

NEVER SIZIBA

Versus

ZIMBABWE CATERING AND HOTEL WORKERS UNION

And

ENOCK MAHARI N.O

And

JEREMIAH MUTSVANGA NO

And

ALOIS MAGEJO – NO

And

PHILIP MATSILELE NO

And

FELISTUS NYAMHUNDA

And

JAPHET SHUMBA

And

DAVID TSANANA

And

TAKUNDA MUWANDI

And

NETSAI MATUMBIKE

And

KANDA ZUZE

And

NETSAI SHOKO

And

PAMELA CHAPOTERERA

IN THE HIGH COURT OF ZIMBABWE

MAKONE J

BULAWAYO 31 JANUARY AND 3 MARCH 2022

Urgent Chamber Application

V.E Ndlovu, for the applicant

E Ndlovu, for the respondents

MAKONESE J: This is an Urgent Chamber Application for an interdict. The terms of the order sought is in the following terms:

“INTERIM RELIEF SOUGHT

Pending the return date, the applicant is granted the following relief;

1. That the 3rd, 4th and 5th respondents be and are hereby interdicted from exercising any powers whatsoever that had accrued to them by reason of their election into office in the Congress of the 1st respondent of the 13th December 2021.
2. That pending the final order, whoever was President, Vice President and Trustee be and is hereby ordered to assume and exercise all such functions as relate to such offices.

TERMS OF FINAL ORDER SOUGHT

That you show cause to the Honourable Court why a final order should not be made in the following terms:

1. That the election of 3rd, 4th and 5th respondents at Congress of the 1st respondents held on the 13th December 2021 be and is hereby declared *ultra vires* 1st respondent's Constitution and consequently a nullity."

The order sought by the applicant is opposed. Respondents argue that the matter is not urgent and ought to be removed from the roll of urgent matters. On the merits, the respondents though not conceding that the Congress held by 1st respondent was not strictly in compliance with the provisions of the 1st respondent's Constitution invited this court to adopt a legalistic contextual approach to the matter.

FACTUAL BACKGROUND

Applicant is a member of the Zimbabwe Catering and Hotel Workers Union (1st respondent). 1st respondent's stated aims and objectives are the establishment of a union that seeks to regulate the relations between members and their employees and to protect and further the interests of members in relation to their employees. Amongst other objectives, 1st respondent was established to foster and encourage the establishment of good conditions in the workplace and generally to promote the interests of its members. Membership to the 1st respondent is open to employees in the Catering Industry in Zimbabwe. In terms of section 23 (8) of 1st respondent's Constitution, a member shall cease to be entitled to any of the benefits of membership including the right to vote, if the subscriptions or other charges due to

him by the Union are more than 3 months in arrears. On 13th December 2021, 1st respondent held its Congress at Macheke, Masvingo. Applicant did not attend the congress as he was not a delegate appointed to attend the Congress. At the Congress, 3rd to 5th respondents were elected to various positions in the 1st respondent's Union. Applicant contends that 9th to 13th respondents are members of the Union who unlawfully voted and participated in the election of office bearers of 1st respondent. This application is for a declaratory order on an urgent basis, for a declaration that the election of 3rd to 5th respondents at a Congress held on 13th December 2021 is a nullity. In the interim, the application seeks to interdict the 3rd to 5th respondents from carrying out any duties of authority and exercising whatever powers that had accrued to them by virtue of their election, pending the return date.

POINTS IN LIMINE

Respondents have raised a single preliminary point on urgency. Respondents contend that the matter is not urgent. They aver that the application relates to a Congress held on 13th December 2021. A period of two months has since elapsed. Respondents aver that applicant being a member of the union was aware, or is deemed to have been aware of the issues of the organisation and that any matters dealing with the Congress ought to have been raised earlier. Respondents aver that the urgency is self created. Applicant's response to the point *in limine* is that the urgency is not self created. The need to act arose on the 24th January 2022 when the applicant learnt from an ex-employee of the Ancient City Hotel that delegates from the Ancient City Hotel had participated and voted at the Congress held on 13th December 2021. Applicant was aware that one Felistus Nyanuhunda has lost the presidency at the elective Congress by a single vote. Delegates from the Ancient City Hotel were not fully paid up members of the 1st respondent and could not cast votes at the Congress. The whole election process was therefore a sham as members who were not entitled to vote were

allowed to attend as delegates. The election of 3rd to 5th respondents was clearly illegal and a nullity because certain members who voted were not entitled to vote. Applicant only became aware of these facts on the 24th January 2022. Applicant avers that when he was alerted of the anomaly in the elective Congress he sprung into action and took steps to protect his interests.

Applicant contends that the Certificate of Urgency and Founding Affidavit both demonstrate that applicant acted when the need to act arose. Applicant submits that he confronted 1st and 2nd respondents in a bid to seek clarity. When he failed to obtain any answers on how members who were not entitled to vote participated in the process he immediately approached the courts. Applicant points out that the need to act arose not from the date the Congress was held, but on 24th January 2022 when he became aware that the voting process was marred by irregularities. It is my view, that the urgency contemplated by the rules was established. Applicant did not sit on his laurels when he became aware that the Congress was vitiated by illegality. A matter is not urgent when the applicant himself does not treat the matter as urgent. The principles on urgency are now well established in this jurisdiction. See: *Kuvarega v Registrar General & Anor* 1998 (1) ZLR 188. The point *in limine* by the respondents has no merit and is accordingly dismissed.

ON THE MERITS

The applicants contend that 9th to 13th respondents were not entitled to vote at the Congress. In terms of 1st respondent's Constitution there is a difference between an ordinary member and a member eligible to vote at a Congress. Section 23 (8) (a) of 1st respondent's Constitution provides that:

“A member shall cease to be entitled to any of the benefits of membership including the right to vote –

- (i) if the subscription or other charges due to him by the Union are more than three months in arrears.
- (ii) During any period while he is under suspension in terms of the Constitution. -”

In terms of the Constitution in the event of the subscriptions or other charges due to the union being more than 3 months in arrears, he shall continue to be subject to the disabilities imposed by the Constitution in paragraph 23 (8) (a) (ii). In his Opposing Affidavit 3rd respondent makes the fatal error of concerning themselves with proof of membership. The issue being raised by the applicant is that 9th to 13th respondents were not eligible to vote. The various annexures relating to 9th to 13th respondents do not prove that the members who voted were not in arrears and that they were not in arrears as contemplated by section 23 (8) (a) of the 1st respondent’s Constitution. *Mr E. Ndlovu*, appearing for the respondents conceded that he was not in possession of any proof showing that 9th to 13th respondents were not in arrears. As regards 12th respondent, it was argued that the member was not fully paid as her employer was not in full operation due to COVID – 19 Regulations. Clearly therefore, 12th respondent was not a fully paid up member, was in arrears, and was not eligible to vote. It was submitted that 9th respondent joined the Union sometime in 2021. She failed to produce proof of payment of subscriptions 3 months prior to the Congress because she had been made to complete stop-order forms for the purposes of deducting the dues towards the subscriptions. It became clear that 9th respondent was not eligible to vote. She was allowed to vote at the Congress despite the absence of clear proof that she was a delegate entitled to vote.

Mr V. Ndlovu, appearing for the applicant contended that it was erroneous to adopt an expensive contextual approach to the interpretation of 1st respondent's Constitution. He argued that the insertion of clause 23 (8) (a) was intended to ensure that only eligible members took part in the vote. The mischief sought to be dealt with in this provision was to prevent the recruitment of members into the union merely for the purpose of voting. In interpreting clause 28 (8) (a) of the Constitution, this court must give effect to the text in the Constitution. The words used must be given their ordinary meaning. It is a primary rule of interpretation that, if the meaning of the text is clear (the plain meaning), it should be applied, and indeed, equated with the legislature's intention in a statute. See: *Principal Immigration Officer v Hawabu* 1936 AD 26.

If the plain meaning of the words is ambiguous, vague or misleading, or the strict or literal interpretation would result in absurd results, then the court may deviate from the literal meaning to avoid such an absurdity. See *Venter v R* 1907 TS 910 at 914. This is known as the golden rule of interpretation.

In this matter there is no doubt that there is no need to apply an expensive contextual approach as argued by the respondents. The papers filed by respondents do not show that the 9th to 13th respondents qualified to vote at the Congress. This makes the Congress a nullity at law.

For the foregoing reasons, I make the following order:

1. The application be and is hereby granted.
2. The respondents are ordered to pay the courts of suit.

Makiya and Partners, applicant's legal practitioners
Mabundu and Ndlovu Law Chambers, respondents' legal practitioners