

DISTRIBUTABLE (8)

(1) ZIMBABWE BANKS AND WORKERS UNION (2)
TIRIVANHU MARIMO
v
(1) MINISTER OF PUBLIC SERVICE, LABOUR AND SOCIAL
WELFARE (2) THE SHERIFF OF ZIMBABWE (3) ZB BANK
LIMITED

**CONSTITUTIONAL COURT OF ZIMBABWE
GARWE AJCC, GOWORA AJCC, & HLATSHWAYO AJCC
HARARE: 11 MAY 2021 & 5 OCTOBER 2021**

L. Madhuku, for the applicants

M. Chimombe, for the first and second respondents

L. Mapuranga, for the third respondent

GOWORA AJCC

[1] This is an application for direct access to the Court made in terms of s 167(5) of the Constitution as read with r 21 of the Constitutional Court Rules, 2016 (“the Rules”).

[2] The applicants intend to approach the Court in terms of s 85(1) of the Constitution, seeking an order that the fundamental right of every person to form and join trade unions and employer-employee organisations of their choice and to participate in the lawful activities of those organisations, enshrined in s 65(2) of the Constitution of Zimbabwe, 2013, has been and is being infringed by employers in respect of employees who are duly elected, or appointed workers’ representatives and trade union leaders to the extent that the employers in question are permitted by law to

dismiss such employees for acts performed *bona fide* and exclusively as the employee's duties and responsibilities as a workers' representative and trade union leader.

- [3] The court finds that it is not in the interests of justice that direct access be granted in this matter. The reasons for so finding appear hereunder.

FACTUAL BACKGROUND

- [4] This application is borne of the Supreme Court judgment in *ZB Bank Ltd v Marimo* SC 21/20. The background to that decision is set out hereunder. The second applicant was employed by the third respondent as an administrative clerk and was also the chairperson of the workers' committee. The management of the third respondent and the workers' committee were engaged in a dispute over employees' salary increments. The dispute was referred to a conciliator who was unable to get the parties to reach a consensus and issued a certificate of no settlement. Thereafter, between 8 and 15 September 2010, the second applicant sent out emails to his colleagues disclosing, through actual salary figures, the percentage adjustments that had been effected to the managerial employees' salaries. He also stated that the workers' committee had decided to embark on a collective job action to press their interests.

- [5] Pursuant to that conduct, the third respondent charged the second applicant with misconduct for contravening s 11 (1) of S.I 273/2000 ("the code"). The allegations against him were that he had acted in a manner that was inconsistent with the fulfilment of the express or implied conditions of his contract. The premise to the charge was that the second applicant had generated offensive emails to a group of staff

members contrary to the third respondent's standing policy contained in its Information Security Management Policy Document ('IT Policy Document'). It was also alleged that the contents of the emails were inflammatory and contained confidential information. The second applicant was found guilty of the misconduct and dismissed from employment.

[6] He noted an appeal to the NEC Appeals Board, which held that the conduct complained of did not constitute an offence. The Appeals Board further found that the third respondent had not substantiated the allegations relating to the charge preferred against the second applicant. Accordingly, it held that the charge preferred against the second applicant was inappropriate. It stated further that although the second applicant exceeded the limit of the number of emails allowed by the third respondent's IT Policy Document, thereby breaching the appellant's standing policy, the emails were neither inflammatory nor offensive, and that confidentiality had not been breached. It also stressed that the second applicant's conduct was in pursuit of a right to represent workers and that the emails were meant to result in a call for collective job action or at least put pressure on the appellant to accede to the workers' wage demands. The NEC Appeals Board consequently ordered the reinstatement of the second applicant.

[7] Aggrieved by that decision, the third respondent appealed to the Labour Court. It averred that the appeals board erred in failing to find that the second applicant had been properly charged and dismissed from employment and, further, that the appeals board had erred in failing to afford to the third respondent an alternative to the reinstatement of the second applicant.

- [8] The Labour Court found that as the employees were considering going on strike over the wage dispute, the second applicant acted within the bounds of his official duties, as the chairperson of the workers' committee, to communicate developments pertaining to the intended strike to his fellow employees. The court, however, stated that although the second applicant may have gone 'overboard' by breaching the appellant's Information Security Policy, the breach did not warrant a dismissal. Consequently, the third respondent's appeal was dismissed.
- [9] The third respondent subsequently noted an appeal to the court *a quo*. Although three issues stood for determination, the relevant issue germane to the disposal of the present application was couched as follows:
- “Whether the court *a quo* erred in failing to appreciate that the respondent's conduct in violating the standing regulations was a breach of his privileges as the representative of the workers' committee and could therefore not be excused.”
- [10] It had been the third respondent's argument that in exercising his entitlement to champion employees' rights, the second applicant did not have the right to breach the law, in this case the standing policy in question. It was the court *a quo*'s finding that there was merit in that contention. The court further held that the right to champion workers' rights is not exercised in a vacuum but should be exercised within the confines of the law as dictated, in this case, by the relevant code of conduct. Adherence to the law within the code of conduct would ensure that the delicate balance between the competing interests of the employer and those of the workers, through their representatives, is maintained. It was further held that the second applicant would not be able to hide behind his position as the chairperson of the workers' committee should the conduct alleged against him be proved. The court *a quo* further held that the second

applicant had indeed violated the third respondent's IT Policy Document by disclosing confidential information. The appeal was consequently allowed.

- [11] Aggrieved by that finding the applicants filed the present application on 1 April 2021. At the hearing of the application, the first respondent was barred for failure to file any opposing papers in the matter. Thereafter, the Court indicated to the parties that, notwithstanding the preliminary points raised by the third respondent, it would hear all the parties and make a determination on the merits.

APPLICANT'S SUBMISSIONS BEFORE THIS COURT

- [12] The applicants make the following argument. Every person enjoys a fundamental right to form and join trade unions and employee or employers' organisations of their choice and to participate in the lawful activities of those unions or organisations. They contend further that this right has been and is being infringed by employers in respect of those employees who, as duly elected or appointed workers' representatives and trade union leaders, are charged with misconduct and dismissed from employment under a code of conduct for acts performed *bona fide* and exclusively as the employee's duties and responsibilities as a workers' representative and trade union leader. The contention is also put forward that in having a law that permits an employer to dismiss from employment an employee for acts performed under the aforementioned circumstances, the State is infringing the fundamental right protected by s 65(2) of the Constitution. Lastly, the allegation is made that the current labour law as interpreted by the court *a quo*, as was done in the judgment *a quo* and others, is inconsistent with s 65(2) of the Constitution.

[13] The applicants argued that two questions arose for determination and these related to whether or not the applicants were raising a constitutional matter and whether or not it was in the interests of justice to grant direct access. Counsel for the applicants further submitted that there was no doubt that the applicants sought to raise a constitutional issue and that it was in the interests of justice to approach the Court because it was not desirable that they approach the High Court in order to impugn the decision of the Supreme Court with regards to trade union immunity. They further submitted that the matter involved a critique of a Supreme Court decision and as such it was not desirable for it to go before the High Court for determination. The applicants also submitted that they had a *prima facie* or arguable case as the Supreme Court did not apply its mind to the long standing position on trade unions enjoying their immunity in terms of s 101 of the Labour Act [*Chapter 28:01*], (“the Labour Act”). They argued that, within the workplace, employers were regulating the way union leaders conduct themselves and that this was improper conduct on the part of employers generally. In this light, applicants submitted that there were prospects of success in that the Supreme Court’s decision went too far in protecting the employer at the expense of the employee which aspect should be dealt with by a full bench of this Court.

THIRD RESPONDENT’S SUBMISSIONS BEFORE THIS COURT

[14] The application was opposed by the third respondent. In *limine*, it averred that the intended application is a disguised appeal against a final judgment of the court *a quo*. It was also contended that, not having been a party to the proceedings *a quo*, the first applicant has no right to question the correctness of that judgment. The submission is also made that the applicants are not clear as to the law which they seek to challenge. The third respondent further submitted that the application is out of time because it

was made ten months after the judgment *a quo* was handed down and that the applicants ought to have made an application for condonation. On the merits, it was argued that s 65(2) of the Constitution did not support the applicants' contention and that, further to the above, an employee has a duty to comply with the terms of their employment contract and that an employees' representative must carry out their duties in a lawful manner. The third respondent further queried the rationale behind its joinder to the present proceedings.

- [15] The third respondent also argued that the applicants were not challenging the validity of s 101 of the Labour Act but were actually challenging the common law. It submitted that the Supreme Court did not, anywhere in its judgment, refer to the Act but rather dealt with a position of the law embodied in the Code. Thus, argued the third respondent, there was no constitutional matter for adjudication before the court and, that the court in terms of its jurisdiction, is restricted to determine constitutional issues only. The third respondent, further to the above, also argued that an employee cannot hide behind a trade union and be free of the employer's disciplinary tentacles for breaching a code of conduct. This would lead to a situation wherein every employee would then want to be ascribed to the union in an effort to evade disciplinary proceedings for acts of misconduct. In this light, the third respondent stated that it had acted within its powers. Consequently, it was submitted that the matter did not give rise to a constitutional matter. It was a matter that the High Court could deal with taking into account its original jurisdiction. For that reason, it was contended that it was not in the interests of justice to grant direct access. It moved that the application be dismissed with costs.

PRELIMINARY POINTS

WHETHER OR NOT THE APPLICATION IS PROPERLY BEFORE THE COURT

[16] The third respondent contends that the intended application is invalid because it is, *inter alia*, a disguised appeal against the definitive findings on appeal by the Supreme Court. The third respondent contends that the judgment of the Supreme Court is final and no appeal can lie against it. The view of the court is that this argument is on the substance of the nature of the relief being sought in the main application. It is therefore an issue that should be determined on the merits as that is the basis upon which the applicants approach the court for an order for direct access. The point is made however, that the applicants are not seeking leave to appeal.

WHETHER OR NOT THE FIRST APPLICANT IS PROPERLY BEFORE THE COURT

[17] The third respondent, in addition to the above, has argued that it stood to reason that since the first applicant was not a party to the proceedings *a quo*, it lacked the *locus standi* to bring this application. It is contended that the first applicant does not have the right at law to question the correctness of the judgment *a quo*. The court finds no merit in this argument. The applicants are not seeking leave to appeal but rather leave for direct access.

[18] The first applicant is a trade union. The second applicant is one of its members. In establishing *locus standi*, the first applicant avers that it seeks to approach the court in terms of s 85(1)(e) of the Constitution which provision allows an association, acting in the interests of its members, to approach the court to vindicate fundamental rights of its members. Its absence from the proceedings *a quo* is of no moment in the circumstances of this case.

[19] In an application such as this, the overriding consideration is whether or not the first applicant has established that, in the application, it is enforcing or promoting the rights of its members as contended. An analysis of the application will show that the first applicant, in the main application, is seeking the vindication of the rights of its members *qua* employees against those of the employer on the premise that s 101 of the Labour Act [*Chapter 28:01*] is inconsistent with s 65(2) of the Constitution. It is the view of the court that the first applicant has shown that it has a direct and substantial interest as a union in seeking to vindicate the rights of its members. The point by the third respondent as to the standing of the first applicant is without merit and must be dismissed.

WHETHER OR NOT THE APPLICATION IS OUT OF TIME

[20] The third respondent has argued as a preliminary point that the applicant is out of time and ought to be dismissed. I consider that this an issue for determination when the merits of the application are discussed.

I turn to consider the application on the merits.

WHETHER IT IS IN THE INTERESTS OF JUSTICE THAT DIRECT ACCESS BE GRANTED.

[21] The Constitutional Court is a specialised court with limited jurisdiction. It only determines constitutional matters. As a result, direct access to the Court is an extraordinary procedure that is availed only in deserving cases that meet the requirements prescribed by the Constitution and the rules of the Court. Section 167(5) of the Constitution provides:

- (5) Rules of the Constitutional Court must allow a person, when it is in the interests of justice and with or without leave of the Constitutional Court—
- (a) to bring a constitutional matter directly to the Constitutional Court;
 - (b) to appeal directly to the Constitutional Court from any other court;
 - (c) to appear as a friend of the court.

In turn, Rule 21(3) prescribes what ought to be contained in an application for direct access. It reads as follows:

- (3) An application in terms of subrule (2) shall be filed with the Registrar and served on all parties with a direct or substantial interest in the relief claimed and shall set out—
- (a) the grounds on which it is contended that it is in the interests of justice that an order for direct access be granted; and
 - (b) the nature of the relief sought and the grounds upon which such relief is based; and
 - (c) whether the matter can be dealt with by the Court without the hearing of oral evidence or, if it cannot, how such evidence should be adduced and any conflict of facts resolved.

Rule 21(8) goes on to provide:

- (8) In determining whether or not it is in the interest of justice for a matter to be brought directly to the Court, the Court or Judge may, in addition to any other relevant consideration, take the following into account—
- (a) the prospects of success if direct access is granted;
 - (b) whether the applicant has any other remedy available to him or her;
 - (c) whether there are disputes of fact in the matter.

[22] The primary task therefore is to determine whether it is in the interests of justice for direct access to be granted. The main argument by the applicants is that the law that permits an employer to discipline an employee for acts done *bona fide* in the exercise by that employee of his or her duties and obligations as a worker or union representative violates a fundamental right and is an infringement of s 65(2) of the Constitution. This section provides as follows:

- “(2) Except for members of the security services, every person has the right to form and join trade unions and employee or employers’ organisations of their

choice, and to participate in the **lawful** activities of those unions and organisations.”(my emphasis)

[23] The applicants argue that the above section protects, in unequivocal terms, the actions of an employee in pursuit of the rights of the employees where such employee commits acts of misconduct *bona fide* in the pursuit of the rights of those he represents in the workplace. Therefore, so goes the argument, any law contained in codes of conduct that permits an employer to discipline an employee who acts *bona fide* and contrary to his contract of employment is an infringement of the right contained in s 65(2) above.

[24] The applicants have not identified, with any specificity, the law that they intend to challenge. In one breath they aver that they allege an infringement of s 65(2) by the law emerging from the interpretation by the Supreme Court of s 101 of the Act. They contend that, at the stage of the application for access to the court, the merits of the intended application are irrelevant. They contend that, by merely alleging an infringement of a constitutional right, they have shown that they are raising a constitutional matter for jurisdictional purposes. They are mistaken.

[25] It is now settled in this jurisdiction that, in view of the position of the Court as a specialised court, an applicant must show that it is in the interests of justice that access to the court be granted. One of the factors that a court may take into account is whether or not the application has prospects of success. The *locus classicus* is *Lytton Investments (Pvt) Ltd v Standard Chartered Bank Limited and Another* CCZ 11/18, where the court stated:

“The Court turns to determine the question whether the applicant has shown that direct access to it is in the interests of justice. Two factors have to be satisfied. The first is that the applicant must state facts or grounds in the founding affidavit, the consideration of which would lead to the finding that it is in the interests of justice to have the constitutional matter placed before the Court directly, instead of it being heard and determined by a lower court with concurrent jurisdiction. The second factor is that the applicant must set out in the founding affidavit facts or grounds that show that the main application has prospects of success should direct access be granted.”

[26] The court holds that the applicants have failed to show that the application has prospects of success. The reasons for so holding are the following.

[27] The application does not raise a constitutional matter for determination by the Court. The relief being sought in the draft order is set out to be the following:

1. That it be and is hereby declared that it is an infringement of the fundamental right protected by s 65(2) of the Constitution of Zimbabwe, 2013, for an employment code of conduct registered in terms of s 101 of the Labour Act [*Chapter 28:01*] to permit an employer to dismiss from employment an employee for acts performed *bona fide* and exclusively as that employee’s duties and responsibilities as a duly elected or appointed workers’ representative and trade union leader.
2. That, for the avoidance of doubt, and arising from the order in para 1, it is declared that the current labour law of Zimbabwe contained in s 101 of the Labour Act [*Chapter 28:01*] and as interpreted by the Supreme Court of Zimbabwe in judgments such as *ZB Bank Limited v Tirivanhu Marimo* (Judgment No. SC 21/20), namely that an employer may be permitted by a registered code of conduct to dismiss from employment an employee for acts performed *bona fide* and exclusively as that employee’s duties and

responsibilities as a duly elected or appointed workers' representative and trade union leader, is inconsistent with the aforesaid s 65(2) of the Constitution and therefore invalid, null and void and of no force or effect.

ACCORDINGLY, IT IS ORDERED:

3. That s 101 of the Labour Act [*Chapter 28:01*] **must be interpreted** in a way that makes it not contemplate (*sic*) a registered code of conduct that permits an employer to dismiss from employment an employee for acts performed bona fide and exclusively as that employee's duties and responsibilities as a duly elected or appointed workers' representative and trade union leader.(my emphasis)
4. There shall be no order as to costs.

[28] An analysis of the draft order does not lead to an order invalidating any law. The order sought seeks to create immunity for employees from disciplinary action within the workplace. The code of conduct which, in this case, would be the offending law, has not been challenged. It was conceded by the applicants' counsel that the majority of codes of conduct are the product of negotiated collective bargaining agreements drawn up by the employers' organisations and the employee organisations of the sector in respect of which the collective bargaining agreement relates to. In my view, it is in the collective bargaining agreement that any immunity, if it is to be granted, must be provided for.

[29] The contention by the applicants is that in a series of judgments, the last of which is *ZB Bank Ltd and Marimo*,(supra), the Supreme Court has found that a union representative who commits an act of misconduct at his workplace in an endeavour to

further the interests of the membership of the union is not immune from disciplinary proceedings. The applicants further contend that this position violates the right provided for in s 65(2) of the Constitution. The right in the section is available to a person to participate in the lawful activities of a union.

[30] My reading of the subsection does not suggest, by any stretch of the imagination, that employees are given *carte blanche* by the Constitution to breach their contracts of employment and provisions contained in codes of conduct and thus create havoc or anarchy within the workplace under the guise of furthering the interests of workers and the union. The contention that the Supreme Court judgment cannot be subjected to scrutiny by the High Court is evidence of the argument by the third respondent that the intended application does not raise any constitutional issues and is in point of fact a disguised appeal.

[31] In order to participate in the activities of a union, a person must be a member of such union. The constitution of the first applicant provides that “membership of the union shall be open to all employees in the financial services industry”. It stands to reason, therefore, that one’s route to union membership is firmly hinged on one’s employment status. One must be an employee, but one must also be an employee in the relevant or appropriate employment sector. If one is not an employee one cannot be involved in union duties nor can one lawfully represent other employees in relation to labour rights.

[32] Thus, the employer-employee relationship is the glue that connects an employee on the one hand and his capacity to act for a union within the industry, on the other.

The employer-employee relationship is sacrosanct and based on trust. The employee is therefore obliged to act in good faith and in a manner that is consistent with the interests of his or her employer. The fact that an employee is a member of a trade union or is a workers' representative does not sever the employment relationship. It does not qualify any of the obligations and duties that each owes the other under the contract of employment. The terms of the contract of employment define the ambit of the parties' relationship. To place the employee's status as a union member or workers' representative above that of the employment contract would be to subsume the contract of employment under such membership. That cannot be a correct position of the law as it pertains to employment contracts.

[33] Section 65 (2) upon which the applicants seek reliance for the alleged violation of the fundamental rights of employees in the workplace does indeed protect the right of every person to form, join and participate in the activities of a trade unions or employer organisations. The rider to the right is that such participation must be clothed with legality. The applicants' counsel was pressed on this issue and was constrained to concede that the activities protected under section 65 (2) must be lawful. It was pertinent to note that applicants' counsel admitted that the participation of the second applicant or his colleagues in an illegal strike would not be the lawful activities contemplated by the section for protection. In my view the concessions from counsel establish that the application does not enjoy prospects of success.

[34] The employment relationship is a voluntary one and the employee is duty bound to honour it if he or she wishes to remain in the relationship. Inherent in the contract of employment is the employer's right to discipline an employee for perceived acts of

misconduct. The applicants accept that codes of conduct that are registrable under s 101 of the Act provide for disciplinary measures for misconduct in the workplace. Thus, the Act itself limits the right to engage in trade union activities unless such activities are lawful. The activities must be consistent with the law and the employer's interests.

[35] The contention by the respondents, which contention finds favour with me, is that the applicants have not identified which law they seek to challenge. They accept that disciplinary measures in the workplace are permitted in terms of s 101 which not only provides for the registration of codes of conduct but sets out what a code of conduct may provide for. They are not seeking to impugn this section. What they suggest is that the proposition by the Supreme Court to hold that an employee may be disciplined for those acts of misconduct done by an employee as a worker representative is in violation of s 65(2) of the Constitution. The Constitution gives every person the right to participate in the "lawful activities" of a trade union. It does not give licence to members to breach the law. The right does not exist in a vacuum and the right must be balanced against the interests of the employer and taking into consideration the obligations that an employee owes his or her employer.

[36] An argument raised by the third respondent as a preliminary point was to the effect that the intended application is a disguised appeal against the judgment of the Supreme Court and that for that reason the application was not properly before the Court. The argument by the applicants is that the Supreme Court is the highest court in relation to matters that do not raise a constitutional issue and no appeal lies against a decision

of that court. The additional argument made is that the order being sought is evidence of the nature of the application that they seek to bring.

[37] It is correct, as contended by the third respondent, that the Supreme Court is the highest court in this jurisdiction and that no appeal lies against its decisions unless the decision is on a constitutional matter. However, it is settled that the law allows an attack against a judgment of the Supreme Court where certain requisites have been met on the premise of the attack. In *Denhere v Denhere* CCZ 9/2019, the Court set out the principle for an attack on a Supreme Court judgment in the following terms:

“In *Lytton Investments (Private) Limited v Standard Chartered Bank Zimbabwe Limited & Anor* CCZ 11/18, the Court noted at pp 6-11 of the cyclostyled judgment that:

“Consideration of the relevant constitutional provisions supports the view that the validity of a decision of the Supreme Court in proceedings involving non-constitutional matters may be challenged on the ground that it has infringed a fundamental right or freedom enshrined in *Chapter 4* of the Constitution. The basis of the right of a party to the proceedings to challenge the validity of a decision of the Supreme Court in the circumstances is the Constitution itself. The right given to a litigant under s 85(1) of the Constitution to approach the Court for appropriate relief on the allegation stated is correlative to the constitutional obligation imposed on the Supreme Court as a body exercising public authority. ...

The scope of the right to approach the Court for appropriate relief under s 85(1) of the Constitution is not limited by specific objects against which the allegations of infringement of a fundamental right or freedom can be made. A constitutional complaint provided for under s 85(1) of the Constitution can be lodged against any act of public authority. A decision of the Supreme Court in a case involving a non-constitutional issue would fall within the category of acts, the constitutional validity of which may be challenged on the grounds prescribed under s 85(1) of the Constitution.”

[38] That the applicants enjoy the right described above is not in doubt. The test for challenging a judgment of the Supreme Court was established in the case of *Lytton Investments P/L v Standard Chartered Bank*, (*supra*) as follows:

“The facts must show that there is a real likelihood of the Court finding that the Supreme Court infringed the applicant’s right to judicial protection. The Supreme Court must have failed to act in accordance with the requirements of the law governing the proceedings or prescribing the rights and obligations subject to determination. The failure to act lawfully would have to be shown to have disabled the court from making a decision on the non-constitutional issue.

The theory of constitutional review of a decision of the Supreme Court in a case involving a non-constitutional matter is based on the principle of loss of rights in such proceedings because of the court’s failure to act in terms of the law, thereby producing an irrational decision. There must, therefore, be proof of the failure to comply with the law. The failure must be shown to have produced an arbitrary decision.

Arbitrariness and inconsistencies threaten the claim to judicial authority. The remedy under s 85(1) of the Constitution is not for the protection of fundamental rights and freedoms in the abstract. Concrete review requires that there be clear and sufficient evidence of the facts on the basis of which allegations of infringements of fundamental rights or freedoms are made.”

[39] In the averments made by the applicants in this matter there is no allegation that the Supreme Court failed to comply with the law. Its compliance with the law is not only conceded, it is accepted. It is in fact accused of complying with and upholding the provisions of codes of conduct in the workplace. There is thus no suggestion of arbitrariness on the part of the Supreme Court. Further, there is no suggestion in the application itself that the decision of the Supreme Court is in any way inconsistent with the law thus justifying an attack on the decision on the basis that it has violated a fundamental right. As stated by the Court in *Lytton*, (*supra*), the remedy under s 85 is not for the protection of fundamental rights in the abstract. An applicant must show the breach of the fundamental right. As contended by the third respondent, correctly in my view, the applicants have brought to the Court an

application that is to all intent and purposes a disguised appeal against the judgment of the Supreme Court in *ZB Bank v Marimo (supra)*.

[40] A selective comparison may be drawn from South Africa where s 14 (4) of the Labour Relations Act, 66 of 1995, provides that a trade union representative has the right to perform various functions at the request of an employee in the workplace. Furthermore, item 4(2) of Schedule 8 of the Labour Relations Act, 66 of 1995, as amended also provides that discipline against a trade union representative or an employee who is an office-bearer or official of a trade union should not be instituted without first informing and consulting the trade union. In that context, the Labour Appeal Court said the following in *BIFAWU & Another v Mutual & Federal Insurance Co Ltd* (2006) 27 ILJ 600 (LAC) at paras [19] and [21]:

“That an employee, even when he or she is representing a fellow employee at a disciplinary enquiry or arbitration hearing, owes certain duties to an employer cannot be doubted. Among these is the duty to act honestly. ... After all, when an employee represents a fellow employee at a disciplinary enquiry or arbitration hearing, he or she does so precisely in that capacity of being a fellow employee. The fellowship does not transubstantiate the continuing employment relationship between the employer and the representing employee.

... the right and duty to represent a fellow employee to the best of one’s ability is not an unbridled licence; it is constrained by the duty to do so honestly. Without honesty on the part of the representatives of the parties, the system would be unviable.”

[41] It is the Court’s view that a workers` representative`s actions, *bona fide* or *mala fide*, and whether carried out in furtherance of his or her duties as a trade unionist or employees` representative, ought not to undermine the employer/employee relationship. This is because the employment relationship is intrinsically both cooperative and antagonistic. It is cooperative in as much as employers and employees

are mutually dependent on one another to secure their goals. At the same time, it is antagonistic because of the different interests that the parties may hold.

[42] The final issue for consideration is whether or not the application is out of time. The Constitution does not prescribe a time frame within which an application premised on s 85 must be brought to court. In turn, the rules do not provide for a time limit within which such application should be brought to court. There is no suggestion on the part of the third respondent that the time frame as to when an application should be mounted is an issue for consideration by the Court. It is not one of the factors for consideration in the assessment of prospects of success vis-a vis the application for direct access. In any event, apart from a bald statement that the application was out of time, the third respondent did not attempt to provide the Court with a proper argument on the substance for the submission. The argument on this point is dismissed as having no merit.

[43] The Court holds that the applicants have failed to demonstrate that it is in the interests of justice to grant leave for direct access. This is because the right to participate in the activities of a trade union or act as a workers' representative cannot be exercised to undermine the employer/employee relationship.

DISPOSITION

[44] In the result, the application be and is hereby dismissed with no order as to costs.

GARWE AJCC : I agree

HLATSHWAYO AJCC : I agree

Lovemore Madhuku Lawyers, applicant's legal practitioners

Gill, Godlonton & Gerrans, legal practitioners for the third respondent