

**THE ATTORNEY GENERAL AND THE LABOUR COMMISSIONER v
FABIAN ZULU AMEDEUS C KAMUKWAMBA SITENGE MUNDIA
MUTANGWA & OTHERS (1995) S.J.**

SUPREME COURT
GARDNER, CHAILA, AND MUZYAMBA JJS
14TH FEBRUARY, 1995 AND 30TH NOVEMBER 1995
S.C.Z. JUDGEMENT NO. 26 OF 1995

Flynote

Trade union - Registration as union - Secondary School Teachers Union.

Headnote

Respondents, as plaintiffs in court below, applied for registration of a union. Labour Commissioner rejected the application on grounds that the Zambia National Union of Teachers existed and represented secondary school teachers. Respondents applied to the High Court for a declaration that their constitutional rights had been infringed. The Commissioner ruled in favour of the respondents. The Attorney-General appealed, advancing four grounds of appeal.

Held:

- (i) Section 9(8)(c) of the Industrial and Labour Relations Act 27 of 1993 is not ultra vires the Constitution and allows for the registration of a separate union for secondary school teachers.
- (ii) (CHAILA, J.S. dissenting) The proposed Secondary School Teachers Union of Zambia comprised a specific category, different from other teachers who are qualified to form a trade union within the terms of section 9(8)(c) of the Industrial and Labour Relations Act, and that its members are not adequately represented by any other union.

Cases referred to:

- (1) The Attorney General & Anor v Lewanika & Others S.C.Z. Judgement No. 2 of 1994

For the appellant: Mr A.G. Kinariwala, Principal State Advocate

For the respondent: Mr R.Simeza of Simeza Sangwa Associates

Judgment

CHAILA, J.S.: delivered the judgement of the court.

The respondents hereinafter referred to as the plaintiffs in the court below, applied on behalf of the secondary school teachers to the Labour Commissioner to have their Union called Secondary School Teachers Union to be registered as a Union. The Labour Commissioner rejected their application on the basis that Secondary School Teachers were represented by Zambia National Union of Teachers. The plaintiffs petitioned the High Court for a declaration that their constitutional rights had been infringed by the denial to have their union registered. The learned High Court Commissioner considered the petition and declared that the Labour

Commissioner's refusal constituted a denial of the plaintiffs enjoyment of their constitutional rights. The High Court Commissioner further ruled that the provisions of section 9(8) (c) of the Industrial and Labour Relations Act No. 27 of 1993 were inconsistent with the provisions of the Constitution of Zambia and that they invalid.

The Attorney General being dissatisfied with the High Court Commissioner's decision appealed to the Supreme Court. The Attorney General filed four grounds which we shall consider as they were argued. The first ground is that the learned trial commissioner erred in holding:

- (a) That section 9(8) (c) of the Industrial and Labour Relation Act No. 27 of 1993 can only be justified if it shown that it was promulgated for the sole purpose of regulating the registration procedures of political parties and trade unions;
- (b) That section 9(8) (c) however goes beyond this at it outrightly bars employees in industries were there is already a union in existence from forming new trade unions;
- (c) that such powers are therefore outside the purview of Article 21 (2) (d) of the Constitution of Zambia Act No. 1 of 1991; and
- (d) that section 9(8) (c) is to that extent therefore in conflict with constitution and invalid.

The second ground is that the learned trial Commissioner erred in law in holding that the refusal by the second appellant to register the respondent's union on the grounds that the teaching profession was already represented by the Zambia National Union of Teachers was a denial of the petitioners' fundamental right and freedom of Assembly and association as enshrined in Article 11 (b) and 21 (1) of the Constitution of Zambia (Act No. 1 of 1991)

The third ground is as follows: that in coming to conclusions to which he did, the learned trial commissioner fell in grave error by failing to address his mind to the exception contained in Article 21 (2)(4) of the Constitution of Zambia (Act No.1 of 1991). The fourth ground of that the judgement of the learned trial Commissioner is against law and weight of the evidence on record.

Mr Kinariwala argued grounds one and two together. He submitted on grounds one and two that section 9(8) (c) of the industrial and Labour Relations Act provides: "Nobody registering as a trade union shall be registered if it purports to represent a class or classes of employees already registered by an existing trade union or are eligible for membership of an existing trade union unless the union intended to be registered represents a specific trade or profession or category or eligible employees who are qualified to form a trade union." He submitted that the intention of legislature behind Section 9(8) (c) of the Act is not to allow more than one trade union in an industry unless the second trade union is intended to represent a specific trade or profession or category or employees who are qualified to form a trade union.

He further submitted that the evidence adduced in the court below clearly demonstrated that the secondary school Teachers Union of Zambia which purported to represent the Secondary Schools Teachers was already represented by the existing National Union of Teachers. Alternatively the Secondary School Teachers which the Secondary School Teachers Union of Zambia purported to represent were eligible for membership of the existing National Union of Teachers. Mr Kinariwala further submitted that the question which now arises for consideration is whether the Secondary School Teachers who were already represented by the existing National Union of Teachers could be regarded as a specific trade or profession or category of employees who were qualified to form a trade union.

It is submitted that the answer is no because the Secondary School Teachers could not be regarded as a specific trade or profession or category of employees as all teachers whether they teach in primary schools or in secondary schools belong to the same profession namely school teaching profession. He further submitted that since the secondary teachers could not be regarded as a specific trade or profession or category of employees who were qualified to form a trade union, the Secondary Teachers Union of Zambia was not eligible to be registered as a second union the teaching industry where there was already in existence another trade union.

Mr Simeza counsel for the respondents on grounds one and two has argued that the learned trial commissioner was correct in his construction of section 9(8)(c) of the Industrial and Labour Relations Act, No. 27 of 1993. He referred the court to Article 21(c) of the Constitution. He has argued that this Article is in conflict with section 9(e) of the Industrial and Labour Relations Act. He has agreed in total with the conclusion reached by the learned trial commissioner on the protection given to members in registering the association. He has further argued that the Secondary School Teachers are a different category as other teachers and as such they should be separately represented and has argued the court dismiss the appeal and allow Secondary School Teachers to register their union.

Our attention has been drawn by both counsel to various provisions in the Constitution of Zambia. Mr Kinariwala in his submission has drawn our attention to Article 21 (1) (2) (d) of the Constitution which reads:

- (1) "Except with his own consent, no person shall be hindered in the enjoyment of 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 any political party, trade union or other association for the protection of his interests.
- (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that it is shown that the law in question makes provision -

(d) For the registration of political parties or trade union in a register established by or under a law and for imposing reasonable conditions relating to the procedure for the entry on such a register including conditions as to the minimum number of persons necessary to constitute a trade union qualified for registration;

Mr Kinariwala has argued that Article 21 of the constitution has made a provision for a law under which such political or trade union is registered may make reasonable condition on the procedure of its registration. Mr Simeza has argued that the Article in the Constitution refers only to the procedure and any regulation on the procedure has nothing to do with the substantive issues covered by the legislation.

In his judgement the learned trial commissioner interpreted Article 21(2) (d) as follows: "In my view, this Article is clear and unambiguous it means that section 9(8) (c) can only be justified if it is shown that it was promulgated for the sole purpose of regulating the registration procedures of political parties and trade unions. Section 9(8) (c) however goes beyond this as it outrightly bars employees in industries where there is already a union in existence from forming new trade unions. Such powers are therefore outside the purview of Article 21(2)(c). To this extent therefore, I also hold that Section 9(8) (c) is in conflict with Constitution."

I have considered the arguments of both counsel as regards the interpretation of Article 21(2) (d) and the learned commissioner's interpretation of the Article. The Article provides in Clause 2 "nothing contained in or done under the authority of any law shall be held to be inconsistent with or contravention of this Article to the extent that it is shown that the law in question makes provision (d) for the registration of political parties or trade unions in a register established by or under a law. The sub clause further provides for reasonable conditions relating to the procedure for entry on such a register including as to the minimum number of persons necessary to constitute a trade union qualified for registration. The interpretation placed on this Article by the learned Commissioner is that it permits only regulations to govern the procedure for registration. The sub clause 2 however talks of making provisions for the registration of political parties or trade unions. Section 9(8) (c) is a repetition of what was contained in the Statutory Instrument No. 67 of 1991. Section 9(8) (c) of the Industrial and Labour Relations Act reads:

"Nobody registering as a trade union shall register it purports to represent a class or classes of employees already represented by an existing trade union or are eligible for membership of an existing trade union unless the union intended to be registered represents a specific trade or profession or category or eligible employees who are qualified to form a trade union."

This law has in my view made a provision for registration of trade unions. Section 9(8) (c) of the Industrial and Labour Relations Act of 1993 is not in any way in conflict with Article 21 (2) (c) of the Constitution. The section is not ultra vires Article 21 of the Constitution. The learned trial commissioner erred in construing section 9(8) (c) of the Industrial and Labour Relations Act of 1993 as being in conflict with Article 21 of the Constitution. I fully agree with the argument by the appellants that the section is not in conflict with the provisions of the Constitution.

I now come to the question of secondary school teachers. Mr Kinariwala has argued that the secondary school teachers are already represented by the existing National Union of Teachers; that evidence adduced in the lower court clearly demonstrated that the secondary school teachers were already represented by an existing National Union of Teachers. He further submitted that the secondary school teachers were eligible for membership of the existing National Union of Teachers. He further argued that the secondary school teachers could not be regarded as a specific trade or profession or category of employees, as all the teachers teaching in primary schools or secondary schools belong to the same class of teaching profession.

Mr Simeza has argued that secondary school teachers form a different class and that they are separate teachers and that they should be separately represented.

There is no dispute that the teachers both at primary and secondary school levels have been represented since 1962 by the National Union of Teachers. There is further no dispute that membership to this union is open to both primary and secondary school teachers. The petitioners admitted in the lower court that they were being represented by National Union of Teachers but not properly represented and that they were free to join the National Union of Teachers.

There is no dispute that the National Union of Teachers has been representing the Teachers since 1962 and that membership is open to two classes of teachers. There is no dispute that both classes of teachers belong to one profession I.e teaching profession. The teaching profession of primary and secondary schools in this country is covered by Chapter 234 of the

laws of Zambia. The Act provides for both government aided and private schools. The Act does not apply to the University of Zambia. The Government of the Republic of Zambia is the main employer of the teaching profession both in primary and secondary schools. In addition to the Education Act there is the Teaching Service Commission created under the Constitution of Zambia. The Teaching Service Commission deals with the appointments and conditions of service of the teachers employed in the government service. The Zambia Union of Teachers has been recognised to represent the interests of teachers mainly in the government service. Section 9(8) (c) of the Industrial and Labour Relations Act of 1993 already referred to provides:

“Nobody registering as a trade union shall be registered if it purports to represent a class or classes of employees already represented by an existing trade union or are eligible for membership of an existing trade union unless the union intended to be registered represents a specific trade or profession of category or eligible employees who are qualified to form a trade union”.

The proven facts are that both the primary and secondary school teachers belong to the same teaching profession; that they are governed by the same legislation; that they have one employer i.e. GRZ and that some teach in the same schools e.g Basic schools (Grade 1 to 9) . There is a great community of interest between the two classes of the profession. I now come to the section itself. Section 9(8) (c) is very clear. The section provides that nobody shall be allowed to register as a trade union if it purports to represent a class or classes of employees already represented by an existing trade union or are eligible for membership of an existing trade union or are eligible for membership of an existing union unless....” The words of the section are clear and unambiguous. Upon literal construction of the section nobody shall be registered as a union where there is one which represents the workers unless the workers come under the exceptions provided by the section. Upon careful perusal of section 9(8) (c) the clear intention of the section comes out. Whether or not one uses literal interpretation or purposive interpretation the intention is clear. The intention is to avoid proliferation of trade unions. The Act does not encourage mushrooming of the trade unions unless of proving that they are a specific profession. To me the burden of proving that they are different from the existing union lies on the people applying for a new union. The applicants in my view must show special and compelling reasons why they should form a different union. In this particular case, both groups of teachers belong to the same teaching profession.

This court was recently faced with the construction of the Constitution of Zambia in the case of Attorney General v Lewanika & Others (1). We said in this case:

“It follows, therefore, that whenever the strict construction given rise to an unreasonable and an unjust situation, it is our view that judges can and should use their common sense to remedy it - that is by reading words in it necessary - so as to do what Parliament would have done had they had the situation in mind .”

In this case in order to avoid absurdity and unjust situation, the court read in some missing words. In the instant case there is no question of implying any meaning or adding any words. The strict and literal interpretation simply means nobody can register as a union if there is one in existence or category of employees. The intention of the legislature is generally to restrict mushrooming of unions. I do not see any unreasonable situation arising in applying strict interpretation of the section. The section permits to register another union if they satisfy conditions laid down by the section. In the present case, there is a union in existence; both groups of teachers are eligible to become members. The respondent's complaint is that they are not adequately represented. The evidence in the court below showed that secondary

school teachers were eligible for membership of the existing trade union I.e Zambia National Union of Teachers. I take judicial notice of the existing structure in the field of education. There is in existence Basic schools which run from Grade 1 upto Grade 9. Grades 8 and 9 are junior secondary schools. The teaching staff at these schools covers all grades from grade 1 to grade 9. I take further judicial notice that the government is the sole employer of the teachers for the primary, basic and secondary schools. If two unions came into existence the government will be faced, when negotiating conditions of service for schools with two unions. The two unions will be negotiating with the government for conditions of their teachers covering the same schools. In my view this was not intended by the legislation. I do not think that the teachers in the secondary schools are a different class from the teachers in primary and basic schools. I am unable to agree with Mr Simeza's argument or contention that secondary school teachers belong to a different class. The two groups of teachers belong to one teaching profession and that there is an existing a union to which both groups or classes are eligible for membership.

For the foregoing reasons I would allow this appeal.

GARDNER, A.J.S.: I have had the advantage of reading the judgement of my learned brother Chaila and I respectfully concur with that part of his judgement which finds that S.9 (8) (c) of the Industrial and Labour Relations Act is not ultra vires Article 21 of the Constitution. I regret however, that I dissent from the learned judge's finding that the said section does not allow the registration of a separate union for secondary school teachers.

With regard to the question of whether or not section 9(8) (c) of the Industrial and Labour Relations Act is ultra vires the Constitution, I should like to comment that Article 21 (2) (c) especially indicates how it is intended that the Article should be construed when considering the meaning of conditions relating to the procedure for entry in a register of trade unions.

The words "including conditions as to the minimum number of persons necessary to constitute a Trade Union qualified for registration" indicate the type of condition intended to be included in the expression 'conditions relating to the procedure for entry in a register' without this specific inclusion it might be said that similar conditions do not relate to procedure. However, the specific inclusion leaves the question as to such conditions beyond doubt. The condition in section 9(8) (c) of the Industrial and Labour Relations Act, which seeks to restrict the number of unions that can be registered to represent persons in the same trade profession, is ejusdem generis, and is equally covered by the provision allowing for the imposition of reasonable conditions. For this reason I would find that the section is not ultra vires the constitution.

With regard to the question of whether or not a union of secondary school teachers is eligible for registration, it is necessary to consider the intention of the wording of section 9(8) (c) of the Industrial and Labour Relations Act. The section reads as follows:

"Nobody registering as a trade union shall be registered if it purports to represent a class or classes of employees already represented by an existing trade union or are eligible for membership of an existing trade union unless the union intended to be registered represents a specific trade or profession or category of employees who are qualified to form a trade union."

Here a distinction is made between classes of employees and categories of employees. The section provides that, even though employees may represent a class or classes of employees already eligible for membership of an existing trade union, (as in this case) these employees may be registered as a union if such a union represents a specific category of eligible

employees who are qualified to form a trade union.

The first part of the section, which prevents members of the same class of employees from registering as a separate trade union, is qualified by the second part of the section which provides that, if they form a specific category of employees in the same profession, they may be allowed to register.

The intention of the section is clear. It is to prevent a proliferation of trade unions within a single trade, profession or industry; that is the effect of the first part of the section. The second part of the section however, if it is construed as it is worded, would allow the registration as a trade union of any group of employees who could show that they represented a specific trade or profession or category of eligible employees. Under the section no group could register unless it came within that provision, and this, to a certain extent, would restrict the number of trade unions which could be registered. There would however, still be a number of groups in numerous categories and sub categories who would be qualified to be registered, and if they were so registered, there would be a plethora of trade unions, thus defeating the object of the section. In order to avoid this situation, the section must be construed, if it can be, to give effect to the intention of the legislature, as manifest in both the first and second parts of the section.

The guide lines of construction followed by this court are set out in the case of Attorney General & Anor v Lewanika & Ors (1). In that case this court followed the relatively new principle of purposive construction set out in the English cases cited therein, and said, at p.30 "It follows, therefore, that whenever the construction gives rise to an unreasonable and an unjust situation, it is our view that judges can and should use their common sense to remedy it - that is by reading words in if necessary - so as to do what Parliament would have done had they had the situation in mind."

In this case, as I have indicated, a strict interpretation of the section could give rise to an unreasonable situation in that the intention of the legislature might be defeated, and it is necessary to construe the section in some way that follows the intention of the legislature. For the purposes of this case it is necessary to consider whether there is anything in favour of the registration of the proposed union of the respondents other than the mere fact that they form a specific category of eligible employees.

The evidence in this case was given by the first respondent, Mr Fabian Zulu. He said that he was a secondary school teacher and he had applied to register a union on behalf of secondary school teachers, in respect of whom a list of one hundred names was submitted to the Labour Commissioner. He said that the majority of members of the existing union, the Zambia National Union of Teachers, were primary school teachers, that, because they were in the minority, the secondary school teachers did not have their grievances dealt with by the union, and, that the union was more concerned with matters of salary and not with other conditions of service. In another part of his evidence he said that teaching in a secondary school is different from that in a primary school because secondary school teachers take specialised subjects and they also have higher qualifications. There was no evidence to contradict this evidence, and, in the court below, as in this court, the only argument against the registration of the secondary school teachers union was that there was already a union for teachers which catered for all members. There was no objection from the existing union.

In considering the application of s.9(8) (c) of the Industrial and Labour Relations Act and its construction under the principles which I have mentioned, one of the matters to take into account is whether the respondents are already adequately represented by an existing union.

If they are adequately represented, there would be no need for the formation of a new union, and the provisions of the second part of section 9(8) (c) of the Act could not be called in aid, because the formation of such a new union would be contrary to the general restriction intended by the section. On the evidence adduced, however, I would find that, as a minority group, the respondents are not adequately represented, and, in order to uphold their constitutional rights, they should be allowed to form a union independently of other teachers.

I would hold that the proposed secondary school teachers union of Zambia comprises a specific category, different from other teachers, who are qualified to form a trade union within the terms of section 9(8) (c) of the Industrial and Labour Relations Act, and that its members are not adequately represented by any other union.

I would find that the provisions of section 9(8) (c) of the Industrial and Labour Relations Act are intra vires the Constitution and allow for the registration of a separate union for secondary school teachers.

I would dismiss this appeal and uphold the order made in the High Court, with costs to the respondents.

MUZYAMBA, J.S.: I have read the judgement of my learned brother Gardner, and, for the reasons that he has given, I would also dismiss the appeal with costs to the respondents to be taxed in default of agreement.

Gardner J S - By a majority the appeal is dismissed with costs to the respondents.
Appeal dismissed.
