ZESA HOLDINGS (PVT) LTD
versus
ENERGY SECTOR WORKERS' UNION

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 20 December 2017 & 23 January 2018

Urgent Chamber Application

T Sibanda, for the applicant
L Madhuku, for the respondent

ZHOU J: This is an urgent application for a temporary interdict to stop the respondent which is the trade union which represents employees of the applicant from proceeding with a collective job action pending determination of an application for a show cause order instituted by the applicant in terms of the relevant provisions of the Labour Act [*Chapter 28:01*]. The application is opposed by the respondent.

The brief background to the application is as follows: The respondent communicated an intention to hold a demonstration. The communication is contained in a letter dated 8 December 2017 which is addressed to the Officer Commanding Zimbabwe Republic Police Harare Central District. The letter states that the intended demonstration is by the applicant's workers. According to the letter the employees were to converge at the applicant's Head Office on 15 December 2017 between 0900 hours and 1100 hours. It is not in dispute that the intended demonstration is now scheduled to take place on 20 December 2017 at the same times stated in the letter of 8 December 2017. In response to the threatened demonstration the applicant instituted proceedings for a show cause order. Those proceedings are still pending. The respondent has expressed its intention to proceed with the demonstration notwithstanding the pending show cause proceedings. That is what triggered the instant application.

The requirements for an interim interdict are settled in this jurisdiction. These are

a) a clear right, or a prima facie right though open to some doubt. Where a clear right is established the applicant does not need to establish a well-grounded apprehension of

irreparable harm. However, where the right is only *prima facie* established, the second requirement becomes relevant, namely,

b) that there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and the applicant ultimately succeeds in establishing the right; and
c) the balance of convenience favours the granting of interim relief; and
d) the applicant has no other satisfactory remedy.

See *Watson* v *Gilson Enterprises (Pvt) Ltd* 1997 (2) ZLR 318 (H)

The existence of a right is a matter of substantive law; whether that right is clearly or only *prima facie* established is a question of evidence. The right must be one which is capable of being protected by law. It does not matter whether the right is protected by the common law or by statute. In the present case, the right to interdict employees from taking part in an unlawful collective job action is a right which is protected by statute, hence the procedures relating to a show cause order which the applicant has already set in motion. Having come to that conclusion, the one other issue to be considered is whether that right is clearly or only *prima facie* established. There was debate as to whether the proposed demonstration is a collective job action or not. The Labour Act [*Chapter 28:03*] in s 2 defines "collective job action" to mean "an industrial action calculated to persuade or cause a party to an employment relationship to accede to a demand related to employment, and includes a strike, boycott, lock-out, sit-in or sit-out, or other concerted action." The list of examples of what would be included in the definition of collective job action is thus not exhaustive. What is central to the nature of the concerted action are the following characteristics:

a) that it is an industrial action;
b) it is directed at a party to an employment relationship;
c) it is designed to persuade or cause that other party to accede to a demand related to employment.

There can be no question that a demonstration held in the context of an employer / employee relationship is an industrial action. The collective energies of the participants are being summoned to action. The demonstration in casu is directed at the applicant in its capacity as the employer of the respondent's members. The letter referred to earlier on makes reference to "a letter of demand" (written by the respondent) to the applicant's Chief Executive Officer.

The letter also complains that "no serious effort has been made by the employer to attend to our demands." One of the issues raised is the alleged refusal by the employer, that is the applicant, to implement a 2012 collective bargaining agreement. Thus, the intended demonstration is clearly a collective job action.

The unlawfulness of the intended collective job action arises from two situations. Firstly, the employees of the applicant are engaged in an essential service, and are prohibited by law from engaging in or recommending collective job action. See s 104 (3) of the Labour Act; and s 2 (g) of the Labour Declaration of Essential Services Notice, 2003. Secondly, the respondent and its members have not followed the procedures set out in s 104 (2) of the Labour Act before resorting to collective job action to resolve their dispute with the employer. The failure to comply with the mandatory requirements of that section renders the collective job action unlawful.

Professor Madhuku for the respondent submitted that s 59 of the Constitution applies. The section provides that:

> "Every person has the right to demonstrate and to present petitions, but these rights must be exercised peacefully."

That section must be read together with s 65 (3) of the Constitution which speaks explicitly to the right of every employee to participate in collective job action. Section 65 (3) explicitly states that "a law may restrict the exercise of this right in order to maintain essential services." Reading s 59 in isolation from s 65 (3) would be contrary to the established principle that a Constitution is a living document whose provisions must be read together as a whole and not in isolation. The respondents have not sought to impugn the provisions of the Labour Act which relate to essential services in the context of collective job action.

The net effect of what has been discussed above is that the applicant has established a clear right. That being the case, the need to establish the well-grounded apprehension of irreparable harm is obviated. The principle of subsidiarity would not arise in this case as the right which is sought to be enforced is one protected by the Labour Act, not by the Constitution.

The balance of convenience favours the granting of the interim relief. No prejudice would be suffered by the respondent if the interdict is granted even if the application for a show cause order fails. On the other hand, if the interdict is not granted and the show cause order is granted it would become academic. The court looks askance at any conduct that renders judicial, and that should include any legal proceedings, academic. The full extent, implications and consequences of the proposed collective job action are matters that can be considered on

the return date. The letter of 8 December 2017 does not limit participation in the demonstration to employees who are on leave.

I do not believe that there is an alternative remedy which would achieve the same result as the interdict being sought in the present case. This is only a temporary interdict pending the outcome of the proceedings for a show cause order. An instruction to the employees not to participate in the collective job action would not have the same effect as the relief being sought *in casu*.

In all the circumstances of this case, I am convinced that the requirements for the relief sought have been established.

In the result, relief is granted in terms of the draft provisional order.

Chinawa Law Chambers, applicant's legal practitioners
Madhuku Legal Practitioners, respondent's legal practitioners