

ZIMBABWE CONGRESS OF TRADE UNIONS
versus
MINISTER OF PUBLIC SERVICE LABOUR AND
SOCIAL WELFARE
and
ATTORNEY GENERAL OF ZIMBABWE
and
ZIMNAT INSURANCE COMPANY (PVT) LTD
and
ZIMBABWE NATIONAL ROAD ADMINISTRATION
(ZINARA)
and
TELONE (PVT) LTD
and
WINDMILL (PVT) LTD
and
SEED CO ZIMBABWE
and
MANICALAND STATE UNIVERSITY OF APPLIED
SCIENCES

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 7 & 14 September 2021

Urgent court application

L. Madhuku, for applicant
Ms *J Shumba*, for 1st and 2nd respondents
T Chagudumba, for 3rd respondent
M Mandevere, *L Makumbe*, for 4th respondent
S V. Hwacha, for 5th respondent
J T Wuchiri, for 6th respondent
P Dube, for 7th respondent
No Appearance for 8th respondent

This matter is an urgent court application made under s 85 of the Constitution of Zimbabwe, 2013 and under Rules 59 and 107 of the High Court Rules, 2021. The terms of the order sought as set out in the draft order are as follows;

- “1. That it be hereby declared that the sudden conduct and/or practice by employers in Zimbabwe (with the 3rd, 4th, 5th, 6th, 7th and 8th respondents as examples), purportedly as a response to the Covid-19 pandemic, whereby they prohibit unvaccinated employees from reporting for work and from continuing to perform their obligations under subsisting contracts of employment is/are an infringement of the fundamental right to human dignity of the affected employees protected by section 51 of the Constitution of Zimbabwe, 2013.
2. That it be hereby declared that the sudden conduct and/or practice by employers in Zimbabwe (with the 3rd, 4th, 5th, 6th, 7th and 8th respondents as examples), purportedly as a response to the Covid-19 pandemic, whereby they prohibit unvaccinated employees from reporting for work and from continuing to perform their obligations under subsisting contracts of employment is/are an infringement of the fundamental right to personal security of the affected employees protected by section 52 (c) of the Constitution of Zimbabwe, 2013.
3. That it be hereby declared that the sudden conduct and/or practice by employers in Zimbabwe (with the 3rd, 4th, 5th, 6th, 7th and 8th respondents as examples), purportedly as a response to the Covid-19 pandemic, whereby they prohibit unvaccinated employees from reporting for work and from continuing to perform their obligations under subsisting contracts of employment is/are an infringement of the fundamental right to fair, safe, just and equitable conditions of work of the affected employees protected by section 65(1) as read with section 65(4) of the Constitution of Zimbabwe, 2013
4. That, as appropriate relief in terms of section 85(1), as read with section 175(6), of the Constitution of Zimbabwe, 2013, the 1st and 2nd respondent be and are hereby directed to cause the enactment of a statutory instrument under section 17 of the Labour Act (Chapter 28:01) that prohibits the aforesaid conduct and/or practices of employers in Zimbabwe and such statutory instrument to be so enacted within fourteen (14) days from the date of this order.
5. There shall be no order as to costs.”

The applicant is a federation of trade unions in Zimbabwe which claims to exist primarily to represent the interests of working people of Zimbabwe. Its affiliate trade unions have ordinary employee members drawn from all industries except the public service. The applicant claims to have 35 affiliate trade unions whose employee membership is alleged to be 189 000.

The 1st respondent has been cited as the capacity of the minister assigned the responsibility over the Labour Act whilst the 2nd respondent is cited in his official capacity as the principal legal advisor to government and its representative in civil and constitutional matters.

3rd to 8th respondents are duly incorporated companies or corporate bodies who have been cited as examples of employers whose conduct, in response to the 3rd wave of the Covid 19 pandemic, as picked out from their internal memos is alleged to be prohibiting their unvaccinated employees from reporting for work and/or continuing with the performance of their obligations

under their contracts of employment. It is alleged that such conduct infringes the fundamental rights to human dignity, personal security and to fair, safe, just and equitable conditions of work of the affected employees as guaranteed in the Constitution of Zimbabwe.

All the respondents, except the 8th respondent, filed papers in opposition. Several points *in limine* were raised as listed below.

- ❖ Urgency was raised by 3rd, 4th, 5th and 7th respondents
- ❖ Misjoinder was raised by 1st, 2nd and 6th respondents
- ❖ Incompetent relief sought raised by 1st, 2nd, 5th and 7th respondents
- ❖ Nonexistent 3rd respondent
- ❖ Material nondisclosure raised by 3rd respondent
- ❖ Ripeness and sanctity of the doctrine of constitutional avoidance and subsidiarity raised by 1st, 2nd and 4th respondents
- ❖ Lack of locus *standi* raised by 4th, 5th and 7th respondents
- ❖ Failure to allege violation of human dignity and prove it raised by 5th and 7th respondents
- ❖ Failure to lead evidence from affected employees raised by 7th respondent, and
- ❖ Procedural improprieties raised by 1st, 2nd, 5th and 7th respondents

On the date of set down, I heard the parties on the points *in limine* and reserved my ruling. This is it, starting with the point on urgency.

WHETHER THE MATTER IS URGENT

In the certificate of urgency it is averred that this matter is urgent despite there being no law providing for compulsory as the 3rd to 8th respondents have taken the law into their own hands by prohibiting unvaccinated employees from reporting for work and/or from continuing with the performance of their obligations under such contracts with a view to unlawfully terminate such contracts.

It is alleged that thousands of employees have been affected with thousands more still to be affected if the matter is not heard and determined urgently. As the largest federation of trade unions, the applicant claims to have acted with the utmost urgency as soon as its attention was drawn to the sudden and continuing conduct of employers in respect to unvaccinated employees. Further, it is alleged that the constitutional rights implicated are fundamental and the harm is

irreparable particularly as the right to dignity cannot be derogated from and there are no laws limiting the enjoyment of the other rights being infringed.

Furthermore it was submitted that the application cannot wait for the relaxation of the measures under level 4 lockdown as the conduct being complained of is aimed at achieving its unlawful objectives before the end of level 4 lockdown.

Mr *Chagudumba*, counsel for 3rd respondent, submitted that the matter is not urgent as the need to act arose on 18 July 2021 and was confirmed in its notice to employees of 21 July 2021. It was pointed out that the deponent to applicant's founding affidavit was aware of the cause of action as far as 21 July 2021 as he was commenting in *The Chronicle* newspaper on that date about mandatory vaccination drive by employers. On 26th July the applicant is said to have threatened litigation but did nothing until the 12th of August when this matter was filed. The certificate of urgency was criticized for not specifically stating when the cause of action arose and why the applicant did not approach the court timeously. It was also stated that the applicant held a meeting to authorize the institution of legal proceedings on 21 July but no reasonable explanation is given for the 10 day delay. In addition it was argued that this matter is academic as the majority of 3rd respondent's employees opted voluntarily to get vaccinated and had received the first jab by 30 July 2021, and most have now been fully vaccinated leading to the conclusion that this matter has been overtaken by events.

Mr *Mandevere*, counsel for 4th respondent submitted that the 4th respondent issued its notice to staff members on 21 July 2021 and 22 days elapsed before the applicant took any action and there is no explanation for the ensuing delay. The alleged harm is said to be speculative as the applicant has not brought any of the employees who were denied access to their workplace to demonstrate this

Mr *Hwacha*, counsel for the 5th respondent pointed out that the applicant has dismally failed to demonstrate special reasons to jump the queue as there is nothing to show irreparable harm and prejudice particularly as all employees have continued to receive normal salaries and benefits.

Mr *Dube*, counsel for 7th respondent argued that the two paramount considerations raised in the case of *Mushore v Mbanga & 2 Ors* of time and consequences have not been fully dealt with by the applicant. The applicant should have acted timeously when the need to act arises because

of an apprehension of harm and the effect of failure to act urgently on the matter should be shown. The 7th respondent's memo was issued out on 27 July 2021.

In response, Professor *Madhuku* explained that they could not rush to court after one or two incidents and waited for the cumulative nature of the impugned conduct before lodging this application. Furthermore he stated that the matter was brought as an urgent application because it was the only way to get to court at the relevant time due to Practice Direction 6 as read with 7 of 2021. He made it clear they would have used a different route if the practice directions were not then operational in limiting the filing of other court process save for urgent matters.

The granting of the right to be heard on an urgent basis is an indulgence which gives considerable advantage to a party by jumping the queue and facts must be set out in the founding affidavit which distinguish the case from others and justifies the granting of such preferential treatment without breach of the principle that similarly situated litigants are entitled to be treated alike. See *Mayor Logistics (Private) Limited v Zimbabwe Revenue Authority* CCZ 7/14. The case of *Finwood Investments Private Limited* HH 805/15 articulates the factors which should be present for a matter to be deemed urgent. These are;

- a. The matter cannot wait at the time the need to act arises;
- b. Irreparable prejudice will result, if the matter is not dealt with straight away without delay;
- c. There is prima facie evidence that the applicant treated the matter urgently;
- d. The applicant gives a sensible, rational and realistic explanation for any delay in acting,
and
- e. There is no satisfactory alternative remedy.

The certificate of urgency on record is silent on the delay in acting from around the 21st July when all but one of the respondents issued their staff notices. It does not mention any dates relating to when the cause of action was complete and the need to act therefore arose. In *Registrar General & Anor* 1998(1) ZLR 188 (H), it was held that the certificate of urgency must contain an explanation for the non-timeous action. The founding affidavit does not relate to the dates too. For instance, nothing is said about the dates of issue of the staff notices and implications of the deadlines set in each. For instance, the 3rd respondent's notice was issued out on 21 July and it gave the deadline of 30 July for having received the first dose of the vaccination. The 1st respondent gave 26th July as a deadline. By the time of filing of this application the deadlines had come and

passed. The apprehension of harm arose on or about the 21st July but there was no immediate action.

The applicant alleged in the certificate of urgency that the respondents were conducting themselves as alleged “with a view to terminating the unvaccinated employees’ contracts unlawfully”. This irreparable prejudice is merely speculative as nothing is alleged about what happened to employees after the deadlines came and passed before the lodging of the application. The explanation for the delay should have appeared in the certificate of urgency and the founding affidavit. It did not. There is no evidence of the applicant having treated the matter urgently.

Professor *Madhuku*’s concession that they used this route simply because it was the only way to get into court, shows that there were other available alternative remedies. Every other case was affected equally by the restrictions on filing of court process.

In addressing me on the propriety of the relief sought, Ms *Shumba* pointed to para 4 of the draft order which seeks a direction on 1st and 2nd respondents to cause the enactment of a statutory instrument within 14 days of this order. It was pointed out that the process of such enactment involves the executive and it would be long drawn out. Such an order does not fit well in an urgent application.

It is my finding that the applicant has not passed the test of justifying that its matter be allowed to jump the queue and be given preferential treatment ahead of other similar matters. In the light of this finding, there is no need to proceed to consider the other nine preliminary points. The matter is accordingly struck off the roll of urgent matters with costs.

Lovemore Madhuku Lawyers, applicant’s legal practitioners
Attorney General’s Office, 1st & 2nd respondents’ legal practitioners
Atherstone and Cook, 3rd respondent’s legal practitioners
Kadzere, Hungwe and Mandeverere, 4th respondent’s legal practitioners
Dube, Manikai and Hwacha, 5th and 7th respondent’s legal practitioners
Sawyer and Mkushi, 6th respondent’s legal practitioners