HH 30-2005
HC 9050/02

PEOPLES OWN SAVINGS BANK
and
GIFT CHIMANIKIRE
and
LEONARD MATOMBO
and
ZIMBABWE POST AND TELECOMMUNIATION
WORKERS UNION

HIGH COURT OF ZIMBABWE
MAKARAU J
Harare, 19 January and 23 March 2005

**Opposed Application**

Mr *W Ncube*, for the applicant
Mr *T Biti*, for the respondents

MAKARAU J: The applicant filed the above application on 9 October 2002, seeking an order restraining the respondents from interfering in the applicant's relationship with its staff and specifically barring the respondents from representing the interest of its staff in matters affecting conditions of service of its staff. The application was opposed.

In turn the third respondent filed a counter- application in which it sought an order compelling the applicant to deduct and forward to the third respondent dues deducted from its staff and for an order registering the determination by the Minister of Labour on 2 July 2002 in this regard. This counter-application was in turn opposed.

The applicant is a statutory corporation that came into being by Act of Parliament in 2001. Prior to that, it was one of the units within the larger Posts and Telecommunications Corporation, ("PTC"), also a statutory corporation during its lifetime. At that time, during the lifetime of the PTC, the respondents were the president, secretary and registered trade union respectively of the workers of PTC as a whole, including the workers of the business unit that gave birth to the applicant.

As a result of its new personality, the applicant regards itself as falling it the Banking Industry, with not ties to the Telecommunications Industry, save in history.

In June 2001, the applicant invited its staff to a Collective Bargaining Agreement meeting, clearly bypassing and ignoring the respondents. This provoked the ire of the respondents who wrote to the applicant alleging that it was engaging in unfair labour practices in violation of the national labour laws by seeking to enter into a collective bargaining agreement for its staff in the absence of the third respondent. Correspondence was exchanged between the parties and their legal representatives without the parties agreeing on the correct legal position. This application was then filed.

Parallel to the events leading to the filing of this application, the applicant had sought the authority of the Minister of Public Service, Labour and Social Welfare to uphold its decision to stop deducting the dues to the third respondent from its staff, in what is commonly referred to as the check off system. The Minister refused to grant his authority and his decision was taken before the Labour Court on appeal. On 3 May 2004, before the application before me was set down, the Labour court upheld the decision of the Minister. In its judgment, which I find well reasoned, the Labour Court had this to say on page 5 of the cyclostyled judgment:

> "The Minister refused to ratify the position taken by the applicant on the basis that the appellant as the employer cannot decide which trade union the employees should belong to. The Minister noted that the employees still wanted to belong to the Respondent in line with their freedom of association.
>
> The Appellant did not challenge the fact that its employees still wanted to belong to the Respondent. Its main argument being that the respondent no longer represents its employees' interests who are now in the banking industry.
>
> **"That may well be so, but that in itself does not give the applicant the right to dictate which union its employees should belong to. That was the basis of the Minister's decision which we agree with."** (The emphasis is mine).

Prior to hearing argument on the merits of the matter, I requested counsel to address me on whether this court still enjoyed jurisdiction over the application in view of the amendment to the Labour Act [*Chapter 18.01*] that came into force on 30 December 2002. Both counsel were unanimous in their view that the amendment to the labour Act giving exclusive jurisdiction in the first instance to the Labour Court in certain specified

matters did not have any application to the above application as it was filed on 9 October 2002, two months prior to the gazetting of the amendment.

In coming to this conclusion, both counsel relied on the two principles in the construction of statutes against retrospectivity and ouster of jurisdiction. I find myself in agreement with the views of counsel that this court still enjoys jurisdiction in this application where *litis contestatio* occurred prior to the promulgation of the amendment to the Act. Since the issue of jurisdiction is not disputed, it is not necessary that I detail the arguments advanced in support of the position that this court enjoys jurisdiction in this matter.

In view of the fact that the Labour court handed down its decision prior to the hearing of this application, an issue in *limine* was taken at the resumed hearing of the matter. This was whether the merits of the application were *res judicata* having been determined by the Labour Court.

The essential elements of the *exceptio rei judicata* are settled in our law. A comprehensive discussion of these is to be found in *Wolfenden v Jackson* 1985 (2) ZLR 313 (SC) where GUBBAY J A (as he then was) reviewed some old authorities before holding that the requirements of the *exceptio* are that the previous proceedings must have been between the same parties or their privies and that the same question must arise. In addition, the parties must be estopped from disputing any issue necessarily decided by the court in reaching its decision. This formulation of the essential requirements of the *exceptio* has been followed in this jurisdiction in other cases. (See *Munemo v Muswera* 1987 (1) ZLR 20 (SC)).

In addressing the issue of whether or not the matter before me had been decided by the Labour Court, Mr Ncube for the applicant sought to argue that the Labour Court had left the matter between the parties open by suggesting that the applicant could have applied for variation of the registration of the third respondent. He relies on the following passage that appears at page 8 of the judgment of the Labour Court:

> "Given the Appellant's position it should have made an application in terms of s39 of the Act to the Registrar for the variation of the registration of the union in so far as it applied to the union's representation of its workers. The variation so sought would have enabled the Appellant to argue its case that adequate

representation of its workers could not be catered for under this union since they were now in the Banking Industry."

As detailed above, the applicant is of the view that the third respondent, registered initially in the Communications Industry, cannot effectively represent its workers who are now in the Banking Industry.

I do not read the above suggestion by the Labour Court as an indication that its determination in upholding the decision of the Minister was an interlocutory ruling, pending the application for the variation of the registration of the third respondent. It was a definitive judgment that put an end to the proceedings between the parties. It ended the litigation between them. As observed by GUBBAY JA in the *Wolfenden* case at page 316 B-C, the *exceptio rei juducatae* is based principally upon the public interest that there must be an end to litigation and litigants should not be allowed to plough the same field twice or to forum shop, hoping for a different result.

It is my view that the applicant is hoping that this court will come to a different position from that adopted by the Labour Court. If that is correct, then it erred for the *exceptio* will hold in favour of the respondents. The issue before the parties in the Labour Court, albeit on appeal from the decision of the Minister, was whether the third respondent would effectively represent the interests of the applicant's staff after the applicant moved to the Banking Industry. The Labour Court ruled that it was not for the applicant to choose who would best serve the interests of its staff as such staff has a constitutional right to belong to a trade union of its choice. The same issue is raised in the application before me where the applicant seeks an order restraining the respondents from representing its staff. The applicant still seeks to choose a trade union for its staff by refusing to deal with the trade union that its staff is happy to belong to. Both proceedings revolve around the right of the applicant, as an employer to choose which trade union its staff should belong to. Thus, in the proceedings before the Minister, the applicant sought to hold back the dues that its staff is obliged to pay to the third respondent. In deciding that the applicant had no such right, the Minister necessarily decided that the applicant had no right to interfere in the contractual relationship between the third respondent and its members, part of whom constitute the staff of applicant. In deciding that that the

applicant could not stop deducting the dues due to the third respondent, the Minister necessarily decided that the third respondent could represent the interests of the applicant's staff. I do not find any issue before me that was not necessarily decided by the Minister and the Labour Court in turn when it upheld the decision of the Minister.

In the result and on the basis of the foregoing, the applicant is estopped from disputing any of the issues necessarily determined by the Minister in the first instance and by the Labour Court on appeal. The *exceptio* raised by the respondents is valid and disposes of the matter before me.

Assuming that I am wrong is holding that the matter before me is disposed of by the *exceptio*, I would still have dismissed the application on the merits.

It is trite that membership to a trade union of one's choice, while entrenched by the provision of the Constitution of Zimbabwe and the Labour Act, is essentially a matter of contract. The member and the trade union enter into a contract where the member is obliged to pay his or her dues in return for representation in certain specified matters by the union. The applicant as employer is not privy to this contract and has no *locus standi* to terminate the membership of its staff in terms of the contract between the two. As pointed out by the Labour Court in its judgment referred to above, the Labour Act gives the employer *locus standi* to make representations when seeking the variation of the registration of the trade union in a particular industry. Thus, to illustrate the point by using the absurd example given in the applicant's affidavit, if a brick-layer exercises the freedom of choice guaranteed him in the Constitution to join a teachers' trade union, and the teachers trade union seeks to be registered in the construction industry to protect the interests of its bricklayer member, then at the hearing of that application for the registration of the trade union in respect of the Construction Industry, that Industry can make representations in terms of the Act against the registration of the union and give reasons why it objects to the teachers' union representing the interests of the bricklayer. Once the teaches union is registered in terms of the Act, the bricklayer's employers are obliged to sit down with that teachers union to negotiate the conditions of service of the bricklayer. This is trite and it reflects the extent to which the labour law protects the rights of workers to belong to trade unions of their choices. The right given by the Act to

employers to make representations during the registration of a trade union is in my view in recognition of the lack of *locus standi* on the part of the employer at common law to interfere in the contractual relationship between a trade union and its members. The right as given by the Act cannot be read to amend the common law of contract generally. In the absence of variation of registration proceedings relating to the third respondent brought in terms of the provisions of the Labour Act, the applicant has no *locus standi* at common law to interfere in the contractual relationship between a trade union and its members.

In view of the conclusion I have arrived at in this matter, it appears unnecessary to me that I deal with the procedural issues raised in the matter by the respondents. These relate to the authority of the deponent to the applicant's affidavit to bring the application on behalf of the applicant and the alleged failure by the applicant to cite the individual employees who are members of the third respondent.

In the result, I make the following order:

1. The application is dismissed.
2. The determination by the Minister of Labour made on 2nd July 2002 is hereby made an order of this court.
3. The applicant is to pay the respondent's costs.

*Coghlan Welsh& Guest*, the applicant's legal practitioners
*Honey & Blankenberg*, the respondent's legal practitioners