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The summary dismissal of nurses by the Zimbabwean Vice President: what does the law say?

Brief Background

Barely one month after the industrial action of junior doctors' in March 2018, saw the government being put to another test. More than 13 000 nurses working in public hospitals went on strike to press the government for payment of their last year's allowances, better working conditions and to fix a flawed system for grading salaries. They also demanded improved working conditions. The industrial action left public hospitals understaffed and risking the lives of admitted patients across the country. The Secretary General (Enoch Dongo) for the Zimbabwe Nurses Association (ZINA), which has more than 16,000 members, stated that government negotiators had tried to avert the strike by promising to pay arrears but nurses resolved to go on strike.¹ According to ZINA, the lowest paid nurse in Zimbabwe earns a gross monthly salary of \$284 before allowances.

The decision to summarily dismiss striking nurses

The ZINA and the Health Services Board (HSB) engaged in negotiations with the Minister of Health and Child Welfare Dr David Parirenyatwa to find an amicable solution to resolve the industrial action. Following these engagements, it was reported by the Vice President General Constantino Chiwenga (Retired) that the government had availed \$ 17 114 446 to the

¹ Zimbabwe's nurses go on strike over allowances. *The Herald* 16 April 2018

ministry of health.² The VP and ministry of health pleaded with the striking nurses to return to work. However, ZINA did not heed to this call and stated that the offer of \$ 17 114 446 related to arrears for allowances dating back to 2010.³ When the nurses and its association stood steadfastly and persisted with the strike, the VP summarily dismissed all the nurses on the eve of the country's Independence Day.⁴ The VP alluded that the industrial action was politically motivated and could not be tolerated. He implored the HSB to recall retired nurses and speed up the process of employing qualified nurses to fill the vacancies of the striking nurses.

The decision to dismiss the nurses was endorsed by the President Emmerson Dambudzo Mnangagwa in a statement wherein he indicated that: *“Government has done everything to comply with the demands of the striking nurses and the striking nurses have done everything to defy the directive by Government. This leaves us with no option, but to dismiss them.”*⁵ A day after the announcement to dismiss the nurses, ZINA released a statement asserting that:

1. ‘Our members are employed by the Health Services Board in terms of written contracts of employment, which contracts still subsist;
2. Our grievances which relate to poor and dangerous working conditions which threaten our health and affects the discharge of our duties, remain unaddressed;
3. The USD \$ 17 144 446 referred to by the Vice President in his press statement as having been transferred to the Ministry of Health relates to arrear allowances dating back to 2010. It is in no way related to our current demands that triggered the collective job action;
4. The USD\$ 17 144 446 has not been received by our members. We cannot confirm that such payment was made to the Ministry of Health;
5. We gave our employer notice of intention to resort to collective job action should our grievances remain unaddressed. Upon the expiration of the notice and when the employer failed to address our concerns, we embarked on a lawful collective job action;
6. We have engaged with the Health Services Board to confirm that it will not implement the directive issued by the Vice President by not later than 1600hrs, on 19 April 2018, failing which we shall approach the High Court on an urgent basis to protect our rights.’

² Press statement by Hon. Vice President C.G.N.D. Chiwenga In his capacity as the Supervisor of the social services cluster on the continuing industrial action by nurses: Released on 17 April 2018

³ Press Statement by ZINA Executive Committee. Released on 18 April 2018

⁴ Press statement by Hon. Vice President (n 2)

⁵ The Government fires all striking nurses; *The Herald 18 April 2018.*

Some inescapable questions that many have grappled with are; whether civil servants (in particular nurses/health workers) are entitled to the right to strike? was the government justified in firing the striking nurses? The complexity of these questions are compounded by the fact that the right to strike is viewed by others as a fundamental human right which ought to be recognised in any democratic society, while other jurisdictions do not recognise it in their constitutions.⁶ In the succeeding discussion, I shall attempt to answer these questions.

The Right to strike in Zimbabwe

The Zimbabwean Constitution of 2013 is the supreme law of the land and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.⁷ This means that if the constitution provides for the right to strike, any law which purports to prohibit the right would be void.

Section 65 (3) of the Constitution stipulates that *'[except for members of the security services], every employee has the right to participate in collective job action, including the right to strike, sit in, withdraw their labour and to take other similar concerted action, but a law may restrict the exercise of this right in order to maintain essential services'*.

Section 65(3) *prima facie* provides for the right to strike. Despite this, public service employees in Zimbabwe are regulated by the Public Service Act⁸ which applies to all employees rendering services to the government (except for the security services, judiciary, parliament and the intelligence services). Such employees do not have the right to engage in collective bargaining nor the right to strike.⁹ Linked to the right to strike entrenched in the constitution are; the right

⁶ In SADC, the right to strike is recognized in the Constitution of the following countries, Malawi, Namibia, South Africa and Zimbabwe.

⁷ Section 2 of the Constitution of Zimbabwe 2013

⁸ Public Service Act 21 of 1995 (Chapter 16:04)

⁹ Section 19(1) of Public Service Act

to freedom of assembly and association as well as the right to freedom to demonstrate and petition which are provided for in section 58 and 59 respectively.

Civil servants in the health sector are regulated by the Health Services Act,¹⁰ (HSA) which recognises their rights to form associations but does not recognise the right to strike. The HSA does not recognise the right to strike despite the right being recognised as a fundamental right entrenched in the Constitution. One question that remains unanswered is whether failure to recognise the right to strike in the HSA simply means health workers cannot embark on a legal industrial action where their demands are legitimate?

Zimbabwe has a mixed and convoluted labour law system to regulate employees' rights in the public and private sector. The nature of the services provided determines the type of rights that employees are entitled to. Again the Minister responsible for the Public Service, Labour and Social Welfare has a discretion to prohibit strikes in sectors that he/she may willy-nilly categorise as providing essential services

Strikes are not permissible in essential services. A question that immediately comes to mind is: what do essential services entail? What constitutes essential services has been a subject of international and regional debate and I shall attempt to briefly discuss this concept. In Zimbabwe, an essential service is defined as being:

‘...Any service the interruption of which endangers immediately the life, personal safety or health of the whole or part of the public...’¹¹

Despite this definition which is in conformity with the International Labour Organisation strict definition, it fails to distinguish between essential and non-essential employees within such services. It therefore casts the net of essential services very wide. Nonetheless it is indubitable that the health workers (in particular nurses) provide lifesaving services to the public.

As mentioned above, strikes are prohibited in sectors that provide essential services. The Labour (Declaration of Essential Services) Notice, 13 June 2003

¹⁰ Health Services Act 28 of 2004 (Chapter 15:16).

¹¹ Labour Act [Chapter 28:01] section 102

declared an extensive list of services that are regarded as essential.¹² This list includes all health workers (i.e. ambulance drivers; nurses; doctors, pharmacists; radiographers; physiotherapists; pharmacy technicians; medical laboratory technologists; laboratory technicians; dentists). Thus, all workers within the health sector are classified as providing essential services and this essentially means they do not enjoy legal rights to conclude binding collective agreements or the right to strike.¹³ Thus disputes in these services that have not been settled within 30 days or such other period as agreed to by the parties will be referred to compulsory arbitration.¹⁴

International Law on the right to strike/ industrial action

Internationally, the right to strike is recognised as one of the important labour standards. Several international legal instruments of the United Nations and the International Labour Organisation (ILO) regulate the right to strike. These instruments afford the right a universal character. Art 20 of the *Universal Declaration of Human Rights (1948)*, indirectly provides for the right to strike.¹⁵ The *International Covenant on Economic, Social and Cultural Rights (1966)* specifically creates an obligation for state parties to provide for ‘*the right to strike if exercised according to the laws of each particular state*’¹⁶

Furthermore, the ILO adopted numerous legal instruments relating to the right to strike. The most important of these are the Convention no. 87 ‘Freedom of Association and Protection of the Right to Organise of 1948’, Convention no. 98 on the ‘Right to Organize and Bargain Collectively’ and the 1949 Recommendation no. 92 on ‘Voluntary conciliation and Arbitration.’

It is important to note that Zimbabwe is a member of ILO and has ratified some of the conventions which promote workplace democracy such as Convention no. 87 which describes a strike as a fundamental right to organise. While the right to

¹² The list includes inter alia: fire services; supply and distribution of water, veterinary services, health services, transport and communication services,

¹³ ITUC 2013 Survey of the Violation of Rights of Trade Union at: <http://survey.ituc-csi.org/Zimbabwe.html?lang=en#tabs-2>

¹⁴ Labour Act [Chapter 28:01] section 93

¹⁵ Art 20 (1) of the *Universal Declaration of Human Rights* provides that everyone has the freedom to peaceful assembly and association

¹⁶ Article 8 of *International Covenant on Economic, Social and Cultural Rights*

strike is internationally recognised as a fundamental right; in Zimbabwe, it is systemically limited to certain employees in non-essential sectors. Separate legislation also limit the right as stipulated in the HAS. This implies that nurses who embarked on an industrial action do not enjoy this fundamental right. In a constitutional democracy, this type of differential treatment of employees' rights especially by the government is arguably unconstitutional. What remains unclear is whether the differentiation is justifiable in an open and democratic society.

Challenges faced by civil servants that intend to strike

Despite the constitution clearly providing for the right to strike, other labour legislations contain unclear provisions on whether a strike is permitted for civil servants involved in the provision of essential services.¹⁷ These laws have not yet been harmonised with the 2013 Constitution. As pointed out in the preceding discussion, the HSA recognises the health workers' right to join an association for purposes of collective bargaining but not the right to strike. This type of legislation creates uncertainties. For instance, where the association (in this case ZINA) fails to reach an agreement with the government, it remains unclear whether that will be the end of the road or employees may then withdraw their services. These legal uncertainties essentially present a plethora of challenges to civil servants when negotiating better wages through their respective associations or trade unions. Some of the challenges include:

1. Threat of losing employment
2. Bureaucratic structures that makes the process tedious.
3. Minister of Public Service, Labour and Social Welfare's veto powers and discretion to categorise any trade or profession as providing essential services which makes it virtually uncertain to embark on industrial action
4. Industrial action being viewed as political at times by the ruling Zimbabwe African National Union Patriotic front (ZANU PF) government as meant to sabotage economy

Was the decision to dismiss nurses lawful?

¹⁷ Uzhenyu D 'Is There Labour Right Provision To Strike In Zimbabwe In Light Of The New Zimbabwe Constitution Of 2013 And The Labour Amendment Act Number 5 of 2015? *IOSR Journal of Business and Management (IOSR-JBM)*

I shall endeavour to answer this question. I will not extend my discussion to the powers of the Vice President, but will proffer advice from an administrative law lens. Administrative law regulates the legal relations between public authorities and private individuals and bodies, and between a public authority and other public authorities.¹⁸ The primary function of administrative law is to exert reasonable legal control over the way in which authorities exercise their functions to guard against abuse of powers.¹⁹ Thus, administrative law is a tool that seeks to achieve a balance between public authorities and those they interact with, and in the process to ensure the maintenance of public. Section 68 of the Constitution guarantees the fundamental right to administrative justice. It stipulates that:

'Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair.'

To fulfil and give effect to this right, the legislature promulgated the Administrative Justice Act (AJA).²⁰ Section 2 of AJA defines administrative authority as including any person, committee or council of a local authority. It also defines administrative action as including any action or decision taken by an administrative authority. The decision of the VP undoubtedly falls under administrative action since he acted in his powers while performing his public function as the supervisor of the social services cluster. However, section 3 places an obligation on administrative authorities when making decisions that will affect the rights, interests or legitimate expectation of any person to act lawfully, reasonably and in a fair manner.

In terms of AJA, to satisfy the prerequisite of 'acting in fair manner' the authority ought to give the concerned person(s) adequate notice of the nature and proposed action, a reasonable opportunity to make adequate representations and notice of any right of review or appeal, if applicable. The requirement of a reasonable opportunity to make adequate representation is one of the cornerstones of natural justice anchored on the *audi alteram partem* maxim. (the right to be heard)

The VP announced the dismissal of nurses approximately two days after the concerned workers embarked on the industrial action. No notice or opportunity to engage was afforded to them before the dismissal. For this reason the VP's

¹⁸ G. Feltoe (2012) A Guide to Administrative and Local Government Law in Zimbabwe p 3

¹⁹ Ibid

²⁰ Act 2004 [Chapter 10:28]

decision flies in the face of the Constitution that he ought to promote and uphold. Courts have on several occasions reproached government authorities,²¹ for failing to exercise their administrative authority in a manner that is fair and does not infringe the rights of the interested persons. Some authors have argued that no administrative authority should be given the discretion to depart from the requirement to act in a reasonable manner and that no statute should exempt an administrative authority from this obligation. Departure from these requirements may be justifiable but in extremely rare cases.²² Section 11 of AJA read with Part 1 of the Schedule exempts certain bodies from having to comply with the above requirements. These exempted decision-makers bodies are:

- i. President or Cabinet in the performance or exercise of executive powers
- ii. Prosecution authorities in decisions regarding prosecution of offenders
- iii. Decision-makers in respect of decisions relating to the appointment of judicial officers.

When the VP took the decision to dismiss nurses, he stated in his press statement that he was acting in his powers as the ‘supervisor of the social services cluster’. Thus, the dismissal of nurses with regard to section 68 of the Constitution and section 3 of AJA is undoubtedly a contravention of the right to right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair.

Conclusion

It is clear that the right to strike is a fundamental constitutional right recognised in Zimbabwe. However, different statutes limit the right to strike, in this case the HSA does not recognise it. Perhaps, the reasoning is imbedded in the fact health workers provide essential services to the public. However, the exclusion of the right to strike in the HSA creates confusion, particularity because this right is linked to the right to freedom of association, which the HSA recognises. Additionally, it is important to emphasise that when a country’s legislation deprives public servants in essential services of the right to strike, workers lose an essential means of defending their interests. Their plight is further exacerbated when their job security is threatened. As such, it is essential that the rights

²¹ N & B Ventures (Pty) Ltd v Minister of Home Affairs and Anor 2005 (1) ZLR 27 (H)

²² G. Feltoe ‘Giving with one hand and taking back with the other: the exemptions and exclusion in the Administrative Justice Act’ 2004 Issue No 11 *Zimbabwe Human Rights Bulletin* 106

entrenched in the Constitution are progressively realised to ensure the development of a sound and plausible legal system in a democratic and constitutional society.