

TALENT JACK
versus
P. MUCHOVO N.O.
and
T.C. NYAMATORE N.O.
and
NATIONAL EMPLOYMENT COUNCIL FOR THE ENGINEERING AND IRON AND STEEL
INDUSTRY

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 28 February 2019 & 13 March 2019

Opposed application

L Ziro, for the applicant
T Zhuwarara, for the respondents

ZHOU J: This is an application for an order compelling the respondents to set a date for conciliation proceedings between the applicant and a company known as Rug Stationers (Pvt) Ltd, and for a declaration that the applicant is entitled to bring both his legal practitioner and a representative of the General Engineers Engineering Maintenance and Civil Engineering Workers' Union to the proceedings. Applicant also seeks attorney-client costs against the third respondent. The application is opposed by all respondents.

The objections *in limine* based on the grounds that this court had no jurisdiction to hear the matter and on the non-joinder of Rungs Stationers (Pvt) Ltd were abandoned by the respondents at the hearing. The matter was therefore argued on the merits.

The factual background to the dispute is as follows. The applicant is entangled in an employment dispute with his erstwhile employer, Rungs Stationers (Pvt) Ltd. He approached the third respondent for conciliation in terms of the provisions of the Labour Act [*Chapter 28:01*].

His complaint was of unfair dismissal. The matter was set down for conciliation on 6 August 2018. On that day the applicant attended the proceedings in the company of his legal practitioner and one Tapfuma Humbarume, a representative of the General Engineers, Engineering Maintenance and Civil Engineering Workers Union, the trade union of which the applicant is a member. The applicant's employer was not in attendance. The applicant states in his founding affidavit that the first respondent who was the designated agent appointed to preside over the conciliation proceedings objected to the presence of Tapfuma Humbarume arguing that the latter was not entitled to be in attendance since the applicant was represented by a legal practitioner. On account of the presence of the said Tapfuma Humbarume the first respondent terminated the conciliation proceedings.

In opposition, the first respondent denies that he refused to conduct the conciliation proceedings. He states that after he objected to the presence of Tapfuma Humbarume the applicant walked out. He was subsequently contacted by the applicant's erstwhile employer who advised that the applicant had been paid what was due to him. He communicated with the applicant his desire to set a date for the conciliation proceedings to deal with the matters outstanding between the applicant and his employer but stopped that process because of the instant matter. He insists that there is no justification for the attendance of the trade union official because, according to him, that trade union does not represent the interests of the employee concerned. The respondents also challenge the authority of Tapfuma Hombarume to represent the trade union of which he is the Grievance Handling Officer. They also dispute the applicant's membership of that trade union. The respondents' state that they do not contest the relief sought in paragraphs 1, 2 and 3 but take issue with paragraphs 4 and 5 of the draft order.

The only issue for determination, therefore, is whether the respondents have a legal basis for objecting to the attendance of the trade union representative as part of the applicant's legal team at the conciliation proceedings. The first respondent suggests that Tapfuma Humbarume did not show proof that he is authorized to represent the trade union or that he is "an official or officer of (the) trade union concerned." That is a clear misdirection on the part of the first respondent, because the trade union official appeared in the conciliation proceedings as a representative of the applicant. The issue relating to whether the gentleman concerned is an officer or official of the trade union which he purported to be from is clearly not being raised in good faith as evidence on

record shows that the first respondent knows as a matter of fact that Humbarume is an official of the trade union in question. A letter attached to the answering affidavit dated 8 November 2014 and addressed to Humbarume at the same trade union was written by the first respondent. Also, the affidavit of Netsai Matongwana confirms that Tapfuma Humbarume is the trade union's officer responsible for handling grievances.

Section 4 of the Labour Act [*Chapter 28:01*] provides for employees' entitlement to membership of trade unions and workers' committees as follows:

- “(1) Notwithstanding anything contained in any other enactment, every employee shall, as between himself and his employer, have the following rights–
- (a) the right, if he so desires, to be a member or an officer of a trade union;
 - (b) . . .
- (2) Every employee shall have the right to be a member of a trade union which is registered for the undertaking or industry in which he is employed if he complies with the conditions of membership.”

The entitlement to membership of a registered trade union is also protected in s 50 (1) of the Labour Act and is entrenched as a fundamental right in s 65 (2) of the Constitution of Zimbabwe. The right to membership of a trade union is also subsumed under the right to freedom of association which the Constitution enshrines in s 58(1). The right of a trade union to represent the interests of an employee is a necessity for the enjoyment of freedom of association, see the judgments of the European Court of Human Rights in the cases of *National Union of Belgian Police v Belgium* 1 EHRR 518 (1975) and *Sweedish Engine Drivers Union v Sweeden* EHRR 617 (1976, which are cited in L Madhuku, *Labour Law in Zimbabwe*, p 278. As shown above, the trade union involved in this case is for the industry or undertaking under which the third respondent falls. Its name says so but, in any case evidence shows the involvement of the respondents in cases in which the trade union has been involved. It is not for the conciliation tribunal to choose for or dictate to an employee the particular trade union to join as long as the trade union which the employee joins is for the undertaking or industry in which he is employed. Such conduct as displayed by the respondents in objecting to the applicant's membership of the trade union of his choice is a violation of the applicant's rights as enshrined in s 65(2) of the Constitution of Zimbabwe and in s 4 (1) (a) and (2) and s 50 (1) of the Labour Act [*Chapter 28:01*], and is unlawful.

Applicant's evidence shows that he is a member of the General Engineers, Engineering Maintenance and Civil Engineering Workers Union. That membership entitles the applicant to all the rights and privileges of a member, including the right to seek advice from and be represented by the trade union or its officials in any labour dispute whether that dispute is at the conciliation stage or some other stage. The trade union has the right to be heard on behalf of its members as well. In this case the trade union official was not even asking to address the first respondent but was only there to assist the legal practitioner because of information that he had which could be helpful in the conciliation proceedings. The applicant is therefore entitled to have him in attendance for that purpose.

The applicant has asked for costs on the attorney-client scale. These represent a special order which is awarded where there are good grounds such as abuse of the procedures of court or some other reprehensible conduct on the part of a litigant, see *Nexbank Investments (Pvt) Ltd & Anor v Global Electrical Manufacturers (Pvt) Ltd & Anor* 2009 (2) ZLR 270 (S); *Fuyana v Moyo & Ors* 2005 (1) ZLR 302 (H). In the present case the conduct of the respondents in contesting this matter this far is an unacceptable abuse of court process and has unnecessarily caused the applicant to be out of pocket. The respondents have not cited any law that prevents a litigant who is represented by a legal practitioner from bringing as part of his team a representative from the trade union which he is a member of. The applicant is thus entitled to be fully reimbursed the costs which he incurred in bringing this dispute to court.

In the result,

IT IS ORDERED THAT:

1. The respondents set a date for conciliation proceedings which date shall be within thirty days from the date of this order.
2. The respondents shall not prevent the applicant from being accompanied and assisted by an official or employee of the General Engineers, Engineering, Maintenance and Civil Engineering Workers Union whether or not there is a legal practitioner in attendance to represent the applicant at the conciliation proceedings.
3. The third respondent shall pay the costs of this application on the attorney-client scale.

Hungwe and Partners, applicant's legal practitioners

Makuwaza and Magogo Attorneys, respondents' legal practitioners