COMMUNICATIONS AND ALLIED SERVICES
WORKERS UNION OF ZIMBABWE
versus
TEL-ONE (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MAKARAU J
Harare 13 September and 26 October 2005

Opposed Application

Mr *Biti*, for the applicant
Mr *Hwacha*, for the respondent

MAKARAU J: This is a labour dispute between a trade union and an employer over the suspension and termination of services of members of the union, the employees of the respondent.

INTRODUCTION

1. The applicant as its name implies, is a trade union, duly registered in accordance with the laws of the country, to represent the interests of the workers in the communications and related industries. The respondent is a provider of communication services. Its employees are members of the applicant.

2. On 6 October 2005, the employees of the respondent went on strike after giving the employer notice of their intention to do so.

3. When served with the notice of intention to go on strike, the respondent applied to the Minister of Public Service, Labour and Social Welfare for a cause order to be issued in terms of section 106 of the Labour Act [*Chapter 28:01*], ("the Act"). The parties were invited to a hearing at which the matter was referred to internal dialogue. A certificate of no settlement was issued. On 6 October 2005, the employees of the respondent went on strike and the respondent once again applied for a show cause order to have the strike declared illegal and stopped. A show cause order was issued and the strike was declared illegal. The applicant noted an appeal against the show cause order issued in the matter. On 9 November 2004, the Labour Court upheld the applicant's appeal.

4. Prior to the determination of the appeal by the Labour Court, the respondent wrote letters of suspension without pay and benefits to 1 254 of its employees who had participated in the strike. A number of the employees were charged with misconduct and were dismissed.

5. The above application was then filed, seeking to have set aside the termination of the employment of the concerned workers as being grossly unprocedural, amongst other grounds.

6. The application was opposed. In its opposing affidavit, the respondent took two points *in limine* that I shall deal with in detail shortly. Regarding the merits of the matter, the respondent argued that it was not barred by any law from proceeding against the concerned employees in terms of its code of conduct.

THE ISSUES

7. The respondent raised in *limine,* the *locus standi* of the applicant to bring this application on behalf of its members. It contended that since the disciplinary proceedings were brought against each individual employee, the applicant has no locus to challenge the proceedings. Secondly, in still in *limine*, the respondent argued that the applicant should have exhausted the domestic remedies available to it before approaching this court on review.

8. Regarding the merits, the issue respondent argued that there is no law barring it from resorting to its code of conduct after invoking the provisions of the Labour Act in a bid to break the collective job action.

9. Thus, the three issues that fall for determination are whether the applicant has standing to bring this application, if so, whether the applicant should be ordered to exhaust the domestic remedied provided for under the Act and, regarding the merits of the matter, whether the invocation of the code of conduct by the respondent after failing to break the collective job action was grossly unprocedural.

THE LAW

10. Dealing with the first issue, I note that section 29 (2) of the Act clothes trade unions with corporate status and specifically provides that trade unions shall be capable of doing all such acts that are authorised by its constitution. The section proceeds in subsection (4) (d) to grant a trade union the right to make representations before any determining authority or the Labour Court.

11. In my view, the fact that the Act entitles a registered trade union with the right to make representations before any determining authority or the Labour Court does not limit it to that role only as suggested by Mr *Hwacha*. It appears to me that if its constitution authorises it to sue and be sued on behalf of its membership, a trade union can bring or defend representative actions on behalf of its members. In my further view, section 29 (4) (d) is expressly providing for a trade union to have a voice in labour disputes that are before determining authorities and the Labour Court, which voice may have been denied at common law and on the narrow construction of the general rule governing rules of procedure as to who may address a determining authority or court in formal hearings.

12. It is my further view that in addition to having a voice before a determining authority and the Labour Court, a trade union may be a party before this court as long as its constitution allows it to sue in the subject matter and as long as it can establish a standing before this court.

13. The issue of standing has been before this and the Supreme Court in a number of cases recently. As observed by McNALLY J in *Law Society of Zimbabwe and Others v Minister of Finance* 1999 (2) ZLR 231 (S), the development of the law of class actions or representative actions in this jurisdiction is nascent. That class actions are desirable in this jurisdiction is evidenced by the passage of the Class Action Act [*Chapter 8:17*], which came into operation in 2000. Thus, as a jurisdiction, it is my view that we have moved miles from the position held in cases such as *Wood and Others v Ondwanga Tribal Authority and Another* 1975

(2) SA 294 to the effect that an individual person is not entitled to protect the right of the public or to "champion the cause of the people". Jurisprudence of today recognises not only that a member of the public can bring a matter in the public interest if he or she shows sufficient legal interest in the litigation but that classes or groups may collectively bring suits to protect class or collective legal interests. The definition of sufficient legal interest in any case, like any other matter in which the court makes a value judgment, is a reflection of the judges' values of the rights to access justice permissible at any given time in that jurisdiction. sometimes access is perceived as narrow, sometimes as wide, but the fact remains that representative or public interest litigation is now a feature of this jurisprudence.

14. It was for a time held as the correct position at law that for a party to demonstrate sufficient interest for the purpose of bringing representative or public interest litigation, they had to demonstrate real and practical prejudice directly stemming from the outcome of the litigation. (See *P.E Bosman Transport Works Committee & Others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 801 (T) *Henrie Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O)).

15. An attempt was made by Mr *P A Chinamasa* to rely on this formulation of the test establishing standing for representative bodies in *Zimbwabwe Teachers Association & Others v Minister of Education* 1990 (2) ZLR 48 (HC). In that case, an association of teachers brought an application against the dismissal of its members, a situation similar to the one before me. Mr *Chinamasa* contended that the association of teachers did not suffer any real and direct prejudice as a body to warrant it being given standing before the court. In rejecting the contention, EBRAHIM J (as he then was) reviewed a number of authorities dealing with the subject before he had this to say: " *from these authorities it is apparent what the legal approach to the issue of locus standi should be. The petitioners must show that they have a direct and substantial interest in the subject matter and what is required is a legal interest in the subject matter of the action".*

16. In holding thus, EBRAHIM J effectively widened the basis upon which standing could be founded in public interest litigation in this jurisdiction. This was prior to the enactment of the Class Action Act.

17. The test as formulated by EBRAHIM J above was referred to with approval by MCNALLY JA in the *Law Society of Zimbabwe* case where he held that the statutory obligation on the part of the Law Society to represent the views of the legal profession and to deal with all matters affecting the profession was sufficient to give it standing on its own, although, out of an abundance of caution, a member of the Society was added to the proceedings as a party in that matter. At page 234 he had this to say: "*I conclude therefore, that the Law Society has locus standi in this matter, if only on the basis that it is statutorily empowered to assist and join with Mrs Mollat in her application. In so ruling, I do not wish it to be understood that I am saying that the Law Society's application could not have stood on its own. I take the view that it could. It has real and substantial interest in the proceedings……."*

18. The applicant has the statutory duty of protecting the interests of its members just like the Law Society of Zimbabwe and the Zimbabwe Teachers Association. The other two associations were held by this court to have sufficient standing to protect the interests of their members. I do not see a legal basis upon which I can treat the applicant differently in the circumstances of this matter. It is seeking to protect the rights of its members not to be untreated unfairly by their employer in matters of discipline and collective job actions. It plays an important role that is recognised by statute in both spheres of discipline and collective job actions. In conclusion therefore, it is my finding that the applicant has established sufficient and legal interest in the application to give it standing before in the proceedings before me.

19. I now turn to the second issue raised by the respondent in *limine*. This relates to the need for the applicant to exhaust domestic remedies before approaching this court. Again, this issue has been before this and the Supreme Court in a number of

matters. In *Zikiti v United Bottlers* 1998 (1) ZLR 389 (H), GILLESPIE J explained in detail and in a manner that appeals to me the rationale behind the reluctance of the courts to allow access *ad libitum* where proceedings and recourse are still available in the lower courts. Instead of the availability of domestic remedies being held as a complete bar to the bringing of proceedings before this court, it is used as a measure to select the instances where the court will withhold its jurisdiction pending the exhaustion of domestic remedies.

20. The position regarding the need to exhaust domestic remedies thus presents itself to me: this court always enjoys jurisdiction to determine matters placed before it even where domestic remedies have not been exhausted but, this court, in its discretion, will sometimes withhold that jurisdiction to allow the domestic remedies to expend themselves.

21. The criteria used by the court in determining whether to withhold its discretion was also discussed in the various cases referred to by GILLESPIE J in the *Zikiti* case. After reviewing the various cases, the conclusion reached by GILLESPIE J is that the approach of the court is to discourage the duplication of proceedings unless good cause has been shown. I do not have a good cause for not following that approach in this matter.

22. In *casu*, it is common cause that an approach was made by the applicant to invoke the domestic remedies. The dispute, as an unfair labor practice, was referred to a labour officer. The labour officer who was assigned the case declined to hear it on the basis that he did not have jurisdiction in the matter.

23. The labour officer was clearly in error when he declined jurisdiction in the matter. Three issues however arise from this error on the part of the labour officer. Firstly, since his ruling that he did not have jurisdiction stands, one can assume that there is no parallel domestic procedure between the parties that is duplicated by the application before me. Secondly, the refusal by the labour officer to entertain the matter clearly demonstrates that he did not appreciate the nature of the dispute between the parties thereby bringing into question the efficacy of the

domestic remedy. Thirdly, it appears that for the applicant to follow the domestic remedied to exhaustion, it now has to appeal against the decision of the labour officer against refusal of jurisdiction. Thereafter the matter may then be heard at first instance provided the Labour Court finds that the labour officer was in error in declining jurisdiction.

24. In my view, the complications surrounding the domestic remedies introduced by the labour officer who erroneously declined jurisdiction, is such that the applicant will not be afforded an expeditious and proper determination of the matter. (See *Tutani v Minister of Labour & Others* 1987 (2) ZLR 88 (H)).

25. On the basis of the above, I am satisfied that just cause has been made for he approach to this court at this stage and that the proceedings before me are not in duplication of any other process already under way in terms of the provisions of the Labour Act.

26. I finally turn to the merits of the application. The applicant has sought to have the decision of the respondent to use its code to discipline the workers set aside on the basis that it was grossly unprocedural, was tainted with bias and that the respondent set up an incompetent body to enforce the code.

27. It was submitted by Mr *Hwacha* for the respondent that after the show cause order was discharged by the Labour Court, the parties were at large to dispose of the dispute using other remedies and that there is no law that restricted the respondent from resorting to its code of conduct. In my view, it is in this regard that the respondent erred.

28. Section 102 of the Labour Act provides that subject to the provisions of the Act, all employees, workers committees and trade unions shall have the right to resort to collective job action to resolve disputes of interest. The Act proceeds under section 107 to provide for the issuance of disposal orders disposing of illegal collective action. In section 108 (3), the Act affords protection to employees engaged in lawful collective action. Such employees are not liable for breach of

contract and their employment shall not be terminated on the ground that they engaged in a lawful collective action.

29. In my view it is these clear provisions of the law that provide the short answer to Mr *Hwacha'*s submission and bar the respondent from resorting to its code of conduct to discipline employees that engaged in the collective job action.

30. For the respondent to proceed to charge the employees who engaged in collective job action under its code was grossly irregular and flies in the face of the express letter of the law. It is not permissible. It seeks in vain to make the code superior to the provisions of the Act under which the code is registered. A code is not part of the *corpus juris* of this country. It is essentially part of the terms of the contract of employment between employer and employee. It cannot override the law of the country.

31. In view of the finding I make above, it is not necessary that I proceed to determine the other two grounds raised by the applicant in its application. The disciplinary hearings held by the respondent were a nullity *ab initio*. Nothing lawful could emanate from them nor attach to them even if they observed all the other requirements of the code and the law. They have to be set aside as being grossly irregular.

32. In the result, I make the following order:

    a) The disciplinary proceedings by the respondent against all its employees who engaged in the collective job action of 6 October 2004 are hereby set aside.

    b) The respondent shall pay the costs of this application.

Honey & Blankernberg, applicant's legal practitioners.

Dube, Manikai & Hwacha, respondent's legal practitioners.