REPORTABLE: (11)

INNOCENT TINASHE GONESE
v
MINISTER OF FINANCE AND ECONOMIC DEVELOPMENT

CONSTITUTIONAL COURT OF ZIMBABWE
MALABA CJ, GWAUNZA DCJ, GARWE JCC, MAKARAU JCC, GOWORA JCC, HLATSHWAYO JCC & PATEL JCC
HARARE: 13 JULY 2022

T. Biti, for the applicant

L.T. Muradzikwa, for the respondent

GARWE JCC:

[1] Section 175(1) of the Constitution of Zimbabwe 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 this Court. Rule 31 of the Rules of this Court, in turn, provides for the procedure to be followed upon the grant of such an order. Any person or entity of the State with sufficient interest may either appeal against such an order or, conversely, apply for confirmation of such an order. The Registrar or Clerk of Court, as the case may be, of the court which has made such an order is required, within a period of fourteen days, to file with the Registrar of this Court a copy of the record of the proceedings, such record to include a copy of the court order. In the event that there is neither an appeal nor an application for

confirmation, confirmatory proceedings shall nevertheless take place but only in accordance with directions given by the Chief Justice.

[2] The present matter is neither an appeal against, nor an application for confirmation of, the order of constitutional invalidity made by the High Court of Zimbabwe. As just noted, it is one which this Court is obligated, by command of the Constitution itself, to confirm or refuse to confirm, as the case may be.

[3] The order by the High Court of Zimbabwe that is the subject of the present proceedings declared s 3(2) of the Finance Act [*Chapter 23:04*] ("the Act") to be unconstitutional. The order further declared two statutory instruments made thereunder, namely the Finance (Amendment of Sections 22E(1) and 22H of the Finance Act) Regulations, Statutory Instrument 123A/20 and the Finance (Amendment of Sections 22E(1) and 22 H of the Finance Act) Regulations, Statutory Instrument 145/20 to be invalid and, as a consequence, set them aside.

[4] Confirmatory proceedings are in the nature of a review. Upon a consideration of the proceedings before the High Court, this Court was of the view that the order of invalidity had not been properly made. In the first instance, the order was made without the citation of the Parliament of Zimbabwe which had enacted s 3 of the Finance Act. 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. The applicant's papers were replete with allegations that Parliament had unlawfully delegated its primary law-making function to the respondent. Further, the applicant had not shown, before the court *a quo*, how his rights under s 56(1) of the Constitution had been violated by the invocation of s 3 of the Act and

the subsequent promulgation of the two sets of Regulations made thereunder by the Minister. Lastly, the rate of carbon tax approved by the respondent, having been operationalised, no consideration was given, despite submissions to that effect by the applicant, to limit the retrospective application of the declaration of invalidity and suspend its invalidity for a given period of time to allow the Parliament of Zimbabwe to regularise the invalidity.

[5] After hearing counsel and upon a consideration of the foregoing, this Court issued the following order:

> "1. Confirmation of the order of constitutional invalidity of s 3(2) of the Finance Act is hereby declined.
> 2. The judgment of the court *a quo* in case No. HC 5714/20, judgment No. HH 265/22 be and is hereby set aside.
> 3. There will be no order as to costs.
> 4. The reasons for this order are to follow in due course."

[6] What now follow are the detailed reasons for the order we made declining to confirm the order of invalidity made by the High Court.

FACTUAL BACKGROUND

[7] 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.
> 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."

[8] Following an amendment to the 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.

[9] On 5 June 2020, pursuant to subs (2) of s 3 of the 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 which were published as Statutory Instrument 123A/20. The Regulations effected amendments to ss 22E(1) and 22H of the Act. In the regulations, the respondent created a new 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.

[10] 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.

[11] On 23 June 2020 the respondent gazetted the Finance (Amendment of Sections 22E(1) and 22H of the Finance Act) Regulations, Statutory Instrument 145/20. 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.

[12] It is these developments that triggered an application by the applicant seeking an order for a declaration that s 3(2) of the Act was an unlawful delegation of Parliament's primary law-making function and, as a necessary corollary, the setting aside of the two statutory instruments made thereunder.

PROCEEDINGS IN THE HIGH COURT

[13] The applicant is a Member of Parliament for the Mutare Central Constituency. He has in the past brought a number of matters raising constitutional issues before the courts. He is a human rights lawyer and a constitutional activist. The respondent,

on the other hand, is the Minister to whom the administration of the Finance Act has been assigned. It is he who invoked the provisions of s 3(2) of the Act and gazetted the two Statutory Instruments – 123A/20 and 145/20 - that gave rise to the dispute between the parties to this matter.

[14] The applicant made it clear in his founding papers before the High Court that he was approaching the High Court under s 85(1)(a) of the Constitution. He stated that, as a legislator, his view was that only Parliament has the right to make laws and that, consequently, he had the *locus standi* to bring the application. He alleged that his rights under s 56(1) of the Constitution had been violated and that he was entitled to the protection of s 134 of the Constitution which proscribes, on the part of the Parliament, the unlawful delegation of its primary law-making function.

[15] It was the applicant's further contention that the respondent has no power to amend any provision of the Act and to bifurcate the taxation of carbon tax between importers using free funds and those not using such funds. He argued that s 3 of the Act, which gives the Minister such power, contravenes the doctrine of the separation of powers as it permits the respondent to amend an Act of Parliament. He submitted that s 134 of the Constitution is clear. Only Parliament can make laws and its primary law-making function cannot be delegated. Section 3 of the Act, which allows the Minister to amend or replace any rate of tax or other charge imposed by Parliament, is therefore unconstitutional. He further submitted that the two statutory instruments were unquestionably made outside the law. He therefore sought an order setting aside s 3 of Act and the two statutory instruments in question, alternatively, an order reading into s 3 of the Act the words "Provided he is not amending or repealing any provision in an Act of Parliament, 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 these purposes".

[16] In heads of argument filed before the court *a quo*, the applicant further submitted as follows. Section 134 of the Constitution permits Parliament, in an Act of Parliament, to delegate the power to make statutory instruments within the scope of, and for the purposes laid out in, that Act but subject to the rider that Parliament's primary law-making function must not be delegated. A government Minister, such as the respondent *in casu*, cannot, by statutory instrument, amend an Act of Parliament. The applicant cited a number of authorities from South Africa, the United States of America, the United Kingdom, Australia and India in support of the proposition that Parliament cannot abdicate, transfer or forsake to others its essential legislative function.

[17] In addition to an order nullifying the Act and the two sets of regulations, the applicant also requested the court to make another order either limiting the retrospective effect of the order of invalidity or suspending such order. The applicant accepted that ordinarily a retrospective declaration might produce significant disruption and that, in the circumstances, there was need to ensure that what had been done in terms of the invalid law was not unscrambled.

[18] The application was opposed by the respondent. He accepted that whilst only Parliament has the right to make laws, it also has the power to delegate subsidiary law-making functions to other officials or persons. The Act allows him as Minister of Finance to make regulations that may amend or replace an existing rate of tax.

Before the promulgation of the two statutory instruments the subject of the dispute between the parties, the Reserve Bank of Zimbabwe would provide the necessary foreign currency to procure fuel. Fuel retailers would buy the commodity using the Reserve Bank facility and thereafter sell it in local currency. Through policy reforms, the Bank then allowed fuel dealers with access to free foreign funds to import the commodity and sell the same in foreign currency. It therefore became necessary for the fuel dealers importing fuel using free funds to pay the relevant taxes in foreign currency whilst those getting the commodity and selling it in domestic currency were to continue to pay the relevant taxes in the local currency.

[19] The respondent submitted that all he did was change the rate for carbon tax on fuel through the two statutory instruments. Those Regulations were subject to confirmation by Parliament within a prescribed period of time. Therefore Parliament remained in control of the process and did not abdicate its primary law-making role. Parliament proceeded to prepare a Finance Bill (HB 4/2020) in order to confirm the Regulations. That Bill had gone through Parliament and, at the time of the hearing of the matter, was merely awaiting Presidential assent. He denied usurping Parliament's primary law-making function and submitted that the change in the rate of tax was lawful. He further denied violating any of the applicant's rights under s 56 of the Constitution, adding that, in any event, there was lack of specificity as to how he (the applicant) had been discriminated against as a result of the promulgation of the Regulations.

THE JUDGMENT OF THE HIGH COURT

[20] In its judgment, the High Court observed that, in keeping with the principle of the separation of powers, the power to make, amend or repeal laws falls within the

domain of Parliament. However a Minister can exercise powers to make subsidiary legislation in matters that are concerned with or are incidental to the smooth administration of an Act of Parliament. This has the effect of easing the workload on Parliament and allows experts to legislate on technical matters that could easily get Parliament bogged down if it were to legislate on all issues.

[21] The court concluded that, on a literal interpretation of s 3(2) of the Act, the respondent had been given powers to amend or replace any rate of tax, duty, levy or other change levied in terms of the Act. It held that such a power can only be exercised by Parliament. By allowing the respondent such powers, Parliament had improperly delegated its primary law-making function to the respondent. The fact that the Regulations made by the Minister were subject to confirmation by Parliament was considered irrelevant. It was improper, in the first instance, for Parliament to delegate its legislative powers beyond what is prescribed in the Constitution. It had permitted the respondent to make, amend or replace rates of tax, duty, levy or other charges made by Parliament.

[22] Ultimately, the court found that only subs (2) of s 3 was unconstitutional. On the suggestion by the applicant that s 3 be amended by reading in words that confine the exercise of the respondent's powers only to those matters that do not involve the amending or repealing of any provision of the Act, the court was of the view that it could not arrogate to itself the power "to read in words" as this was a preserve of the Legislature in the exercise of its constitutional mandate. As regards the two statutory instruments, the court found that, having been made pursuant to s 3(2) of the Act, which it had found to be unconstitutional, both could not stand on their own. Both therefore stood to be struck down as it was through their instrumentality

that the respondent had sought to make changes to a rate of tax that had been set by Parliament. Consequently the court granted the order declaring s 3(2) of the Act to be an unlawful delegation of Parliament's primary law-making function and therefore unconstitutional. The court also declared as a nullity the two statutory instruments in question and ordered that they too be set aside. The matter was consequently referred to this Court for confirmation pursuant to ss 167(3) and 175(1) of the Constitution, read together with r 31 of the Rules of this Court.

APPLICANT'S SUBMISSIONS BEFORE THIS COURT

[23] In heads of argument filed on his behalf, the applicant urged this Court to uphold the judgment of the court *a quo* and confirm the order of constitutional invalidity. More specifically, the applicant requested this Court to confirm that s 3(2) of the Act and the two statutory instruments in question were inconsistent with s 134 of the Constitution and consequently invalid. He submitted that, by giving the respondent the power to amend a rate of tax contained in an Act of Parliament, Parliament had unlawfully delegated its primary law-making function, contrary to the dictates of s 134 of the Constitution. In addition to an order confirming the constitutional invalidity of s 3(2) of the Act and the two sets of Regulations, he further urged this Court to make another order either reading in words to remove the unconstitutional portion complained of or make an order that is just and equitable in terms of s 175(6) of the Constitution.

[24] Asked by the court to clarify what the applicant's cause of action in the court *a quo* was, counsel submitted that the gravamen of the applicant's complaint was that Parliament had unlawfully exceeded its power by giving the respondent in this case the power to amend or replace taxes stipulated in an Act of Parliament.

[25] Further asked why, in these circumstances, Parliament had not been cited as a party, he told the court that it is normal practice, in cases impeaching the validity of a statute, to sue only the Minister to whom the administration of an Act has been assigned and not Parliament. In short he maintained that it was not necessary, before the High Court, to cite Parliament as the applicant's cause of action was against the respondent herein.

RESPONDENT'S SUBMISSIONS BEFORE THIS COURT

[26] As argued in the court *a quo*, the respondent's position remained that Parliament can delegate its law-making authority subject to latter's final confirmation as provided for in s 3(3) of the Act. Therefore Parliament remains in control as it must confirm, within a stipulated time frame, any regulations made pursuant to s 3(2) of the Act.

[27] In oral submissions, counsel for the respondent further argued that, as a matter of fact, there had been no proper respondent before the court *a quo* as the Minister of Finance cannot properly answer to an allegation that Parliament had unlawfully delegated its primary law-making function.

THE NATURE OF CONFIRMATION PROCEEDINGS

[28] This Court, as the highest court in constitutional matters, is endowed with the power to review orders of constitutional invalidity made by lower courts and to determine whether the President or Parliament has failed to fulfil an obligation imposed on him/it by the Constitution. The latter, however, does not concern us here. In a sense, therefore, the Constitution entrusts this Court with the duty of

supervising the exercise of the power by the lower courts to declare statutes invalid and to determine whether any conduct of the highest organs of state is inconsistent with the Constitution. The Constitution and the Rules of this Court make it abundantly clear that this Court must consider every case in which an order of constitutional invalidity is made. In doing so this Court must decide whether or not such declaration has been correctly made. In other words, an important purpose of the confirmation proceedings is to ensure legal certainty - see *du* Plessis, Penfold & Brickhill, *Constitutional litigation*, at pp 94 and 95.

[29] It has already been noted that confirmation proceedings are in the nature of a review rather than an appeal. The court must conduct a thorough investigation into the constitutional status of a legislative provision declared to be unconstitutional. It is irrelevant whether the parties support or oppose the confirmation proceedings. Thus, even if a party offers to settle the dispute and such offer is accepted by the other party, there would still be need to cure the ensuing legal uncertainty. The same consideration would apply in a case where a litigant abandons an appeal made to a court following a declaration of invalidity by a lower court. This is so because, a lower court having already declared a provision in an Act to be inconsistent with the Constitution, the need remains to resolve the uncertainty brought about by such a declaration – *Constitutional Litigation*, *op cit*, at pp 95 and 96.

[30] This Court has also made a number of pertinent pronouncements on the nature of confirmation proceedings. The court proceeds on the basis of the record of proceedings in the lower court and considers all the evidence relating to the alleged inconsistency of the law or conduct. The court must also decide whether the constitutional validity of the law or conduct in respect of which the order of

invalidity was made was a matter properly before the lower court for determination. Thorough investigation is required on the part of this Court, even where the proceedings are not opposed or where there is an outright concession of such invalidity. The reason for this strict requirement is that the invalidity of a law is a legal consequence of a finding of inconsistency between the law in question and the Constitution. This Court can only confirm an order of invalidity if satisfied that the impugned provision is inconsistent with the Constitution – *S v Chokuramba* CCZ 10/19.

[31] It seems to me that, in considering whether or not to confirm an order of constitutional invalidity made by a lower court, this Court should consider the judgment of the lower court as a whole and satisfy itself that it was correctly made. Where this Court reaches the conclusion that the order of invalidity made by the lower court cannot be confirmed, it behoves the Court to clearly delineate the basis or bases upon which it determines that the decision made by the lower court was incorrect. A decision to decline confirmation may therefore be predicted on just one or several bases, be they procedural or substantive and irrespective of whether or not one basis may, ordinarily, be fully dispositive of the matter on its own. The position has also been accepted by this Court that, in respect of the merits of a matter referred for confirmation, such confirmation hinges on the correctness of the judgment of the court *a quo* – *Mupungu v Minister of Justice, Legal and Parliamentary Affairs & Others* CCZ 7/21.

[32] It is also apparent from a consideration of ss 167(3) and 175(5) of the Constitution, read together with r 31 of the Rules of this Court, that this Court must be automatically informed of any declaration of invalidity without delay. More

specifically, r 31 obliges the Registrar or Clerk of Court making the order of invalidity, to refer, within fourteen (14) days, the order of invalidity together with the record of the proceedings to the Registrar of this Court. In terms subrule 6, where there is neither an appeal nor an application to confirm or vary an order of invalidity, the matter is to be disposed of in accordance with directions given by the Chief Justice.

[33] In declining to confirm the declaration of invalidity in the present matter, it seemed to us that three critical issues had arisen during the confirmation proceedings. The first was whether Parliament was a necessary party to the application made in the court *a quo* and if so, the implications of the failure to cite it. The second was whether the applicant had properly pleaded a cause of action before the court *a quo*. The third related to the omission by the court a quo, having declared s 3(2) of the Act to be unconstitutional, to limit the retrospective effect of such declaration as well as suspend its invalidity for a given period of time. Each of these will now be considered separately.

WHETHER PARLIAMENT WAS A NECESSARY PARTY

[34] In his founding affidavit, answering affidavit and heads of argument, the applicant made it abundantly clear that the gravamen of his complaint was that, in enacting s 3(2) of the Act, Parliament had unlawfully delegated its primary law-making function to the respondent. In his founding affidavit, the applicant averred that such delegation was a breach of the doctrine of legality and the doctrine of the separation of powers because "only Parliament can make law". He stated, further, that the application was "a simple one" and was for a declaration that s 3 of the Act is unconstitutional because "it is *ultra vires* s 134 of the Constitution of Zimbabwe"

because it permits the Minister "to amend charges that are done by Parliament".

[35] Indeed the respondent understood the applicant's cause of action to have been that s 3(2) of the Act was unconstitutional because Parliament had improperly delegated its primary law-making function. To the extent that he could do so, the respondent argued that whatever regulations he made pursuant to s 3(2) of the Act would have been subject to confirmation by Parliament within a period of six months. The respondent therefore argued that the requirement that any regulations made by him be subjected to confirmation by Parliament was a sufficient safeguard to ensure that Parliament remained in control of the process.

[36] The court *a quo* also understood the issue before it to have been whether s 3(2) of the Act was consistent with s 134 of the Constitution which provides for Parliament to delegate the power to make statutory instruments as long as its primary law-making function was not delegated. The court opined thus:

> "… the Legislature cannot delegate its powers to make, amend and repeal a law or a provision of that law to a subordinate body or authority through a statutory instrument or subordinate legislation. Doing so is *ultra vires* the provisions of the Constitution that clearly define and delineate legislative authority. Section 3(2) must therefore be understood in that sense. The Constitution does not permit the Legislature to delegate to subordinate bodies or the Executive to be more specific, its powers to make, amend or replace rates of tax, duty, levy or other charges made by Parliament in the exercise of its powers……..
> Once the Court finds s 3(2) unconstitutional, it follows that the two instruments are bereft of any legal foundation and they must fall."

[37] In short, therefore, the complaint by the applicant before the High Court was that Parliament had unlawfully delegated its primary law-making function when it enacted s 3(2) which gives the Minister the right to amend, change or replace any

rate of levy, charge or tax made by Parliament. Indeed *Mr Biti*, during oral submissions before us, stated that the applicant's cause of action has always been that Parliament exceeded its powers by improperly delegating its powers to the respondent.

[38] I am prepared to accept *Mr. Biti's* contention that, in general, a litigant seeking to impeach the validity of a statute must cite the Minister to whom the administration of the Act has been assigned. Subject to comments I make later in this judgment, the Minister in such a case would have sufficient *locus standi* to oppose a declaration of invalidity of a law that he superintends. The majority of applications seeking an order of invalidity of a statute would probably fall into this category. The circumstances of the present case are, however, different.

[39] The serious allegation made in the application before the High Court was that Parliament had improperly or unlawfully delegated its primary law-making function. All the parties to the application were clear in their minds that that was the nub of the matter. The court *a quo* was being asked by the applicant to make such a finding against Parliament. Yet Parliament was not a party and was not before the court. Parliament was not even aware that such a serious allegation was being made against it as an institution. That Parliament was an interested party and should have been cited goes without saying. It was Parliament that had delegated the power to amend rates of fuel taxes to the Minister. The Minister had only acted in accordance with the power as so delegated. The applicant's cause of action was therefore not against the Minister as such but rather against the conduct of Parliament. In these circumstances Parliament was therefore a necessary and interested party.

[40] The imperative of joining all interested parties to ongoing proceedings has been underscored in a plethora of cases. The authors Cilliers AC, Loots C and Nel HC, Herbstein and van Winsen, *The Civil Practice of the High Courts and Supreme Court of Appeal of South Africa, 5th edition, Juta & Co Ltd, Cape Town*, 2009) Vol 1 state at p 215:-

> "A third party who has, or may have a direct and substantial interest in any order the court might make in proceedings or if such an order cannot be sustained or carried into effect without prejudicing that party, is a necessary party and should be joined in the proceedings, unless the court is satisfied that such person has waived the right to be joined ….. In fact, when such person is a necessary party in this sense the court will not deal with the issues without a joinder being effected, and no question of discretion or convenience arises."

[41] The learned authors, *op cit*, go further and explain the meaning of direct and substantial interest. At pp 217-8, they remark as follows:-

> "A direct and substantial interest' has been held to be 'an interest in the right which is the subject – matter of the litigation and not merely a financial interest which is only an indirect interest in such litigation'. It is 'a legal interest in the subject matter of the litigation, excluding an indirect commercial interest only'. The possibility of such an interest is sufficient, and it is not necessary for the court to determine that it in fact exists. For joinder to be essential, the parties to be joined must have a direct and substantial interest not only in the subject-matter of the litigation but also in the outcome of it."

[42] The finding made by the court *a quo* that Parliament had improperly or unlawfully delegated its essential law-making function to the Minister could not have been properly made without Parliament being heard first. In these circumstances, the court *a quo* should have appreciated that Parliament was a necessary party and made an order joining Parliament as a party to enable the latter to place facts before the court on the matter. Only after hearing Parliament would the court have been in a position to determine whether Parliament had indeed unlawfully delegated its

law-making function. As remarked by O'REGAN J in *Mabaso v Law Society, Northern Provinces* 2005 (2) SA 117 (CC), at para 13:-

> "In a constitutional democracy, a court should not declare the acts of another arm of government to be inconsistent with the Constitution without ensuring that arm of government is given a proper opportunity to consider the constitutional challenge and to make such representations to the court as it considers fit. There are at least two reasons for this. First, the Minister responsible for administering the legislation may well be able to place pertinent facts and submissions before the court necessary for the proper determination of the constitutional issue. Secondly, a constitutional democracy such as ours requires that the different arms of government respect and acknowledge their different constitutional functions……."

[43] Whilst the above remarks were made in the context of r 5 of the Constitutional Court Rules of South Africa which require the joinder of an organ of state in certain situations, there can be little doubt that they apply with equal force to the circumstances of the present case. Parliament cannot be accused of having unlawfully delegated its constitutional law-making function without it being afforded the opportunity to be heard before such a finding is made.

[44] It seems to me that there is a further reason why Parliament should have been joined as a party to the proceedings before the court *a quo*. The court *a quo* declared s 3(2) of the Act to be invalid. Having done so, the court *a quo* should have, in terms of s 175(6) of the Constitution, made a further order suspending conditionally or unconditionally, the declaration of invalidity for a specified period to allow Parliament, *not the Minister*, to correct the unlawful delegation. Such an order could not have been made in the absence of Parliament. Nor was it an order that could have been competently made and relayed to Parliament through the respondent in this case. This is an aspect I will revert to shortly in this judgment.

[45] The failure by the court *a quo* to join Parliament as a party before it proceeded to determine that the latter had unlawfully delegated its constitutional law-making function was a fatal irregularity that vitiated the proceedings at the end of the day. This Court has accepted, in *Tour Operators Business Association of Zimbabwe v Motor Insurance Pool and Others* 2015 (1) ZLR 965 (SC) that there are instances where the non-joinder of a responsible authority can be fatal to the proceedings – in this regard see also the High Court decision in *Rodger & Others v Muller & Others* 2010 (1) ZLR 49 (H). In deciding whether such non-joinder is fatal, a court must take into account whether the relief sought calls into question the authority's power, whether the relief sought has a direct bearing on the exercise of power or discretion by such authority and, lastly, whether the relief that may be granted will have an appreciable impact on the rights of such an authority. There can be little doubt, in the present case, that the relief sought and granted had a serious impact on Parliament as an institution. Without its knowledge, the adverse finding was made that it had acted unlawfully by delegating its primary law-making function. A law it had studiously and patiently crafted was held to be invalid without its involvement.

[46] That determination by the court *a quo*, made in the aforementioned circumstances, was clearly wrong. It is one of the bases upon which this Court must decline confirmation of the decision of the court *a quo*.

[47] It further seems to me, from the foregoing, that it may be necessary, in all cases where an Act of Parliament is sought to be invalidated, for Parliament to be cited, in addition to the Minister to whom the Act is assigned. I say so because an order of invalidity is usually accompanied by another order limiting the retrospective

application of the order and another giving the responsible authority, which may include Parliament, the opportunity to regularise or rectify the invalidity.

WHETHER THE APPLICANT'S STATED CAUSE OF ACTION WAS PROVED

[48] The applicant, in approaching the court *a quo*, made it abundantly clear that he was doing so pursuant to s 85(1)(a) of the Constitution. Section 85, which is the cornerstone of the enforcement of fundamental rights and freedoms, provides that certain classes of persons or an association acting in the interests of its members are entitled to approach any court established in terms of the Constitution in order to actualise and effectuate their fundamental rights. That section makes it clear that in approaching a court, such person or entity must allege that a fundamental right or freedom enshrined in Chapter 4 of the Constitution has been, is being or is likely, to be infringed.

[49] An application made under s 85 of the Constitution must therefore allege an infringement of a fundamental right. As Chapter 4 of the Constitution has made provision for a number of fundamental rights, the specific fundamental right allegedly infringed must be identified. If the court is satisfied that there has been, or there is likely to be, such an infringement, it will, by command of the Constitution, make such a declaration and, consequently, grant consequential relief in order to enforce the enjoyment of such a right.

[50] As already noted, the applicant approached the court *a quo* under s 85(1)(a) alleging a violation of his right under s 56(1) of the Constitution. Section 56(1) provides that all persons are equal before the law and have the right to equal protection of the law. The section further provides for the equality of treatment

between men and women and the right of every person not to be treated in an unfair manner on grounds such as nationality, race, colour, tribe as well as a host of others. The section further states that a person is treated in a discriminatory manner if he or she is subjected, directly or indirectly, to a condition, restriction or disability to which others are not subjected or is refused a privilege to which other people are accorded.

[51] Having alleged a violation of his rights under s 56(1) of the Constitution, the applicant's papers said nothing further about any conduct that discriminated against him. Although the respondent did complain in his opposing papers about the lack of clarity of the applicant's cause of action under s 56(1) of the Constitution, the applicant did not, either in the answering affidavit or heads of argument, give any detail on the alleged discrimination he may have been made to suffer. Indeed the applicant exerted much of his efforts at trying to show that s 3 of the Act, in terms of which the respondent had acted in amending the rates of the fuel levies, was an unlawful delegation of Parliament's plenary law-making function. In the result, therefore, the allegation that his rights under s 56(1) of the Constitution had been breached was neither substantiated nor pursued. It was one that remained in the abstract.

[52] In his founding affidavit before the court *a quo* the applicant appeared to have been under the impression that s 56(1) of the Constitution provides a general right to the protection of the law as did s 18 of the former Constitution. In this regard, he stated as follows in para 68-71 of his founding affidavit:

> "68. I therefore bring this application in my individual right in terms of s 85(1)(a) of the Constitution.
> 69. It is my contention that my rights to equal protection and benefit of the

law as codified in s 56(1) of the Constitution has been breached.

70. I am entitled to the protection of the Constitution which is in s 134 which makes it clear that Parliament cannot delegate its primary law making power.
71. I have been denied equal protection and benefit of the Constitution which defines and articulates principles of legality, constitutional supremacy, constitutional accountability and the doctrine of separation of powers."

[53] This Court has, on several occasions in the past, defined the import of the right under s 56(1) of the Constitution. In short, it is a non-discrimination provision which guarantees equality before the law. It is different from s 18(1) of the former Constitution which provided for a general right to the protection of the law. Section 56(1) of the Constitution envisages a law which provides for equality in the protection and benefit of persons affected by it and the right not to be subjected to conduct or treatment to which others similarly placed are not. As remarked in *Minister of Justice, Legal and Parliamentary Affairs & others v Chinanzvavana & Anor* S 119-21, a decision of the Supreme Court of Zimbabwe, which no doubt correctly reflects the law in this country, the provision simply guarantees equality before the law. A person alleging a violation of a s 56(1) right must not only prove unequal or different treatment but also that others in a similar provision were afforded such protection.

[54] In *Nkomo v Minister of Local Government, Rural and Urban Development & Ors* CCZ 6/16 ZIYAMBI JA eloquently and succinctly captured the quintessence of the provision as follows:

> "The right guaranteed under s 56(1) is that of equality of all persons before the law and the right to receive the same protection and benefit afforded by the law to persons in a similar position. It envisages a law which provides equal protection and benefit for the persons affected by it. It includes the right not to be subjected to treatment to which others in a similar position are not subjected. In order to found his reliance on this provision the applicant must show that by virtue of the application of a law he has been the recipient of unequal treatment or protection that is to say that certain persons have been

> afforded some protection or benefit by a law, which protection or benefit he has not been afforded; or that persons in the same (or similar) position as himself have been treated in a manner different from the treatment meted out to him and that he is entitled to the same or equal treatment as those persons."

[55] The above sentiments were echoed in later judgments of this Court in cases such as *Mupungu v Minister of Justice, Legal & Parliamentary Affairs*, *supra* and *Greatermans Stores (1979) (Pvt) Ltd t/a Thomas Meikles Stores & Anor v Minister of the Public Service, Labour and Social Welfare & Anor* CCZ 2/18. In the Supreme Court decision in *Minister of Justice, Legal and Parliamentary Affairs & Ors v Chinanzvavana & Anor*, *supra*, it was also remarked that:

> "In order to found his reliance on this provision the applicant must show that by virtue of the application of a law he has been the recipient of unequal treatment or protection that is to say that certain persons have been afforded some protection or benefit by a law, which protection or benefit he has not been afforded……"

[56] It was not the applicant's contention in the court *a quo* that he has been subjected to treatment to which others similarly placed had not been subjected. Bearing in mind that the gravamen of his complaint related to the power exercised by the Minister in amending fuel levies imposed on fuel importers, it was not his case that he was a fuel importer and that he had been treated differently from other fuel importers. He had, in his founding papers claimed *locus standi* on the basis that he is a member of Parliament, a citizen of this country and a constitutional activist.

[57] The applicant's cause of action was therefore never established. The mere reference to a violation of his rights under s 56(1) did not serve to bring his application within the confines of s 85(1) of the Constitution. He should have pleaded facts to show that, for purposes of s 56(1) of the Constitution, he had been discriminated against. He did not do so principally because, as his papers later

revealed, that was not his cause of action. As remarked by this Court in *Sibangani v Bindura University of Science and Technology* CCZ 7/22:

> "An applicant must set out either the facts or the law that would form the basis of the jurisdiction of the court in his or her cause. It is insufficient for an applicant, without more, to merely cite a provision of the Constitution and assume that the court's jurisdiction is triggered……"

In this regard attention may also be drawn to the decisions of the Constitutional Court of South Africa in *Van der Walt v Mekan Trading Limited* (CCZ 37/01) (2003) ZACC 4 2002(4) SA 317; 2002(5) BCLR 454 and *Sarrahwit v Maritz N.O. & Anor* (CCT93/14) (2015) ZACC 14; 2015(4) SA 491(CC); 2015 8 BCLR 925(CC).

[58] There was a further difficulty with the applicant's papers before the court *a quo*. The draft of the order he sought from the court did not seek a declaration of the infringement of his s 56(1) rights. All it sought was a declaration that s 3 of the Finance Act was unconstitutional and that it should be set aside, together with the two statutory instruments made by the Minister under its *aegis*. In the result the court was faced with an application alleging a violation of rights under s 56(1) but in respect of which no declaration was sought. The declaration that s 3 of the Finance Act was inconsistent with the Constitution could not, on the papers, have arisen from a declaration of a violation of rights under s 56(1).

THE NEED FOR PROPER PLEADINGS IN CONSTITUTIONAL LITIGATION

[59] This matter underscores and brings to the fore the need for careful attention to detail in constitutional litigation. Accuracy in pleadings in matters where the parties place reliance on the Constitution in asserting their rights is of utmost importance. In this regard the authors du Plessis, Penfold and Brickhill in *Constitutional*

Litigation, op. cit. at p 71, cite the remarks by ACKERMAN J in *Shaik v Minister of Justice and Constitutional Development and Others* (CCT 34/03) [2003] ZACC 24; 2004 (3) SA 559(CC); 2004(4) BCLR 333(CC) (2 December 2003), at para 24-25, that:

> "(24) The minds of litigants (and in particular practitioners) in the High Courts are focused on the need for specificity by the provisions of uniform r 16A(1). The purpose of the Rule is to bring to the attention of persons (who may be affected by or have a legitimate interest in the case) the particularity of constitutional challenge in order that they may take steps to protect their interests…….
>
> (25) It constitutes sound discipline in constitutional litigation to require accuracy in the identification of statutory provisions that are attacked on the ground of their constitutional invalidity ……."

[60] The authors further cite, at p 72, the remarks of the Constitutional Court of South Africa in *The Crown Restaurant CC v Gold Reef City Theme Park (Pty) Ltd* 2008 (4) SA 16 (CC), at para 6, that:

> "Litigants are once again reminded that care should be taken to identify properly at the time of the institution of proceedings which constitutional issue they wish to have addressed so that they, the courts and practitioners can ensure that all the necessary material is available to enable proper adjudication of cases at all levels of the judicial system."

In this connection attention may also be drawn to the remarks of PATEL JCC in *Zimbabwe Human Rights Association v Parliament of Zimbabwe & Others* CCZ 6/22.

[61] The court *a quo* consequently failed in its duty to ascertain whether the infringement alleged by the applicant had been established. The court was also wrong in failing to appreciate that the order it made at the conclusion of the matter was not related to the alleged violation of the applicant's fundamental right under s 56(1) of the Constitution. No cause of action founded on a violation of rights encapsulated under s 56(1) had been established.

THE FAILURE TO LIMIT THE RETROSPECTIVE APPLICATION OF THE DECLARATION OF INVALIDITY.

[62] The High Court found that s 3(2) of the Act had unlawfully delegated Parliament's primary law-making function to the respondent and that, pursuant to that delegation, the respondent had, in turn, unlawfully gazetted the two statutory instruments in June 2020 in which he had amended rates of fuel levies previously fixed by Parliament. Although the applicant had unequivocally requested the court to exercise its discretionary powers pursuant to s 175(6) of the Constitution, the High Court did not do so. It did not, in its judgment, even advert to the request by the applicant in this regard. Its order, dated 27 April 2022, reads as follows:

> "(1) Section 3(2)of the Finance Act [Chapter 23:04] be and is hereby declared to be inconsistent with s 134(a) as read with s 117(2)(c) of the Constitution and consequently unconstitutional.
> (2) The Finance (Amendment of ss 22E I and 22H of the Finance Act) Regulations, 2020 published in Statutory Instrument 123A of 2020 be and are hereby declared a nullity and are set aside.
> (3) The Finance (Amendment of s 22E(1) and 22H of the Finance Act Regulations, 2020 published as Statutory Instrument 145/2020 be and is hereby declared a nullity and are set aside."

[63] At the time that the court *a quo* set aside s 3(2) of the Act and the two statutory instruments, the amendments to the rates of the fuel levy had been in operation for almost two years. It goes without saying that, during that period, fuel importers had, in compliance with the two statutory instruments, paid the fuel levies as amended by the statutory instruments. In one fell swoop, the court *a quo* declared the enabling law invalid but said nothing about the fate of the levies that had already been paid to, and collected by, the *fiscus* pursuant to that law. The court also made no provision for the regulations to remain operational subject to conditions it may have considered appropriate.

[64] In light of the doctrine of objective constitutional invalidity, a declaration of invalidity will, in the absence of an order to the contrary, have retrospective effect. In other words, a provision declared to be unconstitutional becomes invalid, not from the date the court so pronounced, but from the date of its enactment or, more pertinently in this case, from the date on which the new Constitution came into effect. In the meantime, members of the public may have conducted themselves in the genuine belief that the law was in fact valid. It is because of the realisation that a declaration of invalidity might produce significant economic and/or administrative dislocation that the Constitution has made provision for discretionary powers by a court to limit such disruption. An immediate declaration of invalidity often results in a *lacuna* in the law that "may create uncertainty, administrative confusion or potential hardships" or may have "serious budgetary implications" – *Constitutional Litigation*, *op. cit*, at pp 118 and 119.

[65] Section 175(6) of the Constitution provides that a court may grant an order that is just and equitable, including an order limiting the retrospective effect of the declaration of invalidity and an order suspending, conditionally or unconditionally, the declaration of invalidity for any period to allow the competent authority to correct the defect. This provision ensures that a court can, in such a case, limit the retrospective application of a declaration of invalidity and further allow the competent authority time to take whatever measures it may consider necessary to correct the defect.

[66] In deciding whether or not a suspension order should be granted a court would normally take into account the harm that may eventuate from a declaration that is

made with immediate effect as against the harm that would result from keeping the provision in operation pending rectification by the appropriate authority.

[67] The court *a quo* was therefore wrong, having declared s 3(2) of the Act unconstitutional, in not invoking its powers under s 175(6) of the Constitution. On the facts of this case and in the absence of such a declaration, the various fuel dealers who had imported fuel using the amended levies imposed by the Minister would have been entitled to demand that the Ministry of Finance refunds these levies in view of the declaration of invalidity. No doubt such a declaration would cause considerable disruption in the economy and very suddenly upend the capacity of the *fiscus* to collect and retain revenues it thought it was entitled in terms of the law to collect for the general good.

[68] In light of the facts of this case, however, there is need for a rider to the observations that have just been made. Regard being had to the conclusion reached in this case that the declaration of invalidity was not correctly made, the failure by the court *a quo* to invoke its powers under s 175(6) no longer remains a relevant issue. It was however the type of error that deserved special mention for the benefit of the court *a quo*. Had the order of the High Court been correctly made, this Court, pursuant to s 175(3), of the Constitution and s 18(1)(a) of the Constitutional Court Act [Chapter 7:22], would have varied the order to ensure the limitation of the retrospective nature of the order and to give the competent authority, Parliament in this case, sufficient time to correct the defect. Section 18 of the Constitutional Court Act [*Chapter 7:22*], in particular, makes it clear that in confirmation proceedings, this Court has the power, *inter alia*, not only to confirm but also to vary or amend the judgment appealed against or give such judgment as the case may require.

THE JUDGMENT OF THE COURT CANNOT BE ALLOWED TO STAND

[69] Having come to the conclusion that the order of invalidity had been incorrectly made, this Court was of the view that there was need to go further and ensure that the judgment of the court *a quo* did not remain extant. Ordinarily the refusal of confirmation would mean that the order of invalidity ceases to have legal effect. However it would also mean that the judgment of the court *a quo*, though effectively still-born, continues to exist as a judgment of the court and may remain persuasive in the future. There is no mechanism at present to red flag the judgment so that it may not be relied upon in the future.

[70] In anticipation of unforeseen circumstances in which this Court may need to be clothed with jurisdiction to review the proceedings of other courts subordinate to it, s 19 of the Constitutional Court Act has granted the power to this Court, and every Judge of this Court, to review proceedings and decisions of such subordinate courts. The section makes it clear that such power may be exercised at any time whenever it comes to the attention of the Court, or a Judge, that an irregularity has occurred in any proceedings or in the making of any decision, notwithstanding that such decision is not the subject of an appeal or application to the Court.

[71] There can be little doubt this is a useful and necessary provision. In the absence of such a power, the Court, or Judges of the Court, would be utterly powerless to act, even where it comes to their attention that there has been an irregularity in the making of a decision on a constitutional matter in a lower court. Such an irregularity would remain unrectified, unless the matter becomes the subject of an appeal or review before a court, which is not always the case.

[72] In addition, s 18(1)(a) of the Constitutional Court Act further provides that this Court has the power, in confirmation proceedings, not only to confirm or vary but also set aside the judgment of the court *a quo*. Although para (a) of subs (1) of the section refers to the judgment appealed against, it is clear, from subs (1) that it also applies to judgments or orders that come before the court for confirmation.

[73] In view of the foregoing, this Court was of the view that the judgment of the court *a quo* should be set aside in its entirety so that no reliance of whatever nature may be placed on it.

[74] On the question of costs, it was our view that, this being a constitutional matter and no basis having been shown for the Court to order otherwise, a no-costs order would meet the justice of the case.

[75] It was for the above reasons that this Court made the order highlighted in para 5 of this judgment.

MALABA CJ	**:**	I agree
GWAUNZA DCJ	**:**	I agree
MAKARAU JCC	**:**	I agree
GOWORA JCC	**:**	I agree
HLATSHWAYO JCC	**:**	I agree
PATEL JCC	**:**	I agree

Tendai Biti Law, applicants' legal practitioners

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