REPORTABLE (25)

POWERSPEED ELECTRICAL LIMITED t/a ELECTROSALES
v
FIDELITY COMMERCIAL TRADES AND ALLIED WORKERS UNION

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, BHUNU JA & MUSAKWA JA
BULAWAYO: 11 NOVEMBER 2022

E. T. Moyo, for the appellant

N. D. Dube, for the respondent

BHUNU

[1] This is an appeal against the judgment of the Labour Court (the Court *a quo*) which allowed the respondent access to the appellant's employees purportedly in terms of s 46 (a) of the Labour Act [Chapter 28:01] (the Act). At the close of submissions by both counsel the court issued an order with reasons to follow. The order is couched in the following terms:

> "In the result it is ordered as follows:
>
> 1. The appeal be and is hereby allowed with costs.
>
> 2. The judgment of the court *a quo* being LC/MT/25/22 be and is hereby set aside and substituted with the following:

"The court declines jurisdiction with no order as to costs."

[2] I now proceed to proffer the court's reasons for the order.

THE PARTIES

[3] The appellant is a registered company in terms of the laws of Zimbabwe. It operates in the retail industry supplying electrical hardware, building materials, home improvement products, industrial fans and products manufactured in the Engineering industry. It employs a sizable number of employees. On the other hand, the respondent is a Trade Union duly registered in terms of s 53 of the Act. Its scope of operations covers most of the employees in the commercial sector industry.

THE BRIEF SUMMARY OF FACTS

[4] The parties are embroiled in a labour dispute concerning the respondent's right of access to the appellant's workers in terms of s 7 (2) of the Act. The dispute has however spilled over to encroach onto issues to do with the scope of coverage of two rival trade unions. That dispute ought to be fought between the respondent and the Trade Union for Engineering which is not a party to these proceedings. The cause of action however remains the respondent's right of access to the appellant's workers now disguised as a dispute over the scope of operation of the appellant under s 46 of the Act

[5] On 10 November 2021, the respondent wrote to the appellant seeking access to all its employees in pursuit of its trade union business. The appellant turned down the request on

account that its employees were already covered by the trade union for the Engineering Industry.

[6] Disconcerted, the respondent approached the labour officer for conciliation during which it applied in terms of s 46 (a) of the Act for a description of the appellant's industry. It argued that its scope of coverage encompassed all employees under the commercial sector. It was therefore the appropriate trade union for the appellant's employees.

[7] The appellant resisted the respondent's claim citing s 2 of the Act. It countered that its employees were already registered and represented by the National Engineering Employment Workers Union in terms of s 2 of the Act. It is not in dispute that the appellant's employees were already represented by another trade union, the National Engineering Employment Workers Union which covers most of the appellant's employees. It is also not in dispute that the existing rival trade union was not cited as an interested party to the proceedings.

(8) The dispute spilled to the court *a quo* which held that the respondent had established that its scope of operation covered the appellant's undertaking. It therefore concluded that the respondent was an appropriate trade union entitled to access the appellant's employees in terms of s 7 (2) of the Act. It thus ordered the appellant to grant the respondent access to its employees.

GROUNDS OF APPEAL

[9] Aggrieved, the appellant appealed to this court on the following grounds of appeal:

"1. The learned judge of the court *a quo* erred and misdirected herself at law in *assuming* jurisdiction in terms of s 46 (a) of the Labour Act *[Chapter 28:01]* over a matter which on a proper construction of the dispute did not turn on that provision.

2. The learned judge of the court *a quo* erred at law and misdirected herself in failing to consider that the definition of an appropriate trade union in terms of s 2 of the Labour Act requires a two-staged inquiry, which inquiry (the) court did not undertake.

3. In the circumstances the court *a quo* grossly misdirected itself and erred at law in finding where there was an agent union for the employees concerned already and which agent union was not cited as a party, that the respondent was the appropriate trade union in terms of s 2 for purposes of s 7 (2) of the Labour Act."

[10] The issue of jurisdiction is paramount and dispositive of a matter without any further ado whenever a court finds that it has no jurisdiction. Thus, the sole issue for determination at this juncture is whether or not the court *a quo* and the labour officer had jurisdiction to hear and determine the matter.

SUBMISSIONS OF THE PARTIES

[11] The appellant's argument is essentially that the court *a quo* inappropriately assumed jurisdiction under s 46 which is inapplicable to the dispute between the parties. That section is only applicable to disputes concerning the name or description of a particular industry or its extent or scope of coverage. The dispute at hand had nothing to do with the name, description or extent of the scope of coverage of the respondent. It was about the respondent's right of access to appellant's employees in terms of s 7 (2) of the Act which regulates the right of access of trade unions to employees at the work place.

[12] The section provides as follows:

"(2) Every employer shall permit a Labour officer or a representative of the appropriate trade union, if any, to have reasonable access to his employees at their place of work during working hours for the purpose of—

(*a*) advising the employees on the law relating to their employment; and
(*b*) advising and assisting the employees in regard to the formation or conducting of workers committees and trade unions; and
(*c*) ensuring that the rights and interests of the employees are protected and advanced; and shall provide such Labour officer or representative of the appropriate trade union, if any, with reasonable facilities and access for the exercise of such functions."

[13] On the other hand the respondent countered that the applicable section in resolving the dispute between the parties is s 46 of the Act because it confers on the court *a quo* the power to determine the scope of operation of a trade union. It therefore submitted that the court *a quo* properly exercised its jurisdiction in determining that its scope of operation covered the appellant's industry. That being the case, it was the appropriate trade union entitled to access the appellant's employees.

[14] Section 46 of the Act provides as follows:

"**46 Matters to be determined by Labour Court**

In the event of any dispute as to —

(a) the extent or description of any undertaking or industry; or
(b) whether any employees are managerial employees;
the matter shall be referred to the Labour Court for determination."

THE DISPUTE

[15] It is common cause that the appellant denied the respondent access to its employees on the basis that its employees were already represented by a registered agent union, that is to say, the National Engineering Employment Workers Union. Thus the issue for determination by the Labour officer was the right of access to the appellant's employees and not the scope of operation of the respondent in its capacity as a trade union. The dispute before the Labour Officer had to do with unfair labour practice for which the Labour Officer had jurisdiction to hear and determine.

THE ISSUE BEFORE THE LABOUR OFFICER

[16] The crisp issue arising from the dispute between the parties was, whether or not the respondent had right of access to the appellant's employees who were already represented by another registered trade union.

THE ISSUE BEFORE THE COURT *A QUO*

[17] Counsel for the respondent submitted that it abandoned and withdrew the unfair labour issue it had placed before the Labour Officer and launched an application before the court *a quo* for a determination that the appellant falls under its scope of operation encompassing the commercial industry. Thus the application before the court *a quo* raised a fresh issue as to whether the respondent's scope of operation covered the appellant's employees.

ANALYSIS AND DETERMINATION OF THE MATTER.

[18] It is needless to say that the appellant adopted a strange confused procedure in which it withdrew its claim before the Labour Officer and then sought to convert the withdrawn claim into an application before the court *a quo* under the guise of obtaining a relief which it had abandoned and withdrawn in the lower tribunal. In prosecuting its misplaced application, the respondent sought a relief not provided for under s 46 of the Act. The section excludes the jurisdiction of the Labour Officer and confers it on the court *a quo*. Section 46 (a) however makes it clear that the court *a quo's* jurisdiction in this respect is limited to disputes concerning the extent or description of any undertaking or industry. Its jurisdiction under this section does not extend to the right of access over which the Labour Officer has jurisdiction as a tribunal of first instance under s 7 (2). Section 8 (b) constitutes the contravention of s 7 (2) as an unfair labour practice which falls under the jurisdiction of the Labour Officer under s 93 of the Act. The applicable law is couched in clear unambiguous peremptory terms hardly permitting any exceptions.

[19] In conclusion I am constrained to remark that the nature of the dispute placed before the court *a quo* had absolutely nothing to do with the appellant. It is a battle that ought to be fought between the competing trade unions. Thus, the court *a quo* could not assume jurisdiction over a dispute that was not between the parties appearing before it. The parties' dispute which the respondent withdrew from the Labour Officer arose out of the application and enforcement of s 7 (2). It had nothing to do with s 46 of the Act. The fresh application in the court *a quo* could not be brought under the guise of prosecuting an application under that section. Doing so is tantamount to getting access to the employees through the back door in pursuit of a matter that it had withdrawn in the first instance tribunal. Under the

circumstances the court *a quo* had no jurisdiction to grant the dubious order sought in a bid to evade the agent union already in place from contesting the application.

COSTS

[20] Neither party deserved any award of costs because the jurisdictional issue was raised *mero motu* by the court.

DISPOSITION

[19] The long and short of it all *is* that the court *a quo* could not assume jurisdiction on appeal over a claim that had been withdrawn under the subterfuge of executing the provisions of s 46 of the Act over which the court *a quo* had no jurisdiction. Thus the court *a quo* erred and seriously misdirected itself in assuming jurisdiction over a matter it had no jurisdiction to hear and determine. We accordingly held that the court *a quo* ought to have declined jurisdiction.

[20] Having come to that conclusion we found it unnecessary to consider all the other remaining issues as the finding on the issue of jurisdiction was dispositive of the matter. It is for *the* foregoing reasons that we issued the order in para 1 of this judgment.

GWAUNZA DCJ: I agree

MUSAKWA JA: I agree

Scanlen and Holderness, appellant's legal practitioners