REPORTABLE (58)

Judgment No S.C. 52\2002
Civil Application No 260\98

AMOS NGULUBE v (1) ZIMBABWE ELECTRICITY SUPPLY AUTHORITY (2) THE MINISTER OF THE PUBLIC SERVICE, LABOUR AND SOCIAL WELFARE

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, SANDURA JA, CHEDA JA, MALABA JA & GWAUNZA AJA
HARARE JUNE 4 & SEPTEMBER 17, 2002

A.P. de Bourbon S.C., for the applicant

P. Nherere, for the first respondent

No appearance for the second respondent

CHIDYAUSIKU CJ: In this application, made in terms of s 24(1) of the Constitution of Zimbabwe, the applicant seeks an order in these terms:-

> "It is ordered that:-
>
> 1. A *rule nisi* do issue calling upon the Minister of Labour and Social Welfare to show cause why -
>
> (a) Section 45(1)(b)(i) and the proviso to s 23(1) of the Labour Relations Act Cap 28:01 should not be declared to be in contravention of s 21(1) of the Constitution of Zimbabwe."

Section 21(1) of the Constitution of Zimbabwe is contained in the Declaration of Rights and provides as follows:-

> "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."

The background to the matter is as follows:

In January 1995, the applicant was engaged by the respondent as an Accounting Officer. This placed him in the category of the respondent's employees referred to as "managerial". Some time later the applicant joined a workers' committee considered by the respondent to be appropriate for employees falling outside the category of managerial employees. For this reason a letter (Annexure 1(a)) was written to the applicant, by the respondent's Area Manager, stating and directing as follows:-

> "As you are a managerial employee you cannot serve as a workers' committee representative. Therefore you are advised to resign from the workers' committee with immediate effect. Please send a copy of your resignation letter to me by Wednesday 14th May 1997."

Because the applicant disputed that he held the position of a manager, he refused to resign from the workers' committee as directed. He was, as a result, suspended from his employment without pay and benefits, with effect from 11th July 1997. A disciplinary hearing was subsequently held, with the applicant facing, among others, charges of contravening sections of the relevant Code of Conduct relating to "disobeying lawful instructions given by an immediate superior and "wilfully failing, neglecting, or refusing to comply with any of the Authority's

(respondent's) regulations, laid down policies or procedures, written standing instructions or rules."

The Disciplinary Committee found the applicant guilty of a "Charge D" offence, a circumstance that called for his dismissal with effect from his date of suspension. He was duly dismissed.

Although the applicant instituted separate proceedings in the Labour Tribunal challenging his dismissal, he contends, in the proceedings before this Court, that his right to freedom of assembly and association guaranteed in s 21 of the Constitution, has been infringed by s 45(1)(b) and by the proviso to s 23(1), of the Labour Relations Act [Chapter 28:01].

The application was opposed by both respondents, although only the first respondent was represented at the hearing of this matter. The second respondent, despite filing heads of argument, did not make any appearance.

Section 45(1)(b)(i) of the Labour Relations Act

I will deal first with the applicant's claim in relation to Section 45(1)(b)(i) of the Labour Relations Tribunal Act.

The relevant part of this section reads as follows:-

> "(1) In any determination of the registration or certification of a trade union or employers organisation or of the variation, suspension or rescission thereof, the Registrar shall -
>
> (a) …

(b) ensure compliance with the following requirements –

(i) a trade union shall not represent employers or managerial employees

(ii) …

(iii) …"

Mr *de Bourbon* for the applicant contends that by prohibiting a trade union representing employers or managerial employees, the section specifically conflicts with the rights guaranteed in terms of s 21(1) of the Constitution. That being the case, Mr *de Bourbon* argues, the contention of the first respondent that the applicant was, as a managerial employee, not entitled to be a member of the workers committee, was in effect a contention that the applicant was not entitled to be a member of a trade union.

While the latter part of Mr *de Bourbon's* contention may, in practical terms, be true, I am not persuaded that the interest of the first respondent in barring the applicant from belonging to the worker's committee in question was to prevent him from becoming a member of a trade union. There is nothing in the evidence before the court to suggest such an intention. Rather, it is evident the first respondent was interested primarily if not solely, in the composition of a workers' committee that existed to represent some of its workers. In that respect I find the first respondent was within its rights to attempt to ensure that the proviso to s 23 (1) of the Labour Relations Act was enforced within its precincts. The applicant himself, in any case does not suggest that he had joined the workers' committee in question simply to be able to join a trade union. Such a suggestion would in any case not have been tenable

since the Labour Relations Act does not require that a worker should join a workers' committee as a condition to being able to belong to a trade union.

Therefore, since the applicant's competency or otherwise to join a trade union has nothing to do with whether or not he belonged to any worker's committee, I find there is nothing to justify his use of the action taken by the first respondent (which relied on the proviso to s 23(1) of the Act) as a basis for challenging the constitutionality of a different section i.e. s 45(1)(b)(i), of the same Act.

Mr *Nherere* takes this argument further and contends that, because the first respondent's actions were not based on s 45(1)(b)(ii), but the proviso to s 23(1), of the Labour Relations Act, this Court is not obliged to rule on the constitutionality or otherwise of s 45(1)(b)(i). I find this contention, which essentially is to the effect that there must exist a dispute between the parties before the court can make a declaratory order of the type sought by the applicant in *casu*, not supported by case authority. *Herbstein* and *van Winsen*[1] note at page 1053 that even though in the past courts consistently held that such an order could not be granted in the absence of a dispute, the learned judge in *Ex parte Nell*[2] departed from this stance and held that an existing dispute was not a prerequisite to the making of a declaratory order. On the same note, in *Ex parte Chief Immigration Officer, Zimbabwe*[3], GUBBAY CJ noted that in an application of this nature, there need not be an opponent, and that the court may determine the applicant's rights without the necessity for it to pronounce upon

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[1] The Civil Practice of the Supreme Court of Africa, 4th ed
[2] 1963 (1) SA 754 at 759H-760G

the respondent's obligations. In *Ex parte Ginsberg*[4], cited with approval in *Ex parte Chief Immigration Officer, Zimbabwe, supra,* the court held that a declaration of rights could be granted on an *ex parte* application.

These authorities are particularly relevant in this case where the first respondent is not, in the strictest sense, an "opponent" in relation to the applicant's challenge to section 45(1)(b)(i) of the Labour Relations Act, and where the second respondent, who might possibly have been an opponent, did not appear to argue its case.

In the absence of a dispute, as in *casu*, the authorities[5] are agreed that the requisites for the grant of such an order are:-

(i) that the applicant has an interest in an "existing, future or contingent right or obligation" and, if the court is satisfied on that point,

(ii) that the case is a proper one for the exercise of the court's decision.

It is within this context that the other part of the applicant's challenge to s 45(1)(b)(i) is to be considered.

In that respect it is contended as follows for the applicant:-

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[3] 1994 (1) SA 370 (ZS) at 376H-I
[4] 1936 TPD 155, 1963

> "It is respectively submitted that such a prohibition (that a trade union cannot represent employees or managerial employees) specifically conflicts with the rights given in terms of section 21(1) of the Constitution. A law cannot prevent managerial employees from forming a trade union. Whether it can prevent employers from forming a trade union is another matter. But certainly managerial employees cannot be prevented from belonging to a trade union. It is to be noted that section 45(1)(b) does not provide for any form of representation by way of a trade union for managerial employees. This is contrary to the Constitution. Those managerial employees who wish to form and belong to a trade union are entitled to do so in terms of the constitution."

The challenge, whatever its merits or demerits, is expressed in general terms and not in relation to any specific action taken or contemplated by or against the applicant. This raises the question of the applicant's interest, a point upon which, on the authority of the cases cited above, the court must first satisfy itself, and also given s 24(1) of the Constitution, which provides that a person may apply to the Supreme Court for redress if in that person's view the Declaration of Rights has been, is being, or is likely to be contravened in relation to him. (my emphasis)

In *Family Benefit Society v Commissioner for Inland Revenue*[6] where the court considered the issue of interest it was stated:-

> "The interest must be a real interest, not merely an abstract of intellectual interest".

Indeed there is a plethora of authorities to the effect that courts will not deal with abstract, hypothetical or academic questions in proceedings for a declaratory

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[5] See for instance, *Ex parte Chief Immigration Officer-Zimbabwe (supra) at 337D and Ex parte Nell (supra)*

[6] 1995 (4) SA 120

order[7]. In *Adbro Investment Co Ltd v Minister of the Interior and Others*[8] the court stated that the plaintiff must not have a "mere academic interest" in the right or obligation in question but that:-

> "… some tangible and justifiable advantage in relation to the applicant's position with reference to an existing{,}future or contingent legal right or obligation must appear to flow from the grant of the declaratory order sought". (my emphasis)

I find these *dicta* to be apposite in the present case. The applicant has not indicated he has contemplated or even that he is at some future date going to contemplate or attempt, to join, form or register a trade union. Trade unionism, by its nature pre-supposes a grouping or groupings of workers with similar interests, who associate for the purpose of advocating and advancing their special interests. Assuming his interest were to form or register a trade union of managerial employees, the applicant has not suggested that such a group already exists within his or other workplaces, nor that such a group, if it existed, was interested in, was contemplating or had contemplated, forming or registering such a trade union. His argument, in effect, is that should some undefined managerial employees who include him, wish at some future date to form, belong to or register a trade union, they would find their way blocked by s 45(1)(b)(i)of the Act.

Given this context, I find the applicant's to be no more than an idle interest, not grounded in any past, present or future action that he may wish to take or that may be taken against him and/or the undefined managerial employees on whose

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[7] See the many authorities cited in *Herbstein and Van Winsen (supra)* at page 1054

[8] 1961 (3) SA 283 T at 285D

behalf he purports to make the present application. There is therefore nothing to suggest that the ruling of the court, were it to be in his favour, would result in some tangible advantage to them, flowing from such ruling. In other words there is no indication that such a ruling would not end as a purely academic exercise.

There is also the requirement that the court's ruling should be binding on those alleging an interest in the relief sought. This requirement is succinctly set out in *Family Benefit Friendly Society v Commissioner for Inland Revenue, supra,* as follows at page 125H-J:-

> "The court will not make a declaration of rights unless there are interested persons upon whom the declaration would be binding. It follows that interested persons against whom or in whose favour the declaration will operate must be identifiable and must have had an opportunity of being heard in the matter. *Ex parte Van Schalkwyk NO and Hay NO* 1952 SA 407 (A) at 411 C & D; *Anglo-Transvaal Collieries Ltd v South African Mutual Life Assurance Society* 1977 (3) SA 63 (T) at 636 C-F and see 1977 (3) SA 642 A at 655 D."

The applicant, it has already been noted, has not indicated whether he has identified others in the category of managerial employee either within his own workplace or in others, who were desirous of forming, joining or registering a trade union, or who had contemplated or attempted to do so. Nor is there any indication that such employees can be identified. The order sought would therefore not be binding on the applicant (who on the papers has shown no intention of exercising the right in question) nor on other managerial employees who, apart from being undefined, have not evinced an interest in the relief sought. They have not been heard, nor, assuming they share the applicant's interest, have they had an opportunity to explain, for example, whether and why, they may not feel that their needs are

adequately catered for by s 45(1)(b)(ii). This section provides that an employers' organisation shall not represent employees other than managerial employees. Therefore, the issue of whether or not these employees may ever be interested in exercising the right sought by the applicant, is left to speculation.

When all is said and done, I find, in the final analysis, that the applicant has failed to prove that he has the requisite interest in the subject matter of the part of the application regarding s 45(1)(b)(i) of the Labour Relations Act. Without that interest, the authorities consulted suggest the applicant, may, further, not have *locus standi* in making the application in question.[9]

I would therefore and in that respect, dismiss the application.

In the light of this finding it is not necessary for me to go to the second stage of the enquiry in matters like this, which is whether or not the case is a proper one for the exercise by the court of the discretion conferred on it.

Section 23(1) of the Labour Relations Act

I will now turn to the applicant's application in relation to the proviso to s 23(1) of the Act.

[9] *Herbstein and Van Winsen, supra,* at page 1056

Mr *de Bourbon,* for the applicant, contends that the proviso is unconstitutional in as much as it puts restrictions concerning who can associate within a (general) workers' committee.

Section 23(1) reads as follows:-

> "… employees employed by any one employer may appoint or elect a workers' committee to represent their interests:
>
> Provided that no managerial employee shall be appointed or elected to a workers' committee, and nor shall a workers' committee represent the interests of managerial employees unless such workers' committee is composed solely of managerial employees appointed or elected to represent their interests."

Mr *Nherere* for the first respondent contends, to the contrary, that the proviso is not *ultra vires* the Constitution. He advances the following arguments to support this contention:-

(i) that the workers' committee that the applicant, as a managerial employee, is precluded from joining is a creature of statute, which does not include both managerial and non-managerial employees; and

(ii) that even if it is held that the proviso to s 23(1) is inconsistent with s 21(1) of the Constitution, it is still not unconstitutional as it comes within the ambit of the derogations permitted by s 21(3)(B) of the Constitution in that it is designed for the purpose of protecting the rights of other persons.

In this latter respect Mr *Nherere* asserts that the applicant is, in effect, seeking that the definition of workers' committee in the Act should do away with the distinction between managerial and non-managerial employees. He contends that the purpose of a workers' committee is to represent the rights and interests of the workers in dealings with the employer. Where the latter is a juristic *persona*, the employer would be represented by the management in negotiations with the workers' committee. Thus, Mr *Nherere* contends, if managerial employees were to be allowed to join ordinary workers' committees, there might be a conflict of interest with the same member of the workers' committee seeking to represent the interests of both management and the workers, especially in matters relating to collective bargaining and recommendations for collective job action. To the extent that the proviso to s 23(1) of the Act was designed for the purpose of protecting the rights of both workers and employers, Mr *Nherere* contends, it was a derogation permissible in terms of s 21(3)(b) of the Constitution. Such proviso was, therefore, reasonably justifiable in a democratic society. Mr *Nherere* cited a number of authorities, including *Nyambirai v National Social Security Authority and Anor*[10] where the court set out the criteria to be considered in determining whether or not a derogation from a constitutionally guaranteed right is permissible in the sense of not being shown to be arbitrary or excessive.

I find much merit in Mr *Nherere's* submissions.

The applicant, in his papers, accepts that he is a managerial employee. In other words he does not submit that he is a non-managerial employee who has been denied the right to join a workers' committee whose purpose was to represent and

[10] 1996 (1) SA 636 ZS at 647

advance the interests of such employees. His contention is, rather, that regardless of being a managerial employee who is free, by virtue of the proviso to s 23(1) of the Labour Relations Act, to join a workers' committee consisting entirely of managerial employees, he should, nevertheless, be allowed to join and be a member of a workers' committee for non-managerial employees.

The applicant thus wants to remain a managerial employee yet participate in the activities of a committee whose primary purpose is to represent the interests of non-managerial employees. By implication, the applicant is saying management, whose interests are of necessity different from those of general workers, should be free to join the latter's workers' committee. By the same token and further, that the reverse should also be allowed, that non-managerial employees should be free to join a workers' committee, where it exists, consisting of managerial employees.

I am not persuaded that there is merit in this reasoning.

It is trite that in any work situation there is a divide between managerial and non-managerial employees not only in terms of responsibilities but also interests and rights. As correctly contended for the first respondent, this demarcation is designed to ensure orderliness in the running of the business/operation concerned. Needless to say, it also creates an environment that ensures that the interests and rights of different categories of workers are articulated or identified, and specifically addressed, thereby reducing the potential for labour unrest. The

legislative provision complained of reinforces this demarcation and for the same practical reasons.

As correctly contended by Mr *Nherere* s 23(1) of the Labour Relations Act creates a workers' committee which it vests with the special responsibility to represent the interests and rights of non-managerial employees. It also, in the same breath, creates the potential for the creation of another workers' committee to represent the special interests of managerial employees. It specifically provides that workers belonging to the two different categories should not sit on the workers' committee, and therefore attempt to represent the interests, of workers belonging to a category they do not fall into. The effect of this provision is that workers are free to appoint from those belonging to their category, a workers' committee to represent their interests and rights, in other words, interests and rights that are peculiar to their special category of workers.

Viewed in the context of s 21(1) of the Constitution there is merit in the contention made for the first respondent that the applicant's eligibility to join a workers' committee has not been interfered with. Rather, the effect of the impugned proviso is to vary such eligibility to the extent that the applicant is rendered eligible to join a workers' committee of managerial employees. *In Re Munhumeso and Others,*[11] which is cited as authority for the test in determining whether a law abridges a fundamental right or freedom, GUBBAY CJ stated at p 62 of the judgment:-

> "The test in determining whether an enactment infringes a fundamental freedom is to examine its effect and not its object or subject matter. If the

[11] 1994 (1) ZLR 49 S

> effect of the impugned law is to abridge a fundamental freedom, its object or subject matter will be irrelevant."

The object of the proviso complained of as already indicated, is to ensure that the interests of different workers are separately articulated and represented. However, on the authority of *Munhumeso's* case, *supra*, this object would be irrelevant if the effect of the proviso in question has is to abridge a fundamental right or freedom. The question that then has to be answered is whether the proviso, in creating a committee to deal with the interests of different categories of workers in the sense of "separate but equal" treatment, abridges the workers' fundamental rights, specifically the applicant's fundamental right to freedom of association? I am not persuaded that it does.

My interpretation of s 21(1) of the Constitution is that it guarantees every individual the right of freedom of assembly and association, not simply for the sake of it, but for the sake of protecting his interests. The right is therefore, in that sense, qualified and restricted to such association as is meant to protect the interests of the individual concerned. In *casu*, the applicant has not indicated that he disputes the fact that the rights and interests of managerial employees are different from those of non-managerial employees. He has not challenged the argument that the interests of non-managerial employees are best, and appropriately, represented by a committee consisting of non-managerial employees. By the same token, the applicant does not dispute that the interests of managerial employees are best represented by other managerial employees. I find in this respect that the proviso to s 23(1) of the Labour Relations Act in effect conforms with the spirit of s 21(1) of the Constitution by

upholding the right of the applicant to associate with workers sharing his interest, i.e. managerial employees in a workers' committee composed of such workers.

However, even if the proviso were to be interpreted to mean that the applicant's fundamental right of association has been abridged, the point has correctly been made for the first respondent that such proviso, in any case, was within the ambit of the derogations permitted by s 21(3)(b) of the Constitution which provides as follows:-

> "(3) Nothing contained in or done under the authority of any court shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision -
>
> (a) …
>
> (b) for the purpose of protecting the rights or freedoms of other persons;
>
> (c) …
>
> (d) …
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> except so far as that provision or, as the case may be, the things done under the authority thereof is shown not to be reasonably justifiable in a democratic society."

Mr *Nherere* submits, correctly in my view that the word "rights" in paragraph (b) is not limited to the fundamental rights enshrined in Chapter 3 of the Constitution, but should be given its ordinary jurisprudential meaning. Viewed in this light it is logical to assume that non-managerial employees have the right to have their interests represented by those of their colleagues who share and, therefore, fully appreciate their needs and interests. The involvement of a managerial employee whose interests they may not share would, in my view, undermine such right. To that

extent, the proviso to s 23(1) of the Labour Relations Act does make provision for the protection of the rights and freedoms of other persons, that is, the non-managerial employees. This means that the possibility of a conflict of interest where the same member of the workers' committee might seek to represent the interests of both management and workers is eliminated.

By virtue of s 21(3) this provision would be unconstitutional only if its effect were shown not to be reasonably justifiable in a democratic society.

The effect of the proviso to s 23(1) of the Labour Relations Act as already indicated, is to ensure that the interests of managerial and non-managerial employees are represented equally but separately, ie, through the medium of representatives who share the same interests and concerns. I therefore find merit in the contention made for the first respondent that the proviso complained of was clearly designed for the purpose of protecting the rights of both workers and management employees and is for that reason reasonably justifiable in a democratic society.

Counsel for the first respondent cited a number of authorities outlining the criteria the court should use to determine whether or not the provision is permissible in the sense of not being shown to be arbitrary or excessive (*Woods and*

Others v Minister of Justice, Legal and Parliamentary Affairs & Others;[12] *Nyambirari v National Social Security and Another*[13]*).* Briefly these are:

(i) that the legislative objective is sufficiently important to justify limiting a fundamental right;

(ii) that the measures designed to meet the legislative objective are rationally connected to it, and

(iii) that the means used impair the right or freedom no more than is necessary to accomplish the objective.

I am satisfied, in *casu,* that these criteria are fully satisfied. In this respect I would concur with the following contention made on behalf of the first respondent[14]:-

> "The purpose of the proviso to s 23(1) is to protect and promote the interests of workers vis-a-vis the employer and, to facilitate the smooth functioning of collective bargaining. Such rights are better protected by ensuring that workers' committees representing non-managerial employees have no managerial employees on them and, the right and interests of managerial employees are protected and promoted by workers' committees representing managerial employees only. It is, therefore, perfectly rational to insist that managerial employees may not be members of ordinary workers' committees."

I am persuaded that the proviso does no more than is necessary to serve this desired purpose. To the extent that managerial employees are not precluded from forming their own workers' committee to represent their

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[12] 1995 (1) SA 703 ZS ((1995) (1) BCLR 56)
[13] 1996 (1) SA 636 (ZS) at 647
[14] para 23 of the 1st respondent's Heads of Argument

rights, I am not satisfied the infringement of his freedom of assembly that the applicant alleges (even if he were correct) is excessive.

When all is considered, I am satisfied in all respects, that the impugned proviso to s 23(1) of the Labour Relations Act does not contravene s 21(1) of the Constitution.

In relation to costs the applicant's prayer is that should the application succeed, he be paid his costs, but that each party should bear its own costs in the case where the application is dismissed. The first respondent, in praying that the application be dismissed, has not asked that it be awarded costs. There will, accordingly, be no order as to costs.

The applicant having failed to prove a case for the relief sought, the application is, accordingly dismissed.

SANDURA JA: I agree

CHEDA JA: I agree

MALABA JA: I agree

GWAUNZA AJA: I agree

Gill Godlonton & Gerrans, applicant's legal practitioners

Ziumbe and Mtambanengwe, first respondent's legal practitioners