

AMALGAMATED RURAL TEACHERS UNION OF ZIMBABWE
and
FOOTWEAR TANNERS AND ALLIED WORKERS UNION OF ZIMBABWE
versus
ZIMBABWE CONGRESS OF TRADE UNIONS

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 26 October, 2021 & 10 November 2021

Urgent Chamber Application

M Rujawa, for the applicants
T. Zhuwarara, for the respondent

MAXWELL J: At the hearing of this matter, I struck it off the roll with costs. The brief reasons given *ex tempore* were

1. The interim relief sought is final in nature. Applicants are seeking restoration of rights that were decided upon and they were advised on 8/10/21. The decision on their rights is extant.
2. There is an alternative remedy provided for in section 51 of the Labour Act [*Chapter 28:01*].

Applicants approached this Court seeking interim relief in the following terms; -

“TERMS OF THE FINAL ORDER SOUGHT

That the Respondents show cause, if any, why a final order should not be made in the following terms:

1. The letter dated 8 October 2021 from the Secretary General of the Respondent to the Applicants is of no force and effect and is set aside.
2. The purported resolution of the 10 September 2021 meeting of the Respondent’s General Council, if any such resolution took place, is of no force and effect and is set aside.
3. The applicants, as fully paid up affiliates of the Respondent, are entitled to exercise their voting rights at the Respondent’s 2021 General Conference through their delegates.
4. The Respondent is barred from preventing the Applicants from exercising their voting rights at the 2021 General Conference.

5. There be no order as to costs unless the Respondent opposes the relief sought.

TERMS OF THE INTERIM RELIEF SOUGHT

IT IS HEREBY ORDERED THAT, pending the determination by this Honourable Court of the issues referred herein above,

The Respondent is interdicted from proceeding to the General Conference on 27th October 2021 to the exclusion of the Applicants or without the full participation of the Applicants, including them exercising their voting rights.

SERVICE OF THE PROVISIONAL ORDER

The Applicants' Legal Practitioners be and are hereby permitted to serve copies of this provisional order upon the Respondents or their legal practitioners."

BRIEF FACTS

On 2 and 29 July 2021, respondent wrote to the applicants advising them that the dates 27 to 29 October 2021, had been selected for the General Conference. On 2nd and 3rd August 2021, applicants were sent letters requesting the names of their delegates and current members which they responded to, supplying the requested information. A legal opinion obtained from Messrs Makururu and Partners on 23 August 2021 stated that each affiliate must submit its current membership four months prior to the General Conference to give the Credentials Committee sufficient time to verify. The opinion concluded that current membership had to be submitted by 26th June 2021 for purposes of the 26th October (*sic*) conference. Applicants stated that affiliates could not comply with the requirements in the legal opinion as they were only informed of the General Conference and were invited to submit information in July 2021. On 24 August 2021, Respondent notified all its affiliates that it was seeking a legal opinion on the interpretation of clause 6.6 and 9.5 of its Constitution. On 2 September 2021, the Applicants were sent a letter to provide nominations for the elective General Conference.

On the 8th of October, 2021, the respondent sent applicants a letter couched in the following terms; -

"RE: Participation in the ZCTU Youth, Women and the General Conference

The above matter refers

I write to advise you that at its meeting held on 10 September 2021, The General Council guided by an opinion provided by the ZCTU Lawyers Mbidzo, Makoni and Muchadehama Legal Practitioners on the issue of the status of new Affiliates to ZCTU which were affiliated after the

cut-off date of submission of membership declarations for conference purposes as provided in Section 9.5 of the ZCTU constitution resolved that,

All the unions that were affiliated post cut-off date which was agreed to be 31 May 2021 will not have voting rights at both conferences mentioned above since the law does not work in retrospect. The Unions were all given the Observer statuses on the Youth, Women and Main conferences.”

The legal opinion and clarification provided by respondent’s legal practitioners were attached to the letter. After unsuccessfully trying to get a reversal of the resolution through correspondence, the Applicants filed the present urgent application. They alleged that their exclusion from voting at the General Conference is contrary to the ZCTU Constitution and therefore unlawful. They also alleged that the interpretation given to the provision in question and the calculation of days which was used to exclude them are wrong.

LOCUS STANDI OF RESPONDENT

Mr *Rujuwa* challenged the authority of the respondent to appear in the proceedings in the absence of a resolution directing how the matter is to be dealt with. In response Advocate *Zhuwarara* submitted that it is the applicant who cited the respondent and that having brought the respondent before the Court it is improper to challenge its presence. *Locus standi* exists when there is a direct and substantial interest in the right which is the subject matter of the litigation and the outcome thereof. See *Senelane Ndlovu v Chapman Anopa Mufudzi Marufu* HH 480/15. In this case applicants are seeking relief against respondent on an urgent basis. They cannot argue that respondent should not respond because they are not aware of the instructions given to counsel. In any event the court proceedings came after correspondence between the parties’ legal practitioners. Appellants’ objection was dismissed for lack of merit.

URGENCY

A matter is urgent if by its nature the circumstances are such that the matter cannot wait in the sense that if not dealt with immediately irreparable prejudice will result. See *Madzivanzira & Ors v Dextrint Investments (Pvt) Ltd & Anor*, 2002 (2) ZLR 316. Applicants contended that there was an imminent threat to their right to participate in the General Conference as fully paid-up members and that they have a reasonable apprehension of irreparable harm as the respondent had not substantively responded or given any assurances that their rights would be respected. They further contended that if the Conference proceeded to their exclusion, the harm would be

irreparable as the violation of rights would have already taken place. The certificate of urgency stated that it was reasonable and appropriate that applicants did not rush to court immediately upon receiving the letter on 8 October 2021 as matters such as these should be ideally resolved out of court in the best interests of all parties. According to the certificate of urgency, it was only when the respondent failed to give the applicants a substantive response that the need to file this urgent application arose. Respondent, on the other hand, stated in heads of argument that the application is disingenuous and woefully late as applicants lived with the reality that the respondent's General Council had resolved as far back as 10 September 2021, that applicants did not have voting rights at the General Conference. Respondent argued that applicants could not wait till the eve of the Conference to approach the court seeking redress. I am not persuaded that applicants treated the matter as urgent. From then 8th of October 2019, they engaged in correspondence with the respondent until more than a week elapsed. They should have rushed to court as soon as they received the letter on 8 October 2021 that advised them of their observer status. It was therefore mischievous and contradictory for the deponent of the certificate of urgency to claim that it was urgent and also reasonable for the applicants to first seek an out of court settlement. Applicants did not exhibit urgency in their reaction to the letter of 8 October 2021. The action required to confirm urgency was to approach the court and not to engage in correspondence with the respondent. I find that in this matter, no urgency was established.

THE NATURE OF THE RELIEF SOUGHT

I am of the view that the relief sought is final in effect. Applicants were advised that they would not have voting rights at the General Conference. They are asking the court to order that the Conference should not proceed unless they are allowed to exercise their voting rights. In the Founding Affidavit it is stated that ; -

“6. This is an urgent chamber application for an interdict and for declaratory relief.”

Advocate *Zhuwarara* submitted that it is not acceptable that a declarator be obtained on an urgent basis. He also submitted that the wording of the interim order sought shows that it is final in effect, to the extent that the Applicants sought an order that the respondent be “interdicted

from proceeding to its General Conference.” He further submitted that there is no qualification or pendency that is alluded to in the wording of the Terms of the Interim Relief. An interdict and a declarator have final effect. Mr *Rujuwa* submitted in response that the interim order can be amended so that relief is not final in nature. I am not persuaded that the circumstances of this case warrant such an amendment. If the draft order is amended, the result may be contrary to what is stated in the Founding Affidavit.

In *Econet Wireless (Pvt) Ltd v TrustCo Mobile (Pty) Ltd and Another* 2013 (2) ZLR 309, it is stated that in general terms a court should not grant interim relief which is similar to or has the same effect as the final relief prayed for. That statement is applicable in this case. Once applicants are allowed to exercise voting rights at the General Conference, they would have got what they were seeking for in the final order sought.

In any event, the decision that the applicants will have Observer status is extant. That decision denied applicants any voting rights. An interdict cannot be granted against a past invasion of a right. See *Mayor Logistics (Pvt) Ltd v ZIMRA* 2014 (2) ZLR 78. It can also not be granted to a person whose rights in a thing have already been taken from him at the time he makes an application for interim relief. See *Airfield Investments (Pvt) Ltd v Minister of Lands & Others* 2004 (1) ZLR 511. Applicants are seeking a relief which cannot be granted, let alone on an urgent basis.

THE ALTERNATIVE REMEDY

It was submitted for the respondent that s 51 (2) (a) & (b) of the Labour Act [*Chapter 28:01*] provide an alternative remedy for the applicants. Section 51 of the said Act provides that;

“51 Supervision of election of officers

- (1) The Minister may, where the national interest so demands, cause to be supervised the holding of elections to any office or post in a registered trade union or employers organization.
- (2) Without derogation from the generality of subsection (1) the Minister may, on the advice of the Registrar-
 - a) Set aside any election if the election was not properly conducted or if the result of the election did not represent the views of the electors;
 - b) postpone, or change the venue of or procedure for, any election, if it is necessary to do so to ensure that the views of electors are given proper expression;
 - c)

Mr *Rujuwa* submitted that the alternative remedy was not available to the applicants as the Minister only acts where national interest is involved. He further submitted that no national interest was suggested in this case. I am not persuaded that an issue involving trade unions is not of national interest. The Legislature in s 51 quoted above provided a remedy that includes the postponement of the elections at the instance of the Minister. Any person who is aggrieved by any action taken by the Minister pursuant to that section may appeal to the Labour Court. This is provided for in subsection (3) of s 51 of the Labour Act [*Chapter 28:01*]. That procedure, in my view, provides adequate redress to an aggrieved party. In this case no effort was made to utilize this procedure. Applicants were improperly before this Court as they had not exhausted the remedies available in the Labour Act [*Chapter 28:01*].

For the above reasons, the application was struck off the roll of urgent matters with costs.

Mtewa & Nyambirai, applicants' legal practitioners
Mbidzo, Muchadehama & Makoni, respondent's legal practitioners