

**First Mutual Life Assurance V Muzivi**

Supreme Court, Harare Judgment No. S-62-03

Chidyausiku CJ, Cheda JA & Malaba JA

Civil appeal

23 September 2003 & 15 March 2004

*Employment – strike – right to strike – strike in defence of an immediate threat to the existence of a workers' committee – management effectively dissolving managerial workers' committee by regrading committee members as non-managerial – a direct attack on existence of committee, entitling members to strike*

*Employment – workers' committee – managerial workers' committee – right of managerial employees to form committee – dispute over composition of committee – must be referred to Tribunal, not to a labour relations officer*

The respondent was employed by the appellant at a grade regarded as a managerial employee. He and others of the same grade decided that they should form a managerial workers' committee to represent their interests. Other employees in another grade, who were regarded for practical purposes as managers, also became members of the committee. The appellant disputed their right to do so and referred the dispute to a labour relations officer. The officer referred the matter to the Labour Tribunal, but also directed the committee to suspend its operations until the Tribunal had made a ruling. While the Tribunal's ruling was pending, the appellant regraded the respondents and his colleagues to non-managerial posts, which move had the practical effect of dissolving the committee. The respondent and his colleagues went on strike. The appellant retaliated by dismissing him.

*Held* that: in terms of s 104 of the Labour Act [*Chapter 28:01*], employees are entitled to go on strike without observing any formalities if their action is in defence of an immediate threat to the existence of a Workers Committee.

*Held*, further that: as there was a dispute over whether members of the committee were managerial employees, the matter should have been referred to the Tribunal directly, not to a labour relations officer. The labour relations officer had no jurisdiction to adjudicate in the dispute and her order suspending the committee was incompetent. It could not therefore be argued that there was no committee in existence.

*Held*, further that: by regrading the respondent and his colleagues and making them ineligible to serve on a managerial workers' committee, the appellant was making an actual and direct attack on the existence of the managerial workers committee. The members were thus entitled to go on strike.

Legislation considered:

Labour Relations Act [*Chapter 28:01*] ss 4(1)(d), 23 (2) & (3), 46(1)(b), s 92(2) and 104(4)(b)

*I Chagonda*, for the appellant  
*The respondent in person*

CHIDYAUSIKU CJ: The facts of this case are to a large extent common cause. In terms of the letter of appointment, the appellant appointed the respondent as a Sales Trainer Grade 8. There is no dispute that the respondent was regarded as an assistant manager.

A concession is made at p 15 of the record that the respondent was a managerial employee.

On 14 August 1997 the respondent, together with other employees of the appellant of the same grade, grade 8, held a meeting to canvass the possibility of forming a Managerial Workers Committee in terms of s 23(1) of the Labour Relations Act [Chapter 28:01] ("the Act"). At a meeting held the following day, 15 August 1997, which now included employees in grade 9, the employees elected an interim Executive Committee of the Managerial Workers Committee. The respondent was elected its Chairman. A meeting was subsequently held between the interim Managerial Workers Committee and senior management. At that meeting senior management recognised the right of managerial employees to form a managerial workers committee in terms of the Act but had certain reservations which senior management subsequently set out in a circular issued by management dated 29 September 1997. The circular reads in part: -

*" Clearly some of the members of staff at Grade 9-1 who are regarded for practical purposes as Managers do not fall within the definition of the Act and therefore do not qualify for membership of such a committee.*

Consequently, the society is of the opinion that the creation of a Management (Managerial) Workers Committee cannot proceed until a determination on this issue by the Ministry of Labour.

Those persons who do not fall within the definition of Manager will obviously have to be represented by the existing Workers Committee since the Act only allows for one workers' committee." (My emphasis)

In response to that circular the respondent, as Chairman of the Interim Executive Committee, pointed out that by custom and practice the appellant recognised employees in grades 9 to 1 as Managerial employees. That practice is acknowledged in the above circular. That being the case they were entitled to form and belong to a Managerial Workers Committee in terms of the Act.

Thus a dispute emerged between the grade 8 and 9 employees and the appellant. On 25 March 1997 the appellant referred the dispute to a Labour Relations Officer in terms of s 23 of the Act. A Labour Relations Officer, Mrs Makamure, referred the dispute to the Labour Tribunal in terms of s 46(1)(b) of the Act. The Labour Relations Officer did not only refer the dispute to the Labour Tribunal, she also issued the following directive:

" The elected Workers Committee should suspend its operations until the dispute is resolved by the Tribunal and its legitimacy specified."  
Shortly after this ruling and upon advice the respondent wrote to the appellant.

The letter, in part, reads as follows:

" On further consultation, we believe that the ruling on the status of MWC (Managerial Workers Committee) is out of line as the MWC is a *universitus* as law and an argument over the composition over its membership does not have effect on its *locus standi*, please advise."  
The appellant responded to this letter by addressing a letter to the Principal

Labour Relations Officer which read in part as follows: -

- " Mr Muzivi is seeking through the back door to:
- a) overrule the determination of Mrs Makamure in respect of the status of managerial workers committee;
  - b) to pre-empt the decision of the Labour Relations Tribunal, his request of your advice on the status of the managerial workers committee is irregular and improper in view of the fact that the matter is *subjudice*."

While this dispute was pending determination by the Labour Tribunal the appellant embarked on a regrading exercise which removed the respondent from the managerial grade. It would appear the same fate befell all the other members of the Managerial Workers Committee. They were regraded at new levels that were not managerial. They were regraded as general employees with technical expertise. Conditions of service were also changed to what the respondent and his colleagues considered were unfavourable. In effect the executive of the Managerial Workers Committee was indirectly dissolved by regrading its members as non-managerial employees.

Aggrieved by these developments the appellant's employees, including the respondent, at a meeting held on 23 July 1998 resolved to go on strike.

According to the respondent the employees at that meeting resolved thus: -

" Unanimously resolved that if the Workers Committee could not negotiate with management, then it was no use and as good as non-existent. The meeting unanimously and spontaneously resolved to go on a collective job action in defence of the Workers Committee."

As a result of the above decision 132 employees of the appellant, out of a workforce of 259 went on strike from 23 to 29 July 1998. The respondent participated in the collective job action and admits the same. The respondent was dismissed from employment for participating in an illegal collective job action. However, the Labour Tribunal concluded that the collective job action was in defence of, among other things, the existence of the Managerial Workers Committee. The Labour Tribunal further concluded that the respondent's and his fellow employees conduct was lawful and permissible in terms of s 104(4)(b) of the Act which provides that:-

" 104(4) Nothing in subsection (1),(2) or (3) shall be deemed to prevent collective job action from being resorted to –  
 (a) ...  
 (b) in defence of an immediate threat to the existence of a workers committee or a registered or certified trade union."

It is clear from s 104 of the Act that employees are entitled to go on strike without observing any formalities if their action is in defence of an immediate threat to the existence of a Workers Committee.

It is against this decision that the appellant now appeals upon the following grounds set out in the Notice of Appeal:

- " 1. The Honourable Chairman misdirected himself in holding that the industrial action in which the Respondent participated in was in defence of an immediate threat to a Managerial Workers Committee.
  - 1.1 That finding was made notwithstanding the fact that at the time that the industrial action took place, there was no Managerial Workers Committee in existence and as such there could not have been an immediate threat to something that did not exist.
  - 1.2. The finding aforesaid was also made notwithstanding an admission by the Respondent himself that the strike was in defence of the Ordinary Workers' Committee which was in existence at the time that the strike occurred.
2. Alternatively and in any event, the Honourable Chairman of the Labour Relations Tribunal erred in holding that there existed an immediate threat to the existence of any Workers Committee particularly when there was no evidence at all pointing to the probable demise of any Workers Committee.
3. The aforesaid factual misdirections were made in circumstances where such misdirection could not have been made if the court a

*quo* had reasonably applied its mind and as such, the misdirections amount to a misdirection on a point of law.

4. The court *a quo* erred in law in holding that the industrial action in which the Respondent participated in was lawful."

There is no factual dispute as to what the respondent did which prompted his dismissal. It is common cause that he participated in a collective job action and it is for that reason that the appellant dismissed him. The issue that now falls for determination is, was the Labour Tribunal correct in concluding that the industrial action in which the respondent participated constitute conduct protected by law in terms of s 104(4) of the Act. If that conduct falls within the ambit of the above section then his dismissal was unlawful. If such conduct does not fall within the ambit of the above section then his dismissal was lawful. I have no doubt that the issue raised here is a question of law, and not fact. The issue of whether the admitted conduct of the respondent constituted a lawful defence from dismissal is a question of what interpretation is to be ascribed to s 104(4), therefore a question of law.

I have no hesitation in dismissing the respondent's contention *in limine* that the appeal is on fact and not law and consequently not competent in terms of s 92(2) of the Act. I also do not see any merit in the respondent's other preliminary objection to the late filing of the appellant's heads of argument. The issue of condonation for the late filing of heads of argument was disposed of by SANDURA JA in a Chamber application before the hearing of this matter.

As already stated in terms of s 104(4) of the Act an employee is entitled to resort to collective job action without any formalities in defence of the Workers Committee.

The appellant has argued that the Managerial Workers Committee, chaired by the respondent, was not properly constituted because some of its members were not managerial employees. The respondent, on the other hand, argued that the Managerial Workers Committee was properly constituted as all its members were managerial employees.

The appellant referred this dispute to the Labour Relations Officer for resolution in terms of s 23 of the Act. Section 23 of the Act provides as follows: -

" 23(1) Subject to this Act and any regulations, employees employed by any one employer may appoint or elect a workers committee to represent their interests:

(1a) Subject to subsection (1b), the composition and procedure of a workers committee shall be as determined by the employees at the workplace concerned.

(1b) Notwithstanding subsection (1a), if a trade union is registered to represent the interests of not less than fifty *per centum* of the employees at the workplace where a workers committee is to be established, every member of the workers committee shall be a member of the trade union concerned:

Provided that no managerial employee shall be appointed or elected to a workers committee, nor shall a workers committee represent the interests of managerial employees, unless such workers committee is composed solely of managerial employees appointed or elected to represent their interests.

(2) For the purposes of appointing or electing a workers committee, employees shall be entitled to –

(a) be assisted by a labour relations officer or a representative of the appropriate trade union; and

(b) reasonable facilities to communicate with each other and meet together during working hours at their place of work; and

(c) be provided by their employer with the names and relevant particulars of any employees employed by him;

so however, that the ordinary conduct of the employer's business is not unduly interfered with.

(3) In the event of any dispute arising in relation to the exercise of any right referred to in subsection (2), the labour relations officer concerned or any other officer acting in a similar capacity, shall, after considering the representations of the parties concerned make such fair and reasonable determination as he deems fit, and such determination shall be binding on the parties:

Provided that if any person is aggrieved by the determination of the labour relations officer or such other officer, he may appeal to a senior labour relations officer who, after taking into account the representations of the parties concerned, shall determine the matter and his decision shall be final."

In the event of a dispute between the appellant and the respondent in relation to any right conferred by subsection 23(2), namely, the right to be assisted by a trade union or a labour relations officer, the provision of reasonable facilities to communicate with each other or meet together during working hours at their place of work, and the provision of names and particulars of employees by the employer, such a dispute can be referred to a Labour Relations Officer in terms of subsection (3) of s 23.

The dispute between the appellant and respondent was not about the rights conferred in subsection (2) of s 23 of the Act. The dispute between the parties was whether some of the employees on the Managerial Workers Committee were managerial employees and the appellant should have referred that dispute to the Tribunal in terms of s 46(b) of the Act which provides as follows:

“ 46 In the event of any dispute as to –  
 (a) ...  
 (b) whether any employees are managerial employees;  
 the matter shall be referred to the Tribunal for determination.”

Upon the dispute being referred to the labour relations officer, Mrs Makamure, she in turn referred the dispute to the Labour Tribunal in terms of s 46(b) of the Act. In this regard she was correct. However, she went beyond merely referring the matter to the Labour Tribunal and issued the following order:

“ The elected Workers Committee should suspend its operation until the dispute is resolved by the Tribunal and its legitimacy specified.”  
 In my view this is where the Labour Relations Officer went into error. The dispute referred to her was not a dispute envisaged in s 23(2) and in respect of which she had jurisdiction. The dispute referred to her was a dispute envisaged in s 46(b) of the Act and in respect of which she had no jurisdiction to adjudicate. She therefore had no power to suspend the Managerial Workers Committee as she did. Even if she had the jurisdiction to suspend the Managerial Workers Committee, such a suspension of the Managerial Workers Committee would not render the committee non-existent.

On this basis the appellant's submission that the Managerial Workers Committee was I will now turn to the issue of whether the collective job action was in defence of immediate threats to a Workers Committee. When the appellant was advised of the formation of the Management Workers Committee it disputed the eligibility for appointment of some of the members of the interim executive committee on the basis that the members were not managerial employees. The appellant as previously stated, referred this dispute to the Labour Relations Officer. The Labour Relations Officer correctly referred the matter to the Labour Tribunal but erroneously suspended the activities of the interim executive

committee. Before the matter was resolved by the Labour Tribunal the appellant embarked on a restructuring exercise whose net effect was to render members of the interim executive of the Managerial Workers Committee, non-managerial employees. The direct consequence of the appellant's conduct in this regard was to abolish the Managerial Workers Committee by rendering all its members disqualified for appointment or election to that workers committee. This conduct of the appellant is more than a threat to the Managerial Workers Committee. It is an actual and direct attack on the existence of the Managerial Workers Committee. It is quite apparent from this conduct and the subsequent conduct of the appellant that it wished to prevent the formation of the Management Workers Committee. It is difficult to imagine a greater and more imminent threat to the Managerial Workers Committee than this.

It is quite apparent from the conduct of the appellant through its various officer's actions that they were determined to eliminate the Managerial Workers Committee and prevent its resuscitation.

As the learned Chairman of the Labour Tribunal correctly observed, s 4(1)(d) of the Act confers on employees the following rights: -

- (1) The right to be a member or an officer of a Workers Committee;
- (2) The right to take part in the formation of a Workers Committee.

The above rights cannot be alienated or suspended at the whim of an employer without due process of the law. The respondent and his fellow employees were within their rights to form as they did the Managerial Workers Committee. If there was a dispute as to the managerial status of some of the members of the interim executive that dispute could only be resolved by the Labour Tribunal. Until the matter had been resolved the respondent was entitled, in terms of s 104(4)(b) of the Act to take or take part in collective job action in defence of an immediate threat to the existence of that Managerial Workers Committee.

In this regard the learned Chairman of the Labour Tribunal concluded: -

" It is clear that the respondent's conduct which barred and hindered the appellant and his colleagues from forming and belonging to a managerial workers committee constituted an immediate threat to the existence of the interim managerial workers committee.

That being the case the appellant and his colleagues responded by embarking on collective job action from the 23rd to the 29th June. The protest was among other things in defence of the existence of the managerial workers committee."

I find myself in agreement with the above observation of the learned Chairman.

I am satisfied that there is no substance in the appellant's submission that at the time of the collective job action the Managers Workers Committee was not in existence by reason of the purported suspension of such committee by the Labour Relations Officer, who in fact had no jurisdiction over the matter.

In the result the appeal is dismissed with costs.

Cheda Jaand Malaba JA concurred

*Atherstone & Cook*, appellant's legal practitioners