while consistent with the latter, is in a great measure independent of it.[81] Equity however cannot create personal rights which are unknown to the law nor can it impose upon a person or a thing an obligation that is

[80] See note 87 above.
[81] Professor I., Angdell, Summary of Equity Pleading (2nd ed., 1883) p. 41.

completely alien under the law or not recognisable at law. To say that equity can do any of these things would be to say that equity is a separate and independent system of law, or that it is superior to it.[82]

3.4. How is the equity element of law reflected in the Labour Act [*Chapter 28:01*] and Labour Court Rules?

Like any other common law jurisdictions, the Zimbabwean legal system does recognize the principle of equity to wit the concept of fairness. Certain provisions in the Labour Act as well as in the Labour Court Rules, expressly give the Labour Court the latitude to apply the general principles of natural justice. As a result, the proceedings in the labour court can be said to be informal to some extent.

Applying general principles of natural justice would result in just, effective, and expeditious resolution of disputes and unfair labour practices. A suggestion by Professor Madhuku is that equity should be paramount in labour matters.[83] My view is that the Legislature has spelt out the jurisdictional ambit of the Labour Court. It is thus a creature of statute and is strictly bound to exercise that jurisdiction bestowed upon it by its enabling statute. The judges of the court cannot cross that line and assume a jurisdiction not spelt out in the Act or any other law.

4. THE ROLE OF THE JUDGES OF THE LABOUR COURT IN LABOUR MATTERS

[82] Brief Survey of Equity Jurisdiction; (1887) x Harvard Law Review. 55, 58.
[83] L. Madhuku. *An Introduction to Zimbabwean Law*, (2010) Weaver Press, Harare, at 41, where he said; 'Common law may lead to injustice because of its rigidity.'

The task of every judge is to apply and interpret the law. In the case of the Labour Court judges, their task is to interpret the Labour Act. This is so because the Labour Court is a creature of statute and in performing their duties, they are only bound by the four corners of the enabling legislation- the Labour Act.[84] The purpose for the creation of the Labour Court was to dispense simple, cheap, and speedy industrial justice.[85] As such, the question to be addressed in this presentation is how this should be achieved.

The efficacy of the Labour Court is to be found in the powers awarded to it as read with the aims of the Labour Act.[86] The major objective of the Labour Act is to promote fundamental rights of employees and their protection from unfair labour practices as well as unfair dismissal and the promotion of social justice and democracy in the workplace. This, the Labour Court achieves by being informal, cheap and being a court of equity and not of strict rules.[87] It is obvious that judges have correctly noted the objective of the Labour Act and the special nature of the court which is the Labour Court. Judgments from the court have recognised the need spelt out in the Act to ensure that the principle of fairness in employment disputes is of paramount consideration.[88] In terms of section 2A(1) of the Labour Act, the purpose of the Act is: -

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[84] *Guwa & Another v Willoughby's Investments (Pvt) Ltd* 2009 (1) ZLR 380 (S).
[85] *Zhakata v Mandoza* HH-22-05.
[86] This is essentially a look at the preamble of the Labour Act as read with section 2A of the same and further read with section 89 of the same.
[87] *Dalny Mine V Banda* 1999 (1) ZLR 220 (S), *and Proton Bakery v Takaendesa* SC 126/04.
[88] *Tedco Management v Bent* LC/MT/142/05 *and Premier Finance Group Ltd v Shava* LC/H/129/09.

> *"to advance social justice and democracy in the workplace" by, inter alia, "securing the just, effective and expeditious resolution of disputes and unfair labour practices" (paragraph (f)).*"

Section 2A(2) requires that the Act be construed in such manner as best ensures the attainment of the purpose referred to section 2A(1), while s 2A(3) stipulates that the Act shall prevail over any other enactment inconsistent with it. In terms of section 2A, we notice two things. The first is that the Labour Court is allowed to apply the principle of equity in resolving labour disputes. The second is that the Labour Court is mandated to advance social justice in an effective and expeditious way. It is for these reasons that the Labour Court is allowed to be an informal court. It is therefore necessary for presiding officers to understand what the equity principle is, how the principle is reflected in the provisions of the Labour Act and the Rules and how best the judges can make use of it in trying to achieve our goal of delivering world class justice in labour matters.

In addition, it is imperative to assess the extent to which the labour court can go in the exercise of its equitable jurisdiction. Whilst it is accepted that the Labour Court enjoys equitable jurisdiction by virtue of subsection(s) (1) and (2) of s 2A of the Labour Act the issue is what does that jurisdiction mean conceptually.[89] In *Madhatter Mining Company v Tapfuma*,[90] in reliance upon the specific wording of s

[89] *Fleximail (Pvt) Ltd v Samanyau & Others* SC-21-14, *Ballantyne Butchery (Private) Limited v Chisvinga & Ors* SC-6-15, *Malimanjani v Central Africa Building Society* SC 47/07 *and Nzuma & Others v Hunyani Paper and Packaging (Pvt) Ltd Civil Appeal No.* SC 137/11.

[90] SC 51/14.

2A(1)(f), it was held, per GWAUNZA JA, at p. 16 of the cyclostyled judgment, that: -

> *"The principles of equity and social justice as well as the imperative for the Labour Court to secure the just and effective resolution of labour disputes, are all called into question when it comes to determining the basis and formula for computing a debt (e.g. damages) suffered in Zimbabwe dollars but claimed in foreign currency. This is particularly so where such damages, being owed to an employee, can no longer be paid in Zimbabwe currency realistically or in a way that gives due value to the employee. The undeniable fact is that a debt is not wiped out by the mere fact that there has been a change to the realisable currency. Equity would demand that a formula be found to give effect to the employee's entitlement to payment of, and the employer's obligation to pay, the debt in question".*

This concept of equity as elucidated by HER LADYSHIP above was concerned with the requirement to achieve social justice in the workplace as reflected in section 2A of the Act with specific reference to equity as an element of substantive law. It relates to how the court should apply the principles of justice in resolving disputes where the applicable law might lead to injustice. The Supreme Court in the cases of *Fleximail (Pvt) Ltd v Samanyau & Others, and Ballantyne Butchery (Private) Limited v Chisvinga & Ors* has correctly applied this equity principle in computing debts. Thus, equity as an element of substantive law does not concern itself with the way proceedings are instituted. It is concerned with the substance of the matter.

What is at issue is whether or not equity is a consideration as regards the procedures to be adopted and applied by the court in proceedings before it. The Labour Court conducts its business differently from other courts. Its procedures are unhampered by technicalities and are

informal.[91] This was reaffirmed in *Rio Tinto Zimbabwe v Mackenzie*[92] wherein the court stated thus: -

> *"The principle that disciplinary proceedings that are tainted with irregularities regarding procedure can be set aside and commenced afresh was restated by MCNALLY JA in the case of Dalny Mine v Banda 1999 (1) ZRL 220 (S) wherein the learned Judge of Appeal had this to say: -*
>
> > *"As a general rule it seems to me undesirable that labour relations matters should be decided on the basis of procedural irregularities. By this, I do not mean that such irregularities should be ignored. I mean that the procedural irregularities should be put right. This can be done in one or two ways:*
> > *(a) by remitting the matter for hearing de novo and in a procedurally correct manner;*
> > *(b) by the Tribunal hearing the evidence de novo".*

This is supported by section 90A of the Labour Act which provides for a number of ways in which the court may depart from the strict rules of presenting evidence in order to ascertain the truth behind disputes. No other court has been endowed with the power to *mero motu* call for evidence to properly determine a dispute.

Equally the court is not bound by the strict rules of evidence, by virtue of section 90A. The ultimate objective is to achieve fairness in order to do justice between the parties. Strict rules on admissibility of evidence should be relaxed as long as that would not result in unfair or unjust results. I must acknowledge that some judgments of the court have correctly interpreted and applied this provision.[93]

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[91] Rule 12 of the Labour Court Rules; see also *Dalny Mine v Banda* 1999(1) ZLR 220 (S).

[92] 2005(1) ZLR 462(S).

[93] *Chataira v ZESA* 2000 (1) ZLR 30 (H), *Ephraim Mtake v Zimbabwe Revenue Authority* LC/H/186/2008 *and Chomunorema v Muzokomba and TelOne* LC/H/212/2009.

The procedural element as regards equity is also reflected in the Labour Court Rules which allow the proceedings of the Labour Court to be informal. Our courts have the aim and objective of ensuring that a Zimbabwe in which world class justice prevails is realised. The Labour Court specifically does this by ensuring that the objectives of the Act to advance social justice in an effective and expeditious manner is realised. The court does this by ensuring that justice in labour matters is delivered expeditiously, which is one of the reasons for the court to operate as an informal court.

It is common cause and a matter of common sense that in labour matters poor indigent employees are often pitted against the vast wealth and resources of employers. Rich employers will not hesitate to use their financial muscle to gain an unfair advantage over poor employees in the most expensive courts where the employee is bamboozled dazzled and lost in the intricacies of legal jargon and technicalities. The majority of employees who lose their jobs are unable to afford the services of a lawyer at the Labour Court let alone at the High Court. Thus, the legislature created the Labour Court, an informal court, to try and maintain social justice between the parties.

The informal nature of the Labour Court is supported by rule 12 of the Labour Court Rules which provides as follows: -

> *"12.* ***Informality of proceedings***
> *(1) Subject to these rules, the Court shall conduct any hearing in such manner as it considers most suitable to the clarification of the issues, the fair resolution of the matters, and generally the just handling of the proceedings before it.*

> *(2) The Court shall, so far as appear to it appropriate, avoid formality in its proceedings and may, where circumstances warrant it, depart from any enactment or rule of law relating to the admissibility of evidence in proceedings before courts of law generally".*

The rule simply means that the proceedings of the Labour Court must be informal. This has been necessitated by the need to allow self-actors, trade unions, human resources personnel, individual employers and individual employees an unfettered opportunity to put across their cases without being hindered or obstructed by the legal technicalities that usually apply in the formal courts like the magistrates courts, High Court and Supreme Court.[94] This is in line with the fact that the Labour Court is regarded as a court of equity whose primary purpose is to give effect to the chief purpose of the Act as explained above- to advance social justice and democracy in the workplace.

Gwisai[95] observed that rule 12 subrule (1) and (2) affirm the informal and flexible character of the Labour Court. Various decisions of the Labour Court have affirmed this informal and flexible character of the Labour Court. In *Kurwaisimba v Windmill (Pvt) Ltd*[96] MUSARIRI P held that the Court was not bound by the strict rule of evidence. HOVE P aptly put it in *Guyo v Trans Africa Timber Merchants*[97] by stating the following: -

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[94] C. Mucheche; Law and Practice at the Labour Court of Zimbabwe, Commentary on the Labour Court Rules of Zimbabwe.

[95] Gwisai, M (2006) Labour and Employment Law in Zimbabwe: Relations of Work Under Neo-Colonial Capitalism. Harare, Zimbabwe Labour Centre and Institute of Commercial Law, University of Zimbabwe.

[96] LC/H/42/06.

[97] LC/H/246/04.

> *"The Labour Court is an informal court, which is not restricted by the usual rules of evidence, as is the case in other courts. It is not concerned with technical issues but concerns itself with substantive issue of justice and fairness".*

5. HOW FAR CAN THE LABOUR COURT GO IN THE EXERCISE OF ITS EQUITABLE JURISDICTION

Lawrence, in his book Equity Jurisprudence noted that at first examination; equity seems to be a dangerous concept as it does not provide the traditional certainty that an enduring rule of law is known for. This he claims could be seen to leave justice to the whims of the judges. But Maine in his piece Ancient Law 50 (1912); stated that equity anchored on universal principles is sufficient to provide certainty. This position was well captured by Howard L. Oleck in an excellent 1951 piece for the Fordham Law Review when he noted that: -

> *"Equity as a universal moral principle supplies the required certainty by basing its decisions on principles, rather than on rules which have the defect of undesirable rigidity. As long as these principles are sound, equity is sound. Such principles must be universal, always, and beyond any dispute as to their validity. And the chief principle upon which equity is founded, dearly, is the principle that justice must be done, despite the seeming finality of any rule of law, if that rule actually works an injustice".*

Equity's ability to innovate has always been demonstrated as evident in many cases where the court has been able to refine, adapt and differentiate the application of many long-standing equitable maxims, as it has always done. Lord Browne-Wilkinson affirmed again that equity is conscience-driven when in *Westdeutsche v Islington London Borough Council*,[98] he noted emphatically that: -

[98] [1996] AC 699.

> *"Equity operates on the conscience of the owner of the legal interest. In the case of a trust, the conscience of the legal owner requires him to carry out the purposes for which the property was vested in him (express or implied) or which the law imposes on him by reason of his unconscionable conduct".*

Equity therefore is and should be a changing and living legal doctrine, always adapting to avoid the law becoming frozen into inflexible and pernicious set of rules. Equitable doctrines only come into the picture if it will be unconscionable to stay with the unjust outcome of the law. Hence Maitland's assertion that "Equity had come not to destroy the law, but to fulfil it".[99]

From the above, it is apparent that equity not only came to fill the gaps left by common law, but it also came in to mitigate injustice by providing remedies that were not available in common law. Equity follows the law[100] and as such it acts to supplement the law and not to supplant it.[101] From this position, it is prudent to note that where the law is definite and clearly stipulated, equity will not interfere, hence its maxims in this instance are meaningless. However, where the statutory provisions of the law are not clear, the principles of equity come into play and act to mitigate the rigours of common law. In *Lord Dudley and Ward v Lady Dudley*[102] Lord Eldon posited the following position:-

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[99] Dr Charles Omole , ESSAY ON THE DEVELOPMENT OF EQUITY WITH COMMON LAW

[100] M Wilkie R Malcolm and P Luxton Equity and Trusts: Equitable doctrines Questions and Answers (7edn OUP London 2010) p207 it is one of the maxims or principles of equity discussed under the topic; Equitable doctrines in the law of Equity.

[101] J E Martin Modern Equity (19 ed Sweet and Maxwell publishers London 2012) Para [24-003] p762.

[102] *Lord Dudley and Ward v Lady Dudley* (1705) Prec Ch 241, 244.

> *Equity is not part of the law, but a moral virtue, which qualifies, moderates and reforms the rigours of the law, and it is a universal truth; it does also assist the law where it is defective and weak…and defends the law of crafty evasions, delusions and subtleties, invented and contrived to evade and delude the common law...Equity therefore does not destroy the law nor create it but assists it.*[103]

Although equity did not have the same rigid rules of precedent as common law, the court of chancery did have certain principles which it applied in administering equity; these came to be known as principles or maxims of equity. These principles of equity are statements which embody rules of equity they are only guidelines and *as such not applied strictly in every case,* they help us understand what rules of equity are.[104] Sir William Blackstone was of the following view: -

> *The law without equity, though hard and disagreeable is much more desirable for the public good than equity without the law, which would make every judge a legislator and introduce most infinite confusion as there would be almost as many different rules of action laid down in our courts as there are differences of capacity and sentiment in the human mind.*[105]

However, whilst it is accepted that the Labour Act as well as the Labour Court Rules gives the Labour Court latitude for the proceedings to be informal, that does not mean that the proceedings in the Labour Court are completely informal. The informality of proceedings in the Labour Court is not a licence for litigants or parties to take a casual approach to proceedings before the Labour Court as that may potentially bring total discord in the meeting out of justice.[106] The following sentiments

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[103] *Lord Dudley and Ward v Lady Dudley* (1705) Prec Ch 241-44 (Lord Eldon).

[104] M Wilkie R Malcolm and P Luxton Equity and Trusts: Questions and Answers 7ed OUP London 2010.

[105] W Blackstone`s Commentaries on: Public Courts of Common Law and Equity The Laws of England Vol 3 cap 4 (1768)

[106] C. Mucheche; Law and Practice at the Labour Court of Zimbabwe, Commentary on the Labour Court Rules of Zimbabwe.

were expressed in the case of *Secretary for Higher and Tertiary Education v College Lecturers Association of Zimbabwe & 14 Ors*,[107]

> *"Notwithstanding its finding that the defects adverted to are not fatal, the court would like to express its displeasure with the attitude of the Applicant. The Applicant's legal practitioner seemed unfazed with the errors pointed out, taking comfort in the fact that he was approaching what he described in his oral submissions as an informal court.*
>
> *The legal practitioner, and perhaps other legal practitioners of a similar mind, need to be reminded that the Labour Court is a court of record formally and constitutionally mandated to preside over matters of labour and employment. See* ***Section 172*** *of the* ***Constitution of Zimbabwe Amendment (No. 20) Act 2013.***
>
> *Whilst the Court, in terms of Section 90A of the Labour Court Act, [Chapter 28:01], as read with rule 12 of the Labour Court Rules, (Statutory Instrument 59 of 2006), exercises some flexibility in the interests of justice, this does not mean it is an informal court where anything goes. Practitioners are warned against slip shod preparation and filing of court papers and reminded of the need to adhere to the Court's Rules, without which the conduct of court proceedings can be chaotic".*

In short, the informality of the proceedings of the Labour Court does not mean that the law should be violated. It is thus important to examine the rule 32 of the Labour Court Rules. Rule 26 provides as follows: -

> ***"32. Departure from rules***
>
> *At any time before or during the hearing of a matter a Judge or the Court may—*
>
> *(a) direct, authorise or condone a departure from any of these rules, including an extension of any period specified therein, where the Judge or Court is satisfied that the departure is required in the interests of justice, fairness, and equity;*
>
> *(b) give such directions as to procedure in respect of any matter not expressly provided for in these rules as appear to the Judge of the Court to be just, expedient, and equitable."*

[107] LC/H/547/13.

The Labour Court is authorized to depart from the rules in the interests of justice, fairness, and equity. The rules are made for the court and not the other way round. The rules serve as a guideline, but they are not engraved in stone or sacrosanct. The Court cannot be a slave of its own rules. It has been said that the rules are flexible and can never be construed as an article of faith or gospel truth.[108] It follows from the above that the Labour Court has latitude to depart from its rules in the interests of justice. One important point which requires emphasis is that labour matters must not be decided on purely technical points at the expense of real justice between the parties. However, as highlighted above, this does not mean that the law must be violated. Although the general position is that labour matters must not be decided on technicalities but on the merits as was stated in the *Dalny Mine v Banda*[109] the position is different where the irregularity is fatal. There are some irregularities which cannot be cured by condonation.

While it is accepted that the Labour Court, as well as tribunals arbitrating labour disputes, are duly empowered by virtue of the aforementioned provisions of the Act and the Rules to dispense equity, clearly this cannot mean that in doing so the existing rules of law are disregarded In particular, a judge cannot invoke and apply equity so as to override or negate the provisions and requirements of any legislation enacted by Parliament or by an executive authority duly delegated to frame subsidiary legislation. The position might be different if such

[108] C. Mucheche; Law and Practice at the Labour Court of Zimbabwe, Commentary on the Labour Court Rules of Zimbabwe at page 23.
[109] 1999 (1) ZLR 220 (S).

legislation is shown to be inconsistent with any substantive provision of the Act, in which event that provision would prevail in conformity with s 2A(3) of the Act.[110]

5.1. The Maxims of Equity

Discussed hereunder are some of the principles of equity which affirm the position that that equity supplements the law, but it does not supplant it. It ought to be noted that all maxims are discretionary in nature and courts may choose whether they wish to apply these principles.

5.1.1. Equity will not suffer a wrong to be without a remedy

This is used where there is no remedy at all in common law or there are remedies, but they are not adequate. Ordering damages for trespass in common law is a good example for the second situation. However, "This maxim indicates that equity will not allow the technical defects of common law to prevent worthy plaintiffs from obtaining redress.[111]

5.1.2. Equity follows the law

According to this principle Courts will firstly apply common law and if this is not fair then an equitable remedy will be provided. This maxim

[110] *Ballantyne Butchery (Private) Limited v Chisvinga & Ors* SC-6-15.
[111] Equity Had to Supplement the Common Law https://www.lawteacher.net/free-law-essays/equity-law/equity-had-to-supplement-the-common-law-equity-law-essay.php

sets out that equity is not in place to overrule judgments in common law but rather to make sure that parties don't suffer an injustice.

5.1.3. He who seeks equity must do equity

A remedy will only be provided where you have acted equitably in the transaction. This maxim is discretionary in nature and is concerned with the future conduct of the plaintiff.[112]

5.1.4. He who comes to equity must come with clean hands

This maxim is linked to the previous maxim and relates to the past conduct of parties. They must not have had any involvement in fraud or misrepresentation, or they will not succeed in equity. A beneficiary failed in their action against the trustees to pay her back the assets of the trust she had already received because of a misrepresentation of her age.[113]

5.1.5. Delay defeats equity

Laches is an unreasonable delay in enforcing a right. Laches is an equitable defence, or doctrine. A defendant who invokes the doctrine is asserting that the claimant has delayed in asserting its rights, and, because of this delay, is no longer entitled to bring an equitable claim.[114] Failure to assert one's rights in a timely manner can result in claims

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[112] *Cheese v Thomas* [1994] 1 All ER 35.
[113] *Overton v Banister* 1844.
[114] Laches https://uk.practicallaw.thomsonreuters.com/3-383-9179?transitionType=Default&contextData=(sc.Default)&firstPage=true#:~:text=Laches%20is%20an%20equitable%20defense,to%20bring%20an%20equitable%20claim.

being barred by laches: it is a maxim of equity that, "Equity aids the vigilant, not the negligent." However, delay alone is not enough to prevent a claimant obtaining relief. The consequence of the delay must be that it would be unfair for the court to give relief, usually because the defendant has changed its position because of the delay.

The party asserting laches has the burden of proving that it is applicable. Laches is distinguishable from the statute of limitation, which prevents a party from asserting claims after the designated limitations period has expired.[115]

If there is an unreasonable delay in bringing proceedings the case may be disallowed in equity. Acquiescence is where one party breaches another's rights and that party doesn't take an action against them; they may not be allowed to pursue this claim at a later stage. These may be used as defences in relation to equity cases. For a defence of laches courts must decide whether the plaintiff has delayed unreasonably in bringing forth their claim and the defence of acquiescence can be used if the actions of the defendant suggest that they are not going ahead with the claim, so it is reasonable for the other party to assume that there is no claim.[116]

5.1.6. Equality is Equity

[115] Laches https://uk.practicallaw.thomsonreuters.com/3-383-9179?transitionType=Default&contextData=(sc.Default)&firstPage=true#:~:text=Laches%20is%20an%20equitable%20defense,to%20bring%20an%20equitable%20claim.

[116] *Nelson v Rye* 1996.

Equity always tries to put the litigating parties on an equal level so for as their rights and liabilities are concerned. Equity acts in such manner that no party gets an under advantage over the other party. It prefers to treat all involved as equals.

5.1.7. Equity looks to the intent rather than the form

This principle was established in *Parkin v Thorold*.[117] This maxim is where the equitable remedy for rectification was established. This allows for a contract to be corrected when the terms are not correctly recorded. This maxim allows the judge to interpret the intentions of the parties if the terms are not recorded properly.

5.1.8. Equity looks on that as done which ought to have been done

The judges look at this contract from the enforceable side and the situation they would be in had the contract been completed.

5.1.9. Equity imputes an intention to fulfil an Obligation

If a person completes an act that could be regarded as fulfilling an original obligation, it will be taken as such.

5.1.10. Equity acts in personam

[117] *Parkin v Thorold* 1852.

This maxim states that equity relates to a person rather than their property. It applies to property outside a jurisdiction provided that a defendant is within the jurisdiction.[118]

5.1.11. Where the equities are equal, the first in time prevails

Where two parties have the right to possess an object the first one with the interest will prevail.

5.1.12. Where the equities are equal, the law prevails

Where two parties want the same thing, and the court can't honestly decide who deserves it most they will leave it where it is.

5.1.13. Equity does not punish

Equity focuses on providing remedies and enforcing fairness rather than imposing punishment on wrongdoers. The primary goal of equity is to restore the affected party to their rightful position or compensate them for any loss or damage suffered because of a breach of equitable duty. These maxims of equity serve as guiding principles for judges in applying equitable remedies and ensuring fairness in the legal system. They help balance the rigid rules of common law with the flexibility and discretion of equity to achieve just outcomes in individual cases.[119] If used properly they can act as checks and balances to the exercise of equitable jurisdiction.

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[118] *Penn v Lord Baltimore* 1750 English court ordered specific performance on land in the US.

[119] Maxims of Equity https://uollb.com/blog/law/maxims-of-equity

6. CONCLUSION

In summation, the Labour Court should continue to strive towards the goal of achieving world class justice. Judges are expected to develop and apply substantive and procedural law, as they always have, flexibly and creatively to uphold and enforce legal rights and duties, to develop the law properly and incrementally, and to draw jurisprudence from its wide and diverse sources. The principles of equity are still undergoing refinement and development to meet the evolving social and economic needs of the justice delivery system.

THE APPLICABILITY OF THE SUBSIDIARITY PRINCIPLE IN CHALLENGES TO CONSTITUTIONAL VALIDITY OF STATUTORY INSTRUMENTS[120]

Honourable Mr. Justice B. Hlatshwayo JCC
Judge of the Constitutional Court of Zimbabwe

Abstract

The application of the subsidiarity principle essentially performs a gate-keeping function. It instructs and provides courts with a framework to answer certain threshold questions before entertaining suits seeking to vindicate constitutional rights or to obtain constitutional damages or other special relief on the Constitution itself. This paper discusses the applicability of the subsidiarity principle, the doctrines of avoidance and ripeness as well as the doctrines of intra and ultra vires.

1. INTRODUCTION

The principle of subsidiarity is one of the cornerstones of constitutional litigation in all courts that have the power and authority to decide constitutional questions. This principle is applicable in four instances of litigation. First, it is crucial in the exercise of original constitutional jurisdiction at High Court and Constitutional Court. Second, it is important in making or refusing referrals to the Constitutional Court in terms of section 175(4) of the Constitution of Zimbabwe, 2013. Thirdly, it is the guiding factor in confirmation proceedings in the Constitutional

[120] A paper presented at the End of Second Term Judges Symposium 2023 held at Village Lodge Gweru in August 2023.

Court under section 175(1) of the Constitution of Zimbabwe, 2013. Lastly, it is used for appeals to the Constitutional Court.

This paper will discuss the principle of subsidiarity and how it has been used by the courts. In addition, the paper will demarcate the position of the principle of subsidiarity in relation to other principles which are avoidance and ripeness.

2. DEFINITIONS

For one to simplify a subject or an aspect, he or she should invariably start with the definition of the subject or aspect that is subject to the discussion.

2.1. The Doctrine of Avoidance

The principle of avoidance dictates that remedies should be found in common law or legislation before resorting to constitutional remedies.[121] The doctrine of avoidance was fortified in *Sports and Recreation Commission v Sagittarius Wrestling Club and Anor*[122] in which EBRAHIM JA said the following: -

> *"There is also merit in Mr Nherere's submission that this case should never have been considered as a constitutional one at all. Courts will not normally consider a constitutional question unless the existence of a remedy depends upon it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of Rights."*

[121] Iain Currie and Johan de Waal, 'The Bill of Rights Handbook' 6th ed, 2013.
[122] 2001 (2) ZLR 501 (S).

Where, therefore, a party seeks to refer a constitutional matter to the Constitutional Court when there are proceedings pending in the lower court in terms of which he can obtain the same remedy which he intends to seek before the Constitutional Court, the judicial officer faced with the request to refer must decline to grant such request on the basis of the doctrine of avoidance. In *Chawira & Ors v Minister of Justice, Legal and Parliamentary Affairs & Ors*,[123] the court stated the following: -

> *"Zimbabwe operates a self-correcting hierarchical judicial system where in the ordinary run of things cases start from the lower courts progressing to the highest court of the land. Generally speaking, higher courts are loathe to intervene in unterminated proceedings within the jurisdiction of the lower courts, tribunals or administrative authorities."*

It must be stated that the principle of avoidance is related to the principle of ripeness.[124] In the case of *Zimbabwe Women Lawyers Association v Minister of Justice Legal and Parliamentary Affairs and Others,*[125] this Court held:

> *"The principle of ripeness is therefore part of the doctrine of avoidance. The basic rationale of the ripeness principle is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies and to protect the agencies from judicial interference until an administrative decision has been formalised and its effect felt in a concrete way by the litigating parties – Abbot Laborates v Gardner 387 US 136 1967."*

2.2. The Principle of Subsidiarity

[123] 2017 (1) ZLR 117 (CC).
[124] See note 130 above.
[125] CCZ-13-21.

The principle of subsidiarity simply provides that norms of greater specificity should be relied on before resorting to norms of greater abstraction.[126] The principle of subsidiarity states that a litigant who avers that a right protected by the Constitution has been infringed must rely on legislation enacted to protect that right and may not rely on the underlying constitutional provision directly when bringing action to protect the right. He can only do that if he wishes to attack the constitutional validity or efficacy of the legislation itself. The principle of subsidiarity underlines the fact that there are many disputes of right or interest which do not give rise to constitutional matters. Where the question for determination is whether conduct the legality of which is impugned is consistent with the provisions of a statute, the principle of subsidiarity forbids reliance on the Constitution, the provisions of which would have been given full effect by the statute.

3. THE SCOPE OF THE PRINCIPLE OF SUBSIDIARITY

In *Magurure v Cargo Carriers International Hauliers (Pvt) Ltd*[127] the Court explained the principle as follows: -

> *"The principle of subsidiarity is based on the concept of one-system-of-law. Whilst the Constitution is the supreme law of the land it is not separate from the rest of the laws. The principles of constitutional consistency and validity underscore the fact that the Constitution sets the standard with which every other law authorised by it must conform. The Constitution lays out basic rights and it is up to legislation to give effect to them. This is the nature of the symbiotic relationship between the Constitution and legislation. The legal system is one, wholesome and indivisible."*

[126] See note 130 above.
[127] CCZ-15-16.

Where a litigant who avers that his right protected by the Constitution has been infringed and seeks to refer that matter to the Constitutional Court, the judicial officer faced with such request must decline to grant the same on the basis that the litigant must first rely on legislation enacted to protect that right and not rely on the underlying constitutional provision directly when bringing an action to protect the right. The request may only be granted where it is shown that the litigant intends to attack the constitutional validity or efficacy of the legislation itself.

Recently, in the case of *Mwenye and Another v Minister of Justice, Legal and Parliamentary Affairs and Others*,[128] this Court stated that: -

> *"Mootness, like ripeness and subsidiarity, is part of the doctrine of avoidance.*
>
> *In an appropriate case this court can decline jurisdiction to entertain an application such as the present. The authority for this proposition is s 23 of the Constitutional Court Act [Chapter 7:22] which allows this court to decline an invitation to exercise its powers where means of redress have been available but have not been used. That section provides:*
>
> *'The court may decline to exercise its powers in relation to any claim for redress founded upon the contravention of the Constitution if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under other provisions of the Constitution or under any other law.'"*

4. SUBSIDIARITY AND STATUTES

There is an idiom which says, 'pick the law-hanging fruit'. The same idiom can be used to effectively explain the principle of subsidiarity. We have several levels of statutes, and all these levels have a defined scope and limit. At the top is the Constitution of Zimbabwe, 2013.[129]

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[128] CCZ-5-23.

[129] See section 2 of the Constitution of Zimbabwe, 2013 which provides that the Constitution is the supreme law of Zimbabwe.

Below the Constitution are statutes directly enacted by the Parliament. The third level is that of statutes enacted based on the authority granted by the Parliament through its primary legislative powers. The delegation of making statutes is governed by section 134 of the Constitution of Zimbabwe, 2013. It reads as follows: -

> ***134 Subsidiary legislation***
>
> *Parliament may, in an Act of Parliament, delegate power to make statutory instruments within the scope of and for the purposes laid out in that Act, but—*
>
> *(a) Parliament's primary law-making power must not be delegated;*
>
> *(b) statutory instruments must not infringe or limit any of the rights and freedoms set out in the Declaration of Rights;*
>
> *(c) statutory instruments must be consistent with the Act of Parliament under which they are made;*
>
> *(d) the Act must specify the limits of the power, the nature and scope of the statutory instrument that may be made, and the principles and standards applicable to the statutory instrument;*
>
> *(e) statutory instruments do not have the force of law unless they have been published in the Gazette; and*
>
> *(f) statutory instruments must be laid before the National Assembly in accordance with its Standing Orders and submitted to the Parliamentary Legal Committee for scrutiny.*

The important point arising from section 134 is that subsidiary legislation should not be *ultra vires* its parent legislation. In that regard, a litigant should first attack the parent act before turning to the Constitution.

5. THEORETICAL UNDERPINNINGS OF THE PRINCIPLE OF SUBSIDIARITY

In principle, subsidiarity analysis tells a court whether to proceed with an action styled as a claim on the Constitution itself (or for constitution-based remedies); or whether, in the alternative, to limit the claimant to such rights and entitlements as are available within the compass of a pertinent statute giving effect to the constitutional right, if any, or the common law.

At stake in this inquiry is whether a court may heed its own judgment on how to give effect to the constitutional right or whether it must leave that task, and the prudential and fiscal choices involved, to the legislature. As a practical matter, courts can only answer the threshold, gate-keeping questions by examining and balancing the pertinent constitutional values and principles. Courts cannot apply subsidiarity theory without precisely addressing the questions, and precisely making the value judgments, that the theory meant them to avoid.

If Parliament enacts legislation to give effect to a constitutional right ('effect-giving statute'), a claimant seeking to protect or enforce that right must rely on the legislation and is precluded from bringing a claim based directly on the Constitution. A claimant eligible under an effect-giving statute for the relief sought will sue based on the statute as opposed to the constitution.

She will sue on the Constitution or for constitution-based remedies only if she cannot obtain what she wants on the statute. It is reasonable to assume, therefore, that whenever a claimant is ineligible for relief on an effect-giving statute, she will pursue her claim by alleging that the enforcement provisions of the statutory scheme are constitutionally inadequate. In other words, if the statute is constitutionally adequate as

applied, and the claimant is remitted to her statutory remedies, he or she is out of luck. If the statute is *not* constitutionally adequate, the claimant may proceed on the Constitution, and the court must hear his or her case.

Thus, in all cases seeking constitutional relief beyond that provided in an effect-giving statute, the courts must make a *pre-threshold determination* as to whether the plaintiff has a legitimate claim of constitutional inadequacy before it can make the supposedly threshold, subsidiarity-prescribed determination whether the case should be decided on the statute alone. Therefore, a litigant who avers that his or her constitutional right has been infringed must rely on legislation enacted to protect that right. He or she may therefore not rely on the underlying constitutional provision directly when bringing action to protect the right unless he or she wants to attack the constitutional validity or efficacy of the legislation itself. That is what is meant by the tenant rule of subsidiarity which provides that norms of greater specificity should be relied upon before resorting to norms of greater abstraction.[130]

6. DETAILED CASE LAW EXAMPLES

As has been explained above, once legislation to fulfil a constitutional right exists, the constitution's embodiment of that right is no longer the prime mechanism for enforcement. The legislation is primary. The right

[130] *Majome v Zimbabwe Broadcasting Corporation & Ors* 2016 (2) ZLR 27 (CC); *Moyo v Chacha & Ors* 2017 (2) ZLR 142 (CC).

in the Constitution plays only a subsidiary or supporting role.[131] Under this part decided cases will be used to demonstrate the practical principle of subsidiarity.

6.1. *Majome v ZBC & Ors*[132]

The applicant challenged the constitutional validity of sections 38B (2), 38C and 38D (1)-(4) of the Broadcasting Services Act [*Chapter 12:06*] on the ground that the provisions authorise the Zimbabwe Broadcasting Corporation (ZBC) to compulsorily deprive her of property in the form of money paid as a license fee not for a public purpose but for the purpose of funding ZANU-PF propaganda through programmes broadcast on television and radio. The applicant was bound by the principle of subsidiarity in the choice of the law on which to found the cause of action. The applicant was required on the principle of subsidiarity to rely on the provisions of the Seventh Schedule to the Act to protect the rights she alleged were infringed. Reliance on the provisions of the Act the validity of which was impugned was a misplaced remedy because those provisions had no direct relationship with the bias in the programmes by the ZBC which she is complaining about. MALABA DCJ as he then was held as follows: -

> *"The applicant was bound by the principle of subsidiarity in the choice of the law on which to found the cause of action. According to the principle of subsidiarity, litigants who aver that a right protected by the Constitution has been infringed must rely on legislation enacted to protect that right and may not rely on the underlying constitutional provision directly when bringing action to protect the right, unless they want to attack the*

[131] *Mazibuko & Ors v City of Johannesburg & Ors* [2009] ZACC 28.
[132] CCZ-14-16.

> *constitutional validity or efficacy of the legislation itself. See AJ van der Walt: "Constitutional Property Law" 3 ed Juta p 66, MEC for Education: KwaZulu Natal v Pi/lay 2008(l)SA 474(CC) paras 39-40, Chinva v Transet Ltd2008(2) SA 24(CC) paras. 59, 69."*

6.2. *Gonese v Minister of Finance and Economic Development*[133]

The applicant had approached the high court seeking an order for a declaration that section 3(2) of the Finance Act [*Chapter 23:04*] was an unlawful delegation of Parliament's primary law-making powers and, as a necessary corollary, the setting aside of the two statutory instruments made thereunder. These statutory instruments are the Finance (Amendment of Sections 22E (1) and 22H of the Finance Act) Regulations 2020 (Statutory Instrument 123A/20) and the Finance (Amendment of Sections 22E (1) and 22H of the Finance Act) Regulations, 2020 (Statutory Instrument 145/20).

For convenience sake, the Finance Act, [*Chapter 23:04*] ("the Act") provides in s 3 as follows: -

> *"3 Regulations*
>
> *1. The Minister responsible for finance may make such regulations as he or she may consider necessary or expedient for the administration of this act and the better carrying out of its purposes.*
>
> *2. Regulations made in terms of subsection (1) may amend or replace any rate of tax, duty, levy or other charge that is charged or levied in terms of any Chapter of this Act, and the rate as so amended or replaced shall, subject to subsection (3), accordingly be charged, levied and collected with effect from the date specified in such regulations, which date shall not be earlier than the date the regulations are published in the Gazette.*

[133] CCZ-11-23.

> *3. If any provision contained in regulations referred to in subsection (2) is not confirmed by a Bill which*
>
> *(a) passes its second reading stage in Parliament on one of the twenty-eight days on which Parliament sits next after the coming into operation of the instrument, and*
>
> *(b) becomes law not later than six months after the date of such second reading; that provision shall become void as from the date specified in the instrument as that on which the rate of tax duty, levy or other charge shall be amended or replaced, and so much of the rate of tax, duty, levy or other charge as was amended or replaced, as the case maybe, by that provision shall be deemed not to have been so amended or replaced."*

To put the audience in the picture of the dispute, it is necessary to refer to the facts of the case as stated by the court in the judgment. Following an amendment to the Finance Act in 1990, carbon tax was levied, by Parliament, on diesel and petrol at the rate of five 0.05 cents and three 0.03 cents per litre respectively. This was irrespective of whether or not the monies used to import the fuel were free funds or not.

On 5 June 2020, pursuant to subsection 2 of section 3 of the Finance Act, the Minister of Finance and Economic Development, the respondent herein, gazetted the Finance (Amendment of Sections 22E (1) and 22H of the Finance Act Regulations 2020. The Regulations effected amendments to sections 22E (1) and 22H of the Act. In the regulations, the respondent created a new taxation structure for carbon tax. Essentially what the Minister did was to create different tax obligations between those importing fuel using free funds and those not using such funds. Consequent upon the gazetting of the regulations, those importing fuel using free funds were to continue paying carbon tax at the rate of 0.03 cents per litre of petroleum product or 5% of cost, whichever was greater. Those importing fuel other than through free

funds were now to pay the tax at a rate of 32,5 Zimbabwean cents per litre of diesel and 142,50 Zimbabwean cents per litre of petrol. In the same regulations, the respondent also created a new tax called the NOCZIM Debt Redemption and Strategic Reserve Levy. In terms of that levy, those importing fuel using free funds were to pay US 1.3 cents per litre of diesel and US 5,7 cents per litre of petrol. Those importing fuel other than through free funds were to pay 32,5 Zimbabwean cents per litre of diesel and 142,5 Zimbabwean cents per litre of petrol.

On 23 June 2020 the respondent gazetted the Finance (Amendment of Sections 22E (1) and 22H of the Finance Act) Regulations, 2020. Those regulations left intact the position in respect of carbon tax payable on fuel imported using free funds. However, fuel imported other than through free funds was now to be levied at the rate of 74,6 Zimbabwe cents per litre of diesel and 229,4 Zimbabwe cents per litre of petrol. In other words that statutory instrument merely varied the rate of tax on fuel imported other than through free funds from Zimbabwe 32,5 cents to 74,6 cents per litre of diesel and Zimbabwe 142,5 cents to 229,4 Zimbabwe cents per litre of petrol

The Regulations also increased the NOCZIM Debt Redemption and Strategic Levy both in respect of fuel purchased using free funds and fuel not so purchased.

After hearing the case, the High Court of Zimbabwe declared section 3(2) of the Finance Act [*Chapter 23:04*] to be unconstitutional. The order further declared the abovementioned two statutory instruments made thereunder to be invalid and, as a consequence, set them aside.

Pursuant to section 175(1) of the Constitution of Zimbabwe, 2013 which provides that an order concerning constitutional invalidity of any law or conduct of the President or Parliament has no force or effect unless confirmed by the Constitutional court, the matter was brought for confirmation proceedings in the Constitutional court. Upon a careful consideration and analysis of the proceedings before the High Court, the Constitutional court was of the view that the order of invalidity had not been properly made. First, it was argued that the order was made without the citation of the Parliament of Zimbabwe which had enacted section 3 of the Finance Act. This is because it is that section which gives the Minister of Finance the power to make regulations that amend or even repeal a rate of tax previously set by Parliament. Also, the applicant's papers were replete with allegations that Parliament had unlawfully delegated its primary law-making function to the respondent which was virtually its cause of action. The Constitutional court then declined to confirm the order of constitutional invalidity of section 3(2) of the Finance Act. Further it went on to set aside the judgment of the High court in case No. HC 5714/20, judgment No. HH-265-22.

7. CONCEPTUAL FRAMEWORK OF THE PRINCIPLE OF SUBSIDIARITY

In social and political philosophy, the principle of subsidiarity is a principle which states that in the relationship among communities, but also in the relation of the individual to any form of human community,

the smaller social or political entity or institution ought to be given priority. In this context, it is an important, if not the most important, responsibility of the bigger institution to enable the smaller one to perform its tasks and to provide it with any necessary support. Subsidiarity is often thought to guarantee a plurality and hierarchy of state and sub-state institutions or entities against an overly powerful supra-national political union. The *raison d'être* of subsidiarity principle is to strike an authoritative balance between the conflicting values of judicial deference and constitutional supremacy, so that courts are not at large weighing the conflict on an *ad hoc*, case-by-case basis.[134]

The central weakness of the theory is that, when called upon to resolve difficult cases, subsidiarity does little more than instruct courts to reopen the question and conduct the *ad hoc* balancing exercise it counselled them to avoid.

Moreover, at least as presently formulated, subsidiarity imports conventional separation-of-powers discourse without rigorous critical examination; it relies upon the deceptively simple but underexamined and ambiguous notion of a statute 'giving effect' to a constitutional right; and, as a result, it tends to skew analysis in the direction of stability rather than transformation.

The subsidiarity approach is not a critical theory. Just like most conventional discourse of separation-of-powers, subsidiarity rests on the conceptions of the various branches and organs of government and their inter-relationships. Subsidiarity performs a 'gate-keeping function'.

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[134] Karl Klare *Legal Subsidiarity & Constitutional Rights: A Reply to Aj Van Der Walt* (2008) 1 Constitutional Court Review p 135.

It instructs courts to answer certain threshold questions before entertaining suits seeking to vindicate a constitutional right or to obtain constitutional damages or other special relief on the Constitution itself ('constitution-based remedies').

8. INTERNATIONAL RECOGNITION OF THE PRINCIPLE OF SUBSIDIARITY

The principle of subsidiarity is not only recognised in municipal laws, it is also recognised internationally. It is however important to note that at the international level it is sometimes recognised by another name known as 'margin of appreciation'. Notable is the treaty establishing the European Community.

A typical example of the use and recognition of the principle of subsidiarity is found in the European Community. Article 5 (once article 3b) of the Treaty reads as follows:

> *"The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty."*[135]

[135] Article 5 of the European Union, Treaty Establishing the European Community (Consolidated Version), Rome Treaty, 25 March 1957, available at: https://www.refworld.org/docid/3ae6b39c0.html [accessed 22 January 2024].

The other evidence of this principle is found in the European Union Preamble to the Convention for the Protection of Human Rights and Fundamental Freedoms.

This Convention was amended in 2013 to introduce the principle of margin of appreciation (subsidiarity). This was done through Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, July 24, 2013, C.E.T.S. No 213. This Protocol inserted a new recital to the preamble which reads as follows:

> *"Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention."*

As is seen above, the term 'margin of appreciation' is the integral tenant of the principle of subsidiarity.

9. DOCTRINE OF *INTRA* AND *ULTRA VIRES*

The principle of subsidiarity is closely linked to the doctrines of *intra* and *ultra vires*. *Intra vires*, translated to mean "within the powers" is a Latin term which relates generally to an action taken within an organisation's or person's scope of authority as conferred by statute. In legal terms, something that is *intra vires* is officially allowed. In other words, *intra vires* is a legal term that indicates that something is within the legal power of a specific entity or jurisdiction. It contrasts with the term *ultra vires*, which means that something is outside the legal power of an

entity or jurisdiction. *Ultra vires* [Latin, "beyond the powers"] is used in constitutional law by the courts who must decide the respective competences of Parliament and provincial legislatures. If one or the other, in enacting a law, goes beyond the jurisdiction allotted to it by the constitution, the court will declare that measure *ultra vires*. If not, the court will declare it *intra vires*. In other words, the doctrine envisages that an authority can exercise only so much power as is conferred on it by law. An action of the authority is *intra vires* when it falls within the limits of the power conferred on it but *ultra vires* if it goes outside this limit.

Subsidiary legislation can be substantially *intra* or *ultra vires* the enabling act or procedurally *intra* or *ultra vires*. Section 134 of the Constitution of Zimbabwe, 2013 lays down that Parliament can, in an Act of Parliament, delegate power to make statutory instruments within the scope of and for the purposes laid out in that Act. It then goes on to lay down a series of requirements for statutory instruments. These are that a statutory instrument must be consistent with the Act of Parliament under which it is made (substantive *intra vires*) and must not infringe or limit any of the rights and freedoms set out in the Declaration of Rights (constitutionally compliant). The delegate can only create legislation on matters upon which it has been empowered to legislate (substantive compliance). If it creates legislation on matters upon which it has not been given power to legislate it is acting *ultra vires* (beyond or in excess of its powers).[136]

[136] *Van Heerden NO* v *Queen's Hotel* 1972 (2) RLR 472 (A); 1973 (2) SA 14 (RA); *S* v *Delta Consolidated (Pvt) Ltd & Ors* 1991 (2) ZLR 234 (S) and *S* v *Dube* 1977 (2) RLR 108 (G).

If only part of the subsidiary legislation is *ultra vires*, the court may strike down that part, provided that what is left can stand on its own. When a piece of delegated legislation is declared to be *ultra vires*, it is void and becomes unenforceable. It cannot affect the rights and duties of any person. However, until a rule is declared invalid by a court, it is presumed to be valid. If the valid and the invalid parts of a rule can be severed, only then the invalid portion of the rule is quashed, and the valid portion can continue to remain operative. However, if the valid and the invalid parts are inextricably mixed up, then the entire rule has to go.

It is trite that statutory instruments are subordinate to their parent legislation. In *Hamilton-Brown v Chief Registrar of Deeds*[137] NICHOLAS J placed the status of the two beyond dispute when he said: -

> *"It is not, however, legitimate to treat the Act and the regulations made thereunder as a single piece of legislation and to use the latter as an aid to the interpretation of the former. The section in the Act must be interpreted before regulation is looked at and if the regulation purports to vary the section as so interpreted, it is ultra vires and void. It cannot be used to cut down or enlarge the meaning of the section (see Clinch v Lieb 1939 TPD 118 at p. 125).*

It is trite that statutory instruments are subordinate to their parent legislation. In *Hamilton-Brown v Chief Registrar of Deeds*[138] the court held that:

> *"It is not, however, legitimate to treat the Act and the regulations made thereunder as a single piece of legislation and to use the latter as an aid to the interpretation of the former. The section in the Act must be interpreted before regulation is looked at and if the regulation purports to vary the section as so interpreted, it is ultra vires and void. It cannot be*

[137] 1968 (4) SA 735 (T).
[138] 1968 (4) SA 735 (T).

> *used to cut down or enlarge the meaning of the section (see Clinch v Lieb 1939 TPD 118 at p. 125).*

The decision was confirmed on appeal in *Chief Registrar of Deeds v Hamilton-Brown*[139] and the passage was applied with approval in *Rossouw & Another v Firstrand Bank Ltd*[140] and *Moodley & Ors v Minister of Education and Culture*, *House of Delegates & Anor.*[141] The same point was magnified in a pithy little statement by BROOME J in *Somers v Director of Indian Education & Anor*[142]

> *"But the answer to this is that just as the tail cannot wag the dog, the regulation cannot vary, or determine the interpretation of, the section. See Hamilton-Brown v Chief Registrar of Deeds 1968 (4) SA 735 (T) at 737D and on appeal at 1969 (2) SA 543 (A) at 547H."*

10. CONCLUSION

This paper gave a detailed discussion of the principle of subsidiarity, defining its relationship with the principles of avoidance and ripeness, and the doctrines of *intra* and *ultra vires*. Also crucial was the reference to the principle of margin of appreciation which is the international version of the principle of subsidiarity. After reading this paper one should be able to answer the following questions:

1. *Is it possible that a statutory instrument can be perfectly intra vires but still be unconstitutional?*
2. *If the High Court sitting as a Constitutional Court in terms of rule 107, finds that the principle of subsidiarity applies, what can it do? Can it proceed to deal with the matter on a non-constitutional basis? Or it should merely decline its constitutional jurisdiction?*

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139 1969 (2) SA 543 (A).
140 2010 (6) SA 439 (SCA).
141 1989 (3) SA 221 (A).
142 1979 (4) SA 713 (D).

3. *At what stage can a litigant petition the Constitutional Court directly in the face of ineffective statutory remedies?*

THE LIMITATION OF THE INTERACTION BETWEEN THE COURT AND THE EMPLOYEE REPRESENTATIVES, TRADE UNIONS AND UNIONISTS[143]

Honourable Mr. Justice B. Patel
Judge of the Constitutional Court of Zimbabwe

Abstract

The registration of Labour Court judgments at the High Court or the Magistrates Court for enforcement enjoins the High Court and the Magistrates Court to ensure that there has been compliance with the relevant procedural aspects. It must not be a routine rubber-stamping exercise. Similarly, the enforcement of rulings rendered by labour officers is predicated upon confirmation proceedings by the Labour Court before they can be enforced by the High Court or the Magistrates Court. The determinations made by the designated agents remain outside the jurisdiction of the Labour court, and by extension, the mechanisms of the High court and the Magistrates Court. Whilst it is accepted that interactions between stakeholders in the law and the judicial sector ultimately provide invaluable feedback in facilitating the administration of justice, the overarching principle of judicial independence must be respected at all times.

1. INTRODUCTION

The Labour Court is a special court designated for dealing specifically with matters relating to employment disputes.[144] Due to the sensitivity

[143] A paper presented at the End of Second Term Judges Symposium 2023 held at Village Lodge Gweru in August 2023.
[144] Section 172(2) of the Constitution of Zimbabwe, 2013.

of the subject matter and the ramifications of its orders, issues relating to the enforcement of its decisions have garnered significant national interest. Thus, judges as the arbiters of justice, must be apprised of the appropriate procedures regarding the enforcement of labour decisions. This paper aims to break down the appropriate procedures relating to the enforcement of the Labour Court judgments.

In addition, this paper will also focus on the propriety question regarding the interaction between the Labour Court, litigants, and their representatives. As an important court in the panoply of the judiciary's courts' structure, it is imperative that courts ought to be viewed as non-partisan and impartial adjudicators. This is not only consistent with the constitutional mandate of the judiciary, but also ensures that the interests of various stakeholders in labour matters are safeguarded.

2. ESTABLISHMENT OF THE LABOUR COURT

To begin with, to fully understand the subject matter at hand, it is necessary to trace the origins and history of the Labour Court. Prior to the establishment of the Labour Court by the promulgation of the Labour Relations Amendment Act,[145] there existed a Labour Court system with various levels for adjudication of labour matters. This system was established in terms of a hierarchy which had six levels, which are set out as follows:

i. Supreme Court of Zimbabwe;
ii. Labour Relations Tribunal;

[145] Labour Relations Amendment Act 2002 (No. 17 of 2002).

iii. Labour Relations Board;

iv. Regional Hearing Officer;

v. Hearing Officer; and the

vi. Labour Relations Officer.

However, the amendments in 2002 brought seismic changes to the labour adjudication system, which included the citation of the governing statute, *i.e.* the Labour Act [*Chapter 28:01*] (hereinafter called the Act). Critically, it also catered for the establishment of the Labour Court with exclusive jurisdiction in determining labour matters at first instance. This is highlighted under section 89(1) of the Act which provides the following:

> ***89 Functions, powers and jurisdiction of Labour Court***
>
> *(1) The Labour Court shall exercise the following functions—*
>
> *(a) hearing and determining applications and appeals in terms of this Act or any other enactment; and*
>
> *(b) hearing and determining matters referred to it by the Minister in terms of this Act; and*
>
> *(c) referring a dispute to a labour officer, designated agent or a person appointed by the Labour Court to conciliate the dispute if the Labour Court considers it expedient to do so;*
>
> *(d) appointing an arbitrator from the panel of arbitrators referred to in subsection (6) of section ninety-eight to hear and determine an application;*
>
> *(d1) exercise the same powers of review as would be exercisable by the High Court in respect of labour matters;*
>
> *(e) doing such other things as may be assigned to it in terms of this Act or any other enactment.*

The sole jurisdiction of the Labour Court as a court of first instance in labour matters is settled under section 89(6)[146] which stipulates that:-

> *"No court, other than the Labour Court, shall have jurisdiction in the first instance to hear and determine any application, appeal or matter referred to in subsection (1)."*

The sole prerogative of the Labour Court was further cemented by its recognition in the Constitution as a court of record.[147] Section 172(2) of the Constitution of Zimbabwe, 2013 underscores that the Labour Court has such jurisdiction over matters of labour and employment as may be conferred upon it by an Act of Parliament.

In commenting on the jurisdiction of the Labour Court, Professor Madhuku in *Labour Law in Zimbabwe* (2015) posited the following: -

> *The Labour Court has jurisdiction where the cause of action and the remedy for that cause of action are provided for in the Labour Act. It also has no jurisdiction to issue an interdict. The Labour Court has no jurisdiction to hear an appeal from, or to review, voluntarily arbitration proceedings because there is no provision in the Act or in any other enactment giving it jurisdiction to do so. For the same reasons, the Labour Court cannot order a mandamus. The expression 'appropriate relief' does not mean any relief. It means a relief specified in appropriate provisions of the Act. The Labour Court can only hear and determine applications for relief specified under the appropriate provisions of the Act.*[148]

3. ENFORCEMENT OF LABOUR COURT JUDGEMENTS

The rationale emanating from the above-cited authority suggests that all matters incidental to the functions of the Labour Court are provided

[146] Section 89(6) of the Labour Act [*Chapter 28:01*].
[147] Section 172 (1) of the Constitution of Zimbabwe, 2013.
[148] L Madhuku, Labour Law in Zimbabwe, Weaver Press Zimbabwe, 2015, p.396.

for in the Act. This also relates to the enforcement mechanisms for giving effect to the judgements of the Labour Court. Therefore, it is imperative to locate the specific provisions in the Act that cater for the enforcement of Labour Court decisions.

Section 92B of the Act stipulates the following on the subject of enforcement:

> ***92B Effective date and enforcement of decisions of Labour Court***
>
> *(1) The Labour Court may fix the date from which any decision, order or determination made by it shall operate, which date may be an earlier or later date than the date of the decision, order or determination.*
>
> *(2) The President of the Labour Court who made the decision, order or determination shall submit sufficient certified copies of it to the registrar of the Labour Court to enable the registrar to furnish a copy to each of the parties affected by it.*
>
> *(3) Any party to whom a decision, order or determination relates may submit for registration the copy of it furnished to him in terms of subsection (2) to the court of any magistrate which would have had jurisdiction to make the order had the matter been determined by it, or, if the decision, order or determination exceeds the jurisdiction of any Magistrates' Court, the High Court.*
>
> *(4) Where a decision, order or determination has been registered in terms of subsection (3) it shall have the effect, for purposes of enforcement, of a civil judgment of the appropriate court.*
>
> *(5) If any order which has been registered in terms of subsection (4) has been rescinded or altered by the Labour Court in terms of section ninety-two C, the clerk or registrar of the court concerned shall make the appropriate adjustment in his register. (my emphasis).*

From the above, it is settled that the enforcement of Labour Court judgments relies on registration in the relevant Magistrates Court or the High Court when the order exceeds the jurisdiction of the former. Once registered with the appropriate court, the Labour Court decision shall have the effect of a civil judgment of that court for purposes of

enforcement. The wording of subsection (4) of section 92B is couched in peremptory terms so that, once registered, the order, judgment or decision enjoys the same status as a civil judgment of the relevant court for purposes of enforcement.

Section 20 of the High Court Act sheds light on the manner of enforcement of civil judgments within the province of the High Court. It is worded as follows: -

> ***"20 Execution of process***
>
> *(1) Subject to section nineteen and to rules of court, the Sheriff shall, by himself or his deputy or an assistant deputy, execute all sentences, decrees, judgments, writs, summonses, rules, orders, warrants, commands and other process of the High Court, and shall make a return thereof to that court, together with the manner of the execution thereof."*[149]

The detailed execution process also applies to Labour Court judgements upon registration with the High Court. Relatedly, section 10 of the Magistrates Court Act provides for the establishment of messengers of court whose duty is to enforce the orders of the Magistrate Court.[150] From a literal reading of the Labour Act it is evident that the Labour Court is not endowed with the requisite authority to execute its own judgements and orders. As previously alluded to, this means that the Labour Court is restricted by its very nature as a creature of statute from enforcing its own decisions.

It is necessary to mention that there were once proposals to amend this existing state of affairs. The Judicial Laws Amendment Bill 2022

[149] Section 20 of the High Court Act [*Chapter 7:06*].
[150] Section 10 of the Magistrates Court Act [*Chapter 07:10*].

(hereinafter "the Bill") sought to amend the enforcement provisions of the Act. The proposed amendment read as follows: -

> ***11 Insertion of new section to Cap.28:01***
>
> *(1) With effect from such date as the Minister shall fix by notice in the Gazette the principal Act is amended by the insertion of the following section after section 92B —*
>
> ***92 BB Messengers of Labour court***
> *(1) In this section Messenger means a Messenger of the Labour Court appointed in terms of this section and includes a Deputy Messenger. (2) Subject to such conditions as he or she may determine, the Minister may appoint Messengers of the Labour Court.*
> *(3) A Messenger may, with the approval of the senior Judge of the Labour Court, appoint one or more Deputy Messengers for whom the Messenger of the Labour Court shall be responsible.*
> *(4) The senior Judge may appoint a person to act as an Acting Messenger when, by reason of the illness, absence or interest of the Messenger of the Court, or on the application of any person interested, he or she may consider it necessary or expedient so to do.*
> *(5) Where no Messenger or Deputy Messenger has been appointed for a Labour Court or for an area to which the Labour Court regularly goes on circuit, every Messenger and Deputy Messenger appointed for the court of a magistrate whose jurisdiction covers the area in question shall be qualified to act as Messenger or Deputy Messenger, as the case may be, of the Labour Court in those circumstances.*
> *(6) When process of the Labour Court is to be served and no Messenger or Deputy Messenger has been appointed at the place where the court is held, a police officer shall, subject to the rules, be as qualified to serve such process in such a case as if he or she had been duly appointed Deputy Messenger.*
> *(7) A Messenger who—*
> *(a) is negligent or dilatory in the service or execution of process; or*
> *(b) wilfully demands payment of more than his or her proper fees or expenses or makes a false return; or*
> *(c) becomes incompetent to perform his or her work; or*
> *(d) conducts himself or herself in any manner or is addicted to any habits inconsistent with the discharge of his or her duties as a Messenger; or*
> *(e) for any other reason is, in the opinion of the senior Judge of the Labour Court, unsuitable or to perform his or her duties; may be suspended by the senior Judge, who may appoint a person to act in his or her place during the period of suspension.*
> *(8) The senior Judge shall forthwith report to the Minister any action he or she has taken under subsection (6) and the Minister may, after consideration of the report, set aside the suspension or confirm it and dismiss the Messenger from his or her office.*

> *(9) A Messenger shall give security to the satisfaction of the senior judge of the Labour Court for the due fulfilment of his or her office and for the due and punctual payment by him or her to the parties entitled thereto of all moneys which come into his or her hands by virtue of his or her office. (10) The tariff of sheriffs and messengers' fees applicable in the Magistrates' Court and High Court shall apply to the tariffs of charges of the Messenger of the Labour Court depending on whether the High Court or Magistrate Court would have had jurisdiction in the matter. (11) A Messenger or Deputy Messenger appointed under this section shall have such powers, and shall conduct his or her duties in such manner, as may be prescribed by order of the Labour Court or in rules of court.*
>
> *(2) Subsections (3), (4) and (5) of section 92B ("Effective date and enforcement of decisions of Labour Court") shall be deemed to be repealed on the date on which subsection (1) comes into force.*[151] *(my emphasis)*

The import of the proposed provision would have been to enable the Labour Court to enforce its own judgements, orders, and decisions through the established office of its messenger of court. More importantly, the promulgation of the proposed amendment would have resulted in the repeal of subsections (3), (4) and (5) of section 92B of the Act. This would have ensured that litigants would no longer have to petition the High Court or Magistrates Court for the enforcement of the Labour Court's judgements.

However, the Bill has since been promulgated into law without the aforementioned clause. The Judicial Laws Amendment Act did not pass the proposed amendment to section 92B of the Act into law.[152] As such, the *status quo ante* regarding the registration of Labour Court judgments in the High Court or Magistrates Court, where applicable, is still operational.

[151] Clause 11 of the Judicial Laws Amendment Bill 2022.
[152] Judicial Laws Amendment Act, No. 5 of 2023.

4. PROCEDURE FOR REGISTRATION OF LABOUR COURT JUDGEMENTS

The provisions of section 92B regarding registration of Labour Court judgements have been interpreted in various judgments of the High Court and more recently in the Supreme Court. In the case of *CFI Holdings t/a Farm & City v Machaya*,[153] the court held that: -

> *The requirements to be satisfied in an application for the registration of an award were listed in Biltrans (Pvt) Ltd v Minister of Public Service, Labour and Social Welfare & Ors 2016 (2) ZLR 306. MALABA DCJ (as he then was), citing with approval the remarks by CHIWESHE JP (as he then was) in Olympio & Ors v Shomet Industrial Development HH-191-12, remarked at 311 B–G as follows:*
>
> *'In registering an arbitral award, the High Court and the Magistrates Court are not carrying out a mere clerical function. While the registering Court may not go into the merits of the award, since its duty is to provide an enforcement mechanism and not to usurp the powers of the Labour Court, it must be satisfied before registering an award that all the necessary formalities have been complied with. In Olympio & Ors v Shomet Industrial Development HH-191-12, CHIWESHE JP at 1 and 2 of the cyclostyled judgment, outlining the requirements for registering an arbitral award, stated: 'The purpose of registration is merely to facilitate the enforcement of such an order through the mechanism availed to the High Court or the magistrate court, namely the office of the Deputy Sheriff or the messenger of court, respectively… In an application such as the present one, this Court is not required to look at the merits of the award - all that is required of this Court is that it must satisfy itself that the award was granted by a competent arbitrator, that the award sounds in money, that the award is still extant and has not been set aside on review or appeal and that the litigants are the parties, the subject of the arbitral award. There must also be furnished, a certificate given under the hand of arbitrator…*
>
> *The requirements that must be satisfied before the High Court or the Magistrates Court grants an application for registration of an award are:*
> *a) The award must have been granted by a competent arbitrator.*
> *b) The award must sound in money.*
> *c) The award is still extant and has not been set aside on review or appeal. d) The litigants are the parties to the award.*

[153] SC-37-23.

> *e) The award must be certified as an award of the arbitrator.' (emphasis added).*
>
> *As correctly noted by the court a quo, whilst both cases related to the registration of arbitral awards, they apply with equal force to the registration of Labour Court judgments. (my emphasis).*

In the cited authority of *Biltrans (Pvt) Ltd* v *Minister of Public Service, Labour and Social Welfare & Ors*,[154] MALABA DCJ (as he then was) further illuminated the role of the High Court and Magistrates Court in registration proceedings as follows: -

> *The High Court and the Magistrates Court would be exercising a judicial function in carrying out the inquiry before registering the award. The inquiry the Court has to undertake and the factors it has to consider are meant to define the content and scope of the right to equal protection of the law. They guarantee the right to equal protection of the law through judicial process.*

Although the above remarks were made in constitutional proceedings, the essential principle to be drawn from them is that the relevant courts are not engaged in a mere rubber-stamping exercise of the Labour Court's decisions. The judicial officer seized with the matter has to ensure that there has been compliance with the relevant procedural aspects.

5. ENFORCEMENT OF DECISIONS OF LABOUR OFFICERS AND DESIGNATED AGENTS

[154] 2016 (2) ZLR 306.

Generally, the enforcement of specific determinations of the Labour Court is unproblematic. However, the Act also provides for the establishment of other officials whose role is outside the scope of the court's functions. These officials may determine labour disputes in the first instance or merely assess the merits of the parties' dispute before confirmation by the Labour Court. This relates to the recognition of the function and importance of labour officers and designated agents.[155]

5.1. LABOUR OFFICERS

The Act recognises the role of labour officers in the determination of labour disputes. Section 93(1) of the Act provides that: -

> *"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."*

The above provision has been interpreted by the Constitutional Court. In the case of *Isoquant Investment (Pvt) Ltd t/a Zimoco v Darikwa*,[156] it was held that:

> *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. (my emphasis)*

[155] Section (s) 63 and 93 of the Labour Act [*Chapter 28:01*].
[156] CCZ-6-20.

In recognition of the inherent limitations relating to the execution of decisions on disputes settled through conciliation, the Legislature has taken cogent steps to ensure their enforcement. The Labour Amendment Act, gazetted recently on 14 July 2023, repealed, and replaced section 93 of the Act and promulgated the following amendment to enable the enforcement of settlements pursuant to conciliation:

> *(2) If the dispute or unfair labour practice is settled by conciliation, the labour officer shall record the settlement in writing, which shall be registrable with the relevant court for enforcement upon default. The certificate of settlement to enable enforcement shall be issued by the labour officer and it shall have the effect for purposes of enforcement, of a civil judgment of the appropriate court.*[157] *(my emphasis)*

The above amendment accords with the jurisprudence developed by our superior courts to the effect that conciliation proceedings are an essential prerequisite to the resolution of disputes that are placed before labour officers under section 93.[158] The effectiveness of conciliation proceedings has been bolstered by the enforcement mechanism that is now established through the above amendment to the Act.[159] The practical significance of this is that parties to litigation will be more inclined to consider the settlement of disputes in light of the compelling enforcement mechanism developed for certificates of settlement.

The medium for adjudication by a labour officer is also spelt out under section 93 but of present interest is the enforcement mechanism when the labour officer assesses the merits of a labour dispute and makes a

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[157] Section 2 of the Labour Amendment Act (*2023*).
[158] *Isoquant Investment (Pvt) Ltd t/a Zimoco* v *Darikwa* CCZ-6-20.
[159] Section 2 of the Labour Amendment Act (*2023*).

primary or tentative ruling.[160] In the case of *Isoquant Investment* (*supra*), it was held that: -

> *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 subsections (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. (my emphasis)*

In terms of section 93(5a) of the Act, the labour officer makes an application for confirmation of the draft ruling as follows:

> *(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 to 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. (my emphasis)*

[160] Sections 63 and 93 of the Labour Act [*Chapter 28:01*].

The enforcement of draft rulings made by labour officers has been the subject of much debate. The import of confirmation proceedings has been canvassed in various judgments of the Supreme Court on appeal from the Labour Court. In the case of *Air Zimbabwe (Pvt) Ltd* v *Mateko & Anor*,[161] GARWE JA (as he then was) elucidated the following:

> *As indicated earlier in this judgment, a draft ruling is exactly what the terms says. It is a draft and has no legal effect until confirmed by the Labour Court. The purpose of the confirmation proceedings is to test the substantive correctness or fairness of the draft ruling. Only through an application for confirmation of the draft ruling can it be given legal recognition and enforcement. As stated in the Isoquant Investments case, supra at pp 26-28 of the judgment: -*
>
> *Confirmation of a draft ruling is a legal process. The judicial officer… is not merely rubberstamping the 'draft ruling' of the labour officer. The judicial officer is required to thoroughly investigate the matter …… 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 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…..'*
>
> *It is apparent from these remarks that the purpose of making an application for confirmation is to place the matter in dispute and the evidence before the Labour Court for hearing and adjudication.*

Therefore, it is evident from the above that the enforcement of draft rulings rendered by labour officers is predicated upon confirmation proceedings by the Labour Court. It is only upon consideration by the Labour Court that a draft ruling of a labour officer is capable of being enforced by the High Court or Magistrates Court. Moreover, it is critical to remain aware that the provisions of section 93(1) of the Act regarding

[161] SC-180-20.

conciliation ought to be substantively complied with before a labour officer can adjudicate a labour dispute.

5.2. DESIGNATED AGENTS

The role of designated agents is provided for in terms of section 63(3a) of the Act as follows: -

> *(3a) A designated agent of an employment council who meets such qualifications as may be prescribed shall, in his or her certification of appointment, be authorised by the Registrar to redress or attempt to redress any dispute which is referred to the designated agent or has come to his or her attention, where such dispute occurs in the undertaking or industry and within the area for which the employment council is registered, and the provisions of Part XII shall apply, with the necessary changes, to the designated agent as they apply to a labour officer. (my emphasis)*

From the above provision, it is evident that a designated agent, unlike a labour officer, has the competence to issue a final determination in an appropriate labour dispute. This prerogative conferred by the Act is unlike the authority of a labour officer whose adjudication is subject to confirmation proceedings by the Labour Court. It appears that where a decision has been rendered, the designated agent is not compelled to submit his or her determination to the Labour Court for confirmation.

This hypothesis was confirmed in the *Isoquant Investments* case (*supra*) wherein the following remarks were made:

> *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 above-cited passage has significant ramifications for the enforcement of decisions by designated agents in instances where they determine the dispute in question. As correctly pointed out, the Labour Court cannot interfere with such a determination, except upon appeal or review by an aggrieved party.

However, this puts the enforcement mechanism of determinations made by designated agents into focus. It would appear that such determinations remain outside the jurisdiction of the Labour Court, and, by extension, the enforcement mechanisms of the High Court or Magistrates Court provided under section 92B of the Act. An amendment to the Act might be necessary to clarify and secure the enforcement rights of parties where and when designated agents elect to render final decisions in labour disputes.

6. INTERACTION BETWEEN THE LABOUR COURT, LITIGANTS AND THEIR REPRESENTATIVES

On a related note, the interaction between the Labour Court and litigants and their representatives is an area of interest due to the provisions of section 92 of the Act. The provision is worded as follows: -

> ***92 Representation of parties***
>
> *A party to a matter before the Labour Court may appear in person or be represented and appear by—*
>
> *(a) a legal practitioner registered in terms of the Legal Practitioners Act [Chapter 27:07]; or*
>
> *(b) an official or employee of a registered trade union or employers' organisation of which the party is a member; or*
>
> *(c) a company director, company secretary, company legal advisor or person in charge of human resources or personnel management on behalf of the employer.*

The Act recognises officials of trade unions and employers' organisations as competent parties that may represent an individual party before the Labour Court. This is in addition to the right to legal or self-representation in legal proceedings. The widening of the scope of representation also mandates the Court to be aware of the interests of various stakeholders in the outcome of matters that it is seized with. These varied interests of the identified stakeholders are often in direct conflict. Labour matters are generally an emotive subject that directly impact upon the livelihood of employees and the financial ledgers of their employers. Thus, the need for impartiality and appearing to be so when dispensing justice in labour matters should not be understated.

The need for impartiality stems from the entrenchment of the independence of the judiciary in the Constitution.[162] Judicial independence *simpliciter* connotes complete autonomy from external guidance, influence, or control except through mediums recognised by the law. It is this principle that gives effect to the judiciary's role as wardens of justice rather than partisan arbiters in disputes placed in its courts.

In recognition of this crucial premise, section 164 of the Constitution of Zimbabwe, 2013 stipulates that: -

> ***164 Independence of judiciary***
>
> *(1) The courts are independent and are subject only to this Constitution and the law, which they must apply impartially, expeditiously and without fear, favour or prejudice.*
>
> *(2) The independence, impartiality and effectiveness of the courts are central to the rule of law and democratic governance, and therefore—*
>
> *(a) neither the State nor any institution or agency of the government at any level, and no other person, may interfere with the functioning of the courts;*
>
> *(b) the State, through legislative and other measures, must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness and to ensure that they comply with the principles set out in section 165.*

The above independence is buttressed by the principles set out under section 165, with particular reference to the following provisions: -

> *(2) Members of the judiciary, individually and collectively, must respect and honour their judicial office as a public trust and must strive to enhance their independence in order to maintain public confidence in the judicial system.*

[162] Section 164 of the Constitution of Zimbabwe, 2013.

> *(3) When making a judicial decision, a member of the judiciary must make it freely and without interference or undue influence.*
>
> *(4) Members of the judiciary must not—*
>
> *(a) engage in any political activities;*
>
> *(b) hold office in or be members of any political organisation;*
>
> *(c) solicit funds for or contribute towards any political organisation; or*
>
> *(d) attend political meetings.*
>
> *(5) Members of the judiciary must not solicit or accept any gift, bequest, loan or favour that may influence their judicial conduct or give the appearance of judicial impropriety.*
>
> *(6) Members of the judiciary must give their judicial duties precedence over all other activities, and must not engage in any activities which interfere with or compromise their judicial duties." (my emphasis)*

The identified principles set out under section 165 which relate to judicial independence are couched in peremptory terms. This means that conduct contrary to the dictates spelt out above is in direct conflict with the supreme law of the land. It is also worth pointing out that the principles guard not only against clearly reprehensible conduct but also against conduct from which some form of compromise to the independence of a judge may be implied.

This is supported especially by the meaning of section 165(6) of the Constitution which is constructed in broad rather than specific terms when addressing the activities that judicial officer's ought to avoid. This provision also covers the interaction of the Labour Court with litigants as well as their recognised representatives under section 92 of the Act. In its interaction with litigants and their representatives, the Labour Court ought to remain aware of the binding constitutional obligation to maintain the independence and propriety of its actions.

Additionally, the need for judges to exude independence in their interactions with litigants has been reinforced in the Judicial Service (Code of Ethics) Regulations, 2012. Section 13 of the Code[163] details the need for judicial officers to safeguard their impartiality at all material times. It is worded as follows:

> *13. (1) A judicial officer shall perform his or her judicial duties without fear, favour, bias or prejudice.*
>
> *(2) A judicial officer shall, so far as is reasonable, so conduct himself or herself as to minimise the occasions on which it will be necessary for the judicial officer to be disqualified from hearing or deciding cases.*
>
> *(3) A judicial officer shall not make any public comment that may affect or may reasonably be construed to affect the outcome of any proceedings or impair their fairness, or make any comment that might compromise a fair trial or hearing. (my emphasis)*

In an address on judicial conduct and ethics, MAKARAU JCC, advanced the following regarding the aforesaid provision: -

> *The prime consideration in this principle is that litigants ought to approach the courts in confidence that their matter is being handled by a non-partisan judicial officer. The very nature of judicial office limits magistrates' freedom of association both publicly and privately. This is to minimise external stimulus in the decision-making process. A deviation from this standard, where the independence of decisions rendered by magistrates is called into question threatens the legitimacy of the proceedings.*[164]

The above sentiments are also relevant in the context of the present Symposium. A practical example would relate to the interactions of judges with employee organisations such as the Zimbabwe Congress of Trade Unions and the various employers' organisations in the

[163] Section 13 of the Judicial Service (Code of Ethics) Regulations, 2012.
[164] Inaugural Magistrates National Conference in Victoria Falls in April 2023.

country. Whilst it is accepted that interactions between stakeholders in the law and the judicial sector ultimately provide invaluable feedback in facilitating the administration of justice, the overarching principle of judicial independence must be respected at all times. Such interactions must be regulated in such a manner that the impartiality of a Judge cannot be called into question.

The following was crisply articulated, again by MAKARAU JCC, in the Legal Year Opening Address at the Masvingo High Court, wherein she reiterated the following on judicial impartiality:

> *As you all know, it is the time-honoured etiquette of the judiciary not to make public addresses at all. The judiciary speaks to the public only on the law which it discusses through the medium of its judgments. This antiquated tradition is maintained, and necessarily so, to protect and enhance the impartiality value that attaches to the judicial office. Judges must only speak publicly on the law and even then, only to the extent that this is necessary to resolve a dispute that has been placed before them.*[165]

The above remarks are eminently apposite to the present discussion. The independence of the judiciary ought to be jealously safeguarded. Judges ought not to wade into public discussions on legal matters. This precondition must be stringently observed lest parties may petition the courts with the preconceived notion that the reasoning or opinion of a judge on a particular subject is common cause.

It creates a precipitously precarious scenario where the impartiality of the bench may be called into question, especially when a judge rules contrarily to an opinion previously expressed in the public domain. It is for this reason that judges should ordinarily only determine legal issues

[165] Legal Year Opening Address at the Masvingo High Court 2023.

to the extent that is necessary to deal with the disputes placed before them for resolution.

7. CONCLUSION

It is settled that the enforcement of Labour Court judgments relies on registration in the relevant Magistrates Court or the High Court when the order exceeds the jurisdiction of the former. Once registered with the appropriate court, the Labour Court decision shall have the effect of a civil judgment of that court for purposes of enforcement. However, an amendment to the Act might be necessary to clarify and secure the enforcement rights of parties where and when designated agents elect to render final decisions in labour disputes. In addition, it is imperative that judges are able to discern whether or not their conduct violates the presumption of impartiality enjoined upon the judiciary by the law. This ensures that justice is not only done but is also seen to be done. Interactions with litigants and their representatives must not appear to be prejudicial to the interests of other stakeholders in the labour and employment sector. Parties must be confident that their matters will be handled by impartial arbiters. It is of the utmost significance in an adversarial jurisdiction such as our own, that judges must not appear to descend into the arena at the expense of any of the other litigating parties.

SELF ACTORS: STRIKING A BALANCE BETWEEN FORMALISM AND ACCESS TO JUSTICE[166]

The Honourable Mr. Justice T. P Uchena JA

Judge of the Supreme Court of Zimbabwe

Abstract

Litigants may, for a variety of reasons, appear unrepresented before the courts. The ability to receive justice in these instances may be hindered as a result of the litigants' limited knowledge of court processes and the litigants' inability to navigate the justice delivery system unassisted. Judicial officers have a duty to remain impartial during proceedings regardless of whether the litigant is represented or unrepresented. Therefore, it is necessary for the court to engender systems which ensure that all litigants have sufficient access to justice and enjoy equal understanding of the processes while maintaining its integrity. The judiciary must strike a balance between requisite formalism and access to justice by all.

1. INTRODUCTION

Access to justice for all is central to the rule of law as it ensures that all potential court users place reliance on the determination of their cases by the courts. If those who should access justice through the courts are denied such access or made to feel that they cannot be accommodated

[166] A paper presented at the End of Second Term Judges Symposium 2023 held at Village Lodge Gweru in August 2023.

by the system, or the system is difficult to access, they may be forced to resort to remedies outside the rule of law.

Lord Dyson, Master of the Rolls in his foreword to '***A Handbook for Litigants in Person'*** said: -

> *"Access to justice is a right not a privilege. That right has in the vast majority of cases traditionally been exercised by members of the public through the services of a lawyer. Over the last ten years there has however been an increase in the number of individuals who have, for various reasons, pursued and defended claims on their own behalf: they have been and are litigants in person (or self-represented litigants). It is anticipated that in the years to come the number of litigants in person will increase and perhaps will do so sharply."*[167]

These comments apply to our jurisdiction with equal force as the number of self-actors appearing in our courts is increasing. It is therefore important for us as judges of this jurisdiction to seriously consider how we are going to capacitate self-actors so that they can litigate in our courts with some level of competency. Their ability to litigate better than they are currently doing will take the burden of ensuring that they meaningfully access justice from judges.

2. THE CONSTITUTION AND ACCESS TO JUSTICE BY SELF-ACTORS

Section 69 subsections (1) to (4) of the Constitution of Zimbabwe, 2013 provides for access to justice, this is provided for in Chapter 4 of the Constitution of Zimbabwe, 2013. Access to justice is therefore a

[167] Bailey, E., Bidder, N., Bowers, P., Hampton, A., Hodge, D., & Hughes, P. (2013). A Handbook for Litigants in Person. Judiciary of England and Wales.

fundamental human right. Section 69 of the Constitution of Zimbabwe, 2013 provides as follows: -

> ***69 Right to a fair hearing***
> *(1) Every person accused of an offence has the right to a fair and public trial within a reasonable time before an independent and impartial court.*
> *(2) In the determination of civil rights and obligations, every person has a right to a fair, speedy and public hearing within a reasonable time before an independent and impartial court, tribunal or other forum established by law.*
> *(3) Every person has the right of access to the courts, or to some other tribunal or forum established by law for the resolution of any dispute.*
> *(4) Every person has a right, at their own expense, to choose and be represented by a legal practitioner before any court, tribunal or forum.*

Section 69 (1) provides for a right to a fair and public trial within a reasonable time before an independent and impartial court to "every person accused of an offence".[168] This means every person without any exception has a right to be tried by the courts once he or she has been accused of an offence. This means that courts have a constitutional duty to conduct fair trials for both self-actors and legally represented accused persons.

Section 69 (2) provides that every person requiring a determination of civil rights and obligations has a right to a fair hearing within a reasonable time before an independent and impartial court, tribunal or other forum establish by law.[169] This means courts have a constitutional duty to conduct civil trials in which self- actors represent themselves fairly and impartially.

[168] Section 69 (1) of the Constitution of Zimbabwe, 2013.
[169] Section 69 (2) of the Constitution of Zimbabwe, 2013.

Section 69 (3) entrenches the right of "every person" to access the courts and other tribunals or forums established by law for the resolution of any dispute.[170] This entails that self-actors, alongside legally represented court users, have an equal right to access the courts. Section 69 (4) gives every person a right at his/her own expense to be legally represented by a legal practitioner before any court, tribunal, or forum.[171] This means it is optional for a person who has a right to access the courts to choose to be legally represented. This usually depends on the person's means, though there may be others who though able to pay for legal representation choose to come to court as self-actors.

What is clear from the above cited section 69 of the Constitution of Zimbabwe, 2013 is that self-actors have an undisputable constitutional right to represent themselves before the courts. It is also clear that the right of a self-actor to access justice, is equal to that of a legally represented litigant. Therefore, it is the duty of the courts to fairly and impartially balance their rights and ensure that they both have equal access to justice. Trials involving self-actors must be conducted in terms of the law. The law must be applied to the self-actor's case as it is. Therein lies the judges' difficulties in dispensing quality access to justice to the self-actors.

It seems to me that the rights given to self-actors by section 69 of the Constitution of Zimbabwe, 2013 requires that some measures be taken

[170] Section 69 (3) of the Constitution of Zimbabwe, 2013.
[171] Section 69 (4) of the Constitution of Zimbabwe, 2013.

to make the right to access the courts by self -actors meaningful. There is need to introduce measures through which the law, procedures and rules of the courts will be explained to enable them to understand and access the courts without difficulties.

3. WHO ARE THE SELF-ACTORS AND WHY DO THEY NOT ENGAGE THE SERVICES OF LEGAL PRACTITIONERS.

Judges should realise that the majority of self-actors come to court without legal practitioners because they cannot afford the expenses of hiring the services of a legal practitioner. Their circumstances force them to come to court as self-actors. The following are examples of what may force a litigant to be a self-actor: -

a. Some incur debts which they fail to pay and are sued by their creditors. If they cannot pay the debt, how can they pay for the services of a legal practitioner.
b. Some are dismissed from employment, resulting in loss of income. How then can they afford the services of a legal practitioner.
c. Some lose their bread winner in an accident and want to be compensated by the party which or who caused the accident. The death of the bread winner means there is no money to hire the services of a legal practitioner.
d. Some are duped resulting in loss of life savings. They cannot afford the services of a legal practitioner after losing life savings.

e. Some may, while engaged in developments which exhaust their resources ,find themselves having to defend themselves against prohibition or demolition orders. They would have used all their resources but have to protect the development from demolition by a local authority.
f. An employee is injured at his work place. He or she spends a long time in hospital. He or she comes out with a disability and cannot continue in employment because his or her body can no-longer perform the duties he or she was employed to perform. The employer denies liability to pay compensation. He or she will have no option but to sue as a self-actor.

The above mentioned examples entail what each judge may have dealt with or will deal with in future so that the circumstances of those who come before our courts as self-actors will be understood. This should also restrain judicial officers from asking questions which are insensitive and offensive to a self-actor who is doing his or her best to come out of difficult circumstances. “Why don’t you engage the services of a legal practitioner?”.

In their preface to the handbook for which Lord Dyson gave the foreword referred to above, the six judge Civil Sub-committee of the Committee of the Council of the UK’s Circuit Judges who wrote the handbook said;

> *“Nevertheless, we recognise that there are increasing numbers of litigants in the civil courts who represent themselves. Legal representation can be very expensive, and the availability of civil legal*

> *aid has been severely limited in recent years. This represents a real problem for society and litigant alike".*[172] *(emphasis added)*

Self-actors represent themselves because they do not have the means to hire the services of a legal practitioner. It should, therefore, be appreciated that the law allows self-actors to represent themselves in our courts as they come from circumstances which force them to self-act. The judicial officers should also appreciate that they are not doing the self-actor a favour but doing a job they are employed to do**.**

4. THE TWO TYPES OF LITIGANTS

In both the criminal and civil justice systems there will always be two types of litigants. The self-actors and those who come fully protected and guided by legal practitioners. They both have a right to be heard by a fair and impartial court. There is however a vast difference between them which the courts should appreciate and mitigate in order to deliver meaningful access to justice to self-actors.

4.1. THE DIFFERENCES

The self-actor comes with his or her raw case prepared without any expertise, crying out for assistance to obtain justice. He or she has to prepare his or her case for court, present it in court on his or her own, including preparing and making submissions in his or her closing

[172] Bailey, E., Bidder, N., Bowers, P., Hampton, A., Hodge, D., & Hughes, P. (2013). A Handbook for Litigants in Person. Judiciary of England and Wales.

address without counsel. How will he or she prepare, present his or her case and make closing submissions without any knowledge of the law? He or she may not even know the various stages of a trial.

The legally represented litigant comes to court with a case prepared and made ready for trial by a lawyer who will have done the following:

a) Listened to the client's narration of what happened and given him or her sound and impartial advice.
b) Assessed the case against both procedural and substantive law.
c) Identified the issues for trial.
d) Researched on how to successfully present the case in court.
e) Considered the case's chances of succeeding and the alternative ways of resolving the issues like negotiating with the other party, abandonment versus the risks of unnecessary costs.
f) Prepared to do all for his client in court until the client is called to the witness stand, to give his or her evidence.
g) The represented litigant will sit and listen while his counsel cross examines his or her adversary.
h) Counsel will prepare and present his client's closing address, loaded with well researched precedents in polished court language to which he or she adds some Latin phrases.

The differences, presents the reason, why the courts and the justice delivery system, must introspect on whether or not they are delivering fair, impartial, and world class justice to self-actors. We should as

courts consider how we can make ourselves and our courts user friendly.

4.2. THE COURT ROOM AND COURT PROCEDURES

The court and court procedures present an intimidating atmosphere to self-actors who have to come to court for the first time because their case must be heard in court by a judge. The attire of the judge and legal practitioners adds to the intimidating atmosphere. The adversarial procedures through which intense cross examination is allowed further intimidates self -actors who do not understand why the legal practitioner for the other party is asking those difficult questions. The task of having to do on his or her own what the legal practitioner does for his or her adversary further complicates the position of a self-actor.

5. THE JUSTICE SYSTEM

The Zimbabwean justice system has been developed to match complex world class justice systems. Lawyers and their clients are proud of it. Due to their training in law, legal practitioners comfortably represent their clients in it, while the self-actor dreads the trial date not sure of how he or she will present his or her case. The substantive laws, procedural laws, and rules of court were enacted in legal language which is not used in everyday conversations the self-actor is used to. The laws and rules have to be applied as they are. They cannot be changed because the case involves a self-actor. It can therefore be correctly argued that the system should do all it can to meaningfully dispense quality justice to self-actors. It cannot be disputed that the

system was designed for the legally represented litigant and that more should be done to improve the quality of justice for self-actors.

6. WHAT SHOULD BE DONE BY THE JUSTICE DELIVERY SYSTEM

The Criminal Procedure and Evidence Act [*Chapter 9:07*] provides guidelines for magistrates courts on how they should conduct criminal trials in which a self-actor is the accused. Sections 163A, 188 (b), 191, and 198 (6) (b)[173] authorise magistrates to assist self-actors by explaining the law and procedure to them before they are asked questions to confirm whether or not they are guilty of the offence charged.

Sections 57 and 58 of the Magistrates Court Act [*Chapter 7:10*] provide for automatic review by a High Court Judge and scrutiny by a Regional Magistrate in respect of sentences imposed on self-actors which exceed twelve (12) months for review and six (6) months for scrutiny and fines exceeding level 6 for review and level 4 for scrutiny. The proceedings are scrutinised by Regional Magistrates and reviewed by High Court Judges to ensure that they are conducted in terms of real and substantial justice. The self-actor will therefore obtain real and substantial justice if the magistrate, the regional magistrate, and the High Court judge each performs his function according to law.

[173] Criminal Procedure and Evidence Act [*Chapter 9:07*].

The same provisions are not available for criminal trials in the High Court because at that level accused persons on trial for serious offences like murder are provided with *pro de*o counsel. After conviction he or she will be on his or her own to apply for bail pending appeal, leave to appeal, condonation for the late noting of an appeal as a self-actor from prison.

In respect of the civil justice system there is need to introduce user friendly measures for the benefit of self-actors, and provisions to guide judicial officers on how far they can go in assisting a self-actor. In the United States of America, the Justice Delivery System in 2007, after realising the increase in the number of self-actors who were representing themselves enacted guidelines which were updated in May 2019, through which judges can confidently' assist self-actors. They call it 'Self-represented litigants and the code of judicial conduct'.[174]

Also exemplary in accommodating self-actors in the justice system is the approach by the United States of America and its various states. Most notable is the American Bar Association Model Code of Judicial Conduct, 2007. Rule 2.2 of the 2007 American Bar Association Model Code of Judicial Conduct provides as follows;

> *A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially" Comment 4 of that rule explains: "It is not a violation of this Rule for a judge to make reasonable*

[174] National Centre for State Courts, Centre for Judicial Ethics *Self-Represented Litigants and The Code of Judicial Conduct, 2019. Retrieved from https://www.ncsc.org/__data/assets/pdf_file/0030/15798/proselitigantsjan2016.pdf.*

> *accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.*[175]

Thirty five (35) jurisdictions (34 states and the District of Columbia) added a version of Comment 4 to their codes of judicial conduct. Sixteen (16) State Supreme Courts have adopted Comment 4 from the model code exactly or with only minor language changes. The Colorado code includes model comment 4 to rule 2.2 and adds a new comment 2 to Rule 2.6 that provides:-

> *The steps that are permissible in ensuring a self-represented litigant' right to be heard according to law include but are not limited to liberally construing pleadings, providing brief information about the proceedings and evidentiary and foundational requirements, modifying the traditional order of taking evidence, attempting to make legal concepts understandable, explaining the basis for a ruling, and making referrals to any resources available to assist the litigant in preparation of the case. Self-representing litigants are still required to comply with the same substantive law and procedural requirements as represented litigants.*[176]

The D. C code includes the model Comment 4 to rule 2.2 and adds a reference to Comment (1A) to Rule 2.6. Comment 1A to Rule 2.6 states: -

> *The judge has an affirmative role in facilitating the ability of every person who has a legal interest in a proceeding to be fairly heard. Pursuant to Rule 2.2 the judge should not give self-represented litigants an unfair advantage or create an appearance of partiality to the reasonable person; however, in the interest of ensuring fairness and access to justice, judges should make reasonable accommodations that help litigants who are not represented by counsel to understand the proceedings and applicable procedural requirements, secure legal assistance, and be heard according to law. In some circumstances,*

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[175] American Bar Association (ABA) *Model Code of Judicial Conduct,* 2007.

[176] National Centre for State Courts, Centre for Judicial Ethics Self-Represented Litigants and The Code of Judicial Conduct, 2019. Retrieved from https://www.ncsc.org/__data/assets/pdf_file/0030/15798/proselitigantsjan2016.pdf.

> *particular accommodations for self-represented litigants may be required by decisional or other law. Steps judges may consider in facilitating the right to be heard include, but are not limited to,*
> *(1) providing brief information about the proceeding and evidentiary and foundational requirements,*
> *(2) asking neutral questions to elicit or clarify information,*
> *(3) modifying the traditional order of taking evidence,*
> *(4) refraining from using legal jargon,*
> *(5) explaining the basis for a ruling, and*
> *(6) making referrals to any resources available to assist the litigant in the preparation of the case.*[177]

At a 2012 Chief Justices Conference and Court Administrators Conference eight (8) states included in the text of Rule 2.2 that:

> *"A judge may make reasonable efforts, consistent with the law and court rules, to facilitate the ability of all litigants, including self-represented litigants, to be fairly heard."*[178]

The Arkansas Code includes the CCJ/COSA version but uses the term "accommodations" instead of "efforts" and adds a comment that explains the judges roll as follows: -

> *The growth in litigation involving self-represented litigants and the responsibility of courts to promote access to justice warrants reasonable flexibility by judges, consistent with the law and court rules, to ensure that all litigants are fairly heard. Examples of accommodation that may be made include but are not limited to*
> 1) *making referrals to any resources available to assist the litigant in the preparation of the case;*
> 2) *liberally construing pleadings to facilitate consideration of the issues raised, providing general information about proceeding and foundational requirements,*
> 3) *attempting to make legal concepts understandable by using plain language whenever possible,*
> 4) *asking neutral questions to elicit or clarify information,*

[177] National Centre for State Courts, Centre for Judicial Ethics Self-Represented Litigants and The Code of Judicial Conduct, 2019. Retrieved from https://www.ncsc.org/__data/assets/pdf_file/0030/15798/proselitigantsjan2016.pdf.

[178] See note 182 above.

> *5) modifying the traditional order of taking evidence and (7) explaining the basis for a ruling.*[179]

The Indiana code includes the CCJ/COSCA version and adds an explanatory comment as follows:

> *A judge's responsibility to promote access to justice, especially in cases involving self-represented litigants, may warrant the exercise of discretion by using techniques that enhance the process of reaching a fair determination in the case. Although the appropriate scope of such discretion and how it is exercised will vary with the circumstances of each case, a judge's exercise of such discretion will not generally raise a reasonable question about the judge's impartiality. Reasonable steps that a judge may take, but in no way is required to take include,*
>
> *a. construe pleadings to facilitate consideration of the issues raised,*
> *b. Provide information or explanation about the proceedings,*
> *c. Explain legal concepts in everyday language*
> *d. Ask neutral questions to elicit or clarify information,*
> *e. Modify the traditional order of taking evidence,*
> *f. Permit narrative testimony,*
> *g. Refer litigants to any resources available to assist in the preparation of the case or enforcement and compliance with any order,*
> *h. Inform litigants what will be happening next in the case and what is expected of them.* [180]
>
> *There are several variations of the rules as modified by the various states to suit their local circumstances, but they all allow judges to take measures towards mitigating the circumstances of self-actors.*

7. THE ROLE OF A JUDGE IN A TRIAL WITH SELF-ACTORS OR A SELF-ACTOR

It should, in view of the above now be clear that a trial in which a self-actor is involved calls for careful handling by the trial judge. The judge should know that the self-actor is not trained in law. That he or she does

[179] See note 182 above.
[180] See note 182 above.

not understand the procedure to be followed. That he or she is not used to the court and its language. It is recommended that a judge can do the following to improve the fairness of court proceedings for a self-actor: -

a) *At the case management and pre-trial stages, carefully explain to the parties what is expected of them and what each part should do before the trial including discussing with them the possibility of settling the case, if settlement is a possibility in their case.*
b) *Carefully read the file in preparation of the trial to understand the facts of the self-actor's case and its issues.*
c) *Enable the self-actor to calm down by gently and patiently in neutral language, talking to the parties about the commencement of the trial. A short explanation of what is about to happen can achieve the objective.*
d) *Use simple English which the self-actor can understand and demystify court proceedings by explaining to him or her what will be happening at the various stages of the trial. If he or she is using the services of an Interpreter allow sufficient time for the Interpreter to interpret.*
e) *Patiently allow the self-actor to fully present his or her case in terms of the law.*
f) *Restrain Legal Practitioners representing the other party from intimidating the self-actor during the proceedings and during cross-examination.*
g) *Listen attentively to the self-actor's presentations and submissions and seek clarification to enable him or her to fully present his/her case.*
h) *Write your judgment in simple English to enable the self-actor to understand your decision.*
i) *Clearly and fairly determine cases on their facts and the law disregarding the manner in which they may have been inelegantly presented.*
j) *Avoid stereotyping self-actors or considering them as a problem because of the bad behaviour of other self-actor especially those who frequently appear before the courts and abuse court processes. Each case should be given the attention and assistance it deserves.*
k) *In respect of serial self-actors who abuse court process, judges should exercise firm control of the proceedings so that they can be conducted in terms of the law and avoid being misled into granting incorrect and unlawful orders. The misbehaviour of a small minority of self-actors which leaves an adverse impression should not be allowed to affect the overwhelming majority of self-*

actors who genuinely want to exercise their Constitutional right to access justice as self-actors.

8. WHAT SHOULD BE DONE BY THE JUSTICE DELIVERY SYSTEM

a) Introduce law reforms to specifically provide for what a judge can or cannot do when conducting trials with self-actors. This will ensure uniformity in trials involving self-actors and remove doubts in the mind of a hesitant judge. In other jurisdictions guidelines have been given to guide judges on how far they can go in assisting self-actors.
b) Introduce 'Self-Actors Hand books and Pamphlets' through which self –actors are assisted by explaining how they can file their case and the various stages of the trial and what the self-actor is expected to do at each stage. These tools have been introduced and are being used in the UK, America Australia Canada, and other jurisdictions.
c) The forms to be used by self-actors should, like how it is done in other jurisdictions, contain notes explaining the procedures to be followed by the parties.
d) Simplify the language used in the enactment of procedural laws and the rules to enable self-actors to understand them.

9. CONCLUSION

This paper explored the court's responsibility towards litigants who are self-actors. It defined the term self-actor and provided a basis upon which litigants may elect to represent themselves before the courts.

Section 69 of the Constitution of Zimbabwe, 2013 makes it abundantly clear that self-actors have an unquestionable constitutional right to represent themselves in court. It is also evident from this provision that a self-actor has the same right to access justice as a litigant with legal representation. The courts therefore have an obligation to impartially and equally balance each party's rights and ensure that everyone has equal access to justice. The role of judicial officers in cases where the parties are self-representing was also explored. Reference to the American Bar Association Model Code of Conduct was made with regard to its provisions which have been adopted in various American States. The code among other things provides for the conduct of judicial officers and encourages impartiality and fairness. These are the principles which should guide all courts in such matters.