

REPORTABLE (34)

MEJA PWANYIWA
v
SHAMVA GOLD MINE

**SUPREME COURT OF ZIMBABWE
HARARE: 12 &15 FEBRUARY 2024**

Leman Pwanyiwa, for the applicant

W. Musikadi for the respondent

CHAMBER APPLICATION

MAVANGIRA JA:

INTRODUCTION

1. The applicant filed a Chamber Application seeking leave to appeal against a judgment of the Labour Court dated 18 July, 2023. The respondent filed opposing papers. The matter was set down for a virtual hearing on 12 February 2024 but had to be rescheduled to 15 February 2024 due to technical challenges that were experienced.
2. At the commencement of proceedings on 15 February 2024, one *Leman Pwanyiwa* announced himself as appearing for the applicant. The court enquired as to the capacity in which he was doing so. His response was that he is a para-legal officer in the Mining Workers Union to which the applicant belongs. The court further enquired whether he had

the right of audience before this Court or a judge of this Court. He boisterously responded that he did. On being asked in terms of which provision of the law, he claimed to have right of audience, he referred the court to “*section 2, subsection 4*” of the Supreme Court Rules and to s 35 of the Labour Act. As the court endeavored to ascertain that he understood the issue at hand, he continued to gallantly defend his stance.

3. In response, Mr *Musikadi*, for the respondent, submitted that Mr *Leman* had no right of audience before the court.
4. Mr *Leman*, however, passionately persisted in his stance. The court then directed him to file heads of argument to justify his contention. Mr *Musikadi* would thereafter file his in response. As a result, the matter was postponed *sine die* in order that the court may, in the meantime, make a pronouncement on the issue. Both sides have now since filed their heads of argument as directed. In fact, Mr *Leman*, who had up to close of business on 22 February 2024, to file his heads of argument, filed them before the end of the day on 15 February 2024 the day on which the directive was given.

LEMAN PWANYIWA’S CONTENTIONS

5. The bases that Mr *Leman* claims to establish his right of audience before this Court now follow hereunder.
6. The applicant is being represented by the Mining Workers Union of Zimbabwe through him as its appointed official. He is employed by the Union as a para-legal officer.

Judgment No. SC 34/24
Chamber Application No. SC 684/23

7. The starting point is r 2 (4) of the Supreme Court Rules, 2018, where a “legal representative” is defined to mean “any person authorized by any law to represent any litigant.” Rule 2 (4) as read with r 59 leaves no doubt that the term “legal representative” includes trade unions or their officials in representing their members in “labour and employment disputes spilling to this Court.”
8. Sections 29 (4) (d) and 35 (a) (v) of the Labour Act, [*Chapter 28:01*], as well as s 85 (1) (e) as read with s 65 of the Constitution give rise to “the right of the Union or its officials to represent their members in the Supreme Court.” The said provisions empower the Union to represent its members even in the Supreme Court.
9. In addition, there is supportive case law in the form of *National Employment Council for Engineering and Iron and Steel Industry v General Engineers, Engineering Maintenance and Civil Engineering Workers Union* SC 60/23, citing *Jack v National Employment Council for Engineering and Iron and Steel Industry* HH 204/19, wherein the High Court held that the trade union was entitled to represent its members and had a right to be heard on their behalf. It also held that an employee has the right to join a trade union as long as it is one for the undertaking or industry in which he is employed.
10. In *casu*, the applicant has “a letter of authority to the union to represent him in the instant matter and any matter incidental thereto.” Furthermore, “the union or its official, *Leman Pwanyiwa* have always represented the applicant since the dispute started. There can be no debate about the applicant’s membership to the union. Further, it is not in dispute that *Leman*

Pwanyiwa is under the employ of the union as a Para-legal Officer.” The said letter of authority is attached as Annexure “A”.

11. He finally states that for these reasons, the union or its officials have the right of audience before the court, in representing the applicant.

12. Note is taken that what Mr. *Leman Pwanyiwa* refers to as “a letter of authority” is a Board Resolution of the Mining Workers Union Zimbabwe date stamped 8 November 2023. It states that at a Board meeting held at Harare on 8 December 2023, it was resolved, firstly, that the union “shall institute any proceedings for and defend any proceedings instituted against its member, *Meja Pwanyiwa*, against *Shamva Mining Company (Pvt) Ltd.*” Secondly, that the union, “by virtue of this Board Resolution be and is hereby authorized to make any such **oral and/or written representations for and on behalf of the said member** and including but without necessary limitation (sic) – the making of any such documents and representations and/or statements and/or affidavits concerning any past, present and future claims of right and or interests **in any tribunal or court of law.**” (the emphasis is added).

13. The third para states that *Leman Pwanyiwa*, “being the Para-legal Officer of the Union, be and is hereby **authorized and empowered to represent and act for and on behalf of the** (sic) *Meja Pwanyiwa* **in any such proceedings.**” (the emphasis is added)

RESPONDENT’S CONTENTIONS

14. In his well set-out heads of argument, Mr *Musikadi*, for the respondent, submitted the following:

“The right of audience before any court of law in Zimbabwe is conferred by the enabling Act and the Rules of the court of law in question. There is no law that gives a trade union or its appointed officials, right of audience before the Supreme Court or any Judge of the court. A trade union being a creature of statute, can only exercise the privileges and the powers conferred on it under the provisions of the Labour Act. The said Act does not give the applicant’s representative or any official of a trade union the right of audience before the Court. Trade union officials who are not admitted to practice as legal practitioners as provided for under the Legal Practitioners Act, [*Chapter 27:07*] do not have the right of audience before any superior court in Zimbabwe.”

15. Counsel referred to s 30 of the Supreme Court Act [*Chapter 7:13*], r 2 (4) of the Supreme Court Rules, 2018 and s 29(4) (d) of the Labour Act in support of his argument. He also commented on Mr *Leman Pwanyiwa*’s reliance on s 85 (1) (e) of the Constitution as being misplaced because the section deals with the *locus standi*, that is, the right of a person to bring legal action where there is an allegation of breach or infringement of rights entrenched in the Bill of rights. The section does not give any person right of audience before any court. Right of audience and *locus standi* have different meanings at law. Counsel also distinguished the *National Employment Council* case cited and relied on by Mr *Leman Pwanyiwa* on the basis that the court in that case dealt with the question of authority to represent an entity created in terms of the law. The issue of whether a trade union or its appointed officials have the right of audience before this Court or a Judge thereof was not

adjudicated upon. In any event, the respondent in that matter was represented by a legal practitioner.

16. Mr *Musikadi* further submitted that the resolution by the Board of the Mining Workers Union is null and void to the extent that it purports to give the applicant's representative the right to appear and make representations before a court of law in violation of s 29 (4) (d) of the Labour Act. The right of audience of a trade union or its officials is limited to making representations before the Labour Court of Zimbabwe and all other determining authorities established under the Labour Act.

17. It was also counsel's submission that there is no common law right of audience before the court and that such right cannot be granted by consent of other parties to the case. Mr *Leman Pwanyiwa* being a para-legal officer and not a registered legal practitioner, does not enjoy the right of audience before the court.

ANALYSIS

18. Section 30 of the Supreme Court Act provides as follows:

“30 Right of audience

Subject to s 29, the rules of court and any other law, in all the proceedings before the Supreme Court the parties may appear in person or be represented and appear by any legal practitioner registered in terms of the Legal Practitioners Act [Chapter 27:07]”

19. In *Godfrey Tapedza & 9 Ors v Zimbabwe Energy Regulatory Authority & Anor* SC 30/20, this Court, *per* HLATSHWAYO JA, as he then was, stated as follows at p 4:

“It is an established principle of law that when interpreting a statute, the first canon of interpretation to be applied is the golden rule of interpretation. This rule is to

the effect that where the language used in a statute is plain and unambiguous, it should be given its ordinary meaning unless doing so would lead to some absurdity or inconsistency with the intention of the legislature. A provision of a statute should be given a meaning which is consistent with the context in which it is found.”

The learned Judge also aptly cited *Chegut Municipality v Manyora* 1996 (1) ZLR 262 (S) at 264 D - E where McNALLY JA stated the following:

“There is no magic about interpretation. Words must be taken in their context. The grammatical and ordinary sense of the words is to be adhered to, as LORD WENSLEYDALE said in *Grey v Pearson* (1857) 10 ER 1216 at 1234, ‘unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further.’”

20. In *Hillary Simbarashe v Zimbabwe Electoral Commission & Anor*, HH 45/08 at p 7, KUDYA J, as he then was stated:

“... According to Francis Bennion in his book **Statutory Interpretation**, Butterworths 1988, at p 844 the expression means “to express one thing is to exclude another.” In full Bennion, *supra*, states thus:

“The maxim *expressio unius est exclusio alterius* (to express one thing is to exclude another) is an aspect of the principle *expressum facit cessare tacitum* known in short as the *expressio unius* principle, it is applied where a statutory proposition might have covered a number of matters but in fact mentions only some of them. Unless these are mentioned merely as examples or *ex abundante cautela* or for some other sufficient reason, the rest are taken to be excluded from the proposition.

The *expressio unius* principle is also applied where a formula which itself may or may not include a certain class is accompanied by words of extension naming only some members of that class. The remaining members of that class are then taken to be excluded.

Again, the principle may apply where an item is mentioned in relation to one matter but not in relation to another matter equally eligible.”

21. Rule 2 (1) of the Supreme Court Rules, 2018, provides as follows:

“In these rules-
legal practitioner” means a legal practitioner registered in terms of the Legal Practitioners Act [*Chapter 27:07*]

Rule 2 (3) reads:

Any reference in these rules to “counsel” shall be read and construed as a reference to a legal practitioner.

Rule 2 (4) reads

Any reference in these rules to “legal representative” includes any person authorized by any law to represent any litigant.”

22. Applying the golden rule of statutory interpretation for the words in a statute to be given their primary meaning, s 30 of the Supreme Court Act and r 2 (4) of the Supreme Court Rules provide that the following persons have the right of audience before the Supreme Court:

- (a) a legal practitioner registered in terms of the Legal Practitioners Act [*Chapter 27:07*].
- (b) a self-actor
- (c) any person authorized by any law to represent any person.

Neither Mr *Leman Pwanyiwa*, nor the Mining Workers Union fit into any of these three classes. Mr *Pwanyiwa* is not a legal practitioner registered in terms of the Legal Practitioners Act. As already stated earlier, he is a para-legal officer.

23. Trade unions are created and registered and regulated under the auspices of Part VII of the Labour Act [*Chapter 28:01*]. Mr *Musikadi*'s submission that a trade union is a creature of statute is thus valid. Section 29 (4) (d) of the Labour Act provides:

“(4) Subject to this Act, a registered trade union or federation of such unions shall be entitled-

...

(d) to make representations to a determining authority or the Labour Court; and

...” (the underlining is added)

Section 29 (5) (c) also provides the following:

“(5) Subject to this Act, a registered employer’s organization shall be entitled-

....

(c) to make representations to a determining authority or the Labour Court;
and

...” (the underlining is added)

Section 30 (1) (a) of the same Act also needs to be related to. It reads:

“(1) No unregistered trade union or employers’ organization may, in its corporate name-

(a) make representations to the Labour Court; or

...”

24. A perusal of the various provisions of the Labour Act quoted above shows that in so far as trade unions are concerned, only a registered trade union, obviously through its officials or agents, has a right of audience before the Labour Court, which is the only court specifically mentioned therein. No other court, including this Court, is mentioned. An unregistered trade union is not conferred with the same. In fact, such may not make representations to the Labour Court.
25. This Court, whilst it determines appeals, cannot, by any stretch of the imagination, be described as a “determining authority”. It is a court of law. The express mention of the Labour Court in these provisions excludes other courts of law, and in *casu*, this Court in particular. This is expressed in the legal maxim *expressio unius est exclusio alterius* – the expression of one thing is the exclusion of the other. This Court, *per* KORSAH JA, in *Eagle Insurance Co. Ltd v Grant* 1989 (3) ZLR 278 (S), cited with approval in *Godfrey Tapedza & 9 Ors v Zimbabwe Energy Regulatory Authority & Anor* SC 30/20 at p 7, had this to say at 280F:

“A rule which is invariably resorted to in the interpretation of statutes – the *expressio unius* rule – is that the mention of one or more things of a particular class may be regarded as silently excluding all other members of the class.”

26. It seems to me that in *casu*, the express mention of a determining authority and the Labour Court means that other courts, including the Supreme Court of Zimbabwe, are excluded. If the legislature had intended to accord trade unions and or their appointed officials right of audience before the Supreme Court or the other superior courts, it would have said so in clear and express language. Mr *Pwanyiwa* has failed to point to any law that does so, in substantiation of his passionately held belief and contention. As correctly submitted by the respondent’s legal practitioner, the trade union, being a creature of statute, can only enjoy the privileges and exercise the powers conferred upon it under the provisions of the Labour Act. Consequently, Mr. *Leman Pwanyiwa’s* contention that he has right of audience before this Court is not supported by any law. This view is fortified by the provisions of s 30 of the Supreme Court Act as read with r 2 (4) of the Supreme Court Rules which specifically afford the right of audience in this Court to a registered legal practitioner, a self-representing litigant and one authorized by any law to represent a person. *Leman Pwanyiwa’s* para-legal activities have no place before this Court.

27. Mr *Pwanyiwa’s* reliance on s 85 (1) of the Constitution is misplaced. The provision reads as follows:

“85 Enforcement of fundamental human rights and freedoms

(1) Any of the following persons, namely-

.....

is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this Chapter has been, is being or is likely to be infringed ...”

The provision is clearly dealing with the right of a litigant to approach a court for relief, that is, *locus standi*, and not the right of audience by a person purporting to represent another, before a court. The right of audience generally relates to the right of a legal practitioner to appear and conduct proceedings in court on behalf of their client, whereas *locus standi* generally relates to the litigant's legal standing in respect of the cause that he or she places before the court in pursuit of certain relief.

28 Section 65 of the Constitution that Mr *Pwanyiwa* also referred to does not assist his cause in any manner. The provision speaks to a person's labour rights. It makes no reference in any of its paragraphs to the right of audience. It is so irrelevant that it would serve no purpose and it would in fact be futile to quote it herein.

29 The *National Employment Council* case (*supra*) is also of no assistance to Mr *Pwanyiwa* because it did not at all deal with the issue of the right of audience. The legal issue related to in that matter was the fact that a legal entity can only be represented by an authorized natural person in legal proceedings. At p 2 BHUNU JA stated:

“... In *Madzivire & Ors v Zvarivadza & Ors* 2006 (1) ZLR 514 (S) it was held that a company, being a separate legal *persona* from its directors, cannot be represented in a legal suit by a person who has not been authorized to do so. In *casu*, the applicant has however attached the minutes of the meeting that granted her authority to represent the applicant. From those minutes it is clear that three officials of the applicant were authorized to represent the applicant and ... is one of them. Consequently, the challenge to the notice of opposition in this respect lacks merit.”

The case does not support Mr *Pwanyiwa*'s claim to right of audience before this Court. In any event, in that case, the registered trade union involved was represented by a legal practitioner from Hungwe & Partners.

30 It was not competent for the Board to purport to clothe Mr *Pwanyiwa* with the right of audience before courts of law, outside the ambit of the Labour Act. The Board has no powers outside the powers conferred upon the trade union by the Labour Act. Beyond or outside determining authorities and the Labour Court, the Board does not have the power to authorize any of its officials to address this Court on behalf of a litigant. To the extent that it purports to do so, the Board resolution is of no force or effect. It was void *ab initio*. In this regard see *Muchakata v Netherburn Mine* 1996 (1) ZLR 153 (S), citing with approval *MacFoy v United Africa Co Ltd* [1961] 3 All ER 1169 at 1172.

31 In conclusion, for the foregoing reasons, the court determines that:

“(a) Mr *Leman Pwanyiwa* is a trade union official who is not registered as a legal practitioner in terms of the Legal Practitioners Act. He therefore has no right of audience before this Court.

(b) The Chamber Application will now be reset down for hearing on the merits without the participation of *Leman Pwanyiwa*, within two weeks of this date.