

DISTRIBUTABLE (41)

ANDREW MAGARASADZA & 34 OTHERS
v
(1) FREDA REBECCA GOLD MINE HOLDINGS LIMITED t/a
FREDA REBECCA GOLD MINE (2) ASSOCIATED MINE WORKERS
UNION OF ZIMBABWE

SUPREME COURT OF ZIMBABWE
HARARE, DECEMBER 16, 2016

T Zhuwarara, for the applicants

C Kwirira, for the first respondent

No appearance for the second respondent

IN CHAMBERS

Before **MAVANGIRA JA**, in chambers in terms of r 5 of the Rules of the Supreme Court, 1964.

For the sake of completeness, the following observation is noted. Despite being served with all the relevant papers the second respondent did not file any papers in response to this application. It was therefore barred. It also did not attend the hearing in chambers. Two men who claimed to be former employees of the first respondent and also to be represented by the second respondent appeared in chambers and indicated that their attendance was solely for the purpose of listening to the

proceedings. Counsel for the applicants and the first respondent indicated that they had no objection to the presence of the two.

This is a chamber application in which the applicants seek an order in the following terms:

- “1. The application for substitution of Respondent in case number SC570/14 be and is hereby granted.
2. That the Applicants substitute the 2nd respondent and be listed in their individual capacity and names as 2nd-35th Respondents and the 2nd Respondent be listed as the 1st Respondent in the appeal under case number SC570/14 in place of 2nd Respondent.
3. That all pleadings, documents and papers under SC570/14 filed with the honourable court from the date of this order shall reflect this substitution.
4. That there be no order as to costs.”

BACKGROUND

Part of the background to this matter may conveniently be extracted from the judgement of the Labour Court LC/H/272/2012 which prompted the appeal in SC 570/14. The parties before the Labour Court were Freda Rebecca Mine Holdings Limited as the appellant and Amalgamated Mine Workers Union as the respondent. What was before the Labour Court in LC/H/272/2012 was an appeal against an arbitral award, the operative part of which read:-

“The Award

Having carefully considered the evidence and both oral and written submissions from parties

1. I hereby declare that Respondent indeed made unilateral variation in the new contract of employment.
2. I therefore declare the new contract of employment null and void.
3. As a remedy, I hereby order parties to seriously engage themselves in fresh negotiations before a new contract of employment is introduced at Freda Rebecca Mine.”

The following is stated at pp 1-2 of the cyclostyled judgment of the Labour Court:

“The material background facts to the matter are as follows:

The appellant operates a mine known as Freda Rebecca Gold Mine situated in Bindura. The respondent is a Trade Union representing mine workers in Zimbabwe. Sometime in 2009 the

appellant introduced a revised contract of employment which was according to the Appellant signed by a majority of its employees. There were some employees who refused to sign the revised contracts of employment who were consequently dismissed from employment. These workers challenged the lawfulness of their dismissal through the Labour Official. When the conciliation failed the matter was referred to an arbitrator and is still pending.

The present matter however concerns an unspecified number of employees on whose behalf the Respondent lodged a complaint to the Labour Officer. The matter was referred to the Arbitrator with the term of reference being “whether the Respondent could unilaterally vary the terms of contracts of employment with its employees”. The Arbitrator handed down an award in the terms as referred to supra. Dissatisfied with the award the Appellant then lodged the present appeal.” (emphasis added).

The Labour Court struck the appeal off the roll on a technicality. It opined that Freda Rebecca had “thrown itself out of court” by failing to comply with the arbitral award or alternatively failing to apply for the suspension of the operation of the award before instituting the appeal.

Freda Rebecca appealed to the Supreme Court against this decision - Appeal No. SC 570/14. On the date set for its hearing, the said appeal was postponed *sine die* by the Supreme Court. The postponement was apparently due to issues that arose regarding the citation and or representation of the parties, which issues were to be sorted out during the period of the postponement. The issues apparently arose due to misunderstandings that developed between the applicants and the second respondent.

The applicants thus instituted the instant application with the anticipation that their success in this application will enable their participation in their individual capacities in the appeal in SC 570/14, which appeal is expected to be re-set down for hearing after the determination of this application.

SUBMISSIONS IN CHAMBERS BY THE APPLICANTS

Mr *Zhuwarara* for the applicants, moved for the granting of the order sought on a number of bases. He submitted that the applicants are the individuals whose contracts were summarily varied and that it is these same contracts that have been the subject matter of the dispute since 2012. He submitted that contrary to what the first respondent contended in its opposing papers, this is not an application for joinder but one for substitution of the second respondent by the applicants. He further submitted that whilst the workers' committee has no legal persona and therefore cannot represent workers, a trade union can do so as it has statutory ability to represent workers. He also submitted that in any event, as the appeal by the first respondent in SC 570/14 deals with a procedural and not a substantive issue, there could be no prejudice to the respondents.

Mr *Zhuwarara* went on to submit that in any event, if the applicants are successful in SC 570/14, the matter will be remitted to the Labour Court where the first respondent can make another complaint about or raise the issue of the representation of the parties, if they so wish. Furthermore, that the cause of action or justification for this application was the fact that the relationship between the applicants and the second respondent had become discordant. He submitted that the applicants' position is that if there are other employees (former employees) who want to continue to be represented by the second respondent they may continue to be so represented, but they (the 34) now want to ventilate their cause without the second respondent.

It was also Mr *Zhuwarara*'s submission that the second respondent has always acted in a representative capacity and did not at any time supplicate for its own rights. There has thus never been any confusion as to who the parties were. He submitted that s 29 (4) (d) of the Labour Act put to rest the question whether or not the applicants (and others) in their collective complaint, could be represented by the second respondent.

Mr *Zhuwarara* also submitted that the application is not one for joinder as it does not seek the joining of a party who was not a party before. It is rather the “unpacking” of the real respondents in that matter that is sought. There has not been any dispute, he submitted, that these 34 applicants had their contracts unilaterally varied or that they are former employees of the first respondent. They cannot therefore be said not to have sufficient interest in the matter. The applicants want the opportunity to respond to the first respondent’s appeal in which it is appealing against the striking off of their appeal in the Labour Court. In the applicants’ view the first respondent has adopted the wrong procedure by appealing against the striking off of their appeal by the Labour Court.

It was also his further submission that the applicants want to be substituted because they were already part of the proceedings but they now want to extricate themselves from the one who was representing them. The substitution, he submitted, is in terms of the common law and s 85 of the High Court rules referred to by the respondent does not and cannot apply. He cited *Zimbank Ltd & Anor v Consolidated Piping & Fitting* 2000 (1) ZLR 672 at 674C-D as the guideline in the determination of this application.

RESPONDENT’S SUBMISSIONS

In response Mr *Kwirira* for the first respondent made submissions to the following effect. From an examination of the draft order sought, it is clear that what is being sought is not substitution but joinder. The High Court Rules relating to substitution must therefore come into play as the Supreme Court rules do not provide for such an application. Rules 85 and 85A of the High Court rules ought to apply to the instant application. An examination of the stated rules will show that the application is defective as the order sought does not provide for the removal of a party and the replacement thereof with another but instead seeks joinder of the applicants to the parties already cited

in SC 570/14. The application is vague and embarrassing and bad at law and ought to be dismissed. The case of *Trop v SA Bank* 1992(3) SA 208 at 221 A-E was cited in support of the submission.

It was also submitted that in terms of ss 29 and 30 of the Labour Act a trade union has the ability and capacity to represent its members in legal proceedings. However, that must be distinguished from being a party to the proceedings. The sections do not provide that a trade union becomes party in proceedings in which they represent their members. In addition, the parties who appeared before the Labour Officer for conciliation are the same parties cited in SC 570/14 and the applicants were not cited as parties thereto.

It was also submitted that as the applicants were not parties in pertinent proceedings before the Labour Officer, the arbitrator, the Labour Court and finally the Supreme Court where an appeal is pending, it does not make sense for them to now at this stage, seek to be made parties to the litigation.

Mr *Kwirira* further highlighted that when the first respondent raised the issue of the second respondent's *locus standi* before the arbitrator no action was taken to have the applicants joined at that stage, yet the applicants now want to be parties to an appeal whose origin was birthed in those proceedings. Neither the arbitrator's award nor the Labour Court judgement cite or speak of the applicants. He submitted that the law does not countenance this as this would be tantamount to allowing them to enter the proceedings through the back door.

Mr *Kwirira* quoted remarks, though *obiter*, made in *TelOne (Pvt) Ltd Communications & Allied Services Workers Union* 2006 (2) ZLR 136 at 141B where CHIDYAUSIKU CJ stated:

“..... Mr Hwacha's contention is that a party that was not privy to the original proceedings cannot apply for the review of such proceedings. I recognise the cogency of this submission.

The proposition that only parties to the proceedings can challenge on review or appeal the outcome of such proceedings admits of little doubt.”

He submitted that applied in reverse quoted remarks buttress his argument. He described the applicants’ quest as an “ambush” of the point of law that had been raised by the first respondent in the earlier proceedings. He prayed for the dismissal of the application.

WHAT IS THE NATURE OF THIS APPLICATION?

The applicants have labelled it an application for substitution. The respondents on the other hand argue that it is in effect an application for joinder. The *Concise Oxford English Dictionary of Current English* 7 ed, 1982 provides the following, amongst others, definition for the word “substitute”:

“(person or thing) acting in place of another; make (person or thing) fill a place or discharge a function for or for another; put in exchange (for)

For “joinder” it provides:

“joining, union.”

The import of para 2 of the order sought is that while the second respondent remains, as is the case already, a respondent in SC 570/14, the applicants are also made additional respondents. The effect of the order, if granted, would be to alter the numbering order, with the previously lone respondent becoming the first respondent while the applicants become the second to the 35th respondents. Thus the applicants do not seek to substitute the second respondent. Rather, they wish to be added as co-respondents. There is no removal of one party and replacement with another as should happen in a substitution. On the face of it, this is a clear case in which joinder and not substitution is being sought.

On the other hand, Mr *Zhuwarara's* repeated and categorical submission in which he maintained that the relief sought by the applicants is not joinder but substitution, is contradictory of the terms of the order that is being sought before me. For that reason, the applicants' papers do not seek to meet the requirements of an application for joinder and they do not do so. In the same breath the effect of the terms of the order sought is in effect a joinder and not substitution. In these circumstances, the aptness of Mr *Kwirira's* citation of the case of *Trope & Ors v The South African Reserve Bank* 1992 (3) SA 208 at 221A-E becomes self-evident. Importantly, the appeal court quoted with approval the lower court's statement that:

“And if the pleadings lack sufficient clarity to enable the defendant to determine those facts and hence the case he has to meet, the pleadings are vague and embarrassing.”

Mr *Kwirira's* submission that at the arbitration proceedings the first respondent raised the issue of the second respondent's *locus standi* but no action was taken then to have the applicants joined at that stage, was not disputed by Mr *Zhuwarara* for the applicants.

Mr *Zhuwarara's* submission in response was merely that the applicants were only praying for an order to be granted in their favour only in relation to the appeal in SC 540/14 and not to any other case. This stance, in my view, tends to lend credence to Mr *Kwirira's* argument that the applicants seem to want to want to circumvent a legal point earlier raised by seeking to now individually enter the fray at this stage.

This court not being a court of first instance is not the proper forum for such an application. In any event, for reasons discussed above, the applicants seek to participate in the appeal in SC 570/14 by way of an application that defies a specific description recognised at law.

The nature of the application before me is unascertainable by reason of the pleadings filed being vague and embarrassing.

THE LAW

The aptness of the case of *Tel One (Pvt) Ltd v Communications & Allied Services Workers' Union* 2006 (2) ZLR 136 (S) at 143, also cited by Mr *Kwirira*, comes to the fore. As a party who was not privy to the original proceedings cannot appeal against or challenge on review those earlier proceedings, it is only logical that a party who was not privy to the original proceedings cannot become a party to the appeal emanating from those proceedings in the manner sought by the applicants.

In *casu* the second respondent substituted itself for the applicants and other employees entirely. It did not cite itself in a representative capacity. There was no reference at all to the applicants and the other employees. This is so despite the fact that the rights that may accrue when the fairness or otherwise of their dismissals is finally determined would affect them individually.

The effect of the non-citation or the lack of reference to the applicants is that the award by the arbitrator ordered that there be negotiations between the employer and the Trade Union in circumstances where the contracts to be entered into would be between the employer and the individual employees. This is an untenable result. I daresay it is an incompetent order. It is trite that for a party who has a real interest in the matter in dispute before a court to be bound by a judgement of the court, such party should be cited¹. It is also trite that a judgement may not be made affecting a person or entity that was not a party to the proceedings².

¹ *Indium Investments (Pvt) Ltd v Kingshaven (Pvt) Ltd & Ors* SC 40/15 at page 8 of the cyclostyled judgement.

² *Mashingaidze v Chipunza & Ors* HH 688/15; *Women & Law in Southern Africa Research & Education Trust v Shongwe & Others* HH 202/03;

The application in *casu* is bad at law. It is vague and embarrassing. In addition, on the facts of this matter, whether it be an application for substitution or for joinder, this court is not the proper forum before which to make it. It cannot therefore succeed.

It is accordingly ordered as follows:-

“The application is dismissed with costs.”

Chambati Mataka & Makonese, applicants' legal practitioners

Magwaliba & Kwirira, 1st respondent's legal practitioners