ZIMBABWE TEACHERS' ASSOCIATION
and
PROGRESSIVE TEACHERS UNION OF ZIMBABWE
and
AMALGAMATED RURAL TEACHERS UNION OF ZIMBABWE
and
EDUCATORS UNION OF ZIMBABWE
and
CIVIL SERVICE EMPLOYEES
versus
PUBLIC SERVICE COMMISSION
and
THE PRESIDENT, REPUBLIC OF ZIMBABWE
and
MINISTER OF FINANCE AND ECONOMIC DEVELOPMENT
and
MINISTER OF PUBLIC SERVICE LABOUR AND SOCIAL WELFARE
and
MINISTER OF JUSTICE LEGAL AND PARLIAMENTARY AFFAIRS
and
THE ATTORNEY-GENERAL

HIGH COURT OF ZIMBABWE
MUNGWARI J
HARARE 19 October 2023, 30 September 2024

Opposed court application for a declaratur

Mr *M. Gwisai with* Mr *E. Matika,* for the applicants
Mr *T Musungwa* with Ms *R. Madiro,* for all the respondents

MUNGWARI J: The Constitution of Zimbabwe, 2013 (the Constitution) introduced a new era of freedoms and rights with the aim of promoting a just and prosperous nation. It enshrined the values of transparency, equality, freedom, fairness, honesty, dignity and hard work. Additionally, in s 199, the Constitution laid the groundwork for the determination of conditions of service of persons employed in the Public Service of Zimbabwe. For the first time in Zimbabwe's history, labour rights were packaged and preserved in the Declaration of Rights under s 65. These rights include the right to fair and safe labour practices and standards; the right to be paid a fair and reasonable wage; the right to form and join trade unions and federations of choice; the right to just, equitable and satisfactory conditions of work and the

right to engage in collective bargaining, organise and form federations of such unions and organisations among others.

The Applicants

[1] The first applicant is Zimbabwe Teachers' Association, a duly registered trade union and recognised association or organisation in terms of the laws of Zimbabwe. It was founded in 1942 and represents the interests of teachers and educators across the whole of Zimbabwe. It claims that its present membership is thirty-eight thousand, three hundred and sixty-five (38 365).

[2] The second applicant is the Progressive Teachers Union of Zimbabwe, a duly registered trade union and recognised association or organisation in terms of the laws of Zimbabwe. It also represents the interests of teachers and educators across the whole of Zimbabwe.

[3] The third applicant is the Amalgamated Rural Teachers Union of Zimbabwe, a duly registered trade union and recognised association or organisation in terms of the laws of Zimbabwe. It claims to represent the interests of teachers and educators across the whole of Zimbabwe and its present membership is six thousand three hundred and forty (6 340).

[4] The fourth applicant is the Educators Union of Zimbabwe another duly registered trade union and recognised association or organisation in terms of the laws of Zimbabwe. It was founded in 2021 and represents the interests of teachers and educators across the whole of Zimbabwe with a current membership of over six (6) thousand.

[5] The fifth applicant is the Civil Service Employees Association also a duly registered trade union and recognised association or organisation in terms of the laws of Zimbabwe representing the interests of the rest of Public Service employees across the whole of Zimbabwe and its present membership is two thousand six hundred (2 600).

[6] All the applicants herein represent the interests of Public Service employees who are their members, concerning their well-being, labour rights and the determination of their conditions of service including remuneration, salaries, allowances, benefits, leave of absence, hours of work, and discipline among others.

The applicants' case

[7] The applicants seek a declaratory order in terms of s 85(1) of the Constitution as read with s 14 of the High Court Act [*Chapter 7:06*]. They argue that because the

Constitution in s 65, entrenched the right to collective bargaining and to organize, the current scenario where public servants are precluded from doing so is not only untenable but also unconstitutional. They contend that the perception that the right to collective bargaining is being implemented is a facade because what is being undertaken currently is simply a consultative process based on the provisions of the repealed Constitution. That they say, has no place in a modern democracy and is not in tandem with the founding values of the Constitution.

[8] One Sifiso Ndlovu deposed to the founding affidavit on behalf of the first applicant. The other applicants, through their designated officers deposed to supporting affidavits in which they contend that the enshrinement of labour rights in the Constitution marked a departure from past practices regarding conditions of work, particularly in the public service. The right to collective bargaining has been extended to all employees, employers and their trade unions and organisations save for the security services. They further argue that section 203(1) (b) was intentionally made subject to section 65(5) of the Constitution, which clearly indicates that the determination of conditions of service of the public service employees must be done through collective bargaining. Further, the said enshrinement of the right to collective bargaining in the Constitution signifies a departure from the unilateralism that characterize ss 19(1), 20 and 31(1) of the Public Service Act [*Chapter 16:04*] (the Public Service Act). Those sections, so the argument went, do not recognise the right to collective bargaining as it was not provided for in the old Constitution. The applicants also contend that the manner in which the conditions of work are determined in the public service remains haunted by ghosts of the past constitutional order. Currently the Public Service Commission may impose conditions of service on public service employees without prior consultation or negotiations. Despite the apparent absence of collective bargaining or consensus the conditions remain binding yet that order was long overtaken by the new constitutional dispensation.

[9] The applicants' understanding of collective bargaining is that employers and employees (or their respective representatives) collectively seek to reconcile their conflicting goals through a process of mutual accommodation and the ultimate goal being to come up with a collective bargaining agreement duly signed and binding on the parties.

[10] The second applicant through its representative Raymond Majongwe added that efforts were made on 24 October 2019 to seek redress through Parliament. The first and second applicants jointly presented a petition to Parliament, raising concerns about the absence of collective bargaining in the Public Service and advocating for the alignment of the Public Service Act with the Constitution regarding collective bargaining. In the same petition, they urged Parliament to ratify and domesticate the International Labour Organisation (ILO) Convention on the Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service, 1978 (C151) and the Collective Bargaining Convention, 1981 (C154) which provide for the right to collective bargaining including in the public service. Unfortunately, Parliament did not act on their petition. To date, no alignment has taken place. Consequently, so they argue, the right to collective bargaining has not been realized and enjoyed in the public service despite its provision in the Constitution under section 203(1)(b) as read with section 65(5).

[11] For the above reasons, so the argument continued, ss 19 (1), 20, and 31(1) of the Public Service Act and the entire Public Service (Public Service Joint Negotiating Council) Regulations SI 141/1997 should be declared unconstitutional in order to align the existing negotiations regime with the new constitutional order.

[12] The challenge to the validity of the impugned law is therefore made against a backdrop of allegations by the applicants that the respondents are not implementing the provisions of the Constitution but are still stuck in the old order which old order deserves to be struck out. In that regard, the applicants collectively seek an order in the following terms:

> i. "That it be hereby declared that;
> (a)The effect of s. 203(1)(b) of the Constitution of Zimbabwe Amendment (No.20) Act, 2013 is that the conditions of service of members of the Public Service including their salaries, allowances and other benefits must be determined through a collective bargaining process which results in a final and definitive collective bargaining agreement.
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> (b)Section 19(1) of the Public Service Act [*Chapter 16:04*] which gives the Public Service Commission and the Minister of Public Service Labour and Social Welfare the authority to unilaterally determine conditions of service of members of the Public Service without going through collective bargaining process is unconstitutional as it is inconsistent with section 203(1)(b) as read with section 65(5) of the Constitution.
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> (c)Section 20 of the Public Service Act is unconstitutional for being inconsistent with section 203(1)(b) as read with section 65(5) of the Constitution in that it does not

provide for the right to collective bargaining and to organise but only provides for discretionary consultation which may not result in any collective bargaining agreement.

(d)Section 31 (1) of the Public Service Act is unconstitutional for being inconsistent with section 203(1)(b) of the Constitution in so far as it gives the Public Service Commission and the Minister of Public Service Labour and Social Welfare the power to regulate conditions of service of members of the Public Service without recourse to collective bargaining.

(e) The Public Service (Public Service Joint Negotiating Council)
Regulations, SI 141 / 1997 is unconstitutional for being inconsistent with s 203(1)(b) as read with s 65(5) of the Constitution in so far as:

ii. Section 3 (1) confers on the Joint Council the power to negotiate salaries, allowances and conditions for members of the Public Service whereas such power lies with the Public Service Commission under section 203(1)(b) of the Constitution and subject to the provisions on collective bargaining under s 65 (5) of the Constitution; and,
iii. The agreements reached at the Joint Council under section 4(f) do not constitute valid collective bargaining agreements as they are mere recommendations to the Minister of Public Service, Labour and Social Welfare

iv. The respondents shall bear the costs of suit severally and jointly, the one paying the others being absolved."

The respondents

[13] The application is opposed by all the respondents who are the following:

The first respondent is the Public Service Commission, (" Commission"), a body corporate created in terms of the Constitution of Zimbabwe tasked with appointing suitable individuals to hold Public Service roles as well as overseeing their conditions of service, including salaries and benefits subject to the Constitution. The second Respondent is The President of the Republic of Zimbabwe cited herein in his official capacity as the person responsible for approving the salaries, allowances and benefits of Public Service employees as may be fixed by the first respondent in terms of section 203(4) of the Constitution. The third respondent is the Minister of Finance and Economic Development cited herein in his official capacity as the person responsible for giving recommendations to the second respondent with regards to conditions of service in terms of section 203 (4) of the Constitution. The third respondent is also responsible for giving concurrence with regards to conditions of service that may result in expenditure being charged on the Consolidated Revenue Fund in terms of section 19(1) of the Public Service Act. The fourth respondent is the Minister of Public Service, Labour and Social Welfare cited herein in his official capacity as the Minister in charge of the Public

Service in terms of section 201 of the Constitution. The said fourth respondent is also consulted with regards to conditions of service for Public Service members in terms of section 203(4) of the Constitution as read with section 19(1) of the Public Service Act. Same also makes regulations together with the first respondent, regulating conditions of service in terms of ss 31 and 32 of the Public Service Act. The fifth respondent is the Minister of Justice, Legal and Parliamentary Affairs. He is cited in his official capacity as the person responsible for revising laws, promoting the Constitution and overseeing legal reforms. The sixth respondent is the Attorney-General cited in his capacity as the principal legal adviser to the Government, tasked with legislative drafting and representing the Government in civil and constitutional matters.

First and Fourth respondents' cases

[14] The fourth respondent through Paul Mavhima, who is the Minister of Public Service, Labour and Social Welfare deposed to an opposing affidavit which was supported by Vincent Hungwe who is the chairperson of the first respondent. They both contend that the applicants did not establish a justifiable cause of action to render the cited provisions constitutionally invalid.

[15] The first and fourth respondents also argued that the applicants' interpretation of s 203(1)(b) of the Constitution suggesting that conditions of service for civil service members must be determined through a collective bargaining agreement is incorrect. They maintain that s65(5) of the Constitution accords employees and employers the right to collective bargaining, but does not mandate that conditions of service must be determined exclusively through a bargaining process. According to the respondents, while the Commission may set conditions of service for public service employees, those conditions must comply with the Constitution. They asserted that sections 19(1), 20, 31(1) of the Public Service Act as well as the provisions of SI 141/97 comply with the Constitution, and do not violate sections 65(5) and 203(1)(b) of the Constitution for two primary reasons:

a. The people who sit in the joint negotiating council are representatives of both the employers and employees.
b. A reading of all the impugned provisions shows that there is nowhere in the provisions where members of the public service are prohibited by the Public Service Act or SI 141/97 from exercising their right to collective bargaining.

[16] Further, the respondents added that in terms of the provisions of section 203(4) of the Constitution the terms of a collective bargaining agreement for public servants cannot

be final and mandatory without the President's final approval and the recommendation of the Minister responsible for Finance. These recommendations and approvals are essential to the completion of the collective bargaining process thus making it unnecessary for the impugned provisions to specifically provide for collective bargaining to be compliant with the Constitution.

Second, third, fifth and sixth respondents' cases

[17] The second, third, fifth and sixth respondents, filed their opposition through the affidavit of Prince Machaya who was the Attorney General at the time the suit was instituted. Prince Machaya asserted that he was duly authorised by all four respondents to do so. He denied each and every allegation of fact and conclusion of law averred to in the founding affidavit.

The approach in determining constitutionality of statutes

[18] The accepted approach in determining the constitutionality of any law, entails interpreting the relevant provisions of the Constitution first and then interpreting the full content of the impugned law as the second step. The final step entails comparing the meaning ascribed to the impugned law with the provisions of the Constitution. If the impugned law is capable of two meanings, one contrary to the Constitution and the other in keeping therewith, the court must adopt the meaning that will give effect to the Constitution. See the case of *Zimbabwe Township Development (Pvt) Ltd v Lou's Shoes (Pvt)) Ltd* 1983(2) ZLR376(S).

[19] Further, the decision of the Constitutional court in the matter of *Combined Harare Residents Association and Ors v The Minister of Local Government, Public Works and Anor* CCZ 03/24 also provides useful guidance on how to deal with applications of such a nature. In that decision, MAKARAU JCC stated the following page 5-6 of the cyclostyled judgment:

> "At the confirmation proceedings, the matter narrowed down to two broad concerns. These were consecutively, whether the challenge to the provisions of the Urban Councils Act was properly before the court *a quo* and if so, whether the order of constitutional invalidity made by that court was correct and in consequence thereof, should be confirmed. The first broad question encompasses two or more issues relating to the jurisdiction of the court *a quo*, the *locus standi* of the applicants before that court and all the procedures that were adopted by the court in making the order of invalidity. The second focuses on the merits of the matter and raises issues connected therewith. I pause momentarily to note that the two broad questions that arose for the Court's consideration in this matter are invariably the two that will arise in all confirmation proceedings under s 167 (3) of the Constitution. This is so because confirmation proceedings under the section are hybrid in nature, combining both a review of the

> procedures that were adopted by the court *a quo* and an examination of the correctness of the decision thereby made. This two-pronged inquiry if I may call it that, will have to be undertaken even if the papers filed of record by the parties to the confirmation proceedings do not so reflect. I venture to say that this inquiry will have to be made even if the confirmation proceedings are unopposed and the order of invalidity is sought to be confirmed with the consent of all parties. Confirmation proceedings before this Court are essentially a validation not only of the ultimate order of invalidity made, but of the process by which such an order was made and, the competence of the court that made the order. Put differently, before confirming an order of constitutional invalidity, this Court must be satisfied that the order of constitutional invalidity was not only properly raised before the court *a quo*, but that it was correctly made by that court and represents a correct interpretation of the Constitution. (See *S v Chokuramba*CCZ 10/19 and *Mupungu v Minister of Justice Legal & Parliamentary Affairs and Others* CCZ 7/21)"

[20] What comes out of the above finding by the Constitutional Court is that in the determination of the constitutional invalidity or validity of the impugned provisions, I must ask myself whether firstly, I have jurisdiction to deal with the matter and whether the applicants have *locus standi* to bring the challenge. It is only after I am satisfied of these preliminary issues that I can proceed to deal with the merits of the arguments.

[21] When the parties appeared before me to present their arguments, they agreed that I should adopt a rolled-up approach in terms of which the parties would argue the preliminary points and merits at the same time where after in judgment, I would consider the preliminary points first and if I am persuaded to uphold them, give an appropriate order. If the points *in limine* fail, I would then proceed to give judgment on the merits as well.

[22] As will be demonstrated, the objections raised are similar to those which the court *a quo* in the cited case of *Combined Harare Residents Association and Ors* (supra) was seized with. They are the following:

The Preliminary Objections

a. The second, third, fifth and sixth respondents objected to their inclusion as respondents in this matter arguing that they are not responsible for the administration of the Public Service Act and as such their inclusion in the proceedings is a misjoinder.
b. The first and fourth respondents raised two objections. They alleged that the applicants do not have *locus standi* to bring the application before this court. Furthermore, they alleged that the applicants had not established a cause of action as s 85(1)(a) of the Constitution states that an applicant must allege and show an

infringement complained of from a fundamental right or freedom provided for under Chapter 4 of the constitution.

The mis-joinder

[21] The applicants argued that all four respondents have a direct and substantial role in the remuneration set up of the civil service and are therefore properly cited. According to the applicants, the second respondent who is the President is now directly involved in the setting up of remuneration under section 203(4) of the Constitution. The third respondent, the Minister of Finance is directly incorporated in the negotiations for remuneration under s 19 of the Public Service Act which ascribes to him the role to concur to the remuneration. The fifth and sixth respondents are directly responsible for advising the executive on the law including the implementation of the Constitution and the alignment of any laws to it.

[22] In response thereto, the respondents initially insisted with the *point in limine* stating that contrary to the applicant's assertions, the cited parties are not responsible for the administration of the Act in issue and the applicants should have only cited the minister responsible and excluded all the others. The court brought to their attention Rule 32(11) of the High Court Rules, 2021 (the Rules) and requested them to address it *vis a vis* their stance. They conceded that the rule provides that a mis-joinder does not impede a court from determining a matter. Thereafter, they then elected to abandon the *point in limine*. The objection was therefore rendered a non-issue. It is abandoned.

Locus standi

[23] The first and fourth respondents questioned the legal standing of the applicants, arguing that the applicants had not clearly indicated the capacity in which they are approaching the court that is whether they were doing so in their individual capacities under s 85(1) (a) or as representatives under s 85(1)(e) of the Constitution. They contend that the applicants should have approached the court in a singular capacity rather than multiple capacities. They referenced the case of *Mudzuri and Anor* v *Minister of Justice, Legal and Parliamentary affairs and Ors* 2016(2) ZLR 45(CC) which discussed the principle that a party should not act in dual capacities in a single proceeding. Consequently, the respondents were of the view that the applicants had not properly established their *locus standi*.

[24] Conversely, the applicants emphasized the unique nature of the right to collective bargaining. They argued that this right conferred upon them as trade unions

and employees' organisations is intrinsically linked to the rights of the employees they represent. The right to collective bargaining cannot be exercised by trade unions or employees' organisations without their members and vice versa. Hence, the applicants asserted that they were approaching the court in both their individual capacities as employees' organisations and in their representative capacities on behalf of their members. They insisted that they referred to section 85(1)(a) and (e) of the Constitution.

[25] A consideration is of s 85 of the Constitution reveals that the section allows any person acting in their own interest, or on behalf of others who cannot act for themselves, to approach the court alleging that a fundamental right or freedom has been, is being, or is likely to be infringed. In matters that concern alleged violations of the Bill of Rights, the test for standing is a wide one. This was articulated in the case of *Denhere* v *Denhere* CCZ 9-19 which advocated for an expansive interpretation of *locus standi* in constitutional matters. The principle of broad standing was also reiterated in *Mupungu* v *Minister of Justice, Legal and Parliamentary Affairs and 6 Others* CCZ-7/21, which emphasized that the test for standing in constitutional cases is not as restrictive as in common law civil suits, thereby allowing individuals with a substantial interest in the matter to seek judicial redress. The position was stated in the following words:

> "Under the common law, legal standing in civil suits is ordinarily confined to persons who can demonstrate a direct or substantial interest in the matter. See *Zimbabwe Teachers Association & Ors* v *Minister of Education* 1990 (2) ZLR 48 (HC), at 52F-53B. However, it is now well established that the test for *locus standi* in constitutional cases is not as restrictive but significantly wider. This approach was aptly articulated in *Ferreira* v *Levin N.O. & Others* 1996 (1) SA 984 (CC), at 1082 G-H: ... I can see no good reason for adopting a narrow approach to the issue of standing in constitutional cases. On the contrary, it is my view that we should rather adopt a broad approach to standing. This would be consistent with the mandate given to this court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled.
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> The broad approach to *locus standi* in constitutional cases was also affirmed by this Court in *Mawarire* v *Mugabe N.O. & Ors* 2013 (1) ZLR 469 (CC), where the applicant's standing was endorsed on the basis that he had invoked the jurisdiction of the Court on a matter of public importance. The position advanced on behalf of the fourth and fifth respondents is that the applicant lacks the requisite sufficient interest *in casu* because he was not a litigant in or party to the proceedings a quo. This position is palpably unsustainable for several very compelling reasons."

[26] The principle which runs through the above authorities is that the test for *locus standi* in constitutional cases is not and must not be restricted. Rather it must be widened. The applicants in this case have approached this court alleging a violation of

the right to collective bargaining and right to organize as enshrined in section 65(5)(a) and (b) as read with section 203(1)(b) of the Constitution. This right is inherently collective necessitating that individuals and organisations act together to realise it. Although the respondents referenced the dictum by MALABA DCJ (as he then was) in *Mudzuru and Anor v Minister of Justice, Legal and Parliamentary affairs & Ors,* (*supra*) which suggested that a litigant must act in a single capacity, that does not detract from the broader context. The applicants' founding and supporting affidavits clearly show, just like the applicants in *Mudzuru and Anor*, that despite reference to acting in their personal capacities in terms of s 85(1)(a) their claim was squarely pinned on s 85(1)(e). The applicants represent a collective of employees and their organisations. They have sufficiently established their standing to bring this matter before the court. The parties who must answer to the issues are before the court and they have answered to the issues raised in the application.

[27] Unfortunately, the question of *locus standi* does not end there because it is intricately woven into the existence of a cognisable cause of action. For that reason, it follows that there must be an identifiable cause of action. Put simply, what this means is that there must be facts sufficient to justify suing or to justify the enforcement of the rights alleged by the applicants against the respondents. The rationale for the above is not difficult to see. It is that it would be impossible for the applicants in this matter to demonstrate a direct and substantial interest in the matter if there are no facts which justify their suit. The same point was made by the Supreme Court in the case of *Allied Bank v Dengu and another* 2016(2) ZLR 373(S)at p. 376 H per MALABA CJ that

> "The principle of *locus standi* is concerned with the relationship between the cause of action and the relief sought. Once a party establishes that there is a cause of action and that he is entitled to the relief sought, he or she has *locus standi*. The plaintiff or applicant only has to show that he has a direct and substantial interest in the right which is the subject matter of the cause of action"

<u>Cause of action</u>

a. In full appreciation of the intricate relationship between standing and cause of action, the respondents also raised an objection that because s 85(1)(a) premises *locus standi* on a personal interest in the matter, the applicants must have alleged and shown that the infringement complained of is of a fundamental right or freedom provided for under Chapter 4 of the constitution. We have already dealt with the matter concerning the *locus standi* of the applicants and in what

capacity they bring the action before this court. For the avoidance of doubt, they not only approach this court in their personal capacities but also in their representative capacities. The applicants in paragraph 19 of their founding affidavit state what they deem to be their cause of action. Paraphrased that cause of action is that the impugned provisions violate their rights in particular s 65 of the Constitution which provides for the right to collective bargaining. They further allege that these contested sections are inconsistent with s 203(1)(b) as read with section 65(5)(A) of the constitution in so far as they do not provide for the right to collective bargaining.

b. The respondents in turn contend that section 203 of the Constitution which relates to the functions of the Commission is not contained in Chapter 4 of the Constitution. They argued that, reference to s 65(5) in section 203(1)(b) does not make the functions of the Public Service in relation to conditions of service for Public Service employees part of the rights enshrined in Chapter 4. The said section 65(5) relates to labour rights in relation to collective bargaining, organising and forming and joining federations of such unions and organisations. They asserted that applicants have not made any averments of any infringement of section 65(5) such as that members of the Public Service have been prohibited to join or form any employees' organisations. According to the respondents, the applicants are themselves registered organisations of trade unions which represent the interest of teachers and educators across Zimbabwe and the fact that they exist is a living testimony to the section's continued vitality and relevance. At no point in their founding affidavit, has there been an allegation of any sort of infringement of section 65(5). That they say, shows that there is no infringement of chapter 4 rights that the applicants raised. They urged the court not to pass the invalidity of a statute upon the complaint of an applicant who fails to show that there is a real injury. Reliance was placed on the case of *Majome vs Zimbabwe Broadcasting Corporation* and 2 Ors CCZ14/16.

[28] My understanding of the respondents' argument that the applicants have no cause of action is premised on the two viewpoints that they raised. Firstly, that because the applicants have approached this court in terms of s85(1)(a) in their personal or even in their dual capacities then they must have demonstrated the infringement of a right

contained in Chapter 4 of the constitution. Secondly, that they did not allege an infringement of any nature such as that their members were prohibited from engaging in collective bargaining and or prohibited from forming trade unions and employee organisations. Put simply the respondents allege that the applicants did not plead any consequential or tangible benefit they would obtain from such a declaration.

[29] The respondents' arguments seem critical to me. There is no dispute between or amongst these parties. The contestation raised is academic. The applicants do not allege that the respondents have in any way barred them from exercising the rights conferred by the particular sections of the Constitution which they cite. They cannot base their motion for the declaration of constitutional invalidity of the said sections on an academic apprehension. If the court were to grant the order they seek, it will be nothing but an order in the abstract.

[30] To put this into context, in their founding papers the applicants complained of the archaic way in which the respondents have gone about attending to their labour rights. They cited the disparity between the old constitution and the current one and the need to align the old law with the new so as to bring effect to the constitutional provisions around collective bargaining. They say nothing more. The allegation is just that what is taking place on the ground is a consultative process and not collective bargaining and for that reason the impugned sections must be declared unconstitutional.

[31] The above allegation, in my view clearly betrays the indisputable fact that the declaration of invalidity is not predicated upon a live dispute between the parties. The court has not been informed of what triggered the application's contention that the provisions are constitutionally invalid other than their mere opinions that they are so. The applicants needed to do more if they wanted this court to determine their matter. They ought to have created a live dispute between themselves and the respondents. They ought to have shown that they are embroiled in a wrangle with the respondents who have refused to abide by what they perceive as their constitutional rights.

[32] If my findings herein needed support the remarks of GARWE JCC when dealing with the same question in the matter of *Combined Harare Residents Association and Ors* vindicate me. He said:

> "From the forgoing, it is quite apparent that the declaration of invalidity was not predicated upon a live dispute between the parties. Examples were given of the instances when the Minister allegedly interfered with the operations of councils in general. Those instances did

> not however constitute the basis upon which the applicants had sought the declaration of invalidity. Those instances, once they had occurred could have formed the basis of separate constitutional applications seeking declarations of invalidity as well as consequential relief. Indeed, in the case of the Pomona Waste Management agreement, the applicants amongst others instituted proceedings in the High Court in case No. HC2766/22 seeking an order setting aside the council resolution in terms of which the agreement had been adopted and approved. It goes without saying that the applicants could have, in that same suit, challenged the constitutionality of s314 of the Act and sought, as consequential relief, the setting aside of the directive given by the Minister. But that is not what the applicants sought. It is clear the applicants decided to challenge the validity of s314 of the Act merely on account of their perception that the section was not consistent with the constitution. I entertain no doubt in my mind that this is not permissible and that the court *a quo* should have declined jurisdiction to deal with a dispute in abstract context. The legal question placed before the court *a quo* did not rest upon existing facts or rights"

[33] In the application before me, the applicants seek an order declaring ss 19 (1), 20, and 31(1) of the Public Service Act and the entire Public Service (Public Service Joint Negotiating Council) Regulations SI 141/1997 unconstitutional. That is the only relief they seek. They did not plead a tangible benefit that they would obtain from the granting of the order that they seek. There is no live controversy that stands to be resolved by any order from this court. There is no background dispute against which the constitutionality invalidity of the impugned provisions is anchored. It is simply a case of, *"because the Constitution provides for it, then the existing provisions of the Acts contested cannot give full meaning to the provisions of the constitution."* That cannot be enough. In my view that makes the application purely academic and abstract. It must therefore follow that; the applicants have no cause of action. Resultantly I find that there is merit in the point *in limine* raised by the respondents. I uphold it.

Costs

[34] The general practice in this jurisdiction is that courts do not order the payment of costs in public interest litigation. This is one such matter and I do not see any reason why I should depart from that rule. In the circumstances, I ORDER THAT:

1. The applicants' application be and is hereby dismissed in its entirety.
2. There will be no order as to costs

MUNGWARI J: ……

MATIKA, GWISAI AND PARTNERS, Applicants' legal practitioners

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