REPORTABLE **(164)**

MFUNDO MLILO
v
THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE

SUPREME COURT OF ZIMBABWE
GARWE JA, MAKARAU JA & MAKONI JA
HARARE: FEBRUARY 1, 2019 & DECEMBER 7, 2020

T. Biti, for the appellant

V. Munyoro, for the respondent

GARWE JA

[1] This is an appeal against the judgment of the High Court handed down on 4 May 2018. The appellant had, before that court, sought a declarator that the Presidential Powers (Temporary Measures) (Amendment of Electoral Act) Regulations, 2016 published as Statutory Instrument 117/2017 were null and void and of no force or effect. The appellant had also sought an order declaring the enabling Act, the Presidential Powers (Temporary Measures) Act, [*Chapter 10:20*] to be inconsistent with the Constitution of Zimbabwe and, as a consequence, the striking down of that Act. In the alternative, the appellant sought a declarator that s 2 (2) of the Act is inconsistent with the Constitution and that the same be struck down.

[2] After hearing argument from both parties, the High Court dismissed the application with costs. It is against that order that the appellant has now appealed to this Court.

BACKGROUND FACTS

[3] The Presidential Powers (Temporary Measures) Act, [*Chapter 10:20*] ("the Act") provides as follows in s 2 thereof:-

" 2 **Making of urgent regulations**

(1) when it appears to the President that:-
  (a) a situation has arisen or is likely to arise which needs to be dealt with urgently in the interest of defence, public safety, public order, public morality, public health, the economic interests of Zimbabwe or the general public interest; and
  (b) the situation cannot adequately be dealt with in terms of any other law; and
  (c) because of the urgency, it is inexpedient to await the passage through Parliament of an Act dealing with the situation; then, *subject to the Constitution* and this Act, the President may make such regulations as he considers will deal with the situation.

(2) Regulations made in terms of subsection (1) may *provide for any matter or thing for which Parliament can make provision in an Act*:
Provided that … (not relevant)." (Italics are for emphasis)

[4] Section 5 thereof provides:-

"Regulations made in terms of section *two* shall, to the extent of any inconsistency, prevail over any other law to the contrary, apart from regulations that have been made and are in force in terms of the Emergency Powers Act, [*Chapter 11:04]*."

[5] Acting in accordance with the above provisions of the Act, the President of the Republic of Zimbabwe, who is the respondent in this matter, published, on 15 September 2017 in the Government Gazette Extraordinary, the Presidential Powers (Temporary Measures) (Amendment of Electoral Act) Regulations, Statutory Instrument 117/2017 ("the Regulations"). The Regulations sought to amend certain sections of, and the Schedule to, the Electoral Act *[Chapter 2:13]*.

[6] On 20 October 2017, the applicant filed a court application seeking the declarators referred to and an order setting aside both the Act and the Regulations.

THE APPELLANT'S CASE A QUO

[7] In his founding affidavit in the court *a quo*, the appellant, as applicant, stated as follows. The Act is unconstitutional because it gives the President of the Republic of Zimbabwe the power to enact regulations which override existing Acts of Parliament. Nowhere in the Constitution is the President given the power to make law as provided for in the Act. Although s 116 of the Constitution states that the Legislature of Zimbabwe consists of Parliament and the President, it is clear that the President is involved only to the extent stipulated in Chapter 6 as read with the Fifth Schedule to the Constitution. Section 134 of the Constitution makes it clear that Parliament may, in an Act of Parliament, delegate the power to make statutory instruments within the scope of and for purposes laid out in the Act but in no uncertain terms prohibits the delegation of Parliament's primary law making function. It was never the intention that delegated legislation could have the effect of altering an existing Act of Parliament. In terms of s 5 of the Act, the President has sweeping powers to make laws that transcend existing Acts of Parliament. For that reason, the applicant sought an order striking down both the Act and the Presidential Powers Regulations.

THE RESPONDENT'S CASE A QUO

[8] In his opposing affidavit, the respondent stated as follows. The provisions of the Electoral Act amended by the Regulations had not envisaged the use of the biometric voter registration system which requires voters to have finger prints and photographs taken in addition to filling in forms. The President accepted that, in terms of s 2 of the Act, he can enact laws but submitted that any regulations he makes are subject to scrutiny by Parliament which can resolve either to have them amended or repealed. Further, and in any event, s 110 of the Constitution gives him the power conferred by the Constitution, an Act of Parliament or other law to enable him to exercise his functions as Head of State. The reference to "other law"

includes provisions of the common law, customary law and international law in force in Zimbabwe. Under the common law, the President has always enjoyed prerogative powers which entitle him to promulgate temporary legislation in urgent situations. Those prerogative powers have not been abolished under the Constitution and consequently remain at his disposal.

DETERMINATION OF THE COURT A QUO

[9] In its determination, the court *a quo* found that, in invoking his powers under the Act, the respondent was not abusing the law-making function conferred upon him by the Act. The new voters' roll could not properly be covered by a law which Parliament would have introduced, debated and passed into law without interfering with the requisite time lines of the 2018 harmonised elections. The court *a quo* accepted that the question whether or not the Act is legal depends on the interpretation of the Constitution. It found that the President's "necessary and unavoidable intrusion into the function of Parliament" is evident from a reading of s 86 of the Constitution. It further found that "it is only the President who has the power to limit, through the Act, the people of Zimbabwe's fundamental rights and freedoms which are contained in the Constitution". The court also found that "because the President's law making power exists in the Act, the drafters of the Constitution did not include it in s 134 of the Constitution" and that "because his powers as stated in s 86 (2) (b) of the Constitution relate to the limitation of the people of Zimbabwe's fundamental rights and freedoms in certain unforeseen circumstances, he could not effectively exercise the same under s 134 of the Constitution". The court consequently dismissed the application with costs.

PROCEEDINGS BEFORE THIS COURT

[10] Unhappy with the dismissal of his application by the court *a quo*, the appellant noted an appeal to this Court. His grounds of appeal are that:-

"1.1 The court *a quo* erred as a question of law, in upholding the validity of the Presidential Powers (Temporary Measures) Amendment of Electoral Act Regulations 2016 published in Statutory Instrument 117/2017.

1.2 A *fortiori*, the court *a quo* erred in holding that the President could make law.

1.3 In addition, the court *a quo* erred in failing to hold that the Presidential Powers (Temporary Measures) Act *[Chapter 10:20]* was an unlawful delegation of legislative power and was therefore *ultra vires* the Constitution of Zimbabwe.

1.4 In the alternative, the court *a quo* failed to uphold that s 2 (2) of the Presidential Powers (Temporary Measures) Act [*Chapter 10:20*] was null and void and of no force and effect to the fact that it permitted the making of laws overlooking Parliament." (*sic)*

In his prayer he seeks an order setting aside the order of the court *a quo* and, in its place, an order granting the relief he had sought before the court *a quo.*

APPELLANT'S SUBMISSIONS BEFORE THIS COURT

[11] In his submissions, the appellant states as follows. Section 86 of the Constitution is just a limitation clause and does not allow the President to limit rights or to be the person who curtails the rights of persons. Section 86 of the Constitution only relates to a law of general application made and passed by Parliament and not by an individual. The Act that is the subject of this appeal amounts to Parliament outsourcing its original law making powers. The function of the President under s 110 of the Constitution is not to make law but merely to assent to a Bill and, if he does not agree, to refer the Bill to the Constitutional Court for an opinion on its constitutionality. He further argues that there is a difference between delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made and assigning primary law making power to another body. In this case "the President is even higher than Parliament because he can amend what Parliament has done."

[12] On the remedy, the appellant submits that an order should be issued nullifying the Act. However since the retrospective declaration of invalidity might produce significant disruption in the voter registration exercise, the court should make an order that limits the retrospective

effect of any such declaration. He makes it clear that he has no difficulty with the substance of the amendments and that the gravamen of his displeasure is the manner in which they were effected.

RESPONDENTS SUBMISSIONS BEFORE THIS COURT

[13] In his heads of argument, the President states that whilst he does not entirely agree with the reasoning of the court *a quo*, he agrees with the order made. He submits, as he did before the court *a quo*, that the Presidential prerogative is a power that attaches to the President by virtue of his office and that, under the common law, he has always enjoyed prerogative powers which entitle him to promulgate temporary legislation in urgent situations. Those prerogative powers were never abolished but are now codified under the Act. The reference to "other law" in s 110 (1) of the Constitution includes, by necessity, the provisions of the common law in force in this country. Lastly, he maintains that as the Regulations have to be laid before Parliament for approval, this shows that Parliament essentially still retains its primary law making power.

[14] In the course of considering the possible disposition of this matter, a question of law arose, namely, whether the appellant could properly appeal to this Court against a determination of constitutional validity by the court *a quo*. Being an important issue that could be dispositive of this matter and in light of the fact that neither party had hitherto addressed the court on it, this Court asked both parties to file supplementary submissions within a given time frame. This the parties proceeded to do.

APPELLANT'S SUPPLEMENTARY SUBMISSIONS

[15] In his supplementary heads of argument, the appellant has submitted that where the High Court, as in this case, issues an order of constitutional validity that determination is subject to an ordinary appeal to this Court. Where, however, the same court issues an order of constitutional invalidity, then that order must be referred to the Constitutional Court in terms of s 175 of the Constitution. In other words, in the former case, there is no obligation that the order of constitutional validity be referred to the Constitutional Court for confirmation.

[16] The appellant further submitted that, in terms of s 43 of the High Court Act [*Chapter 7.06*], the Supreme Court has an obligation to hear and determine all appeals from the High Court of Zimbabwe, whether in the exercise of its original or appellate jurisdiction. Further, in terms of s 21 of the Supreme Court Act, the Supreme Court has jurisdiction to hear and determine an appeal in any civil case from the judgment of any court or tribunal from which, in terms of any other enactment, an appeal lies to the Supreme Court. In terms of s 22 of the Supreme Court Act, the Supreme Court shall have the power to confirm, vary, amend or set aside the judgment appealed against or give such judgment as the case may require. There is therefore nothing in the High Court Act or Supreme Court Act, so the appellant argues, that takes away the power of the Supreme Court to entertain an appeal from the High Court. The only limitation is in respect of an order of Constitutional invalidity which must be confirmed by the Constitutional Court before it has any effect.

[17] The appellant has further submitted that, in light of the wording of s 175(3) of the Constitution, any interested person has a right to appeal or apply directly to the Constitutional Court to confirm or vary the order of constitutional validity. Subsection (3) of s 175 refers to a court order made in terms of subsection (1) of that section, which subsection provides for an order of constitutional invalidity. The reference in subs (3) to an order concerning

constitutional validity in terms of subs (1) restricts the meaning of subs (3) to orders of constitutional invalidity only. In other words, the right to appeal to the Constitutional Court is restricted by the fact that such a right only applies to an order of constitutional invalidity provided for in subs (1).

[18] Further, r 31 of the Constitutional Court Rules refers to an order of constitutional invalidity and not an order of constitutional validity. The express mention of orders of constitutional invalidity excludes orders of constitutional validity. In the event that the Supreme Court declares a law to be invalid, then that order has to be confirmed by the Constitutional Court.

RESPONDENT'S SUPPLEMENTARY SUBMISSIONS

[19] The respondent does not accept the appellant's submissions in this regard and submits that the Supreme Court has no jurisdiction to hear and determine such an appeal because in terms of s 175(1) of the Constitution only the Constitutional Court is empowered to confirm or vary an order concerning constitutional validity by any court. Subsection (3) of s 175 refers to an order concerning constitutional validity by a court in terms of subs (1). If subs (1) and (3) of s 175 are read together, it becomes apparent that s 175 refers not only to orders of constitutional invalidity but also orders of constitutional validity.

[20] Only the Constitutional Court is empowered to confirm or vary an order of Constitutional invalidity. The Supreme Court would be unable to sufficiently deal with the issue of constitutional validity or invalidity of any law and is not in a position to vary or confirm any order concerning constitutional validity of any law. Although the Supreme Court is the final court in non-constitutional matters, it cannot usurp the powers of the Constitutional Court in this regard.

ISSUE(S) ARISING FOR DETERMINATION

[21] From the foregoing, it seems to me that two broad issues arise for determination before this Court. The first is whether an order of constitutional validity by the High Court can be appealed against to the Supreme Court rather than directly to the Constitutional Court. The second is whether the Presidential Powers (Temporary Measures) Act is consistent with the Constitution of Zimbabwe. I proceed to deal with these two issues in turn.

[22] The question whether an order of constitutional validity is appealable to the Supreme Court is one of interpretation. To determine the question there is need to look at the provisions of the Constitution that have a bearing on this issue. One must, I think, start with s 167(3) which states as follows:

> "(3) The Constitutional Court makes the final decision whether an Act of Parliament or conduct of the President or Parliament is constitutional and must confirm any order of constitutional invalidity made by another court before that order has any force."

[23] Section 169 (1) of the Constitution, in turn, provides:-

"169 JURISDICTION OF SUPREME COURT

(1) The Supreme Court is the final court of appeal for Zimbabwe, except in matters over which the Constitutional Court has jurisdiction."

[24] This is then followed by s 175 which provides in relevant part as follows:-

"175 POWERS OF COURTS IN CONSTITUTIONAL MATTERS

(1) Where a court makes an order concerning the constitutional invalidity of any law or any conduct of the President or Parliament, the order has no force unless it is confirmed by the Constitutional Court.
(2) … (Not relevant)
(3) Any person with a sufficient interest may appeal or apply, directly to the Constitutional Court to confirm or vary an order concerning constitutional validity by a court in terms of subsection (1)".
(4) … (Not relevant)
(5) An Act of Parliament or rules of court must provide for the reference to the Constitutional Court of an order concerning constitutional invalidity made in terms of subsection (1) by a court other than the Constitutional Court."

CONSTITUTIONAL INTERPRETATION

[25] In *Mawarire v Mugabe & Ors* 2013 (1) ZLR 469, the Constitutional Court of Zimbabwe remarked as follows at p 499 C - E of the judgment:-

> "In general, the principles governing the interpretation of a constitution are basically the same as those governing the interpretation of statutes. One must look to the words actually used and deduce what they mean within the context in which they appear. See *Hewlett v Minister of Finance* 1981 ZLR 571 (S) at 580. If the words used are precise and unambiguous, then no more is necessary than to expound them in their natural and ordinary sense. See *The Sussex Peerage* (1843-1845) 65 RR 11 at 55. In essence, it is necessary to have regard to the words used and not to depart from their literal and grammatical meaning unless this leads to such an absurdity that the Legislature could not have contemplated it."

[26] Constitutional interpretation, however, often requires more than simply according words their literal or ordinary grammatical meaning. Various decided cases have also stressed the need for a generous and purposive interpretation to give expression to the underlying values of the Constitution. In *S v Makwanyane* 1995 6 BCLR 665(CC) the Constitutional Court of South Africa also stated that the provisions of the Constitution should not be construed in isolation but in their context. It is permissible to have regard to the purpose and background of the legislation. The court cited with approval remarks in *Jaga v Donges N.O. and Another* 1950 (4) SA 653 A, 662 G-H that:

> "Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that 'the context', as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background."

[27] A further consideration in the interpretation of a statute is that the legislature is presumed not to intend an absurdity, ambiguity or repugnancy to arise out of the grammatical and ordinary meaning of the words it uses in an enactment. Therefore, in order to ascertain the true purpose and intent of the legislature, regard is to be had, not only to the literal meaning of

the words, but also to their practical effect. In this respect, the words in question must be capable of an interpretation that is consistent with the rest of the instrument in which the words appear.

[28] In interpreting the provisions of the Constitution it is, as stated, necessary to adopt a broad and generous approach and also to ensure that all the relevant provisions on the subject are considered. As stated in *Attorney-General v Dow* (1992) BLR 119 (CA) 131, 132:-

> "… the very nature of a Constitution requires that a broad and generous approach be adopted in the interpretation of its provisions; that all the relevant provisions bearing on the subject for interpretation be considered together as a whole in order to effect the objective of the Constitution."

[29] Indeed s 46 of our Constitution, which deals with the interpretation of Chapter 4, makes it clear that such interpretation must pay due regard to all the provisions of the Constitution and in particular, the principles and objectives set out in Chapter 2. Section 331 of the Constitution, in turn, provides that section 46 applies, with any necessary changes, to the interpretation of the rest of the Constitution.

APPEAL AGAINST AN ORDER OF CONSTITUTIONAL VALIDITY – TO WHICH COURT DOES IT LIE

[30] The Constitutional Court Rules, 2016, in r 21 make provision for the matters that do not require the leave of the court. These include "appeals in terms of s 175(3) of the Constitution, against an order concerning the constitutional *validity or invalidity* of any law." It is apparent that the framers of the Rules considered that even an order of constitutional validity could be the subject of an appeal directly to the Constitutional Court and that leave to appeal was not necessary in such a case.

[31] One must, I think, accept that the ordinary literal and grammatical interpretation of s 175(1) of the Constitution is that an order concerning the Constitutional invalidity of any law has no force or effect unless confirmed by the Constitutional Court. In my view such an interpretation is in accord with s 169(3) which makes it clear that the Constitutional Court must confirm any order of constitutional invalidity made by another court before that order has any force.

[32] The real question, as already noted, is which court should hear and determine an appeal against an order of constitutional validity. The Constitution has not, itself, stated to which court such an appeal shall lie. It should also be accepted that, in general, appeals from the High court lie with the Supreme Court.

[33] Section 169(3) however makes it abundantly clear that the Constitutional Court makes the final decision whether an Act of Parliament is constitutional. It does not state that the Constitutional Court only makes the final decision on whether an Act of Parliament is invalid. The clear intention that comes out from a careful reading of that section is that it is the Constitutional Court that makes the final decision on whether an Act of Parliament is constitutional or not. That means the Constitutional Court makes the final decision whether an Act of Parliament is valid or not. In the event that an order of constitutional invalidity is made by a lower court, such an order has no effect until the Constitutional Court has confirmed such invalidity.

[34] Section 175(3) provides that an interested person may appeal or apply directly to the Constitutional Court to confirm or vary an order concerning constitutional validity by a court in terms of subs (1). Whilst the subsection refers to subs (1), it also refers to "an order

concerning constitutional validity" – and not only constitutional invalidity. An order concerning constitutional validity is exactly that. It is not limited to orders concerning constitutional invalidity only.

[35] Taken together, therefore, ss 169(3) and 175(3) simply mean that an order of constitutional validity or invalidity may be appealed against directly to the Constitutional Court. Bearing in mind that only the Constitutional Court makes the final decision on the validity of an Act of Parliament, it could not have been the intention of the legislature that an order concerning constitutional validity be the subject of an appeal to the Supreme Court in the normal way for the reason that the Supreme Court does not make the final decision on whether or not an Act of Parliament is valid. Only the Constitutional Court has that jurisdiction.

[36] In any event, the submission that an appeal against an order of constitutional validity should lie to the Supreme Court and not the Constitutional Court would result in a patent absurdity. The Supreme Court is an appellate court and does not itself deal with matters at first instance. It does not itself declare, at first instance, an Act of Parliament to be valid or invalid. Its powers, in terms of s 22 of the Supreme Court Act, are to confirm, vary, amend, or substitute the order appealed against. If it amends the order of the lower court, that amended order becomes the order of the lower court. Similarly, where it substitutes an order, that order becomes the order of the lower court.

[37] In this case, the High court made an order that the impugned Act was valid and constitutional. The appellant wants this order set aside and replaced with an order declaring the Act unconstitutional. Assuming, *arguendo*, that the Supreme Court were to agree with the appellant and grant the order substituting the order of the court *a quo* with one of constitutional

invalidity, the Supreme Court would not itself have the power to refer the order to the Constitutional Court for confirmation. The order substituting the judgment of the High Court with one of invalidity would become a judgment of the High Court itself, to be actioned by that court. The record would have to be returned to the High Court. The High Court would thereafter refer the order of constitutional invalidity to the Constitutional Court for confirmation. Such a process would be convoluted and unnecessary. An appeal from an order of constitutional validity directly to the Constitutional Court would resolve the issue of validity or invalidity once and for all.

[38] Subs (3) of s 175 of the Constitution could have been more elegantly worded to obviate possible confusion as to its interpretation. It is garbled. It's gibberish. Taking into account their ordinary signification, the words used in the subsection create uncertainty as to the real intention of the Legislature as regards appeals against orders concerning constitutional validity, which, no doubt, would include both orders of constitutional validity and invalidity. One can understand a situation where a person with sufficient interest applies directly to the Constitutional Court to confirm an order of constitutional invalidity so that the order has force. It is, however, difficult to imagine an interested person appealing directly to the Constitutional Court to confirm an order, presumably made in its favour. An interested person would, surely, appeal directly to the Constitutional Court to have an order either of constitutional validity or invalidity set aside and substituted with one to the contrary. In the final analysis however, it seems to me that the intention of the legislature was that appeals against both constitutional validity and invalidity be determined by the Constitutional Court, which has the jurisdiction to make the final decision in this regard. Consequently the appeal noted to this Court is invalid and for that reason the matter ought to be struck off the roll.

[39] For the sake of clarity, it must be stressed that it is the order of constitutional validity or invalidity which may be appealed directly to the Constitutional Court for that court "to confirm or vary" the order. The right to appeal directly to the Constitutional Court does not apply to orders made in respect of other constitutional matters in which the Constitutional Court exercises concurrent jurisdiction with the other courts established under the Constitution.

[40] In view of the above conclusion, it becomes unnecessary to consider the issue whether or not the Presidential Powers (Temporary Measures) Act is constitutional or not.

COSTS

[41] The question whether an appeal lies to the Supreme Court from an order of constitutional validity is one that has hitherto not come before this Court. It is a question that was, at worst, moot. In the circumstances, an order that each party bears its own costs would appear to me to be the most appropriate.

DISPOSITION

[42] The order of constitutional validity should have been the subject of an appeal directly to the Constitutional Court and not to this Court. The appeal filed with this Court is, therefore, irregular and a nullity. The matter ought therefore to be struck off the roll.

[43] In the result, the following order is made:-

The matter is struck off the roll with each party paying its own costs.

MAKARAU JA : I agree

MAKONI JA **:** I agree

Tendai Biti Law, appellant's legal practitioners

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