REPORTABLE (21)

Judgment No. SC 25/07
Civil Appeal No. 8/06

ZIMBABWE GRAPHICAL WORKERS UNION v

(1) FEDERATION OF MASTER PRINTERS OF ZIMBABWE
(2) MINISTER OF PUBLIC SERVICE, LABOUR AND SOCIAL WELFARE

SUPREME COURT OF ZIMBABWE
SANDURA JA, GWAUNZA JA & GARWE JA
HARARE, JANUARY 15 & SEPTEMBER 14, 2007

P Machaya, for the appellant

S Sadomba, for the first respondent

No appearance for the second respondent

SANDURA JA: This appeal arises out of a labour dispute which was decided in favour of the respondents by the Labour Court.

In a judgment handed down on 3 January 2006 the Labour Court declared that the collective job action embarked upon by the appellant on 25 July 2005 and terminated on 3 August 2005 was unlawful.

The background facts in the matter may be tabulated conveniently as follows –

1. The appellant ("the Union") consists of the employees in the printing, packaging and newspaper industry, and the first respondent ("the Federation") is an amalgamation of the employers in that industry.

2. During the first half of 2005 the Union commenced negotiating with the Federation a cost of living adjustment of the salaries and allowances payable to its members during the last quarter of 2005. The Union proposed a salary increase of 220% and the introduction of a housing allowance of $1 500 000.00 and a transport allowance of $300 000.00 per month, but the Federation rejected the proposals and, instead, offered an increase of 40% of the current salaries and allowances.

3. After three rounds of negotiations, the parties reached a deadlock, and thereafter the Union began preparing for a lawful collective job action, which was approved by an overwhelming majority of its members voting by secret ballot.

4. On 15 June 2005 the Union gave the Federation notice of its members' intention to resort to collective job action. The notice, in relevant part, reads as follows:

"**MEMORANDUM**

To: Federation of Master Printers of Zimbabwe

From: Zimbabwe Graphical Workers Union

Date: 15 June 2005

> **Ref:** Notice of Intention to go on an Industrial Collective Job Action
>
> The above refers:
>
> In terms of Part XIII section 104(2)(a) of the Labour Act, we are hereby giving you fourteen (14) days to redress our grievances. The grievances are outlined below –
>
> (1) We want wage/salary increase of 220%.
>
> (2) We want housing and transport allowances of $1.5 million and $300 000.00 respectively.…"

5. On 20 June 2005 the Federation applied to the second respondent ("the Minister") for a show cause order.

6. On 4 July 2005 the Minister, acting in terms of s 106(1) of the Labour Act [*Chapter 28:01*] ("the Act"), issued a show cause order directing the Union to appear before the Labour Court on 7 July 2005 at 11 am to show cause why the threatened collective job action should not be disposed of in terms of s 107 of the Act.

7. On 7 July 2005 the parties appeared before the Labour Court, and a disposal order was issued by that court with the consent of the parties. It reads as follows:

> "Whereupon, after reading documents filed of record and hearing both parties' representatives, it is by consent hereby ordered that a disposal order be issued on the following terms:

1. That the salaries dispute between the parties be and is hereby referred to a labour officer for conciliation.

2. That pending the outcome of the conciliation mentioned in paragraph 1 above, the respondents are prohibited from embarking on the threatened collective job action."

8. On 18 July 2005 the parties appeared before a labour officer for conciliation. That exercise lasted until 20 July 2005 and, as the dispute was not settled, the labour officer issued a certificate of no settlement to the parties on 21 July 2005.

9. On 25 July 2005 the Union resorted to collective job action. On the same day, the Federation applied to the Minister for another show cause order.

10. On 28 July 2005 the parties appeared before a labour officer and made their submissions on the Federation's application for the second show cause order. However, the circumstances in which the application, which had been submitted to the Minister, was placed before the labour officer were not clear. Presumably, the Minister wanted the labour officer to look into the matter and compile a report thereon for his consideration. Nevertheless, after considering the submissions made by the parties, the labour officer compiled a report in which he recommended that the Minister should not issue the show cause order sought because, in his view, the collective job action was lawful. That recommendation was subsequently supported by the provincial labour officer for the Harare region.

11. Nevertheless, on 1 August 2005 the Minister issued the second show cause order, directing the Union to appear before the Labour Court on 3 August 2005 at 10 am to show cause why the collective job action commenced on 25 July 2005 should not be disposed of in terms of s 107 of the Act. In addition, the Minister directed that, pending the determination of the matter by the Labour Court, the collective job action should be terminated immediately or, in any case, within twenty-four hours of receipt of the show cause order.

12. On 3 August 2005 the parties appeared before the Labour Court. It appears from the record that the parties did not complete their submissions on that day, but had to appear again on two or three other occasions, before the Labour Court reserved its judgment.

13. On 3 January 2006 the Labour Court handed down its judgment. It declared that the collective job action embarked upon by the Union on 25 July 2005 and terminated on 3 August 2005 was unlawful.

Aggrieved by that decision, the Union appealed to this Court.

The Labour Court found that when the notice given by the Union on 15 June 2005 expired on 29 June 2005, and the Union did not immediately thereafter embark upon the collective job action it had threatened, it lost the right to resort to such action on the basis of the notice given on 15 June 2005, and that a fresh notice should,

therefore, have been given before the Union embarked upon the collective job action on 25 July 2005. As no such notice had been given, the Labour Court concluded that the collective job action was unlawful.

The correctness of that finding has been challenged in this appeal.

Subsections (1) and (2) of s 104 of the Act read as follows:

> "(1) Subject to this Act, all employees, workers committees and trade unions shall have the right to resort to collective job action to resolve disputes of interest.
>
> (2) Subject to subsection (4) (which is not relevant in the present case), no employees, workers committee, trade union, employer, employers organisation or federation shall resort to collective job action unless -
>
> (a) fourteen days written notice of intent to resort to such action, specifying the grounds for the intended action, has been given -
>
> (i) to the party against whom the action is to be taken; and
>
> (ii) to the appropriate employment council; and
>
> (iii) to the appropriate trade union or employers organisation or federation in the case of members of a trade union or employers organisation or federation partaking in a collective job action where the trade union or employers organisation or federation is not itself resorting to such action; and
>
> (b) an attempt has been made to conciliate the dispute and a certificate of no settlement has been issued in terms of section ninety-three."

There are three issues for determination in this appeal. The first is whether the dispute between the parties was a dispute of interest or a dispute of right.

The second is whether the Minister had the power in terms of the Act to issue the second show cause order. And the third is whether the Union lost the right to resort to collective job action, on the basis of the notice given on 15 June 2005, when it did not embark upon such action immediately after the expiration of the notice on 29 June 2005. I shall deal with these issues in turn.

WAS IT A DISPUTE OF INTEREST OR A DISPUTE OF RIGHT?

This issue is important because if the dispute between the parties was a dispute of right, the Union had no right to resort to collective job action to resolve the dispute. I say so for two reasons.

The first reason is that the right given by s 104(1) of the Act to employees, workers committees and trade unions to resort to collective job action is in respect of the resolution of disputes of interest and does not cover disputes of right. Section 104(1) states that:

> "… all employees, workers committees and trade unions shall have the right to resort to collective job action to resolve disputes of interest." (emphasis added)

And the second reason is that in terms of s 104(3)(a)(ii) of the Act employees, workers committees, etcetera, cannot resort to collective job action if the issue in dispute is a dispute of right. Section 104(3)(a)(ii) reads as follows:

> "(3) Subject to subsection (4) (which is not relevant to the present case), no collective job action may be recommended or engaged in by –

(a) any employees, workers committee, trade union, employer, employers organisation or federation -

(i) … ; or

(ii) if the issue in dispute is a dispute of right;".

The terms "dispute of interest" and "dispute of right" are defined in s 2 of the Act as follows:

"'dispute of interest' means any dispute other than a dispute of right.

'dispute of right' means any dispute involving legal rights and obligations, including any dispute occasioned by an actual or alleged unfair labour practice, a breach or alleged breach of this Act or of any regulations made under this Act, or a breach or alleged breach of any of the terms of a collective bargaining agreement or contract of employment."

Thus, a dispute of right would be a dispute concerning, for example, the infringement or interpretation of an existing legal right embodied in a statute or contract of employment. On the other hand, a dispute of interest would be a dispute concerning, for example, the creation of new legal rights for the workers, such as higher salaries and allowances.

The learned authors, Alan Rycroft and Barney Jordaan, in their book *A Guide to South African Labour Law* 2 ed, have this to say on disputes of interest and disputes of right at p 169:

"Broadly speaking, disputes of right concern the infringement, application or interpretation of existing rights embodied in a contract of employment, collective agreement or statute, while disputes of interest (or 'economic disputes') concern the creation of fresh rights, such as higher wages, modification of existing collective agreements etcetera. Collective bargaining, mediation and, as a last

> resort, peaceful industrial action, are generally regarded as the most appropriate avenues for the settlement of conflicts of interest, while adjudication is normally regarded as an appropriate method for resolving disputes of right."

I entirely agree with those observations, which accord with the definitions of "dispute of right" and "dispute of interest" set out in s 2 of the Act.

In the circumstances, there can be no doubt that the issue which was in dispute between the parties in this case was a dispute of interest, involving the creation of fresh legal rights in the form of higher salaries and allowances.

DID THE MINISTER HAVE THE POWER IN TERMS OF THE ACT TO ISSUE THE SECOND SHOW CAUSE ORDER?

I do not think he had. However, before I give my reasons for that conclusion, I wish to set out the relevant provisions in ss 106 and 107 of the Act.

Section 106, in relevant part, reads as follows:

> "**106 Show Cause orders**
>
> (1) Whenever a workers committee, trade union, employers organisation or federation of registered trade unions or employers organisations … threatens, recommends, encourages, incites, organises or engages in any collective action … the Minister, acting on his own initiative or upon the application of any person affected or likely to be affected by the unlawful collective action, may issue an order calling upon the responsible person to show cause why a disposal order should not be made in relation thereto.
>
> Provided that the Minister may call both parties to appear before him or her for submissions before he or she issues a show cause order if he or she deems it necessary that they appear.

(2) A show cause order -

(a) shall specify -

(i) the date, time and place at which the responsible person must appear before the Labour Court to show cause why a disposal order should not be made; and

(ii) the order or action desired or proposed;

(b) may direct that pending the issuance of a disposal order, the unlawful collective action concerned be terminated, postponed or suspended."

And s 107, in relevant part, reads as follows:

"**107 Disposal orders**

(1) On the return day of a show cause order the Labour Court shall … inquire into the matter and shall afford the parties concerned an opportunity of making representations in the matter.

(2) After conducting an inquiry in terms of subsection (1), the Labour Court may issue a disposal order directing that –

(a) the unlawful collective action be terminated, postponed or suspended; or

(b) the issue giving rise to the unlawful collective action concerned be referred to another authority to be dealt with in terms of Part XII and that, pending the determination of the issue in terms of that Part, the unlawful collective action concerned be terminated, postponed or suspended."

In my view, the Minister did not have the power to issue the second show cause order. I say so because there is no provision in the Act in terms of which the Minister, after issuing a show cause order directing the parties to appear before the Labour Court, to show cause why a disposal order should not be made in terms of s 107, could issue another show cause order in the same matter, and in respect of the same

dispute, directing the parties for the second time to appear before the Labour Court to show cause why another disposal order should not be made in terms of s 107.

In addition, subss (5) and (7) of s 93 of the Act set out the procedure to be followed by the parties after a certificate of no settlement has been issued by a labour officer. Instead of applying to the Minister for the second show cause order, the Federation should have followed that procedure to resolve the dispute.

Subsection (5) of s 93 of the Act, in relevant part, reads as follows:

> "After a labour officer has issued a certificate of no settlement, the labour officer, upon consulting any labour officer who is senior to him and to whom he is responsible in the area in which he attempted to settle the dispute or unfair labour practice –
>
> (a) … ;
>
> (b) may, with the agreement of the parties, refer the dispute or unfair labour practice to compulsory arbitration; or
>
> (c) … ."

However, as the Union did not want the dispute referred to compulsory arbitration, the labour officer could not act in terms of s 93(5)(b). He could only have done so with the agreement of both parties, but the parties disagreed on that course of action.

Nevertheless, that was not the end of the matter, because the Federation should have acted in terms of subs (7) of s 93 which, in relevant part, reads as follows:

"(7) If, in relation to any dispute or unfair labour practice –

(a) after a labour officer has issued a certificate of no settlement in relation to the dispute or unfair labour practice, it is not possible for any reason to refer the dispute or unfair labour practice to compulsory arbitration as provided in subsection (5); or

(b) …;

any party to the dispute or unfair labour practice may, in the time and manner prescribed, apply to the Labour Court –

(i) for the dispute or unfair labour practice to be disposed of in accordance with paragraph (b) of subsection (2) of section eighty-nine, in the case of a dispute of interest; or

(ii) … ."

And s 89(2)(b), mentioned above, reads as follows:

"**89 Functions, powers and jurisdiction of Labour Court**

(1) …

(2) In the exercise of its functions, the Labour Court may –

(a) …

(b) in the case of an application made in terms of subparagraph (i) of subsection (7) of section ninety-three, remit it to the same or a different labour officer with instructions directing that officer to attempt to resolve it in accordance with such guidelines as it may specify;".

In the circumstances, it is clear beyond doubt that after issuing the first show cause order the Minister had no further role to play in the matter. The second show cause order was, therefore, null and void. The same applies to the second disposal order issued, because the matter was not properly before the Labour Court.

Although that effectively disposes of this appeal, I shall deal with the third issue because I consider it important, as it formed the basis on which the matter was determined by the court *a quo*.

DID THE UNION LOSE THE RIGHT TO RESORT TO COLLECTIVE JOB ACTION WHEN IT DID NOT RESORT TO SUCH ACTION IMMEDIATELY AFTER THE NOTICE GIVEN ON 15 JUNE 2005 EXPIRED ON 29 JUNE 2005?

I do not think it did. I say so because when the fourteen days expired on 29 June 2005, the Union could not immediately thereafter lawfully resort to collective job action. In fact, the Union did not have the right to resort to collective job action at that stage because, in terms of s 104(2)(b), the Union could not resort to such action unless an attempt had been made to conciliate the dispute and a certificate of no settlement had been issued in terms of s 93 of the Act.

It was common cause that the Labour Court referred the dispute to a labour officer for conciliation on 7 July 2005. The conciliation exercise subsequently commenced on 18 July 2005 and ended on 20 July 2005. The exercise was not successful, and a certificate of no settlement was issued to the parties on 21 July 2005.

In my view, it was only on 21 July 2005, after a certificate of no settlement had been issued to the parties, that the Union acquired the right to resort to

collective job action. Four days later, on 25 July 2005, the Union embarked on the collective job action.

It seems to me that the delay of four days in commencing the collective job action was not unreasonable, bearing in mind the fact that the Union had to organise the collective job action and inform its members throughout the country about the decision to resort to such action after the certificate of no settlement had been issued.

In submitting that the Union should have given a fresh notice in respect of the collective job action embarked upon on 25 July 2005, counsel for the Federation relied upon what this Court said in *Moyo and Ors v Central African Batteries (Pvt) Ltd* 2002 (1) ZLR 615 (S). At 620 C-D GWAUNZA AJA (as she then was) said:

> "There is no evidence on record to show the nature of the grievance that led to the strike of December 1997. However, even if the grievance had been the same – for instance, because the respondent had not complied with whatever determination was made in October 1997 – as long as the original notice period had expired, there would still have been need to issue a fresh notice of the intended strike in accordance with s 104(2) of the Act."

In that case, the respondent's employees wrote to the member-in-charge at Norton Police Station on 26 August 1997, stating their intention to resort to collective job action fourteen days later. The letter was copied to the Ministry of Labour and to the relevant trade union. The employees did not notify their employer about the proposed action, but the employer later became aware of it from some other source.

When the fourteen days expired, the employees did not immediately embark on the proposed collective job action, but did so subsequently on 3 December 1997, relying upon the notice given in August 1997. This Court held that a fresh notice in respect of the collective job action of 3 December 1997 should have been given.

However, *Moyo's* case *supra* is distinguishable from the present case. The main distinction is that *Moyo's* case *supra* was decided in terms of s 104(2) of the Act before it was amended by s 37 of the Labour Relations Amendment Act No. 17 of 2002, which came into force on 7 March 2003.

The amendment introduced an additional requirement which had to be met by the employees intending to embark upon collective job action, i.e. they could not embark upon such action unless an attempt had been made to conciliate the dispute and a certificate of no settlement had been issued in terms of s 93 of the Act.

Thus, whereas before the amendment, and assuming that all the other requirements set out in s 104(2) were met, employees intending to embark on collective job action acquired the right to embark upon such action immediately after the expiration of the fourteen days notice, after the amendment that right was acquired by the employees only after an attempt had been made to conciliate the dispute and a certificate of no settlement had been issued in terms of s 93.

Once acquired, the right could only be lost if it was not exercised within a reasonable time, and no reasonable explanation for the delay in exercising the right was given.

Thus, in *Free State Consolidated Gold Mines (Operations) Ltd v National Union of Mineworkers and Ors* 1988 (2) SA 425 (OPD), HEFER J said the following at 429 C-E, whilst considering an issue similar to the one in this case:

> "While the remarks of HOEXTER JA lend support to the contention that a right to strike acquired in terms of s 65 must be exercised within a reasonable time, the premise that a right must be asserted within a reasonable time after its acquisition does not warrant the conclusion that the failure to do so results *ipso iure* in its loss. This latter point emerges clearly from the judgment of HEFER JA in *Mahabeer v Sharma NO and Anor* 1985 (3) SA 729 (A) at 736 E-I."

And at 430 A-B the learned Judge continued:

> "In determining what is a reasonable time or an unreasonable delay in any given case, all the circumstances relative to the delay must be taken into account, including the explanation given for the delay. (See *Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie, en 'n Ander* 1986 (2) SA 57 (A) at 86I-87A.)"

I entirely agree with the learned Judge. It is incumbent upon the employees who have delayed in embarking on collective job action to give a reasonable explanation for that delay.

In *Moyo's* case *supra* it does not appear from the judgment that the employees gave a reasonable explanation for the delay in embarking on the collective job action.

However, in the present case the Union gave a reasonable explanation for not embarking on such action immediately after the end of the fourteen days notice on 29 June 2005, i.e. that an attempt to conciliate the dispute had not yet been made, and a certificate of no settlement had not yet been issued, matters over which the Union had no control. In fact, as already stated, the Union could not have lawfully resorted to collective job action before 21 July 2005, when the certificate of no settlement was issued in terms of s 93.

Finally, when the parties appeared before the Labour Court on 7 July 2005, in response to the first show cause order, which was issued on 4 July 2005, it must have been common cause that the Union had not lost the right to resort to collective job action on the basis of the notice given on 15 June 2005. I say so because of the wording of the disposal order, which was issued by the Labour Court with the consent of the parties. It reads as follows:

> "1. That the salaries dispute between the parties be and is hereby referred to a labour officer for conciliation.
>
> 2. That pending the outcome of the conciliation mentioned in paragraph 1 above, the respondents are prohibited from embarking on the threatened collective job action." (emphasis added)

The Union was, therefore, prohibited from embarking on the threatened collective job action "pending the outcome of the conciliation", which must mean that if the conciliation exercise was not successful the Union was at liberty to resort to collective job action.

The conciliation exercise commenced on 18 July 2005 and ended on 20 July 2005. The exercise was not successful, and a certificate of no settlement was issued on 21 July 2005.

In the circumstances, the collective job action embarked upon by the Union on 25 July 2005 and terminated on 3 August 2005 was lawful.

Consequently, the following order is made –

1. The appeal is allowed with costs.

2. The order of the court *a quo* is set aside and the following is substituted –

> "It is declared that the collective job action embarked upon by the respondent and its members on 25 July 2005 and terminated on 3 August 2005 was lawful."

GWAUNZA JA: I agree

GARWE JA: I agree

Mbidzo, Muchadehama & Makoni, appellant's legal practitioners

Gill, Godlonton & Gerrans, first respondent's legal practitioners