

IN THE HIGH COURT FOR ZAMBIA

COMP/IRCLK/ 457/2017

INDUSTRIAL RELATIONS DIVISION

HOLDEN AT LUSAKA

BETWEEN:



SAMUEL LIATO & MILANDU SICHIKOLO

COMPLAINANTS

AND

NATIONAL PENSION SCHEME AUTHORITY

RESPONDENT

Before Judge M. K. Chisunka

APPEARANCES:

For the Complainant: Mr. P. Mulenga – Mulenga Wallace & Associates.

For the Respondent: Mr. K. Mwondela – Lloyd Jones & Collins.

R U L I N G

Cases Referred to:

- 1. Shell and BP v. Coridaris (1975) ZR 174 (SC).***
- 2. American Cynamid Company v. Ethicon Ltd (1975) AC 396.***
- 3. Zambia State Insurance Corporation Ltd v. Dennis Mulope Mulikelela (1990) ZR.***

A. Introduction

1. This ruling decides an interlocutory application for an order of interim injunction to restrain the Respondent from effecting its decision to transfer the Applicants from their current employment stations and from continuing with the harassment and or intimidation of the Applicants pending determination of this action.
2. The Applicants are the Complainants in the underlying action and employees of the Respondent.
3. The basis upon which this application is made is contained in the Affidavit in Support of the Summons filed on 20th November, 2017.

B. Background to the Application

4. The record shows that the underlying action was commenced on 20th June, 2017 by Notice of Complaint in which the Complainants allege that the Respondent's decision of 3rd October, 2017 to transfer them in the same capacity, as Inspectors, to other stations outside Lusaka was an act of intimidation, malafide and or bad faith on the part of the Respondent, calculated to silence the Complainant's as a result of their union activism and therefore illegal.

5. As a consequence thereof, the Complainants now seek the following relief from this Court:

- (a) *A declaration and order that the said transfers are unreasonable, illegal, discriminating, made in bad faith and therefore null and void.*
- (b) *An order of injunction restraining the Respondent from effecting its decision to transfer the Complainants.*
- (c) *Any other or further relief the Court may deem fit.*
- (d) *Costs for and incidental to these proceeding.*

6. I heard the application on 27th June, 2017. Both parties relied on the documents filed in Court augmented by their oral submissions. But in view of their extensive reference to authorities, I directed that both parties should file written submissions and Skeleton Arguments not later than 8th January, 2018.

7. This is the background to the present application.

C. The Evidence and submissions

8. The Affidavit in Support of the application, sworn jointly by the Complainants disclosed that:

- (a) Both Complainants were employees of the Respondent having been employed as Inspectors on 5th May, 2009 (1st Complainant) and 2nd June, 2010 (2nd Complainant) respectively and currently stationed at Lusaka.

(b) Both Complainants are members of the Zambia Union of Financial Institutions and Allied Workers (ZUFIAW) and are elected office holders at the Lusaka ZUFIAW Branch.

(c) Both Complainants were, prior to their transfer, currently under suspension from ZUFIAW.

9. The Complainants' advocates augmented the affidavit evidence with their oral submissions which were to the effect that:

- (i) *The applicants, being elected union officials under the Lusaka Branch of ZUFIAW, will immediately and automatically lose their mandate as elected union officials and their tenure of office, which is protected by the Industrial and Labour Relations Act (ILRA), CAP 269 shall be curtailed prematurely and permanently if transferred.*
- (ii) *Though the Complainants were currently under suspension they were still substantive office bearers until after the next elections unless expelled.*
- (iii) *Though the Respondent had the right and prerogative to transfer their members of staff in accordance with the Respondent's needs and objectives, this was a unique case in that the applicants were not merely employees of the Respondent but they were elected union officials with a secured tenure of office and thus the right and prerogative of the employer to execute such a transfer was inferior to and cannot override the statutory provisions of the ILRA.*
- (iv) *Should the transfer be effected and the applicants lose their positions damages could not be an adequate remedy for such a loss. (Counsel relied on the authorities of **Shell and BP v. Coridaris (1975) ZR** at page 17, and **Zambia State Insurance Corporation Ltd v. Dennis Mulope Mulikelela (1990)**).*

10. Opposing the Application for Injunction, Counsel for the Respondent stated that he would place reliance on the Affidavit in Opposition filed on 8th December, 2017 deposed to by Betty Chipika Meleki and submitted as follows:

- (i) *Being employees of the Respondent, the applicants were subscribers and were subject to the Respondent's various policies which governed their relationship with the Respondent including, the Collective Agreement ("SLM1") the Recognition Agreement ("SLM3"), the Human Resources Policy as well as the Disciplinary and Grievance Procedure Code.*
- (ii) *The said documents were instructive on the issue regarding transfers and other procedures. The Respondent exercised its contractual powers as an employer to transfer the Complainants and the Complainants were part of a larger group of employees who were affected by the transfers.*
- (iii) *Both Applicants were transferred on 2nd October, 2017 and the Respondent had since re-deployed other members of staff to the stations previously occupied by the Complainants.*
- (iv) *The Respondent had since paid the requisite upset allowances to all the officers who were affected by the transfers including the Complainants'.*
- (v) *The Complainants' suspension from ZUFIAW was a matter between the Complainants and the Union and that had no bearing on the transfers of the 2nd October, 2017 by the Respondent. The transfers were calculated to streamline operations and improve effectiveness. There was no Malafide.*

D. General Principles Guiding Grant of Injunctions

11. **Injunctions** whether interim, interlocutory or final are equitable remedies that are granted at the Court's discretion. Interlocutory injunctions prohibit defendants from doing certain defined conduct for a set period of time. The purpose is to protect the moving party against injury by violation of his legal rights, for which he could not be adequately compensated by damages or which could not be cured (because the moving party is unable to collect damages) if the matter were to be resolved in the moving party's favour at trial.
12. The following authorities are instructive on the general principles of law to be considered in granting injunctions:
 - (i) ***Turnkey Properties v. Lusaka West Development Company Ltd and Zambia State Insurance Corporation Ltd (1984) ZR 85*** where it was stated that:
 - (a) An interlocutory injunction is appropriate for the preservation of a particular situation pending trial.
 - (b) An interlocutory injunction should not be regarded as a device by which an applicant can attain or create new conditions favourable only to himself.
 - (c) In application for Interlocutory Injunction the possibility of damages being an adequate remedy should always be considered.
 - (ii) ***Shell & BP Ltd v. Conidaris & Others*** where it was stated that:

"A Court will not generally grant an interlocutory injunction unless the right to relief is clear and unless it is to protect

the Plaintiff from irreparable injury; mere inconvenience is not enough. Irreparable injury means injury which is substantial and can never be adequately remedied or atoned for the damages, not injury which cannot be possibly repaired.”

- (iii) ***Zambia State Insurance Corporation Ltd v. Dennis Mulope Mulikelela (1990) ZR***, where it was stated that:

“...of course, in order to entitle the Plaintiffs to an Interlocutory Injunction, though the Court is not called upon to decide finally on the rights of the parties, it is necessary that the Court should be satisfied that there is a serious question to be tried at the hearing, and that on the facts before it there is a probability that the Plaintiffs are entitled to relief.”

E. My Decision

13. I have considered the submission by Counsel for both sides, evaluated the evidence and considered the authorities that were cited by both parties. I make the following observations:

- (i) *There appear to be no dispute between the Complainant's and the Respondent. I therefore have serious doubts whether there is a real issue to be tried in the main matter.*
- (ii) *If there is any dispute, it is open to the Complainants to invoke the dispute resolution process which is in place in the Respondent. If the issue is about transfers, this can be dealt with by invoking the Grievous Procedure Code.*
- (iii) *The fact that the applicants were elected members of the union, that in itself and by itself does not make them special employees to the extent that they could not be transferred.*

- (iv) *The Complainants have not demonstrated to the Court that they would suffer irreparable damage if the injunction is not granted.*
- (v) *The Complainants are first employees of the Respondent. The issue of being union members does not override that primary relationship.*
- (vi) *There is no evidence before me to show that the Complainants exhausted the administrative procedures in place with the Respondent before coming to Court.*

ORDERS

14. Given what I have said above, I refuse to allow the application for interim injunction and I dismiss it accordingly.

Delivered at Lusaka this.....day of January, 2018.

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M. K. CHISUNKA
HIGH COURT JUDGE

