

BONIFACE MAGURURE & 63 ORS
v
CARGO CARRIERS INTERNATIONAL HAULIERS PVT) LTD T/A
SABOT

CONSTITUTIONAL COURT OF ZIMBABWE
CHIDYAUSIKU CJ, MALABA DCJ, ZIYAMBI JCC,
GWAUNZA JCC, GARWE JCC, GOWORA JCC,
HLATSHWAYO JCC, GUVAVA JCC & MAVANGIRA JCC
HARARE, JULY 14, 2014 & NOVEMBER 16, 2016

F Mahere, for the applicants

A P de Bourbon SC, for the respondent

MALABA DCJ: The applicants have approached the Court in terms of s 85(1)(a) of the Constitution of the Republic of Zimbabwe Amendment (No. 20) 2013 (“the Constitution”), which provides that any person who alleges that any of the fundamental rights and freedoms enshrined in Chapter IV has been, is being or is likely to be infringed may approach a Court, seeking appropriate relief, which a court has a discretion to grant.

The applicants, with the exception of the fifth applicant who is a Workers Committee Chairperson, are all cross border truck drivers. They are employed by the respondent, a company, whose business is to transport goods across borders in the Southern African Development Community (SADC) region using trucks.

The applicants accuse the respondent of unfair labour practices. They allege that the respondent forces them to drive for long hours a day from 4 a.m. to 2100 hours. They are not allowed to leave vehicles unattended and complain that as they drive they are tracked by the respondent through satellite devices. It is their allegation that they are made to work overtime without pay.

The applicants allege that several of the drivers and workers' committee members who tried to protest the long working hours and lack of overtime payment were subjected to disciplinary action. Most of them were found guilty of inciting "unlawful collective job action" and dismissed from employment. Some of the appellants have pending disciplinary cases, on the same charge.

The applicants accept that the legality of the conduct of the respondent can be determined in terms of a Collective Bargaining Agreement existing between the parties. The Collective Bargaining Agreement ("the CBA") published under S.I. No. 67 of 2012 has binding effect as a law of general application. It governs the working hours, wages and the payment of the employees in the transport sector. The CBA governs the rights and obligations of the parties.

The applicants approached the Court alleging that in conducting itself in the manner alleged the respondent has infringed their fundamental right to fair and safe labour practices enshrined in s 65(1) of the Constitution which provides:

"Every person has the right to fair and safe labour practices and standards and to be paid a fair and reasonable wage."

The relief the applicants seek is an order to the effect that the long working hours they are required to endure and the alleged refusal by the respondent to pay for overtime be declared to be unfair labour practices in violation of s 65(1) of the Constitution. They also seek an order interdicting the respondent from compelling them to work overtime. At the same time they seek an order directing the respondent to pay them for the overtime worked. The applicants also seek an order that all employees dismissed by the respondent after being found guilty of misconduct relating to demands of payment for overtime worked be reinstated without loss of salary and benefits. Finally, they seek an order declaring that the disciplinary action taken by the respondent against the Workers Committee Members for raising some of the applicants' grievances be declared a violation of the right to organize enshrined in s 65(5) of the Constitution.

The respondent denied the allegations levelled against it. It averred that the truck drivers were paid for the overtime they worked in terms of the CBA. It said that the long hours of work were a result of the nature of the job the drivers had voluntarily chosen to take. The reason why the drivers were made to drive from 4a.m. to 2100 hours was to avoid night driving and the accidents going with it.

Mr *de Bourbon* for the respondent argued that the grounds on which the applicants have approached the Court do not raise a constitutional matter for the Court to exercise its jurisdiction as conferred by s 167(1)(b) of the Constitution. Section 167(1)(b) of the Constitution provides that the Constitutional Court decides only constitutional matters and issues connected with decisions on constitutional matters in particular references and applications under s 131(8)(b) and para. 9(2) of the Fifth Schedule. Section 167(1)(C) provides that the Constitutional Court

makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.

Section 332 of the Constitution defines “constitutional matter” to mean “a matter in which there is an issue involving the interpretation, protection or enforcement of the Constitution.

Have the applicants brought to the Court for determination a matter in which there is an issue involving the interpretation, protection or enforcement of the Constitution? The fact that the applicants allege that the respondent has by the conduct it is alleged to have committed infringed their fundamental right to fair and safe labour practices enshrined in s 65(1) of the Constitution does not mean that they have raised a constitutional matter. It is for the Court to decide whether the determination of the legality of the conduct of the respondent if proved would require the interpretation and application of s 65(1) of the Constitution.

Mr *de Bourbon* correctly pointed out that s 65(1) of the Constitution sets out a minimum standard to the effect that every person in a labour relationship is entitled to fair and safe labour practices. The Labour Act governs all labour matters. Miss *Mahere* referred to s 6(1) of the Labour Act which reiterates and expands on the standard prescribed by s 65(1) of the Constitution. The section provides in relevant part:

“6. Protection of employees’ right to fair labour standards

(1) No employer shall –

(a) pay any employee a wage which is lower than that to fair labour specified for such employee by law or by agreement made under this Act; or

- (b) require any employee to work more than the maximum hours permitted by law or by agreement made under this Act for such employee; or
- (c) fail to provide such conditions of employment as are specified by law or as may be specified by agreement made under this Act; or
- (d) require any employee to work under any conditions or situations which are below those prescribed by law or by the conventional practice of the occupation for the protection of such employee's health or safety.”

Section 8 of the Act defines unfair labour practices by an employer. One of the acts specified under s 8(e)(i) as unfair labour practice is failure by an employer to comply with or implement a collective bargaining agreement. Section 8(e)(i) of the Act presupposes that there is a collective bargaining agreement made under the Act governing the rights and obligations of the parties who are in a labour relationship.

The standard of what is unfair labour practice prescribed by the Act was not in issue. In other words the question is not whether in defining unfair labour practice the Act violated the fundamental right to fair labour practice enshrined in s 65(1) of the Constitution. The Act recognized that the parties in a labour relationship have a right to fair labour practices. It recognized that there were labour practices that would constitute unfair labour practices in violation of the fundamental right. It went on to define those labour practices which if proved would amount to unfair labour practices in violation of the right. In defining unfair labour practices in s 8 the Act protects the right to fair labour practices enshrined in s 65(1) of the Constitution.

The Act sets out the remedies both in the sense of what is to be done to seek relief and the appropriate relief to be granted in cases of disputes as to whether the conduct of an

employer constitutes unfair labour practice or not. There is no allegation in this case that the remedies prescribed under the Act do not meet the standard of effective remedies the Constitution requires to be prescribed for the resolution of disputes of right.

The fact is that the applicants invoked the wrong remedy for the protection of their rights. The applicants are challenging the legality of the conduct of the respondent. It is not in dispute that such conduct is governed by the Collective Bargaining Agreement. It is not in dispute that the Collective Bargaining Agreement together with the Act, provides for remedies to address a situation where an employer is allegedly practising unfair labour practices. The applicants have not alleged that these pieces of legislation are unconstitutional.

The question whether the alleged conduct of an employer in a labour relationship governed by a Collective Bargaining Agreement constitutes unfair labour practice is not a constitutional matter. Its determination does not involve the interpretation and application of s 65(1) of the Constitution. It involves the interpretation and application of s 8 of the Act as read with the relevant provisions of the Collective Bargaining Agreement. In other words, all the questions raised for determination are not constitutional matters. They are statutory matters.

A constitutional matter arises when there is an alleged infringement of a constitutional provision. It does not arise where the conduct the legality of which is challenged is covered by a law of general application the validity of which is not impugned. The question whether an alleged conduct constitutes the conduct proscribed by a statute requires not only proof that the alleged conduct was committed, it also entails that the statutory provision against which

the legality of the conduct is tested be interpreted to establish the content and scope of the conduct proscribed before it is applied to the conduct found proved.

This case is governed by the application of the principle of subsidiarity. In *Mazibuko and Others v City of Johannesburg and Others 2010(4)SA 1(CC)* the principle is set out as follows:

“Where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution.”

The Constitutional Court of South Africa had earlier on in *South African National Defence Union v Minister of Defence and Others 2007 ZACC 10*, said:

“Where legislation is enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard.”

Essentially a litigant cannot challenge the conduct of a decision maker as breaching a fundamental right in the Constitution without first utilizing the remedies offered by the legislation that gives effect to that right. Where there is legislation giving life to a right in the Constitution, a litigant cannot found a cause of action directly on the Constitution without attacking that statute as unconstitutional. See *MEC for Education, Kwa-Zulu Natal and Others v Pillay 2008 (1) SA 474*.

John Grogan writing on “*Labour Relations*” in *Currie and De Waal, “The Bill of Rights Handbook” (2013), JUTA*, discussing the effect of s 23(1) of the “The Constitution of the

Republic of South Africa, 1996” enshrining the right everyone has to fair labour practices states at p 473:

“Section 23 of the 1996 Constitution sets out these rights in skeletal outline, but is buttressed by a number of national statutes, designed to give effect to those rights. As the law now stands, if an employee’s rights can be enforced under one or other of these statutes, that employee cannot rely directly on the Constitution.”

See *Fredericks v MEC for Education & Training Eastern Cape* (2002) 23 LLJ 81(CC).

The principle of subsidiarity underlines the fact that there are many disputes of right or interest which do not give rise to constitutional matters and directs as to the route to be taken for the protection of the rights allegedly violated. In this case, a Collective Bargaining Agreement made within the provisions of the Labour Act, exists, providing for wages, overtime payment and for dispute resolution. In essence it regulates fair labour practices. The applicants have ignored this legislation. They have chosen to rely directly on the provisions of s 65(1) of the Constitution in bringing the application to the Court. The Court cannot condone such an approach.

Once legislation to fulfil a constitutional right exists, as was made clear in *My Vote Counts NPC v Speaker of the National Assembly and Others* 2016(1) SA 132(CC), the Constitution’s embodiment of that right is no longer the prime mechanism for its enforcement. The legislation is primary. The applicants cannot rely directly on s 65(1) of the Constitution as they can claim relief under the Act. It was not the intention of the makers of the Constitution that employees should be able to approach the Constitutional Court to complain that they have not been paid for overtime worked or that they are made to work longer hours than are prescribed for the particular industry.

The situation would have been different if the applicants were attacking the constitutional validity of the provision of the Act under which the Collective Bargaining Agreement was made. As was put in *My Vote Counts NPC case supra*:

“Where a litigant does attack the legislation, as here, saying that it falls short of a standard embodied in the Constitution itself, then they are free to invoke the Constitution directly. That, indeed, is the essence of constitutionalism: it allows all legislation to be subjected to constitutional scrutiny. So a litigant may invoke the Constitution to gauge the extent to which legislation meets a constitutional obligation – but the litigant may not evade addressing that legislation.”

The principle of subsidiarity is based on the concept of one-system-of-law. Whilst the Constitution is the supreme law of the land it is not separate from the rest of the laws. The principles of constitutional consistency and validity underscore the fact that the Constitution sets the standard with which every other law authorized by it must conform. The Constitution lays out basic rights and it is up to legislation to give effect to them. This is the nature of the symbiotic relationship between the Constitution and legislation. The legal system is one, wholesome and indivisible. As was put in *Gcaba v Minister for Safety and Security and Others* 2010(1) SA 238(CC).

“The constitutional and legal order is one coherent system for the protection of rights and the resolution of disputes.”

Using the Constitution directly to litigate would have been permissible if there was no law of general application against which to measure the conduct of the employer, thus leaving the Constitution as the only available yardstick of measurement. In this case, the law of general application proscribing the conduct of the employer does exist. If the employer engages in conduct that falls outside the scope of that law, the aggrieved party must use that very law to protect its

rights. That is the essence of the rule of law. Ignoring these principles would undermine the laws that support the constitutional order and the rule of law.

The application is devoid of merit. It is dismissed with no order as to costs.

CHIDYAUSIKU CJ: I agree

ZIYAMBI JCC: I agree

GWAUNZA JCC: I agree

GARWE JCC: I agree

GOWORA JCC: I agree

HLATSHWAYO JCC: I agree

GUVAVA JCC: I agree

Messrs Kwenda & Associates, applicant's legal practitioners

Messrs Ahmed & Ziyambi, respondent's legal practitioners