ZIMBABWE BANKING AND ALLIED WORKERS UNION & ANOTHER
versus
BEVERLEY BUILDING SOCIETY & OTHERS

HIGH COURT OF ZIMBABWE
PATEL J
HARARE, 23 March 2006 and 17 September 2007

Opposed Application

Mr. Biti, for the applicants
Mr. Gijima, for the 1st respondent

PATEL J: The 1st applicant in this matter is the Zimbabwe Banking and Allied Workers Union (ZIBAWU). The union was originally registered in February 1991 to cover banking institutions and in April 1992 its scope of coverage was varied to cover financial institutions.

The 1st respondent is Beverley Building Society (BBS). Until December 2004 all the employees of BBS were members of the Commercial Workers Union of Zimbabwe (CWUZ). At that juncture, many of these employees resigned from CWUZ and opted to join ZIBAWU. Nevertheless, BBS has continued to deduct union dues from all of its employees in favour of CWUZ. The reason for this, according to BBS, is that it is bound to do so in terms of sections 52, 53 and 54 of the Labour Act [*Chapter 28:*01] as read with the Collective Bargaining Agreement: Commercial Sectors (Statutory Instrument 45 of 1993) which applies to all commercial entities, including building societies such as BBS. As against this, ZIBAWU, which is a party to the Collective Bargaining Agreement: Banking Undertaking (Statutory Instrument 273 of 2000), contends that BBS is a financial institution within the scope of that agreement. It further contends that BBS's current practice violates section 21 of the Constitution as read with the relevant provisions of the Labour Act and the governing conventions of the International Labour Organisation (ILO).

The applicants herein seek a *declaratur* that SI 45 of 1993 does not apply to ZIBAWU's members, coupled with an order compelling BBS to deduct and forward to ZIBAWU the union dues of such of its employees as are members of the latter. BBS resists this relief on the basis that ZIBAWU, unlike CWUZ, is not a party to SI 45 of 1993 and is not duly registered to

claim union dues from BBS employees. Moreover, BBS is regulated by the Building Societies Act [*Chapter 24:02*] and is not a financial institution within ZIBAWU's scope of coverage. According to BBS, sections 52, 53 and 54 of the Labour Act are designed to curb the mischief of multiplicity of union representation in order to achieve uniformity and equity in the collective bargaining process.

The issues for determination in this matter, as I perceive them, are as follows:

(a) Is a building society covered exclusively by SI 45 of 1993 or does it also fall within the ambit of SI 273 of 2000 as a financial institution?

(b) Do sections 52, 53 and 54 of the Labour Act obligate an employer to collect and remit union dues only in favour of a trade union which is registered to represent workers in the industry in which its employees are employed?

(c) Do sections 52, 53 and 54 of the Labour Act violate the freedom of association enshrined in section 21 of the Constitution as read with the relevant Conventions of the ILO?

Building Society *qua* Financial Institution

SI 45 of 1993 (the Commercial Sectors Agreement) was concluded on the 14th of April 1992 between the National Commercial Employers' Association of the one part and CWUZ of the other part. By virtue of section 2(1), the Agreement applies to all employers and employees in the "commercial sectors of Zimbabwe". The latter term, as defined in section 3 as read with the First Schedule, includes "building societies". It also includes "financial institutions excluding commercial banks, merchant banks (accepting houses) and discount houses".

SI 273 of 2000 (the Banking Undertaking Agreement) was made and entered into on the 29th of March 1999 between the Banking Employers' Association and ZIBAWU, both being parties to the Employment Council for the Banking Undertaking. In terms of section 1, the provisions of the Agreement are binding upon "all employers and employees in the undertaking who are members of the employers' organisation or the trade

union [ZIBAWU] respectively" and "all such other employers and employees in the undertaking to which this agreement relates, within the area of Zimbabwe". Section 3 defines "banking undertaking" or "undertaking" to mean "the business of a registered commercial bank, registered accepting house (merchant bank) or a registered discount house [and] financial institutions, trusteeship, executorship and insurance broking where such business is carried out by a registered bank itself or by a subsidiary of such bank". It is pertinent to note that ZIBAWU's certificate of registration, as varied in 1992, employs the same terminology.

Section 8(1)(b) of the Commercial Sectors Agreement allows deductions from the remuneration due to an employee by a written stop-order for contributions to, *inter alia*, "subscriptions to a trade union". Similarly, section 12(1)(b) of the Banking Undertaking Agreement allows deductions effected through the written authority of an employee for "the monies due to a trade union in the form of a check-off system".

It is clear from the wording of the Banking Undertaking Agreement that it applies to all employees in the banking undertaking who are members of ZIBAWU – including employees of building societies, but only if it is accepted that those societies fall within the purview of that undertaking. The critical question, therefore, is whether or not a building society forms part of the banking undertaking.

Mr. Biti, for the applicants, contends that this question must be answered in the affirmative. In support of this contention he relies to a large extent on General Notice 101 of 2005, which was promulgated on the 11th of March 2005 by the Minister of Finance in terms section 3(3) of the Banking Act [*Chapter 24:20*]. The effect of this Notice is to apply a significant number of the provisions of the Banking Act to every building society regulated by the Building Societies Act [*Chapter 24:02*]. *Mr. Biti's* contention, in essence, is that the Notice operates to obliterate the difference between banks and building societies to such a degree that both entities must now be regarded without distinction as financial institutions.

While I accept that the scope of the provisions applied to building societies is fairly extensive, I am unable to agree with *Mr. Biti's* argument.

The starting premise of section 3 of the Banking Act is to exclude building societies and other institutions from the remit of that Act. The broad purpose of the assimilation between banks and building societies, as I see it, is to ensure that the latter conform with the rules and standards prescribed for the former to the extent that building societies participate in the business ordinarily carried out by banks. However, it does not follow that banks and building societies are, to all intents and purposes, entities *ad idem* without any meaningful distinction. Although banks and building societies are both subsumed under the general rubric of "financial institution", the distinction between them remains legally and practically intact. In my view, the Banking Act and the Building Societies Act constitute quite separate regimes which apply to distinct financial entities, but with overlapping regulatory effect whenever this is deemed expedient by the regulating authority.

Turning to the specific sphere of labour relations, it is clear that the Commercial Sectors Agreement undoubtedly applies to all building societies. Its scope of coverage also extends to other financial institutions, but with the express exclusion of commercial banks, merchant banks and discount houses. Conversely, the Banking Undertaking Agreement applies to the business of a commercial bank, merchant bank and discount house as well as the business of a financial institution, but only to the extent that such latter business is carried out by a registered bank itself or by its subsidiary. In my view, the distinction between the banking sector on the one hand and the building society sector on the other is explicitly and rigidly maintained by the two separate regimes embodied in SI 45 of 1993 and SI 273 of 2000, respectively, insofar as concerns the regulation of labour relations in these two sectors. I therefore conclude that a building society, *stricto sensu*, is governed exclusively by the Commercial Sectors Agreement and falls outside the ambit of the Banking Undertaking Agreement. It follows that BBS itself is not subject to or bound by the provisions of the latter Agreement.

Union Dues for Registered Union

Before dealing with the specific sections governing union dues, it seems relevant to have regard to the provisions of section 45(1) of the Act

which sets out the considerations relating to the registration of trade unions and employers organisations. The Registrar is enjoined in this respect to take into account, *inter alia*, "the desirability of affording the majority of the employees and employers within an undertaking or industry effective representation in negotiations affecting their rights and interests" and "the desirability of reducing, to the least possible number, the number of entities with which employees and employers have to negotiate". While these provisions clearly support the 1st respondent's argument against the multiplicity of union representation in a single industry, they do not necessarily preclude the collection of union dues by more than one union within that industry.

Sections 4(2) and 50(1) of the Labour Act [*Chapter 28:01*] entitle all employees to membership of the trade unions registered to represent their undertaking or industry:

> S.4(2) "Every employee shall have the right to be a member of a trade union which is registered, as the case may be, for the undertaking or industry in which he is employed if he complies with the conditions of membership".
>
> S.50(1) "Every employee shall be entitled to membership of any registered trade union which represents his undertaking or industry if he is prepared to comply with its rules and conditions of membership."

Section 52(1) of the Act recognises the right of registered unions to levy union or association dues as follows:

> "For the purpose of fulfilling its obligation to represent the interests of its members employed or engaged in the undertaking or industry for which it is registered, a registered trade union or employers organisation may, subject to this Act, levy, collect, sue for and recover union and association dues".

Section 53 of the Act restricts the collection of union dues by unregistered trade unions by stipulating that:

> "(1) No employer shall, without the consent of the Minister, pay on behalf of any employee any union dues other than to a registered trade union.
>
> (2) Any employer who contravenes subsection (1) shall be guilty of an offence and liable to a fine not exceeding level seven or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment".

The collection of union dues is regulated by section 54 which, in its relevant portions, provides that:

> "(1) Union dues shall be collected by an employer from his employees and transferred to the trade union concerned—
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> (a) by means of a check-off scheme or in any other manner agreed between the trade union and the employees and the employer or employers organisation concerned; or
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> (b) failing such agreement as referred to in paragraph (a), by authorisation in writing of an employee who is a member of the trade union concerned.
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> (2) .....
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> (3) .....
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> (4) .....
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> (5) .....
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> (5a) No employer shall collect or pay any union dues in terms of this section to or on behalf of a trade union or federation—
>
> (a) while its registration is suspended; or
>
> (b) after its registration has been rescinded.
>
> (6) Any employer who fails or refuses to collect union dues and transfer them to the trade union concerned in accordance with this section shall be guilty of an offence and liable to a fine not exceeding level seven or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment".

Also relevant in the context of union dues is section 30(3) of the Act which stipulates that:

> "No unregistered trade union may, whether in its corporate name or otherwise—
>
> (a) recommend collective job action; or
>
> (b) have the right of access to employees conferred by subsection (2) of section *seven*; or
>
> (c) levy, collect or recover union dues by means of a check-off scheme".

Taking all of the foregoing provisions together, the statutory regime that emerges is as follows. By virtue of section 4(2), every employee has "the right to be a member of a trade union which is registered, as the case may be, for the undertaking or industry in which he is employed". Similarly, in terms of section 50(1), every employee is "entitled to membership of any registered trade union which represents his undertaking or industry". Conversely, in accordance with section 52(1), a registered trade union is entitled to levy and collect union dues in order "to represent the interests of its members". However, its right to do so is confined to those of its members who are "employed or engaged in the

undertaking or industry for which it is registered". It follows that a trade union is not entitled as of right to collect union dues from its members employed in an industry or undertaking for which it is not registered.

Section 53 of the Act prohibits an employer, under pain of criminal sanction, from paying any union dues on behalf of any employee "other than to a registered trade union". This prohibition is bolstered by section 54(5a) and is mirrored by the restriction imposed upon unregistered unions by section 30(3)(c) against the collection of union dues through a check-off scheme. In my view, section 53 is concerned solely with unregistered unions and does not *per se* proscribe the payment of union dues to a trade union registered in another industry or undertaking.

Section 54 requires an employer to collect union dues, by means of a check-off scheme or in any other agreed manner or pursuant to a written authorisation, and to transfer such dues to "the trade union concerned". The employer's obligation to collect and transfer union dues must be effected "in accordance with this section". The critical question to be answered is this: what is the meaning that should be ascribed to the phrase "the trade union concerned"?

In favour of ZIBAWU, it might well be argued that the terminology employed in section 54 differs materially from that used in section 52. Thus, "the trade union concerned" in section 54 must mean the trade union of which the employees concerned are members rather than the trade union registered in the industry or undertaking in which they are employed.

As against this, it seems preferable to read section 52 together with section 54 in an holistic fashion so as to confine the application of the latter to the trade union referred to in the former. In other words, the employer's obligation under section 54 must be restricted to a trade union registered in the industry or undertaking in which its members are employed. Such trade union, in effect, constitutes "the trade union concerned" for the purposes of levying union dues. To interpret these provisions otherwise would mean that an employer would be obliged to collect and transfer union dues to a trade union with no capacity to represent the interests of the employees from whom those dues are

levied. That would surely negate the very purpose of collecting union dues from employees, viz. effective trade union representation of those employees in the industry or undertaking in which they are employed. Of course, there is nothing in law to stop an employee from joining and paying subscriptions to a trade union which does not represent his industry or undertaking. However, that does not obligate his employer to collect and transfer union dues to that trade union in accordance with sections 52 and 54.

It follows from the above analysis that BBS is not required to collect and remit any union dues to ZIBAWU inasmuch as the latter is not registered to represent those of its members who are employed in the Commercial Sector. Accordingly, the relief sought by ZIBAWU as against BBS cannot be granted in terms of the relevant provisions of the Labour Act.

Violation of Section 21 of the Constitution and the ILO Conventions

Section 21 of the Constitution of Zimbabwe enshrines the freedom of assembly and association in the following terms:

> "(1) Except with his own consent or by way of parental discipline, no person shall be hindered in his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to political parties or trade unions or other associations for the protection of his interests.
>
> (2) The freedom referred to in subsection (1) shall include the right not to be compelled to belong to an association".

The Long Title of the Labour Act articulates the objects of the Act to include:

> "to give effect to the international obligations of the Republic of Zimbabwe as a member state of the International Labour Organisation and as a member of or party to any other international organisation or agreement governing conditions of employment which Zimbabwe would have ratified".

The ILO Convention of direct relevance to the present matter is the Freedom of Association and Protection of the Right to Organise Convention, No. 87 of 1948. Article 2 of the Convention expresses the freedom of association in the following terms:

> "Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation".

The term "organisation" is defined in Article 10 of the Convention to mean:

> "any organisation of workers or of employers for furthering and defending the interests of workers or of employers".

In substance, the Convention prescribes the right of workers and employers to establish and join organisations of their own choosing for furthering and defending their respective interests. By the same token, the Constitution guarantees the right of every person to form or belong to any association for the protection of his interests. In essence, the freedom of association as enunciated in both instruments comprises three distinct rights, that is to say:

(a) the right to establish or form an association;

(b) the right to join or belong to an association; and

(c) the right not to join or belong to an association (expressly stated in the Constitution and necessarily implied in the Convention).

Does the freedom of association extend beyond the three rights described above? In other words, does that freedom include as well the right of an association to pursue the objects or purposes for which it has been formed? And, more specifically in the present context, does it embrace the right of a registered trade union to compel an employer to collect and transfer union dues from its employees who are members of the trade union but who are employed in an industry for which that union is not registered?

With direct reference to these questions, the decision of the Privy Council in *Collymore & Another v Attorney-General* [1970] AC 538, at 547-548, provides unequivocal authority for the following propositions. Firstly, the freedom to associate cannot be equated with the freedom to pursue without restriction the objects of the association. Secondly, the abridgement of the right of free collective bargaining and of the freedom to strike is not an abridgement of the freedom of association. Therefore,

the freedom of a trade union to organise and bargain collectively is something over and above the freedom of association.

Also instructive is the majority decision of the Canadian Supreme Court in *Professional Institute of the Public Service of Canada v Commissioner of the Northwest Territories & Others* (1990) 2 SCR to the effect that the constitutional guarantee of the freedom of association does not include a guarantee of the right to bargain collectively. Thus, the legislative restriction of collective bargaining is not a violation of the freedom of association. Moreover, the objects, purposes and activities of an association, even if they are fundamental to its existence, are irrelevant to the constitutional protection of the freedom of association.

To similar effect, the Indian Supreme Court has consistently adopted the position that the constitutional right to form a trade union does not carry with it any right of every individual union to represent its members in an industrial dispute. Nor does the right to form a union include any guaranteed right to collective bargaining or to strike. See in these respects the authorities cited in Basu: *Shorter Constitution of India* (10th ed.) at pp. 121-122. The learned author himself, at p. 120, takes the view that the right to form an association does not carry with it a further guarantee that the objects or purposes of an association so formed shall not be interfered with by law.

Having regard to the above authorities, I am of the firm opinion that the freedom of association enshrined in section 21 of the Constitution and in Article 2 of the Convention does not *in se* include the right to pursue the objects, purposes and activities of a given association. If there is any such right, it certainly is not one that is constitutionally recognised and any claim to it must be established *aliunde*, viz. by dint of statute or the common law.

Does the strict application of this approach operate to render nugatory the right of a person to form or belong to an association "for the protection of his interests". In my view, it does not necessarily and invariably have that effect. In any event, the objects, purposes and activities of an association, to the extent that they purport to protect its members' interests, are only relevant insofar as their restriction or control

operates to violate the freedom of association itself. On this basis, it is necessary to test every alleged restriction of an association's objects in order to determine whether or not it hinders the right to form or belong to the association. In this respect, it must be emphasised that the right to associate is one which vests in the persons who wish to associate and not in the association which they have formed or joined. That being so, the rights and functions of the association itself can rarely, if ever, be relevant to a proper analysis of the freedom of association.

The position of unregistered unions under the Labour Act, viz. their relatively unprivileged status in terms of what they are legally permitted to do, is obviously relevant to the larger question posed above. However, both of the trade unions *in casu* are duly registered under the Act, albeit in respect of different industries. Therefore, I do not think it necessary or appropriate for the purposes of this case to delve into the collection rights of unregistered unions as regulated by sections 30 and 53 of the Labour Act.

Turning specifically to sections 52 and 54 of the Labour Act, their combined effect is to require an employer to collect union dues from his employees by way of a check-off scheme and to transfer those dues to the trade union to which they belong and which is registered to represent their interests in the industry in which they are employed. The employer is statutorily bound and cannot be compelled to do so in favour of a trade union which is not so registered. As I read these provisions, the obligations and restrictions imposed by them do not prevent any employee from joining any trade union of his choice, including one that is not registered for the industry in which he is employed. Nor do they preclude the employee from paying his union dues to that union by any means other than a check-off scheme instituted and implemented by his employer. Conversely, the union is at total liberty to collect its dues from that employee in any other appropriate manner. Most importantly, there is nothing to hinder the union itself from applying to extend its scope of coverage to include any industry in which its members are employed so as to enable it to effectively represent their interests in that industry.

In the final analysis, sections 52 and 54 of the Act cannot be said to impede or circumscribe the freedom of association of those members or of the trade union as guaranteed by section 21 of the Constitution and by Article 2 of the Convention. The limitations envisaged by the statutory provisions do not bear on the right to form or belong to any trade union. Conversely, a trade union's claim to collect union dues in a manner not sanctioned by statute cannot properly be conceived to form part of the freedom of association.

The fact that a particular trade union is not entitled to levy union dues in a given industry through a check-off scheme may operate in practice to militate against the desirability of joining or belonging to it. However that may be, the legal right to form or belong to the union remains intact and unimpaired. It is often the case that a right conferred and protected by the law is not exercised because of the practical futility of so doing. But that does not necessarily vitiate the legal nature of that right or amount to an infringement of the right.

Conclusions

To conclude, I am of the opinion that sections 52 and 54 of the Labour Act do not contravene the freedom of association guaranteed by section 21 of the Constitution and Article 2 of the Convention. Moreover, as already stated, the provisions of the Act cannot be construed to accommodate the principal relief claimed by the applicants vis-à-vis the collection of union dues through a check-off scheme from those of ZIBAWU's members who are employed by BBS. However, insofar as concerns the *declaratur* sought by the applicants as to the right of ZIBAWU's members to join any trade union of their choice, this is clearly in conformity with the law and I see no reason not to grant a declaratory order to that effect.

As for costs, the applicants have not been successful in their main claim. However, I consider the issues raised in this application to be matters of significant public importance and I am therefore inclined not to award costs against any of the parties herein.

Order

In the result:

1. It is declared that the Commercial Sectors Agreement contained in Statutory Instrument 45 of 1993 does not operate to prevent or interfere with the right of the 1st applicant's members to belong to the 1st applicant or to any other trade union of their choice.
2. It is ordered that each party shall bear its own costs.

Honey & Blankenberg, applicants' legal practitioners
Gill, Godlonton & Gerrans, 1st respondent's legal practitioners