

REPORTABLE (12)

**(1) FARAI KATSANDE (2) ZIMBABWE BANKS AND ALLIED
WORKERS UNION
v
INFRASTRUCTURE DEVELOPMENT BANK OF ZIMBABWE**

**CONSTITUTIONAL COURT OF ZIMBABWE
CHIDYAUSIKU CJ, MALABA DCJ, ZIYAMBI JCC,
GWAUNZA JCC, GARWE JCC, GOWORA JCC,
HLATSHWAYO JCC, GUVAVA JCC, MAVANGIRA AJCC
HARARE, 23 JULY 2014, & May 24, 2017**

C. Kwaramba, for the appellant

T. Mafukidze, for the respondent

GWAUNZA JCC: This is an application in terms of s 85 (1) of the Constitution.

The applicants seek an order affirming the first applicant's constitutional right to belong to a trade union of his choice in terms of s 65(2) of the Constitution. They also seek an order declaring as unconstitutional and a violation of this fundamental right, the conduct of the respondent in: -

1. refusing the first applicant permission to belong to and participate in the lawful activities of the Zimbabwe Banks and Allied Workers Union (ZIBAWU); and
2. giving him the ultimatum to choose between his job and the trade union.

The applicants in addition seek an order quashing any disciplinary proceedings against the first applicant arising from;

“the respondent’s imposition of restrictions on his involvement and/or participation in second applicant’s lawful activities,”

as well as costs of suit.

The facts which give rise to this application are as follows. The first applicant was employed by the respondent as a loans officer with effect from June 2010. In the same month, he was elected Vice President of the second applicant. On 27 October 2011, the first applicant was promoted to the post of Senior Loans Officer. In May 2012, he was appointed interim President of the second applicant. The respondent reacted to this appointment and expressed its disapproval of the continued association between the first and the second applicants. The respondent’s position was that since the applicant was a managerial employee, he could no longer represent the interests of non-managerial employees. This was in view of the fact that the second applicant was a trade union concerned with such interests. There was correspondence back and forth between the second applicant and the respondent concerning the issue. The second applicant repeatedly wrote to the respondent seeking the release of the first applicant to attend its functions and meetings both within and outside Zimbabwe. The requests were all turned down. Meetings were held between the first applicant and the respondent and the latter reiterated that the first applicant could not be a managerial employee and president of the second respondent at the same time. In the respondent’s view, the two roles were mutually inconsistent.

The first applicant’s position was that he was not a managerial employee and if he was, he would still have the right to associate with the second applicant in terms of s 4 of the Labour Act (“the Act”). This is the section that guarantees employees the right to belong to a trade union of their choice, and to participate in its lawful activities.

The second applicant's request for the release of the first applicant to attend trade union business in South Africa from 18-21 March 2013, was rejected by the respondent. The first applicant nevertheless proceeded to go for the workshop. The applicants held the view that the respondent's refusal to grant the first applicant permission to attend functions and meetings of the second respondent was also a violation of s 14 (6) of the Collective Bargaining Agreement: Banking Undertaking, SI 273/2000. The section provides that paid special leave shall be granted to an employee who is nominated to attend national or international conferences as a trade union representative.

On 2 April 2013, the respondent preferred two misconduct charges against the first applicant. The first related to his absence from work during the time he attended trade union business in South Africa and the second to wilful disobedience of a lawful instruction not to attend. A disciplinary committee was constituted and it held that the proceedings were to be held in abeyance until the matter pending in the Labour Court was finalized. This was a referral of the dispute to the Labour Court in terms of s 46(b) of the Act, made by the first applicant. In the referral, the first applicant sought a determination on the question of whether or not he was a managerial employee of the respondent.

The second applicant again wrote to the respondent requesting the release of the first applicant for an elective congress which was to be held from 4-6 April 2013. The respondent responded and maintained its position that it would not allow the first applicant to attend as he

could not belong to the second applicant since he was a managerial employee. Undeterred, the second applicant again wrote to the respondent requesting the release of the first applicant to attend a ‘Uni-Africa Regional Conference’ in Nairobi, Kenya from 15 -21 September 2013. The respondent, maintaining its position, turned down the request. The first applicant attended the conference regardless and the respondent preferred two other misconduct charges against him.

Subsequent to the filing of this application, the first applicant was brought before a disciplinary committee to answer to the second set of charges, relating to his participation at the Kenya conference. He was found guilty and was dismissed from the respondent’s employ. The first applicant then filed a complaint of unfair labour practice with the Ministry of Labour.

Based on two main grounds, the respondent submits that the application is not properly before this court.

Firstly, the respondent contends that there are two cases pending before the Labour Court, both filed by the first applicant, opposed by the respondent, and still awaiting determination. Further, that the question of whether or not the first applicant is a managerial employee is at the heart of both this dispute and the two matters pending in the Labour Court. Consequently, the pendency of the matter in the Labour Court renders this application impermissible. Similarly, any determination of the issue by that court would make this application unnecessary.

I find there is merit in the respondent's submissions.

The first applicant referred the dispute to the Labour Court in terms of s 46(b) of the Act which reads as follows;

“46. Matters to be determined by the Labour Court

In the event of any dispute as to-

- a)
- b) whether any employees are managerial employees;
the matter shall be referred to the Labour Court for determination”

The matter was thus properly referred to the Labour Court and, therefore fell to be determined by that court. There is nothing on the record to suggest that the matter was withdrawn from the Labour Court. It can therefore be assumed that it is still pending determination there. The same applies to the first applicant's complaint of unfair labour practice, filed with the Ministry of Labour.

There was thus no need for the applicants to file this application. It falls to reason that before or following a determination of the issue by the Labour Court the first applicant, if that was his wish, would have had to follow a procedure that dictated a different route to reach this court.

Specifically, he would have had to reach this court through a referral in terms of s 175(4), or an appeal (if applicable) in terms of s 175 (1) and (3) of the Constitution. He could also have filed an appeal against the determination of the Labour Court, to the Supreme Court for a final determination of the matter.

The route taken by the applicants in bringing this matter to the Constitutional Court is criticized in the case of *Anna Colleta Chihava & 2 Ors vs The Provincial Magistrate Francis Mapfumo NO & 1 Other* (CC 02/14). In that case the court held that the wording of s 85(1) of the Constitution should not be understood to mean that a litigant is free to unceremoniously abandon proceedings in a lower court, and be able to mount a constitutional challenge before this court, seeking the same relief that the lower court would have been competent to grant. A contrary interpretation would not only result in an absurdity - where different courts may be seized simultaneously with the same dispute - but would also cause procedural confusion pertaining to the courts' jurisdictional parameters. It would also open the way to undeserving or 'unripe' cases being brought to the Constitutional Court, to the detriment of its effective operation.

The respondent, I find, is correct in its assertion that the applicants have improperly attempted to 'jump the gun' by coming to this court in a bid to preempt the Labour Court's determination of the very same issue.

Apart from this, the procedure adopted by the applicants would constitute an affront to the time honoured common law principle that a superior court should be slow to intervene in ongoing proceedings in an inferior court, except in exceptional circumstances. This principle is persuasively articulated as follows in the case of *Wahlhaus v Additional Magistrate, Johannesburg* 1959 (3) SA 113 (A): -

“... a superior court would be slow to exercise any power upon the untermiated course of criminal proceedings in a court below, but would do so in rare cases where grave injustice might otherwise result or where justice might not by other means be attained.”

I am satisfied the same principle applies with equal force to civil proceedings in a lower court.

Echoing the same sentiments in the recent case of *Cuthbert Tapuwanashe Chawira & 13 Ors v Minister of Justice Legal and Parliamentary Affairs & 2 Ors* CCZ 3/17 this court, per Bhunu JCC held as follows: -

“Zimbabwe operates a self-hierarchical judicial system where in the ordinary run of things cases start from lower courts progressing to the highest court of the land. Generally speaking, higher courts are loath to intervene in untermiated proceedings within the jurisdiction of the lower courts, tribunals or administrative authorities

These sentiments find expression in the words of GUBBAY CJ in the leading case of *Catholic Commission for Justice and Peace in Zimbabwe v A-G & Ors* 1993 (1) ZLR 243(S) at 250G, where the learned Chief Justice had this to say;

“Clearly it (Supreme Court) has jurisdiction in every type of situation which involves an alleged breach or threatened breach of one of the provisions of the Declaration of Rights and particularly, where there is no other judicial procedure available by which the breach can be prevented. Compare *Martin v Attorney General & Anor* 1993 (1) ZLR 153 (S) (my emphasis)”

It becomes evident from all that has been said above, that there is merit in the respondent’s contention that this is a proper case for the application of the doctrine of ripeness and avoidance. This doctrine holds that: -

“where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed”. See *State v Mhlungu* 1995 3 SA 867 (CC) para [59].

The doctrine was affirmed in *Zantsi v Council of State, Ciskei & Others* 1995 4 SA 615 (CC) paras [2] – [8]. It is a well-founded principle in our law that this court will not ordinarily consider a constitutional question unless the existence of a remedy is dependent solely upon it. The doctrine of avoidance was fortified in *Sports and Recreation Commission v Sagittarius Wrestling Club and Anor* 2001 (2) ZLR 501 (S) in which Ebrahim JA said the following: -

“There is also merit in Mr Nherere’s submission that this case should never have been considered as a constitutional one at all. Courts will not normally consider a constitutional question unless the existence of a remedy depends upon it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of Rights” (my emphasis)

I find in the circumstances of this case, and based on the authorities cited above, that the doctrine of avoidance can properly be invoked against the applicants. A remedy was clearly available to them in the Labour Court, had they chosen to pursue the matters pending in that court, to their logical conclusion. In other words, they could have secured a determination of the issue in question in the lower court, without having to ‘reach’ the Constitutional Court in the manner they did.

In the final analysis, and in light of the foregoing, I find that the application is not properly before this court and ought to be struck off the roll.

Despite this finding which would be dispositive of this matter, I find it pertinent and of interest to address the other ground upon which the respondent premised its argument that this

matter is not properly before this Court. This was that the application does not raise a constitutional question.

The respondent contends that the applicants seek to have declared unconstitutional, conduct that was done in terms of an extant legal provision whose constitutionality the applicants do not challenge. The provision in question is s45(1)(b) of the Labour Act and reads as follows: -

“45 Considerations relating to registration or variation, suspension or rescission of registration of trade unions or employer’s organizations

(1) In any determination of the registration of a trade union or employers’ organization or of the variation, suspension or rescission thereof, the Registrar shall—

(a)

and

(b) *ensure compliance with the following requirements—*

(i) a trade union shall not represent employers;

(ii) an employers’ organization shall not represent employees other than managerial employees;

(iii) the constitution of a trade union or employers’ organization shall not be inconsistent with this Act. (my emphasis)

(2)

While the section as a whole is concerned with the actions of the Registrar of Trade Unions and the considerations that he must take into account in relation to the registration, variation, suspension and rescission of the registration of a trade union, it is evident that subparagraphs (i) – (iii) of its ss (1)(b) also restate the legal position relating to who a particular trade union may or may not represent. They also distinguish employers from employees (both as defined in the Act), in terms of who or what should represent them. I do not find that the respondent’s conduct, impugned by the applicants, was properly guided by its interpretation of this section.

The respondent attached to its papers evidence (in the form of a letter) of the first applicant's promotion to "the IBDC Managerial Team" as a loans officer. The same document contains a paragraph reading as follows: -

"EMPLOYMENT STATUS

In terms of IDBZ's structure, you are considered to be a managerial employee"

In its definitions section, the Act defines 'employer' thus, in relevant part: -

"employer means any person whatsoever who employs or provides work for another person and remunerates and expressly undertakes to remunerate him, and includes-

- (a) the manager, agent or representative of such person who is in charge or control of the work upon which such other person is employed;
- (b) – (e) ..."

The dispute *in casu* concerns whether the first applicant fits into this definition of employer, and if he does not, whether the respondent's refusal to allow him to participate in the affairs of the second applicant constituted a violation of his labour rights guaranteed under s 65(2) of the Constitution. It should be noted in this respect that the respondent is not said to have refused the first applicant permission to join or involve himself in the affairs of an employer's organization.

The applicants allege the same violation of the first applicant's labour rights even if it is determined that he falls into the category of "employer" as defined. The applicants in this respect allege in their heads of argument that the second applicant as a trade union does not represent the

interests of non-managerial employees only, but that it also has within its membership, employees said to be “managerial” like the first applicant. In addition, they argue that the second applicant’s constitution does not rule out this circumstance.

The evidence before the court shows that the respondent, having promoted the first applicant to a position ranked by it as managerial, and relying on the plain meaning of the words

‘a trade union shall not represent employers’,

contained in s 45(1)(b)(i) of the Labour Act, engaged in the conduct complained of. They refused the first applicant permission to involve himself in the activities and affairs of a trade union. The respondent therefore did no more than interpret (correctly in my view) the literal meaning of the provision in question and based its conduct on such an understanding. It appears to me that the applicants wished the respondent to read into the same words, a meaning that is not apparent from a plain reading thereof. I am not persuaded that there was a legal basis for them to do so.

As contended for the respondent, the applicants are attacking the wrong victim. In this respect, the respondent in my view correctly argues as follows: -

“... the applicants do not challenge the constitutionality of the provisions of the Labour Act which, we submit, permit the respondent’s refusal of permission for first applicant’s absence. A litigant may not bypass legislation and rely directly on the Constitution without challenging the provision in question. It is trite that conduct permitted by a law is not unlawful unless the law has been declared invalid”

I find this to be a persuasive argument. The learned authors of the book “Constitutional Litigation,”¹ *Max du Plessis, Glenn Penfold and Jason Brickhill*, define a constitutional question thus:-

“The quintessential example of a constitutional matter is one that involves the direct application of the Bill of Rights, that is, a constitutional challenge to law or conduct based on an unjustified infringement of a fundamental right”

The applicants *in casu* challenge the conduct of the respondent that was informed by the explicit language of an extant legal provision ie, s 45(1)(b) of the Act. If by such conduct the respondent, in the view of the applicants, violated a perceived fundamental right of theirs, then the appropriate action to take would have been to challenge the constitutional validity of the law in question. For it would be that law, and not conduct based on it, that would be based on an unjustified infringement of a perceived fundamental right. It hardly needs mentioning that the striking down of such a law would have the result of nullifying the conduct complained of.

Accordingly, and based on the above definition, I find that the application does not raise a constitutional question.

On this ground, too, I find that the application is not properly before the court and ought to be struck off the roll.

¹ First Ed. at p 19

The respondent prays for an order of costs against the applicants, on an attorney and client scale. It contends that the application typified a case of abuse of court process, and that the court should show its disfavor by ordering costs on the higher scale.

The practice of this court is that constitutional matters should not attract costs against the losing party in the absence of compelling reasons justifying such an award. I am not persuaded that an order for costs, more so on a higher scale, is merited under the circumstances of this case.

Accordingly, having found that the application is not properly before this court, I make the following order: -

1. The application be and is hereby struck off the roll.
2. There shall be no order as costs.

CHIDYAUSIKU CJ: I agree

MALABA DCJ: I agree

ZIYAMBI JCC: I agree

GARWE JCC: I agree

GOWORA JCC: I agree

HLATSHWAYO JCC: I agree

GUVAVA JCC: I agree

MAVANGIRA AJCC: I agree

Mbidzo, Muchadehama & Makoni, applicants' legal practitioner

Kantor & Immerman, respondent's legal practitioners