

ZESA TECHNICAL EMPLOYEES ASSOCIATION
v
ZESA HOLDINGS (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
HARARE, MARCH 7, 2016

L Madhuku, for the applicant
A K Maguchu, for the respondent

Before **MALABA DCJ**, in Chambers in terms of r 6 of the Supreme Court (Miscellaneous Appeals and References) Rules, 1975. It is opposed.

The parties concluded a collective bargaining agreement but did not register it. The respondent proceeded to pay salary and benefits to all managerial employees as provided for in the collective bargaining agreement for two months. After two months, the respondent changed course and reduced the salary and benefits. The applicant was aggrieved by this move and approached an Arbitrator who ruled in favour of the respondent. The applicant appealed to the Labour Court which upheld the decision of the Arbitrator to the effect that the collective bargaining agreement entered between the parties was invalid and not binding. The Labour Court and the Arbitrator arrived at that decision on the ground that a collective bargaining agreement is a product of the application of the provisions of the Labour Act [*Cap. 28:01*] and as such can only come into existence and have binding force upon strict compliance with the statutory provisions.

The applicant which at that time was a registered trade union was dissatisfied with the Labour Court decision. It appealed against that decision to the Supreme Court. It however did not file a valid notice of appeal and the matter was struck off the roll with costs on 31 July 2015. The applicant now seeks the indulgence of the court to appeal out of time. The papers show however that this application was made for what is called an ‘application for condonation and reinstatement of an appeal on 2 November 2015 in the name of the applicant.

It is common cause that the applicant has since ceased to exist as a trade union. There was no disclosure in the founding affidavit of the fact that there was no longer an entity going by the name of the applicant. It only became apparent during the hearing of the application that the entity that had appeared before the Labour Court in the name of the applicant had ceased to exist.

Mr *Maguchu* who appeared for the respondent raised a number of objections to the application. The most important point taken by Mr *Maguchu* was that there was no proper application before the court because the entity seeking to invoke the protection of the law does not exist. Professor *Madhuku* who appeared for the applicant, whilst conceding that the entity that appeared before the Labour Court no longer exists, indicated that there is in existence a trade union going by the name National Energy Workers Union who took over the rights and obligations of the defunct entity which appeared before the Labour Court. Until Professor *Madhuku* disclosed the information in his address to the court there was no disclosure in the papers of the existence of the new trade union. No mention of it had been made in the founding affidavit.

Mr *Maguchu* pointed out that there should have been an application by the new trade union for an order of substitution of the party to enable the new trade union to claim the rights and obligations of the former trade union in the proceedings. As matters stand the new trade union remains without any right to make any claim in the proceedings.

The issue before the Court is whether the application was validly made by a non-existing entity. The starting point here is section 29(2) of the Labour Act [*Cap. 28:01*] (“the Act”) which provides:

“Every trade union, employers organisation or federation shall, upon registration, become a body corporate and shall in its corporate name be capable of suing and being sued, of purchasing or otherwise acquiring, holding or alienating property, movable or immovable, and of doing any other act or thing which its constitution requires it to do, or which a body corporate may, by law, do.” (underline my emphasis)

It is clear from the reading of s 29(2) of the Act that once a trade union is registered it becomes a body corporate, having the power to sue or be sued. It is also true that only an existing corporate body has the capacity to sue or be sued. Once an entity ceases to exist, it loses its capacity to sue or be sued. It ceases to enjoy any of the rights enjoyed by a registered body corporate. Upon dissolution a trade union ceases to enjoy the rights enjoyed by registered trade unions and as such becomes a non-existing entity which lacks the capacity to institute proceedings and claim rights. No obligations can be enforced against a non-existent entity.

Although the Act does not expressly provide for the effect of dissolution of a trade union, it can be noted from the reading of s 29(2) that once a trade union is dissolved it ceases to be a body corporate and therefore it loses the rights which a registered trade union

enjoys. These rights include the right to sue or be sued which rights can only be exercised by a body corporate.

The case of *National Entitled Workers Union (NEWU) v Commission for Conciliation, Mediation and Arbitration and Others* [2010] ZALC 155 is instructive on this issue. The court said the following:

“The other important principle from the CCMA’s case, which has not been stated in so many words, is that the de-registration of a trade union does not dissolve that union as a voluntary association. This means a de-registered trade union is entitled to continue its existence in terms of the right to Freedom of Association. A de-registered trade union does however; lose certain rights accorded to it by virtue of registration in terms of the LRA. One of the rights which a deregistered trade union loses due to de-registration is the right to represent its members before all the statutory dispute resolution bodies. In respect of the court, a de-registered trade union loses its right of appearance accorded to it in terms of s161 of the LRA.” (underline my emphasis)

C. Wilfred Jenks, in his book *The International Protection of Trade Union Freedom* at page 303 has the following to say:

“In a case relating to New Zealand the deregistration of a trade union has the effect of revoking privileges, such as legal recognition, the right to conclude legally enforceable collective agreements and the exclusive right to represent the workers at all stages of conciliation and arbitration procedure,....”

From the above it is clear that once a trade union is dissolved it loses certain rights that a registered trade union in terms of section 29(2) of the Labour Act enjoys. These rights include the right to sue or be sued. The entity presented as the applicant lost the rights bestowed to it in terms of s 29(2) of the Act the moment it was de-registered and as such cannot bring proceedings before the Court.

The inquiry in this case goes to the issue of what happens to the proceedings instituted by a non-existing entity. It is trite that where a non-existing entity institutes

proceedings, the proceedings are a nullity because there would be no applicant or plaintiff as the case may be.

In the case of *Stewart Scott Kennedy v Mazongororo Syringes (Pvt) Ltd 1996*

(2) *ZLR 565 (S)* at page 572, the court said the following:

“Without a plaintiff there can be no claim. A document which purports to be a summons requiring the defendant to comply with a claim of a non-existent person is null and void as far as the institution of the claim is concerned. The plaintiff is the one who issues the challenge to litigation (see Voet 5.1.9) and must be a persona.”

Although the court in the *Mazongororo case (supra)* was dealing with action proceedings, the principle applies to application proceedings. Without an applicant there can be no claim. As such, a purported founding affidavit sworn to by a person purporting to be representing a non-existing entity is a nullity, because a person who swears to a founding affidavit can only relate to the facts which came to his/her knowledge at the time he/she is acting as the representative of an existing legal persona. Resultantly, there can be no proper application instituted on behalf of a non-existing entity.

Professor *Madhuku*, claimed that the rights and obligations of the former trade union, Zesa Technical Employees Association, has been taken over by the new trade union, National Energy Workers Union. The question which then arises is whether the new trade union, if it has legally acquired those rights and obligations, can claim them in these proceedings without applying to be a party. For an entity to claim rights and obligations of another entity in proceedings there has to be an application for substitution of that party. If the new trade union became the successor to the entity that appeared before the Labour Court and had assumed its rights and obligations, there should have been an application for substitution

of the new trade union in the proceedings. Without such an application, the application was brought by Zesa Technical Employees Association, a non-existing entity.

The need for an entity to be joined or substituted before claiming rights has been noted by the courts. In the case of *Tel-One (Private) Limited v Communications and Allied Services Workers Union* SC-26-06, **CHIDYAUSIKU CJ** said that,

“It is quite clear that s 29 of the Act, which the learned Judge relied on, confers on the respondent the locus standi to sue and to be sued in its own name in matters such as in casu. Section 29 of the Act, however, does not make a trade union such as the respondent a party to proceedings which the trade union has not commenced or in respect of which the trade union has not been cited or joined as a party. Section 29 of the Act merely confers on a trade union the right to sue or to be sued or to be joined as a party to proceedings.”

Similarly, in the South African case of *Luxavia (Pty) Ltd v Gray Security Services (Pty) Ltd* 2001 (4) SA 211 (W), the court in granting the application for substitution of a party, said that:

“There are several cases where the substitution of one entity for another has been allowed in order to ensure that the true plaintiff is before the court.”

The position at law is therefore that, where a party to proceedings dies or ceases to exist the claim is not extinguished. If another party wishes to proceed with the claim, there should be made in terms of relevant rules of court an application for substitution. It is not in dispute that the new trade union did not make an application for an order of substitution. There is therefore no entity with legal capacity to make the application for ‘condonation and reinstatement of an appeal’ which had been struck off the roll. There is no applicant on whom the court may grant the rights sought by way of the relief.

DISPOSITION

Matter is struck off the roll with no order as to costs.

Dururu A and Associates, applicant's legal practitioners

Dube, Manikai and Hwacha, respondent's legal practitioners