

ZVISHAVANE-MBERENGWA
MINING ASSOCIATION
versus
ZIMBABWE MINERS FEDERATION

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 18 FEBRUARY 2019 AND 21 MARCH 2019

Opposed Matter

T Tavengwa for applicant
W Ncube for respondent

MOYO J: This is an application set down for confirmation of the provisional order issued by this court on 14 April 2018. The provisional order was granted *ex parte*. Applicant and other associates are affiliate associations of the respondent.

The main complaint by the applicant was that there has been some underheard dealings that affected the constitution of the respondent in that certain “unknown” organisations were sneaked into the membership of the respondent without proper procedures having been followed and that one Rushwaya had paid for all these associations that were unknown. It was also alleged that this Rushwaya was also unknown to the respondent and had clandestinely registered such associations in a bid to rig the elections that were pending by the respondent. It was alleged that this Rushwaya, brought in or paid for these fake associations in a bid to have them vote in the respondent’s elections and therefore distort the outcome.

Applicant has raised a point *in limine* challenging the opposition by starting that Wellington Takavarasha does not have a mandate to represent respondent in these proceedings as he says that he was authorized by General Council and yet the General Council does not have power to represent the respondent. That only the national executive council has the authority to

defend these proceedings. This, applicant submits derives from clause 6.11.5 of the respondent's constitution which provides thus:

“6.11 DUTIES FUNCTIONS AND POWERS OF THE NATIONAL EXECUTIVE:

6.11.5 Institute, conduct, defend, or abandon, any legal process by or against the federation or otherwise concerning the affairs of the federation.”

On the other hand, the General Council is provided for in clause 5 of the constitution and its powers are spelt out in paragraph 5.4. Amongst the powers given to the General Council, there is no such power as to institute or defend legal proceedings per the respondent's constitution.

In response to this point *in limine* the respondent's counsel submitted that the provisional order was sought and granted against the General Council and that applicant cannot submit that the general council cannot oppose an order granted against it. I find that this submission is incorrect in my view for the simple reason that firstly, the provisional order is against the respondent per the information in the provisional order. It is nowhere stated that an order is being sought against the General council. Whilst perhaps the effect of the order may affect the functions of the General Council, it is so affected as an arm or organ of the respondent and not in its own right.

I accordingly find that the provisional order was not issued against the General council but was issued against the respondent.

Clearly in paragraph 2 of the opposing affidavit, Mr Wellington Takavarasha states thus:

“I am the respondent's Chief Executive officer and in that capacity I am authorized to make this affidavit. Additional at the general meeting held in Gweru on 14 June 2018, this application, which was yet to be heard, was discussed and I was expressly authorized to oppose the application and to make the opposing affidavit.”

The problem with the authority as pleaded by Mr Takavarasha is that, nowhere in the constitution is a chief executive officer given authority to institute or defend legal process on behalf of the organization.

The second problem is that, the so called authority by the General Council, which is not a natural person and cannot speak, can only be in the form of some document and not verbal.

Even if the document giving such authority were there, there would still be another hurdle, the constitutional one where in, organisations are bound by their constitutions which they would have drafted for themselves and they would have chosen that kind of management of their affairs. This court, being a court of law, cannot embrace a willy nilly departure from one's constitutional dictates. Not only is adherence to one's constitution good for law and order, but it is also a good corporate governance principle. The reason why there is a constitution in the first place is so that the association or organization operates within the confines of good order and to avoid chaos.

This court cannot then encourage organisations to breach their own constitutions and do as they please. That is unlawful and this court cannot lend a hand to or allow an unlawfulness to prevail. Respondent is bound by the provisions of its constitution and if it intended to defend this application, it should have done so within the confines of its own constitution.

It is for these reasons that I hold that the notice of opposition and the opposing affidavit are not properly before the court, as they have been brought through the back door and not in accordance with respondent's own constitutional provisions.

As a result, I will proceed to confirm the provisional order, which in my view stands unopposed.

I accordingly make the following order:

The provisional order granted by this court on 14 June 2018 be and is hereby confirmed.

Mutuso, Taruvinga & Mhiribidi Attorneys' applicant's legal practitioners
Dube Manikai & Hwacha, respondent's legal practitioners