NETONE CELLULAR (PRIVATE) LIMITED
versus
THE MINISTER OF PUBLIC SERVICE LABOUR AND
SOCIAL WELFARE
and
NATIONAL EMPLOYMENT COUNCIL
FOR THE COMMUNICATIONS AND ALLIED SERVICES INDUSTRY

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 28 February 2013 – 25 February 2015

Opposed Application

D. Ochieng, for the applicant
C. Mucheche, for the 2nd respondent

MAKONI J: The applicant approached this court seeking the following relief:

"IT IS DECLARED AS FOLLOWS:

1. The application to the Applicant of the provisions of a collective bargaining agreement born of a process to which the Applicant was not party is a violation of the Applicant's constitutional right to freedom of association.

2. The imposition upon the Applicant of the requirement to register with the Second Respondent is a violation of the Applicant's constitutional right to freedom of association.

3. The mandatory payment of dues by the Applicant to the Second Respondent is a compulsory acquisition of the Applicant's property in violation of the Applicant's constitutional right to protection from the compulsory acquisition of property without compensation.

4. Section 82(1)(a) of the Labour Act [Chapter 28:01] and sections 2(a) and 36 of the Collective Bargaining Agreement for the Communications and Allied Services Industry (S.I.1 of 2012) are in violation of section 21 of the Constitution to the extent that they provides for the infringements declared in paragraphs A1 and A2 of this order.

5. Sections 33 of the Collective Bargaining Agreement fro the Communications and Allied Services Industry (S.I.1 of 2012) is in violation of section 16 of the Constitution by reason of the infringement declared in paragraph A3 of this order.

IT IS ORDERED THAT:

1. Sections 2(a), 33 and 36 of the Collective Bargaining Agreement for the Communications and Allied Services Industry (S.I.1 of 2012) are struck down.

2. Section 82(1)(a) of the Labour Act [Chapter 28:01] is struck down to the extent od deleting the words, "and all employers, contractors and their respective employees in the undertaking or industry to which the agreement relates".

The background to the matter is that the applicant is in the business of providing celleular communications. The second respondent is a council established in terms of s 56 of the Labour Act [*Chapter…*] ("the Act") for the communications services sector.

Sometime in 2010 the second respondent, after having followed the due process provided for in the Act, varied its scope to include, *inter alia*, cellular communications.

In a letter dated 9 January 2012 the second respondent advised the applicant that a Collective Bargaining Agreement for the Communications and Allied Services Industry (the (CBA) had been published on 6 January 2012, in S.I 11 of 2012. It further invited the applicant to register with the second respondent and pay the dues as stipulated in the CBA. The applicant objected and the second respondent threatened to have the applicant arrested. The applicant then instituted the present proceedings.

The applicant avers that despite being the biggest employer in the communications industry, it was not aware of and did not participate in the creation of either the second respondent or the CBA. It has no wish to be a member of second respondent nor does it wish to pay dues to it. It has notified the second respondent which has sought to compel the applicant to submit to membership and remit dues in terms of the provisions of the CBA and the Act.

It further avers that s 82 (1) (a) of the Act makes CBA's apply to entire industries without regard to whether the participants have adopted the instrument. It is not a member of the employers association that is party to the CBA and is not aware whether any of its employees belong to a union party. Section 82 (1) (a) therefore violates its right to freedom of association and is therefore inconsistent with s 21 of the Constitution. Sections 2 (a) 1 (b) of the CBA are unconstitutional for the same reasons.

The applicant further avers that s 33 and 36 of the CBA are unconstitutional. Section 33 effects a compulsory acquisition of the applicant's funds by requiring the applicant to pay dues to second respondent. This violates s 16 of the constitution. Section 36 compels the applicant to join the second respondent thereby violating the applicant's rights under s 21 of the constitution. The second respondent went to the extent of violating the applicant's rights by making a report to the Police and persuading the Police to arrest officers of the applicant.

In opposition the second respondent initially raised two points *in limine* namely:

(1) Whether this court has jurisdiction to entertain the present matter.

(2) Whether the applicant is approaching the court with dirty hands.

On the merits the application is opposed on the basis that the applicant is bound by the CBA as it is registered with the respondent in terms of the law. The CBA is registered to cover the entire communications industry. The applicant is bound by the CBA as it is an employer in the Communication and Allied Services Industry. The publication of the CBA as a S.I 1 of 2012 was constructive notice to the applicant about its coming into being.

At the hearing of the matter, the second respondent abandoned the issue of the doctrine dirty hands. It will not be necessary to make a determination on it.

The second respondent approached the issue of lack of jurisdiction of this court from two angles viz: See

(i) that this court has no jurisdiction to declare legislation unconstitutional

(ii) that this court has no jurisdiction, at first instance, to entertain the application as the matter emanates from the provisions of the Act.

I will deal with the points in seriatim

Lack of jurisdiction to declare legislation unconstitutional

Mr *Mucheche* submitted that the issue for determination by this court is captured in para 5 of the applicant's founding affidavit viz:

He contended that this court has no jurisdiction, at first instance, to determine a constitutional application. Under the then current constitution, that jurisdiction is the preserve of the Supreme Court sitting as a Constitutional Court. The Supreme Court is approached either by way of referral in terms of s 24 (2) or a direct application in terms of s 24 (1).

He further contended that although the application is for a declaratur it in fact a disguised constitutional application. He submitted that the court should look at the grounds on which the application is based rather than the order sought. He concluded by submitting that the relief sought by the applicant can only be obtained in the Supreme Court. He cited *Narasha* v *Old Mutual Life Assurance Co Ltd* 2000 (2) ZLR 197 H.

Mr *Ochieng* submitted that in terms of s 13 of the High Court Act [*Chapter 7:06*] this court has jurisdiction to entertain the matter. The Supreme Court will then confirm the order of the High Court.

In my view, it is trite, that this court has jurisdiction in constitutional matters. This court is entitled to rule on whether breaches of the Declaration of Rights or other violations

have occurred. For the benefit of the second respondent, and like other minded litigants, I will restate the law on this point in the hope that this point will not detain courts in the future

Section 81 of the Constitution provides:

.

> "(1) There shall be a High Court which shall be a Superior Court of record and shall have jurisdiction and powers as may be conferred upon it by or in terms of the Constitution or any Act of Parliament"

Section 13 of the High Court Act [*Chapter 7:6*] provides:

> "Subject to this Act and any other law, the High Court shall have full original civil jurisdiction over all persons and over all matters within Zimbabwe".
>
> Civil matters are defined as any case or matter which is not a criminal case or matter.

Clearly this includes constitutional matters.

This position was re-enforced in *Capital Radio (Pvt) Ltd* v *Broadcasting Authority of Zimbabwe Ors* 2003 (2) ZLR 236 (s) at 243 C-D. Chidyausiku CJ spoke of a litigant's right to institute a constitutional application in the High Court when he stated:

> "The provisions of section 24 do not, in any way, circumscribe the *locus standi* of an applicant in the High Court. In the High Court the common law test, namely having an interest in the matter under adjudication, is sufficient to establish *locus standi*. In a constitutional application in the High Court all that a litigant is required to show to establish *locus standi* is a substantial interest in a matter".

In any event there are a plethora of cases in our jurisdiction where the High Court has dealt with constitutional matters see *Zimbabwe Banking & Allied Workers Union & Anor* v *Beverley Building Society & Ors* 2007 (2) ZLR 117 H. *Chituku* v *Minister of Home Affairs and Ors* HH 6/04, *Banana* v *Attorney General* 1998 (1) ZLR 309 (S). See also *Greig Linnington Constitutional Law of Zimbabwe* (2001) p 18-20)

<u>Labour Dispute</u>

Mr *Mucheche* submitted that although the applicant is seeking for a *declaratur,* the court must look at the nature of the dispute and see whether the legislature has not provided relief in another forum. The issue of CBAs fall under the domain of Labour Court. The Labour Act provides for adequate remedies to address peculiar circumstances of an employer or employee such as:

> "(1) section 81 of the Act provides for an appeal to the Labour Court".

He further submitted that in terms s 89 (6) of the Act no other court in Zimbabwe is competent to deal with labour matters other than the Labour Court. The applicant is taking

issue with provisions that regulate the administration of CBAs. The provisions are within the ambit and shape of the Labour Act and the forum of first instance is the Labour Court and not any other court.

Mr *Ochieng* contended that the dispute between the parties relate to violations of the applicants constitutional rights and the Labour Court is not empowered to grant such relief. He further contended that the Labour Court has no power to issue declarators.

Paragraph 5 of the applicant's founding affidavit is very clear on the nature of the application before me. The application seeks to challenge the constitutionality of s 82 (1) (a) of the Act and s 2 (a), 33 and 36 of S.I. 1/12. It is dispute over the violations of applicant's constitutional rights and is not the sort of dispute that is reserved for the Labour Court by s 89 (6) of the Act. The Labour Court is a creature of statute and is empowered only to grant the forms of relief that are specified in the relevant statute. See *Gomba* v *Associated Mine Workers Union* HH 118/05.

There is nothing in the enactment that empowers the Labour Court to determine disputes as to violations of the Constitution and strike down legislation. In any event it is settled law that the Labour Court has no power to issue declarators. See *Mushoriwa* v *Zimbabwe Banking Corporation Ltd* 2008 (1) ZLR 125 H at 129 A _C.

It is clear from the above that from whichever angle you look at this issue, this court has jurisdiction to determine the dispute before it.

Violation of s 21 (1) of the constitution

Mr *Ochieng* contended that the nub of the issue is that by compelling the applicant to register with the second respondent the CBA forces the applicant into a position where it is a member of the second respondent and deprives the applicant of its property. The applicant is being compelled to associate with the second respondent. Such conduct is a negation of the freedom that s 21 of Constitution serves to uphold. In addition to the forced association s 33 of he CBA, reinforced by s 2 (a) of the CBA and s 82 (1) (a) of the Act compel, the applicant to pay levies to the second respondent against its will.

Mr *Ochieng* contended that voluntary participation in the process and conscious submission to agreed terms are essential elements of collective bargaining. This is confirmed by the fact that participation in collective bargaining is not made mandatory by s 74 (2) of the Act. It uses the permissive 'may' in relation to collective bargaining Mr *Ochieng* further contended that levies being demanded by the second respondent do not constitute a rate or

tax that is reasonably justifiable in a democratic society and therefore not a permissible derogation from s 16 (1) of the Constitution.

Mr *Mucheche* submitted that the second respondent is a legal body set up in terms of s 56 of the Act. It has authority to regulate conditions of employment in the communications industry. The fact that the applicant professes ignorance of its existence does not take away its legal authority. He further contended that CBAs created minimum conditions of employment in an industry and are justified in democratic society. They harmonise the interests of employers and employees. The applicant is bound by operation of the law as it is operating in that industry and cannot seek to escape the minimum conditions of that industry. The applicant did not take advantage of the domestic remedies provided for in the Act if it had any issues with the coming into being of the CBA that binds it.

The ILO Right To Organise And Collective Bargaining Convention (No. 98) 1949 describes collective bargaining as:

> "Voluntary negotiation between employees or employer's organisations and workers organisations, with a view to the regulation of terms and conditions of employment by collective agreement".

Some of the essential features of collective bargaining are viz:

> "(i) It is a method used by trade unions to improve the terms and conditions of employment of their members.
>
> (iii) It seeks to restore the unequal bargaining position between employer and employee".

An agreement recorded as the outcome of a collective bargaining is binding on the parties to the agreement . Collective bargaining legislation imposes obligations on the parties to adhere to the terms of the agreement. See Collective Bargaining by Dr I. Chanetsa in *Pe COP Journal of Social and Management Sciences* p 6.

In our jurisdiction, CBAs are entered into in terms of s 74 (2) which reads:

> "(2) Subject to this Act and the competence and authority of the parties trade unions and employers or employees organisations may negotiate collective bargaining agreements as to any conditions of employment which are of mutual interest to the parties there to….".

Section 79 of the Act provides for the registration of the CBA by the Registrar of Labour. In terms of s 80 (1) the registration of the CBA, the Minister of Labour shall publish agreement as a statutory instrument. In terms of s 80 (2):

> "the terms and conditions of the collective bargaining agreement shall become effective and binding –

(a) from the date of publication of the agreement in terms of subsection (1) or

(b) from such other date as may be specified in the agreement".

The impurgned s 82 (1) (a) provides:

> "82 Binding nature of registered collective bargaining agreements
> (1) where a collective bargaining agreement has been registered it shall –
> (a) with effect from the date of its publication in terms of section *eighty-five*, or such other date as may be specified in the agreement, be binding on the parties to the agreement, including all the members of such parties and all employers, contractors and their respective employees in the undertaking or industry to which the agreement relates".

Section 2(a) of the CBA provides:

> "This collective bargaining agreement shall apply to –
>
> (a) all employers in the communication and allied services industry i.e telecommunications, postal services, cellular communications, courier services, phone shops and public financial series within the communications sector.
>
> (b) All non-managerial employees (including contract or fixed period employees in the communications and allied services, in the area of Zimbabwe".

What comes out from the definition of collective bargaining in the convention and from s 74 (2) of the Act is the voluntary element in collective bargaining. Voluntary participation in the process and conscious submission to the agreed terms are essential elements.

Section 82 brings in the element of the binding nature of registered CBAs. It provides that a registered CBA shall be binding on the parties to the agreement including all the members of such parties, and all employers, contractors and their employees in the under taking or industry to which the agreement relate. As the applicants contend, who are the parties to the CBA. The answer is to be found in s 2 (a) of the CBA which states that it applies to all employers in the communications and allied services industry. In other words even if the applicant had no part whether as principal or agent, in the agreement it is bound by the CBA by virtue of it being an employer in the communications industry. The applicant complains that it is being compelled to register with the second respondent i.e. associate with the second respondent against its will.

It is not in dispute that the applicant is being compelled, against its will, to be bound by the provisions of the CBA and as a consequence register with the second respondent and pay dues due to the second respondent.

The applicant contends that s 21 (3) recognises that the formation and activities of employers associations are an exercise of the freedom of association. The exercise is especially insulated from derogations that are permissible in the case of other associations of persons.

Mr *Mucheche* on the other hand contends that s 27 (3) provides an exception or derogation to s 21 (1) and that the registration of a CBA does not run foul to s 21 (1) of he constitution.

Section 21 provides:

> "Except with his own consent or by way of parental discipline, no person shall be hindered in his freedom of assembly and association that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to political parties or trade unions or other associations for the protection of his interests.
>
> (2) The freedom referred to in subsection (1) shall include the right not to be compelled to belong to an association.
>
> (3) Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provisions:-
>
> (a) ……
> (b) ……
> (c) for the registration of companies, partnerships, societies or other associations of persons, <u>other than political parties, trade unions or employers organisations;</u> or
> (d) …….
> (My own underlining).
>
> except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society".

I find merit in the submissions by Mr *Ochieng*. Section 21 (3) (c) recognises that the formation and activities of employees associations are an exercise of the right of freedom of associations. He concludes on p 80 of the Head of Argument by saying:

> "So special is that exercise, that it is specifically insulated from derogations that are permissible in the case of other associations of persons".

In other words there are derogations in respect of other associations but not in respect of trade unions or employer's associations.

As is clear from s 21 of the Constitution, the right to freedom of association embraces the right to form and join associations and the right not to be compelled to belong to any

association. *National Constitutional Assembly* v *The President & Ors* 2005 (2) ZLR 301 (H) at 316 G reinforced the point when Guvava J stated:

> "I know of no right in the constitution which forces person to associate against their will. Indeed, it would be a total negation of that very freedom which s 21 of the constitution strives to uphold particularly the freedom of association"

I would agree with the applicant that s 36 of the CBA violates the applicant's rights in so far as it compels the applicant to behave as though it was the second respondent's member by requiring it to register with it.

As regards s 82 of the Act my view is the issue for determination is whether the applicant can be bound by the provisions of the CBA in issue. It is common cause that the applicant as a principal or though an agent, did not participate in neither did it sign the agreement. I find merit in the submissions made by Mr *Mucheche* that the whole fabric of the process of collective bargaining and enforceability is meant to protect the interests of those parties that are affected by it. The law maker determined that the registration of the CBAs shall have the effect of binding all players in the industries to which they apply. Not to do so would defeat the objectives of collective bargaining some of which are to restore the unequal bargaining position between employers and employees and to peg minimum conditions of employment to ensure adequate protection of the weaker party to the employment contract i.e. the employee. Statutory intervention is justified to deter some unscrupulous employers from abusing and trampling upon the rights of employees with impunity.

The whole essence of collective bargaining was aptly under scored by *Archibold Cox, Labour Law, cases and Materials* (Thirteenth Edition) 2001 at p 200 where he stated:

> "Genuine collective bargaining is the only way to attain equality of bargaining power. The greatest obstacle to collective bargaining are employer dominated unions, which have multiplied with amazing rapidity since Industry Recovery Act. Such a union makes a sham of equal bargaining power.
> Only representatives who are not subservient to the employer with whom they deal can act presently in the interest of employees. For these reasons the very first step towards genuine collective bargaining is the abolition of the employer dominated union as an agency for dealing with grievances, labour disputes, wages rated, or hours of employment."

At page 289, the same learned author reinforces the importance of collective bargaining at industry level as follows

> 'The perceived benefits of multiemployer bargaining are several. For both the employers and the union, it brings less expensive, less frequent and mare informed negotiations than would obtain on an individual-employer basis. Workers desire industry – wide bargaining also because it may help the union insure gains which no one employer can grant for fear of competitive disadvantage."

The fact that the applicant has a functional workers committee and has been working together with it on issues such as improvement of conditions of service is neither here nor there. The fact that the applicant pays wages higher than those set by the second respondent is to be commended but cannot detract from the fact that it has to so bound by the law governing the operations of its industry.

I do not see how the applicant's right to freedom of association is violated. In any event, s 34 of S.I 1/12 provides adequate remedies to address the peculiar circumstances of the applicant. In terms of s 34 of S.I 1/12, the respondent, may in its sole discretion, grant exemptions:

In my view it will not be necessary to determine the issue of the violation of s 16 of the constitution in view of my finding that the applicant cannot be compelled to register with the second respondent. Registration would have entailed that the applicant pays dues to the second respondent.

The applicant did not seek an order for costs against the respondents. It has succeeded in part. The respondent sought costs on a higher scale. It raised points *in limine* which unnecessarily detained the court. Taking into account that the issue that was raised by the applicant was important I will not make an order of costs against either party. See *Nyambirai* v *NSSA* 1995 (2) ZLR 1 (S) at 16B.

In the result I will make the following order.

A. IT IS DECLARED AS FOLLOWS

1. The imposition upon the Applicant of the requirement to register with the Second Respondent is a violation of the Applicant's constitution right to freedom of association.
2. The Collective Bargaining Agreement for the Communications and Allied Services Industry (S.I1 of 2012) are in violation of section 21 of the Constitution to the extent that they provides for the infringements declared in paragraphs of this order.

B. IT IS ORDERED THAT:

1. Sections 2(a), 33 and 36 of the Collective Bargaining Agreement for the Communications and Allied Services Industry (S.I.1 of 2012) are struck down.
2. There will be no order as to costs.

Coghlan Welsh & Guest, applicant's legal practitioners
Civil Division of the Attorney General's Office, 1st respondent's legal practitioners
Matsikidze & Mucheche, 2nd respondent's legal practitioners