REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CIVIL APPEAL NO. P320 OF 2018

Complaint No. GSD IRO 35 of 2018

Application No. 7 of 2018

IN THE MATTER OF THE INDUSTRIAL RELATIONS ACT,

CHAPTER 88:01

IN THE MATTER OF A COMPLAINT BY OILFIELDS WORKERS' TRADE UNION, PURSUANT TO SECTION 84 (1) OF THE INDUSTRIAL RELATIONS ACT, OF THE COMMISSION OF AN INDUSTRIAL RELATIONS OFFENCE IN BREACH OF SECTION 40 (1) OF THE INDUSTRIAL RELATIONS ACT

AND

IN THE MATTER OF AN APPLICATION BY OILFIELDS WORKERS' TRADE UNION FOR AN INTERIM ORDER UNDER THE PROVISIONS OF THE INDUSTRIAL RELATIONS ACT CHAP 88:01 AND IN PARTICULAR UNDER SECTIONS 7 (1) AND/OR 10 (1) (B) THEREOF AND/OR THE INHERENT JURISDICTION OF THE COURT

BETWEEN

PETROLEUM COMPANY OF TRINIDAD AND TOBAGO LIMITED

Appellant

OILFIELDS WORKERS' TRADE UNION

Respondent

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

(JOINED AS AN INTERESTED PARTY TO Application No. 7 of 2018 by Order of the Industrial Court on October 4, 2018)

Interested Party

PANEL: I. Archie, Chief Justice

A. Mendonca, Justice of Appeal

A. des Vignes, Justice of Appeal

APPEARANCES:

Mr. R. Amour SC., Ms. V. Gopaul, Mr. D. Ali instructed by Ms. M. Ferdinand and Ms. K. Peterson for the Appellant.

Mr. D. Mendes SC., Mr. A. Bullock instructed by Ms. L. Abdulah for the Respondent

Mr. S. Jairam SC., Mr. R. Dass instructed by Mr. D. Allahar for the Interested Party.

DATE DELIVERED: 18 OCTOBER, 2018

I have read the judgment of Archie C.J., I agree with it and have nothing to add.

A. Mendonca

Justice of Appeal

I too agree.

A. des Vignes

Justice of Appeal

JUDGMENT

Delivered by Ivor Archie, C. J.

Introduction

1. This appeal is of significant importance because it raises a jurisdictional issue with regard to the power of the Industrial Court. At the heart of the appeal is whether the Industrial Court has the power to grant injunctive relief in respect of an Industrial Relations Offence (IRO). Although this issue has been hotly debated since the grant of the injunction herein on 8 October, 2018, it is not new. In fact, there has been a divergence of opinions expressed at the level of the Industrial Court, which creates uncertainty that this court must resolve. We answer the question in the affirmative. The second issue to be addressed is whether, in any event, the Industrial Court demonstrated in its decision that it had properly exercised its discretion within the permissible margin of appreciation so as to preclude our intervention.

Background

2. The existing state of affairs is as a consequence of the appellant's ["Petrotrin's"] decision to terminate the services of some five thousand five hundred (5500) workers, and to close its refinery operations. Petrotrin is the largest state owned corporation with dual operations; upstream operations in exploration and production (E&P) and downstream operations in refining and marketing (R&M). The uncontroverted evidence is that Petrotrin has been operating at a loss from 2014 to 2017. With the aid of its consultants, Petrotrin explored what it would take to operate E&P and R&M efficiently, so that it could be profitable and meet its debt obligations on its own. These debt obligations included short term loan facilities of approximately US$500 million – US$600 million, the payment of a US$850 million bond due in August 2019 and approximately US$250 million due in 2022.

3. As a result of the consultations that were had amongst Petrotrin's management, its Board and its consultants, the Board was of the view that E&P could be made profitable and R&M, with significant improvements on almost every international benchmark, could be made slightly positive to neutral on its cash flow. Petrotrin, by letter dated 5 March 2018, to the respondent

["the Union"], affirmed its commitment to a consultative approach with the Union to agree on a road map to make the company competitive. Petrotrin also proposed the establishment of a joint committee comprising of members from the Union and from Petrotrin's senior management. On 3 April, 2018, the Union and Petrotrin signed a Memorandum of Agreement (MOA), which inter alia, provided that the parties would discuss strategies that would ensure the Company's sustainability[1].

4. Sometime in or around the third week of August 2018, in the course of examining the options available for the continuation of operations in E&P and R&M, Petrotrin was advised that the continued operation of the refinery required substantial cash flow, and this was not possible when considered against the backdrop of its existing debt of TT$13 billion. The only viable economic plan that did not require ongoing subventions from the government or supplementation from other sources was to shut down the Company and invest in E&P, which could earn a return. The Board went to Cabinet and shared this information and received its approval to move forward with the closure of Petrotrin (as a legal entity) and termination of its employees.

5. Petrotrin met with the Union on 28 August, 2018, to discuss the change in circumstance, that is, that sustainability of the company in its existing configuration was no longer a viable option. The Union was informed that closure of Petrotrin was the only viable economic and financial option, and that its employees would be terminated and a stand-alone company, focused on E&P, would assume responsibility for the servicing of Petrotrin's debts.

6. Subsequent to the meeting of 28 August, 2018, Petrotrin met with the Union on four other occasions; 11 September, 2018, 19 September, 2018, 25 September, 2018 and 1 October, 2018. The meetings provided a platform to have the Union's questions and concerns addressed. Additionally, the Union was given the opportunity to present a proposed alternative plan to closure, which it did, but Petrotrin pointed to substantial deficiencies in the plan, which, from Petrotrin's point of view made it unsusceptible to proper assessment. A smaller team, at the request of the Union, was created to assist the Union with shaping its

[1] Memorandum of Agreement, exhibited "OW 4" affidavit of Oswald Warwick dated 1 October, 2018.

alternative plan and Petrotrin offered the services of a Board member for that exercise. In the meantime, Petrotrin commenced informing its workers that they would be terminated and that the company would be closed on 30 November, 2018.

7. By letter dated 1 October, 2018, the Union made a complaint to the Industrial Court pursuant to section 84 (1) of the Industrial Relations Act (IRA) alleging that Petrotrin was in breach of section 40 (1) of the IRA. The Union sought the following orders:

    i. An order that Petrotrin acted in violation of section 40 (1) of the IRA by failing, in good faith, to treat and enter into negotiations with the Union for the purpose of collective bargaining and,

    ii. An order imposing a fine of $4,000.00 on Petrotrin.

    iii. An order restraining Petrotrin from terminating the employment of any employee pursuant to any restructuring.

    iv. An order mandating Petrotrin to negotiate with the Union in good faith, in accordance with section 40 (1) of the IRA.

8. On 2 October, 2018 the Union filed an injunction application supported by affidavit, seeking interim orders against Petrotrin in the following terms:

    i. An order restraining [Petrotrin], its agents and servants from terminating or otherwise determining any contract of employment entered into between [Petrotrin] and members of the bargaining units of which [the Union] is the recognised majority union until determination of the complaints or until further order from the court;

    ii. An order restraining [Petrotrin], its agents and servants from making any offer for the voluntary separation from employment of any of its workers who may be members of the bargaining units of which [the Union] is the recognised majority union until the determination of the complaints or until further order from the court.

9. At the hearing of the application for interim injunctive relief, the Attorney General (AG) applied to be joined as an interested party. The parties agreed to have the AG heard on the

interim application, and the court so granted. The Industrial Court on hearing the application granted the injunctive relief sought. It is this decision which Petrotrin has appealed.

10. Before the hearing of this appeal Petrotrin applied for and was granted, on 10 October, 2018 a stay of the injunction until the hearing and determination of the appeal. By its amended notice of appeal, Petrotrin filed 17 grounds of appeal, which may be broadly summarised under the following heads:

    i. Lack of jurisdiction to grant an injunction;

    ii. The status of the MOA;

    iii. The construction of section 40 (1) of the IRA;

    iv. The obligation to consult;

    v. The changed circumstances;

    vi. The balance of convenience;

    vii. The adequacy of damages;

    viii. Undertaking in damages;

    ix. Proportionality and/or necessity.

Matters for consideration on appeal

11. We have examined the grounds of appeal filed and have listened extensively to the arguments posited on same and have had the benefit of written submissions by Petrotrin, the Union and the AG. It is not necessary for us to decide whether there has been a breach of s.40 (1) of the IRA as well as the matters at "iv" and "v" at paragraph 10 above which impact on the question whether there has been a breach of section 40(1). That issue is to be determined by the Industrial Court. It is sufficient to say that there is a serious issue to be tried in that regard. We are however required to make a determination on the following:

    i. Whether the Industrial Court has the jurisdiction to grant an injunction in an IRO.

ii. Whether the balancing exercise necessary for the grant of an injunction was properly carried out.

Jurisdiction to Grant Injunctions

12. This issue was not addressed by the written ruling of the Industrial Court. Jurisdiction was assumed despite previous utterances of a differently constituted panel to the contrary. Accordingly, we are unable as a reviewing court, to consider the rationale of the court with respect to its assumption of jurisdiction. As intimated at the commencement of this judgment, the mantle now falls to this court to consider the issue and to make a definitive determination on same. Petrotrin's argument with regard to this issue is based on primarily two grounds: (1) the statute, that is the IRA, does not give the court such a power in these circumstances; and (2) injunctions are generally not available in criminal law.

13. This court agrees, in part, with the submissions advanced by Mr. Amour SC., for Petrotrin, in so far as he noted that this question is one of statutory interpretation. It is essential for us therefore to examine the legislative historical background and language of the IRA, and its predecessor the Industrial Stabilisation Act ["the ISA"], and to place the issue at hand in that context.

14. In assessing the court's powers we also consider it crucial to examine sections 4, 7 and 8 of the IRA. Section 4 of the IRA provides for the establishment of the Industrial Court.

15. With regard to the historical context, due consideration must be given to the evolution of industrial relations and employment law over the last two centuries. The modern principles of collective bargaining were unknown to the common law. Indeed, at one time combinations to force wage increases by withholding of labour were punishable as conspiracies in restraint of trade. Employers had no obligation in law to meet and treat with trade unions. The 5 year period immediately preceding the passage of the ISA was characterised by tumult and instability in the industrial relations landscape. There were over 230 strikes with a loss of over 800,000 man-days. An important objective of the ISA, as its long title stated was: *"…to provide for the compulsory recognition by employers of trade unions and organisations representative of a majority of workers… and…for the constitution of a court to regulate matters relating to the forgoing and incidental thereto".*

16. The ISA was only partly successful, in part because the Industrial Court lacked effective coercive powers[2]. The introduction of the IRA in 1972, (which was passed with a special majority in recognition of its deviation from previously understood rights), therefore represented a conscious attempt to free the Industrial Court from the strictures of the common law. Among the important developments introduced was the power in certain specified circumstances to grant injunctive relief. However the Legislature went further by the passage of section 4 of the IRA. Section 4, which established the Industrial Court, at Section 4(1) reads as follows:

> *For the purposes of this Act, there is hereby established an Industrial Court which* ***shall be a superior Court of record and shall have in addition to the jurisdiction and powers conferred on it by this Act all the powers inherent in such a Court.*** *[my emphasis].*

17. Section 7 of the IRA provides for the jurisdiction of the court. This section, particularly 7 (1) outlines, in addition to the court's powers as a superior court of record, certain specific matters in respect of which the court can exercise its jurisdiction and/or grant injunctive relief. Further, Section 8 (1) of the IRA provides as follows:

> *"The Court, as respects the attendance and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction,* ***shall have all such powers, rights and privileges as are vested in the High Court of Justice on the occasion of an action****."[my emphasis]*

18. The Industrial Court in the case of ***Minister of Labour v Carlisle Tyre and Rubber Company Limited A11 of 2003***, examined the plenitude of powers that characterised the Industrial Court as a superior court of record. The court went into great detail with respect to the sections identified in the earlier paragraphs. While it is true that the case is not factually identical to the case at bar, because it concerned the procedure under s. 65 of the IRA, the analysis is apposite. The presiding Judge rightly pointed out that the legislature intended to be concise in ensuring that the Industrial Court had all the powers, rights and privileges

[2] So, for example, in **Trinidad Bakeries Ltd. v National Union of Foods, Hotels, Beverages and Allied Workers & The Attorney General** (1968) 12 W.I.R. 320 the Court of Appeal ruled that the Industrial Court had no power to reinstate a worker who had been unlawfully dismissed.

which would guarantee its ability to be effective in discharging the functions for which it was established.

19. Of course, as has already been observed, the Industrial Court has expressed divergent views on the issue. In fact, the current President of the Industrial Court sat with three other judges in the matter of ***Petroleum Company of Trinidad and Tobago Limited v Oilfield Workers trade Union Application No. 3 of 2013***, and made a finding that the grant of an interim injunction could not be underpinned by the complaint of an IRO. The rationale is unclear and in any event that finding does not bind our court. The issue is purely one of statutory interpretation. To the extent that the Industrial Court in the above cited case did not conduct a careful examination of the statutory powers of the court and the jurisdiction necessarily inherent in a court of superior record to protect and preserve the efficacy of its processes and reliefs, it was decided *per incuriam.* A reasoned and analytical determination on the question of a court's power must begin with a detailed examination of the instrument that gives it life.

20. It is significant that sections 4 (1) and 7(1) at the outset indicate that the Industrial Court is a superior court of record, having all the powers inherent in such a court, **in addition to** the powers prescribed by the Act. By way of analogy, the Supreme Court, which comprises the High Court and the Court of Appeal, is a superior court, and as such, no matter is deemed to be beyond its jurisdiction, unless it is expressly shown to be so. Superior Courts have an inherent jurisdiction which gives them the power to regulate their own procedures, provided that the exercise of this power is not inconsistent with statute or statutory rules. Halsbury's Laws of England, summarised the principle thus:

> *"inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of the law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them"*[3].

[3] Halsbury's Laws of England Fifth Edn. Volume 12 2015- Civil Procedure.

21. The IRA does not, in this court's view, provide for the grant of injunctive relief only in a trade dispute. Though the Act provides at s. 7 (1) (c) that the court shall have the jurisdiction *"to enjoin a trade union or other organisation or workers or other persons or an employer from taking or continuing industrial action"*, there is no express provision that prohibits the grant of interim injunctive relief in an IRO complaint. We reject Petrotrin's argument that the maxim *expressio unius est exclusio alterius* (to express one thing is to exclude another) is applicable in this case. We are of the view that the wording of the IRA, which indicates that the court is a superior court of record, is sufficient to vest the court with power to grant injunctive relief in any matter before it. Sections 4, 7 and 8 of the IRA sufficiently confer the ability to grant injunctions in these circumstances. It would be inaccurate to say that the IRA does not contain any expression in favour of such a power. A superior court's jurisdiction is unlimited, unless limited by the provisions of the statute or statutory rules or necessary implication. The IRA provides no such limit. The phrase "in addition to" is indicative of the court having powers outlined in the Act in conjunction with powers of a superior court. No other reading or interpretation can reasonably be gleaned from the Act.

22. The wording of the Act is clear and requires no further term or expression to be read into it. When we consider section 8 (1), we are fortified in our view that the Industrial Court, in addition to having the powers outlined by the Act, does have all the powers of the Supreme Court, therefore allowing it to grant interim injunctive relief where it is necessary to do so in respect of any matter within its jurisdiction[4].

23. The second prong of the argument for Petrotrin and the AG is that injunctions are not generally granted in criminal law. They relied on the case of ***Gouriet v Union of Postal Workers [1978] AC 435***, wherein Viscount Dilhorne expressed the view that equity and criminal law are two separate areas of law which were never intended to overlap. Counsel for the AG underscored the point that in the limited instances where an injunction is granted in criminal law, the Attorney General is the party who must invoke the jurisdiction of a civil court in aid of the criminal law.

[4] In that regard also we can discern no restrictive intent in the language of section 10 (1) (b) of the IRA.

24. However, ***Gouriet***, in the intervening 40 years since it was decided, has been replaced by a more contemporary jurisprudence[5], whereby the courts of equity have gone outside the parameters of ***Gouriet*** to grant injunctions in criminal matters. This court favours that approach. In exercising such a power the court is guided by certain considerations. The grounds are many, and on this occasion, we need only to consider two of them because they substantially touch on the issue at bar:

    a. Where an emergency arises – A court's interpretation of the term 'emergency' in the context of granting an injunction in a criminal matter may vary. In the case of ***John Fairfax Publications v Doe (1995) 37 NSWLR 81***, the court interpreted an emergency as a combination of seriousness and immediacy. In that case the defendant, a newspaper company, had already published the contents of a phone-tapped private conversation illegally and there was a distinct possibility that they were going to publish it again in the near future. The planned future publication could have interfered with the applicant's fair trial in a forthcoming criminal proceedings.

    b. The relevant statute expressly or impliedly provides for the injunctive relief: This ground is on all fours with the case at bar. We have no difficulty in declaring that the IRA gives the Industrial Court the express power to grant injunctions in an IRO complaint, which is ultimately a criminal matter. This is entirely consonant with section 10(3)(b) of the IRA, which expressly enjoins the Industrial Court in the exercise of its powers to act ***"in accordance with equity, good conscience and the substantial merits of the case before it, having regard to the principles and practices of good industrial relations".*** The concerns about the boundaries of the courts of equity expressed in ***Gouriet*** are of little concern when we recall that the Industrial Court is a unique creation established in a particular historical context and for special purposes and expressly gives the union and the employer the right to institute proceedings in relation to an IRO.

[5] Dr. Kumar Amarasekara and Keith Aikers, "Injunctions in Criminal law: An Anglo- Australian Analysis" (2001) Deakin Law Review Vol 6 No. 1

25. The IRA is the relevant statute that gives the Industrial Court the power to grant injunctions in an IRO complaint. This court felt, however, that it was helpful to identify the two exceptional grounds in the preceding paragraph. In an instance where the Industrial Court (which we have determined has the power pursuant to the IRA), after assessing the requirements necessary for a grant, determines that the situation is one of urgency or that an emergency exists, it may grant the injunction to preserve the status quo. This modern approach taken by the courts with regard to injunctions in criminal law is a new chapter that adds a new and energised jurisprudence to the criminal law. Accordingly, we find that the Industrial Court does have the power to grant injunctions in an IRO complaint.

Where Does the Greater Risk of Injustice Lie?

26. The Industrial Court at paragraphs 32 and 33 of its judgment correctly noted that, when considering the grant of an injunction it must see whether the matter brought before it disclosed serious issues to be determined; and, whether the risk of injustice will be greater if the injunction is granted or refused. The court found that there would be a greater injustice if the issues affecting the loss of employment of five thousand five hundred workers are not properly ventilated before the closure of the Company.

27. This court is of the view that the Industrial Court fell into a demonstrable error of omission in the conduct of the necessary balancing exercise. Having acknowledged Petrotrin's right to close its business operations, on the face of the judgment there is a failure by the court to properly consider all of the elements that had to be placed in the balance. In particular, in the face of the uncontroverted evidence before it of the possible effects on the national economic landscape, if the injunction were granted, the court appeared to conflate the interest of the five thousand five hundred Petrotrin workers with the interests of the wider public[6]. The two

[6] The Industrial court is required by section 10(3)(a) of the IRA, in exercising its powers, to take into account the interests of the community as a whole as well as the interests of the persons immediately concerned.

interests are not identical. In fact, they are in some respects contradictory and needed to be weighed against each other.

28. This court must now assess the factual matrix on the principles set out in ***National Commercial Bank (Jamaica) Limited v OLINT Corporation Limited*** ***[2009] UKPC***, on the basis that we are satisfied that we can look at the matter afresh because the Industrial Court failed to demonstrate in its decision that it gave any or sufficient consideration to the wider public interest[7].

29. Lord Hoffman, delivering the opinion of the Board in ***OLINT,*** noted that the purpose of an interlocutory injunction is to preserve the status quo**.** His reasoning on the balancing exercise is incisive and warrants fulsome reproduction:

> *"The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in American Cyanamid Co v Ethicon Ltd [1975] AC 396, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.*
>
> *In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the*

[7] We do observe in deference to the Industrial Court, which heard and determined the application with commendable alacrity that mention was made of the Public Interest but we must be guided by the written judgment on record, which is devoid of the relevant analysis.

injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. This is an assessment in which, as Lord Diplock said in the American Cyanamid case [1975] AC 396, 408:

> ***"It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them."***

Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will tum out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases."

30. For this court to assess where the greater injustice lies we must look to the evidence in this case. Wilfred Espinet, Chairman of the Board of Directors of Petrotrin, deposed to an affidavit dated 4 October, 2018. The evidence emanating from said affidavit, with respect the precarious financial state of the Company, may be summarised as:

    a. The Company was operating at a loss for several years, from 2014 to 2017;

    b. The Company had debt obligations which included short term loan facilities of approximately US$500 million – US$600 million, the payment of US$850 million bond due in August 2019 and approximately US$250 million due in 2022;

    c. After consultations with its consultants on a prospective restructuring strategy, the Company learned that R&M required a great deal of cash flow, which it did not have available to it. This did not augur well against the backdrop of its large existing debt. The only viable economic plan was to shut down the Company and invest in E&P which could earn a return;

d. The Company was on the watch list of the credit rating agency, Moody's; the Company's credit rating had been downgraded twice previously by Moody's; and, the nexus between the Company's credit rating and the country's sovereign debt which arises from the government's ownership of the Company;

e. Three scenarios were contemplated, two of which required massive cash flow to deal with the consequential debt that would have resulted. The third scenario, which the Company ultimately chose, was closure which would result in the termination of its employees;

f. The union, with the aid of members from the Company, was given the opportunity to present a viable alternative plan. In the Company's opinion, the plan was highly deficient and could not be reasonably considered;

g. If an injunction is to be granted, the consequences for the Company and the country would be dire. The Company would have to continue, thereby creating a larger debt while being unable to afford to continue its operations. The government, by virtue of the Minister of Finance in his budget speech, indicated that neither the government nor the tax payers can finance the Company if it were to continue as normal or continue with a change in its organisational design and function.

31. There was also the affidavit evidence of Vishnu Dhanpaul, Permanent Secretary in the Ministry of Finance. His evidence supports that of Espinet's. It outlines the Company's debts and the financial losses of the Company for the period identified above. He also deposed that it is not commercially sound and viable to continue operations in R&M.

32. The Union's evidence to support its application for interim injunctive relief was given by Oswald Warwick, Executive Trustee of the Union, in an affidavit filed 2 October 2018. His evidence gives a background into the dispute between the parties. We can glean from his evidence that because of the Company's decision to close its operations, it will result in the loss of some five thousand five hundred jobs.

33. On the day of the hearing of this appeal both parties made applications pursuant to Part 64.17(2) of the Civil Proceedings Rules 1998 (as amended). These applications sought to have further evidence adduced that spoke to matters subsequent to the grant of the injunction.

This court allowed the applications of the parties. The Warwick affidavit dated 15 October, 2018 does not provide any evidence which would aid in the balancing exercise.

34. The evidence in the further affidavit of Espinet, dated 9 October 2018, may be summarised as follows:

    a. The grant of the injunction will have detrimental impact on the efforts of the Company to address its financial situation:

        i. To address its existing long term loans the Company sent out a request for proposals (RFP) for refinancing to both foreign and local banks, with a deadline for submission of 9 October, 2018. RFP requires funding to be placed by 30 November, 2018. A closing date beyond 30 November 2018 would result in a best case financing structure being put in place by 31 January 2019;

        ii. As at 9 October, 2018 the Company has outstanding short-term commitments to trade suppliers and banks which fall due between 9 October, 2018 and 26 October 2018 totalling US$197.4 million and cannot be financed. The Company is not generating cash flow that is capable of servicing its short term commitments;

        iii. For every additional month of operation, the Company is incurring a further costs of US$22 million in respect of operating costs, which it is also not capable of financing;

        iv. The Company's bankers, since the grant of injunction, are being increasingly cautious about the Company's ability to resolve its financial situation. The grant of the injunction has presented a situation whereby it will be difficult to obtain extensions from its bankers;

        v. Without extensions from its bankers, the Company's short term loans will become due starting 12 October, 2018 which the Company is in no position to pay.

b. There are far reaching implications for the country as a consequence of the nexus between the Company's credit rating (which will be downgraded significantly) and the sovereign debt.

35. We have to consider which course of action is less likely to cause irremediable damage or put another way, where does the greater risk of injustice lie? In balancing the risks of injustice the interests of Petrotrin, its workers (as represented by the Union), and the wider national community must be considered. In doing so, we make the observation that:

a. There is no suggestion that the company intends to disregard the terms of the existing collective agreement. In fact, the examples of termination letters provided on the record explicitly evince an intention to adhere to the requirements of that agreement;

b. The termination letters do not in any event take effect until 30 November, 2018, well after the Industrial Court would have heard and determined the IRO. In the meantime, if a viable option other than closure is identified and agreed upon, the letters can be withdrawn and the termination process rolled back.

36. As at 8 October, 2018 there was a plethora of evidence before the court to properly inform it of the difficulties faced by all concerned. Mr. Mendes SC., in addressing this court argued that by the time the IRO is heard a substantial number of persons would have received their termination letters and this would result in a diminution of the Union's influence and negotiating power. He vigorously contended that such a result constitutes a risk of injustice that would affect the Union. We are not persuaded that the refusal to reinstate the injunction is likely to cause irremediable harm to the Union because the termination process can be arrested. Further, the Industrial Court, cognisant of the importance of the matter, gave early dates for trial. The Industrial Court docketed the matter to be heard on 30, 31 October and 1 November, and undertook to deliver judgment by 5 November. These dates are well before 30 November, 2018, that is, the date for closure of operations of Petrotrin. The refusal to grant the injunction would not irremediably affect the status quo because the Company's closure is still some time away from the date of decision in the substantive IRO application. The court can by its pronouncements affirm and reinforce the importance of the principle and practice of collective bargaining.

37. On the other hand, if the injunction is continued or reinstated there is:

    a. A non-trivial risk to Petrotrin of being driven into liquidation (this would present further hardship for its employees, who may suffer as a result of obtaining little to no payment due to their ranking on a creditors' list of priority).

    b. Risk to the wider national community of:

        i. Increase in the sovereign debt ratio;

        ii. Downgrade of credit rating;

        iii. Increase in the cost of borrowing;

        iv. Adverse effects on the national economy and its ability to deliver on social programs.

38. In the circumstances it is not clear to us how or even whether that damage is even compensable or even remediable. We cannot in these circumstances allow the injunction to continue or have it reinstated.

Disposition

39. For the reasons which we have outlined this court hereby orders:

    a. The appeal is allowed;

    b. The injunction granted by the Industrial Court on 8 October, 2018 is discharged;

    c. There will be no orders as to costs.

I. Archie

Chief Justice