ZIMBABWE ENERGY WORKERS' UNION
and
NATIONAL ENERGY WORKERS' UNION
versus
ZESA HOLDINGS (PVT) LTD

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 9 & 13 March 2015

Urgent chamber application

M. Gwisai, for the applicants
A.K. Maguchu with *G. Chingoma*, for the respondent

MAFUSIRE J: This was an urgent chamber application for an interdict. The two applicants were trade unions. The respondent was an employer. The membership of the applicants comprised employees of the respondent. The interdict was sought against the respondent. The essence of the interdict was to restrain the respondent from proceeding with its offer to the employees of certain sums of money in lieu, and in full and final settlement of, a certain arbitration award in favour of the employees. In a nutshell, the basis of the interdict was that the respondent's conduct in making the offer directly to the employees, and in amounts less than their total entitlement, was calculated to undermine the applicants as the true and legitimate representatives of the employees and to render ineffectual the whole process of collective bargaining. It was also said that the respondent's move was designed to render the arbitration award itself ineffectual. Ancillary relief sought was in the form of a mandatory interdict to compel the respondent to submit the complete template of the process and outcome of the job re-grading exercise that the respondent had unilaterally carried out purportedly in compliance with the arbitral award.

In brief, the background to the application was this. After a protracted period, the energy sector, to which the parties belonged, had concluded a collective bargaining agreement ("***cba***"). It had been registered and published in 2012 in accordance with the provisions of the Labour Act, (*Cap 28:01*). But subsequently, a dispute had arisen between the respondent and the employees on the correct interpretation and effect of the new job

grading system introduced by the cba. The dispute had been referred to arbitration. The respondent had challenged in this court the outcome of the arbitration proceedings. By consent the matter had been referred back to arbitration but before a different panel. On 15 September 2014 the new tribunal had given its award. Among other things, it directed the respondent to conduct a re-grading exercise for all its employees falling within certain grades and to pay them salaries on the basis of their new grades, backdated to 1 January 2012, the date of the cba. The award was still to be quantified.

In the application before me, the applicants complained that the respondent had purported to unilaterally conduct the job re-grading process to the exclusion of its employees and that it was enticing their members directly with offers to pay reduced sums of money on the basis that it was unable to meet the full salary bill that would be payable under the cba. The respondent's offer, through the Group Chief Executive, to the employees, through the works councils and work stations, was succinct. Headlined "***Brief To All Employees Graded A3 – D2***", it read as follows:

> "The arbitral award on the 2012 Collective Bargaining Agreement dispute was handed down on 15th September 2014. In effect, the Company was tasked to carry out the following:-
>
> a) To place ZESA NEC graded employees on the NEC Salary Scales arising out of the 2012 Collective Bargaining exercise.
>
> b) To re-grade employees so that all employees are placed in their correct N.E.C. grades.
>
> c) To remunerate ZESA employees in line with the arbitral award.
>
> The Company has complied with (a) and (b) above but has faced challenges in implementing (c).
>
> <u>JOB RE-GRADING</u>
> In light of the award, Management carried out an in-depth job evaluation, rationalisation and re-grading exercise. In undertaking this assignment, the Company took into account the job grading exercises conducted by the Group in 1998, 2003 and 2006.
>
> As a result of this exercise, certain jobs have been found to be incorrectly graded. Notably, these include jobs that were previously grade A.1 and A.2. These two grades were collapsed and grouped into Grade A.3 during the period of hyper-inflation.

It has been decided that employees whose jobs have been re-graded will retain their current grades and conditions of service on a Personal to Holder Basis (PTH). However, employees joining the Group on new employment contracts will join at the appropriate correct grades.

FINANCIAL IMPLICATIONS OF AWARD ON THE ZESA GROUP

Management has computed the financial implications that arise from implementing the award. The total back-pay amounts to US$118 million, whilst the incremental payroll cost for the year 2015 is US$68 million, or approximately $5.7 million per month.

Implementing the arbitral award will worsen the Company's financial performance. The net liability position which stood at $496 m in 2012 will worsen to $922 m in 2015. The financing gap for the year 2015 will amount to $182 m.

The Company does not have the financial capacity to implement the award. Whilst the Group has been able to pay salaries timeously on a monthly basis, this has been under difficult and strained circumstances. Imposing a wage structure as envisaged in the award would result in the Company failing to pay employees going forward. This undesirable situation has been experienced in several other public and private sector companies. This incapacitation of the Company would also affect service delivery, thereby negatively impacting the economy.

INCAPACITATION FROM IMPLEMENTING THE AWARD

In view of the above situation, the Board of Directors of ZESA Holdings has mandated Management to plead incapacitation from implementing the salary scales arising from the 2012 Collective Bargaining Agreement. After having seriously pursued all available options and consulted widely, this decision is the only practical way forward.

EX-GRATIA SETTLEMENT OFFER

In order to mitigate the effects of non-implementation of the award on NEC Graded employees, the Ministry of Energy and Power Development has approved a settlement offer open to all employees of ZESA Holdings and its subsidiaries who were in employment in 2012. This offer is not open to employees [in] grade D3 and above. The total value of the settlement offer being made to eligible employees is $21 million.

This scheme is optional and is a once off payment. Employees willing to accept the offer will commence receiving payments at the end of March 2015. The amounts payable per employee per grade are attached. The Company will carry the income tax obligations arising from the payment. Payments may be on a staggered basis due to cash flow constraints. Details of Company specific pay out dates can be sourced from the Human Resources Departments. This settlement offer will be open for uptake from 24 February 2015 to 15 March 2015.

I urge all employees to seriously consider the need to safeguard the Company's ability to continue to provide a service to the nation, whilst remunerating employees competitively and on time. I also urge all employees to diligently carry out their

> responsibilities in order for the ZESA Group to effectively discharge its mandate to the people of Zimbabwe."

The acceptance form which the individual employees had to complete and sign had the following rider:

> "I _____ hereby unconditionally acknowledge acceptance of a settlement offer made by ZESA Holdings with respect to 2012 Collective Bargaining Agreement dispute in full and final settlement of the dispute.
>
> I confirm that I do accept the settlement offer without any coercion and on my own free will."

The applicants blasted the respondent for taking such a move. Its urgent chamber application was filed on 2 March 2015. It was argued that the matter was urgent because, among other things, the applicants would be exposed as ineffectual representatives of the employees, thereby throwing the whole collective bargaining process and concept into jeopardy. It was also stated as a ground of urgency that the full panel of the arbitral tribunal was unavailable for the applicants to seek any further relief from it.

The respondent's substantive answer was that there was nothing unlawful or untoward with its offer and that the applicants had no support from the very employees that they purported to represent because, on a daily basis, droves of them were coming forward to sign up for the offer.

At the hearing, the respondent took a number of points *in limine.* At the outset it charged that there was no proper application before the court because the founding affidavits had been improperly commissioned. What had happened was that the founding affidavits indicated that they had been sworn and signed by the deponents on 27 February 2015, yet the date stamp of the commissioner of oaths before whom the affidavits purported to have been commissioned was 26 February 2015, i.e. the previous day. The applicants had applied to amend their affidavits. They explained, through both their deponents and the commissioner of oaths himself, that their affidavits had indeed been sworn, signed and commissioned on 27 February 2015 but that the commissioner had inadvertently omitted to alter his date stamp from the previous day, the affidavits being the first documents that he had commissioned on that day.

Despite that explanation the respondent stuck to its objection. I overruled it. I felt the respondent was being pedantic. The explanation for the discrepancy was plausible enough to me. It was a minor mistake. I was satisfied that despite the date stamp reading 26 February 2015, the founding affidavits had been sworn, signed and commissioned on 27 February 2015.

The respondent's next objection was that the applicants had not demonstrated their authority to represent the employees. It was said that the fact that more than a thousand employees had come forward to take up the offer freely and voluntarily cast considerable doubt on the mandate of the applicants. With such doubt it had become incumbent upon the applicants to demonstrate and prove their authority.

It seemed common cause that the total number of respondent's employees affected by the cba was upward of five thousand. I overruled the respondent's second objection. The issue between the parties had been raging on for three years or so. Throughout that period the employees had been represented by the applicants. Their authority had never been questioned. Furthermore, it was rather speculative to say, as the respondent seemed to argue, that by the end of the life of its offer probably all the employees, or the large majority of them, would have taken it up. The applicants were duly constituted and registered trade unions for the sector in question. They had the mandate to represent employees in that sector who were their members.

The respondent's third objection *in limine* was that there was no urgency in the matter. It was argued that there was no risk of any irreparable harm to anyone if the respondent's offer was allowed to continue. I agreed. This objection carried the day.

Our legal system allows a litigant who can demonstrate that his or her situation is so urgent that it cannot wait for the normal process of filing pleadings - with the attendant delays - to fast track it, and bring it to a judge for urgent determination. Where a litigant has determined that his or her matter is urgent, the Rules of Court require that if he or she is to be represented by a legal practitioner, such application should be accompanied by a certificate from the legal practitioner certifying that the matter is urgent, and giving reasons for such belief. Once that is done the registrar of this court is obliged to immediately submit such application to a judge in chambers. On his part, the judge is implored to consider the matter forthwith, although retaining the discretion to call for oral submissions from interested parties as he or she may direct.

In *General Transport & Engineering (Pvt) Ltd & Ors v Zimbabwe Banking Corporation Ltd*[1] GILLESPIE J, quoting himself in *Dilwin Investments (Pvt) Ltd t/a Formscaff v Jopa Eng Co (Pvt) Ltd*[2] said[3]:

> "A party who brings proceedings urgently gains a considerable advantage over persons whose disputes are being dealt with in the normal course of events. This preferential treatment is only extended where good cause can be shown for treating one litigant differently from most litigants. For instance where, if it is not afforded, the eventual relief will be hollow because of the delay in obtaining it."

Naturally, an urgent application has the disadvantage that the issues cannot possibly be interrogated, ventilated or canvassed adequately. That is why, if the applicant has made out a *prima facie* case for relief, only a provisional order is issued at that stage, unless the parties consent to a final order. This inevitably entails the same matter being heard again in the future. To that extent there is pressure brought upon to bear on the judicial process. But the system does recognise that there are certain matters that simply cannot wait for determination in the normal process, and that they have to be heard on an urgent basis. It is up to the judge seized with the matter to decide, in spite of the certificate of urgency by the applicant's legal practitioner, whether or not the matter is truly urgent within the meaning of the Rules.

In this case, the respondent's objection on urgency was in two ways. Firstly, it pointed to the paucity of the applicants' founding affidavits and the certificate of urgency in setting out the grounds of urgency. The main ground of urgency in the first applicant's founding affidavit, which the second applicant had merely adopted, was that the respondent had set a short span for the uptake of its offer, namely, from 25 February 2015 to 15 March 2015. It was said that given the short notice there was a danger that many of the employees would sign up. For the rest of the grounds of urgency the first applicant's founding affidavit referred to the certificate of urgency. However, the certificate of urgency essentially said nothing different.

The second part of the respondent's objection on urgency necessarily touched on the merits. Mr *Maguchu*, for the respondent, argued that the applicants had demonstrated no irreparable harm that would befell were the respondent to proceed with its offer. He argued

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[1] 1998 (2) ZLR 301 (H)
[2] HH 116 -98
[3] At p 302A

further that if what the respondent was doing was contrary to law, as Mr *Gwisai* for the applicants urged, then it would eventually be set aside, but that there was no reason why the matter could not be dealt with on the ordinary roll.

I accepted the soundness of respondent's objection on urgency. That the respondent's offer had a short span or that the notice period had been too short did not, in my view, create the kind of urgency envisaged by the Rules of this Court. There was simply no risk of an irreparable harm. The applicants' case was for an interdict. The requirements of an interdict are:

1 a *prima facie* right, even if it be open to some doubt;
2 a well-grounded apprehension of irreparable harm if the relief is not granted;
3 that the balance of convenience favours the granting of an interim interdict;
4 that there is no other satisfactory remedy.

See *Setlogelo* v *Setlogelo* 1914 AD 221 at 227; *Tribac (Pvt) Ltd* v *Tobacco Marketing Board* 1996 (1) ZLR 289 (SC) @ 391; *Hix Networking Technologies v System Publishers (Pty) Ltd & Anor* 1997 (1) SA 391 (A) @ 398I – 399A)*; Flame Lily Investment Company (Pvt) Ltd* v *Zimbabwe Salvage (Pvt) Ltd and Anor* 1980 ZLR 378; *Universal Merchant Bank Zimbabwe Ltd v The Zimbabwe Independent & Anor* 2000 (1) ZLR 234 (HC) @ 238.

Section 6(1)(a) of the Labour Act says that no employer can pay an employee a wage that is lower than that specified by law or by agreement. Mr *Gwisai* argued forcefully that what the respondent was doing was tantamount to wriggling out of the cba and the arbitral award and that such conduct was unlawful. Mr *Maguchu* countered that the offer was not in itself unlawful; that what probably could be said to be unlawful would be the agreement by the parties if the employees eventually accepted it but that this still would not be a contravention of the Labour Act, because, unlike the Consumer Contracts Act[4], for example, which prohibits any waiver of rights conferred under it, the Labour Act had no such anti-waiver provision[5]. As such, Mr *Maguchu's* argument continued, the applicants had no right or power to seek to stop an agreement between adult men and adult women with their employer.

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[4] *Chapter 8:03*.

[5] The anti-waiver provision is s 8 of the Consumer Contracts Act. Non-waiver is not absolute. It is subject to s 4(3)(a). This prohibits a court from granting relief *mero motu* where a party in whose favour relief might be granted has waived his rights at any stage of the proceedings.

I strongly felt that, contrary to Mr *Maguchu's* argument, what the respondent was doing was unlawful and that the agreement that it sought to achieve with the individual employees would be illegal under s 6 of the Labour Act. In my view, the respondent, citing an inability to meet the cba wage, had unilaterally decided that it would not pay that wage. It was then going about enticing the employees to endorse its decision. Given the manifestly unequal bargaining strengths of the parties, the employees, obviously driven by the never-ending pressing financial needs, would have no choice but to sign away their rights.

The wage set by the cba was the wage the respondent would be obliged, by both the law and the agreement, as envisaged by s 6 of the Labour Act, to pay. It was common cause between the parties that even though the arbitral award was still to be quantified, the actual amounts would be well in excess of the respondent's offer. Therefore, not only would the respondent's offer and the resultant agreements after the acceptance of such an offer be illegal, but such conduct was a criminal offence under s 6(2) of the Labour Act. That was my very strong, but *prima facie* view of the matter.

However, why I found for the respondent on urgency anyway was that, whichever way one looked at it, the unlawfulness of the respondent's conduct did not give rise to any urgency of the matter. There was nothing stopping the applicants from bringing their case on the ordinary roll. As GILLESPIE J put it in the *Zimbank* case, *supra*, preferential treatment is only extended to a litigant where good cause is shown, for example where, if it is not afforded, the eventual relief would be hollow because of the delay in obtaining it. *In casu*, if the respondent's offer to, and or the resultant contracts with, the employees were illegal, they could still be declared to be so on the ordinary roll. There would be nothing hollow about such an eventual relief.

Paradoxically, this was not a case where one party wanted to stop a payment to the other party in the fear that once that payment was made that would be the end of the money because there would be no chance of recovering it back even after achieving success in the subsequent proceedings. It was a case of the one party wanting to pay beneficiaries, who seemed eager to accept the payment, and a third party wanting to stop that payment, chiefly for the purposes of preserving its reputation as an effective collective bargaining vehicle for such beneficiaries.

That the applicants' case was about preserving their reputation as well as their very existence was all but confirmed both in submissions during the hearing and in the papers. It was argued that if I did not grant the interdict, not only would the system of collective

bargaining under an umbrella body be undermined and rendered ineffectual, but also that the applicants would suffer massive resignations from employees who would see no benefit from continued membership. It was said that there was a danger that the applicants could collapse as juristic persons. In paragraph 21 of the first applicant's answering affidavit the position was summarised thus:

> "21. In any case, even if the actions of Respondent should subsequently be declared unlawful, Applicants would have suffered immense damage to their reputation and goodwill as trade unions, wherein many of their members may easily drop out of the union as a result."

With respect, that was insufficient for urgency. Whilst trade unions, once formed and registered, are juristic persons, with the concomitant right to exist separately from their individual members, and whilst trade unionism is a fundamental right of every employee, in my view, none of that detracts from the fact that, ultimately, it is the right of every employee to determine collectively the continued existence of any trade union. Trade unions derive the right of their continued existence from their members. Therefore, it is not a sound legal argument that where members might in future decide to resign their membership *en masse* freely and voluntarily, such may be a ground for an interdict against an employer whose actions may be perceived, rightly or wrongly, to be the catalyst to such resignations. The right to freedom of assembly and association and, corollary, the right not to assemble or not to associate with others, are also fundamental human rights and freedoms of employees. Section 58(2) of the Constitution says that no person may be compelled to belong to an association.

It was on the basis that the applicants had failed to establish the risk of an irreparable harm that I held that the matter was not urgent. However, because I was convinced, on the face of it, that what the respondents were doing by making such offers of payment to the employees below the cba wage - in full and final settlement for that matter - was to induce an illegal agreement, I was not prepared to dismiss the urgent chamber application outright. Instead, I decided to refer it to the ordinary roll. In the end I issued the following order:

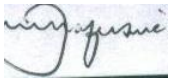
1. That the application was not urgent.

2. That the application would be referred to the ordinary roll, with the papers already filed of record standing as the founding papers, the notice of opposition and answering affidavits, as the case might be.

3. That given the urgency with which the papers referred to above might have been prepared, that each party was at liberty to file supplementary affidavits.

4. That the costs of the urgent chamber application would be costs in the cause when the matter was eventually determined on the ordinary roll.

13 March 2015



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