

JOHN MAKARUDZE  
and  
MAXWELL MUNONDO  
versus  
COSMOS BUNGU  
and  
THE EXECUTIVE COMMITTEE, HARARE MUNICIPAL WORKERS' UNION  
and  
THE HARARE MUNICIPAL WORKERS' UNION

HIGH COURT OF ZIMBABWE  
MAFUSIRE J  
HARARE, 23 October 2014 & 7 January 2015

**Special case**

*A. Debwe*, for the plaintiffs  
*J. Mambara*, for the defendants

MAFUSIRE J: The constitution for the third defendant (hereafter referred to as “*the Union*”) was registered with the then Industrial Registrar in 1962. It listed eleven objects. The first of these was to regulate the relations between members and their employers, and to protect and further the interests of members in relation to their employers. The membership clause was couched as follows:

- “5. MEMBERSHIP  
(1) Membership of the Union shall be open to employees in Salisbury Municipality Undertaking who are employed in the occupations listed in the schedules ‘A’ and ‘B’.”

Schedule “A” had cashiers, health aids, constables, telephone attendants, messengers, assistant projectionists, welfare assistants and cooks. Schedule “B” had labourers.

In terms of that constitution the second defendant (hereafter referred to as “*Excom*”) would constitute the governing body of the Union. The members of Excom would be elected at the annual general meeting and would serve for one year. They would be eligible for re-election. They could be removed from office on the decision of a general meeting. General

meetings would be held once every three months. There were other ways in which members of Excom could vacate office. These were:

- resignation;
- suspension;
- expulsion from the Union;
- absenteeism;

At all relevant times the plaintiffs and the first defendant were all members of the Union. The first defendant was the chairman of Excom. The first plaintiff was the vice-chairman. The second plaintiff was chairman of one of the sub-committees of the Union. On 10 May 2011 the plaintiffs issued out a summons against the first defendant, Excom and the Union. Apart from costs they sought three declaratory orders and one directive. The three declaratory orders were these:

- that Excom's term of office had expired;
- that the "seats" in Excom had become vacant;
- that the first defendant had "*legally ceased*" to be a member of the Union and was no longer entitled to hold any office in it.

The directive was this:

- that the Union had to hold elections for Excom within forty five days of the date of the court order.

The basis for seeking a *declaratur* that Excom's term of office had expired and that the "seats" in it had become vacant was that it and the first defendant had been elected way back in February 2006 and yet neither any other elective general meeting nor the triennial meetings had ever been held since then.

The basis for seeking the *declaratur* that the first defendant had "*legally ceased*" to be a member of the Union and that he was no longer eligible to hold any office in it was that he had been dismissed from the employment of the Harare City Council, the employer, (hereafter referred to as "*Council*"). The plaintiffs' argument on that point was that membership of the Union was open to Council employees only. It was common cause that following the judgment of an independent arbitrator on 24 June 2012, the first defendant had been dismissed from Council's employment for absenteeism with effect from 2010.

The defendants contested the plaintiff's claims. Their defence was both on technical and substantive grounds. The first technical ground was that the plaintiffs, being mere

members of the Union, had no *locus standi* to bring the action. In addition, the defendants contended that the plaintiffs themselves had been expelled from the membership of the Union. On this the defendants relied on the first defendant's two letters to the plaintiffs, both dated 31 May 2011. He had signed them as "Executive Chairman".

The second technical ground relied upon by the defendants was that the plaintiffs had not exhausted their domestic remedies and that this court had no jurisdiction to entertain their case in such circumstances. The full argument on this was that the election of members of Excom and their removal from office was something governed by the constitution. Among other things, the defendants argued, the plaintiffs could themselves have motivated the calling and holding of the elective general meetings and moved motions to remove from office those members of Excom whose terms of office would have expired. Having failed or neglected to do so, the plaintiffs were non-suited before this court.

With regards to the expiry of Excom's term of office, the declaration of vacancies, and the directive to hold elections within forty five days, the defendants' substantive defence on the merits was that there had been an elective general meeting in 2012. A new Excom had been incepted. The first defendant had been elected Executive Chairman. Therefore, the remedies sought by the plaintiffs in that regard had fallen away.

With regards the order that the first defendant had "*legally ceased*" to be a member of the Union and was no longer eligible to hold any office in it by reason of his dismissal from employment, the defendants' substantive defence on the merits was three-pronged. Firstly, they contended that the first defendant was appealing against that dismissal. It seems that the first defendant had appealed to the Labour Court against the arbitrator's decision. But the Labour Court had dismissed that appeal. He had then filed an application for leave to appeal to the Supreme Court. At the time of the hearing before me that application was still pending. The first defendant's argument though was that an appeal to the Supreme Court against a decision of the Labour Court automatically suspends that decision. As such, the Labour Court's upholding of the arbitrator's decision ordering his dismissal from employment stood suspended. Therefore, he could continue in office with the Union.

Secondly, the defendants contended that a new constitution of the Union had been registered in December 2013. It had amended the old constitution in several ways. On membership, the new constitution had opened up membership, not only to all employees, as

before, but also to “...*any other person*...” who wished to abide by the requirements of the constitution. The material portion of the new clause on that point read as follows:

“5. MEMBERSHIP AND THE ROLE OF MEMBERS

- a) Membership of the Union shall be open to all employees from grade 5 to grade 16 in Harare Municipal Undertaking who wish to abide by the requirements of this Constitution and conditions of membership other than Executive employees and any other person who wishes to abide by the requirements of this constitution other than executive employees who should be prepared to abide by this constitution and the rules and conditions of membership.
- b) For the avoidance of doubt, membership of the Union being a fundamental constitutional right to freedom of association, no employer or his/her agent shall interfere or question any individual’s membership of the Union. The determination of membership shall be at the absolute and sole prerogative of the Union through its Executive Committee in terms of the HMWU Constitution.”

Thirdly, the defendants argued that in terms of the new constitution, the position of chairman of Excom had been turned into an executive, full-time and salaried one. The incumbent would be in charge of the day-to-day management of the Union. It was argued that it did not require that the incumbent be a member of the Union.

The plaintiffs denied that they had been expelled from the Union. They dismissed the first defendant’s letters aforesaid. They said they had not been called to any hearing to answer any charges.

The plaintiffs argued that the new constitution was not relevant to their case. The purported election of the first defendant as executive chairman was a nullity. Among other things, it had been done before the new constitution had become operational. The new constitution did not operate retrospectively.

Regarding the first defendant’s alleged appeal to the Supreme Court and the argument that the Labour Court’s decision had automatically been suspended, the plaintiffs challenged the defendants to produce the evidence of such an appeal. They contended that an application for leave to appeal was not an appeal. Therefore, there had been no suspension of the Labour Court’s decision by the mere application for leave.

Regarding the new constitution allegedly opening up membership of the Union, not only to all employees of Council, but also to “... *any other person*...” who wished to abide by its requirements, the plaintiffs argued that this had to be read in context. The Union was a trade union to advance the interests of Council employees. Trade unions were governed by

the Labour Act, [*Cap 28:01*]. Only employees in a particular undertaking could form, register and become members of a trade union, not “...*any other person*...”

Regarding the position of the executive chairman being a full-time and salaried office that did not require the incumbent to be a member of the Union first, let alone to be an employee of Council, the plaintiffs dismissed the defendants’ contention as one that would lead to untold absurdities. Trade unions cannot be run by persons that are neither members nor employees of the undertaking to which the employees and the employers belong.

In a nutshell, that was the case before me. The action had been referred to court as a special case in terms of Order 29 of the rules of this court. The issues, as agreed upon at the pre-trial conference, had been condensed to three, namely:

- whether the High Court had jurisdiction to entertain the plaintiffs’ action;
- whether the plaintiffs had the *locus standi* to institute the proceedings; and
- whether the first defendant was still eligible to be a member of the Union after his dismissal from employment.

I propose to deal with the question of plaintiffs’ *locus standi* first. If they did not have the requisite *locus standi in judicio* to bring these proceedings, then that will be the end of their case.

(i) **Plaintiffs’ locus standi**

*Locus standi in judicio* refers to one’s right, ability or capacity to bring legal proceedings in a court of law. One must justify such right by showing that one has a **direct and substantial interest** in the subject-matter and outcome of the litigation: see *Zimbabwe Teachers Association & Ors v Minister of Education and Culture*<sup>1</sup>. In that case EBRAHIM J, as he then was, stated<sup>2</sup>:

“It is well settled that, in order to justify its participation in a suit such as the present, a party ... has to show that it has **a direct and substantial interest** in the subject-matter and outcome of the application.”

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<sup>1</sup> 1990 (2) ZLR 48 (HC) See also *Dalrymple & Ors v Colonial Treasurer* 1910 TS 372; *Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O); *United Watch Diamond Co (Pty) Ltd & Ors v Disa Hotels Ltd & Anor* 1972 (4) SA 409 (C); *Deary NO v Acting President & Ors* 1979 RLR 200 (G); *PE Bosman Transport Works Committee & Ors v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 801 (T); *AAIL (SA) v Muslim Judicial Council* 1983 (4) SA 855 (C); *SA Optometric Association v Frames Distributors (Pty) Ltd t/a Frames Unlimited* 1985 (3) SA 100 (O); *Molotlegi & Anor v President of Bophuthatswana & Ors* 1989 (3) SA 119 (B)

<sup>2</sup> At pp 52 - 53

The **direct and substantial interest** test has been followed in a plethora of cases such as those listed in footnote one above. In *Henri Viljoen (Pty) Ltd v Awerbuch Brothers*<sup>3</sup> it was held to connote:

“... an interest in the right which is the subject-matter of the litigation and ... not thereby a financial interest which is only an indirect interest in such litigation.”

CORBETT J, in *United Watch & Diamond Co (Pty) Ltd & Ors v Disa Hotels Ltd & Anor*<sup>4</sup>, elucidated it as follows<sup>5</sup>:

“This view of what constitutes a **direct and substantial interest** has been referred to and adopted in a number of subsequent decisions, including two in this Division ... and it is generally accepted that what is required is a legal interest in the subject-matter of the action which could be prejudicially affected by the judgment of the Court ( See *Henri Viljoen’s* case *supra* at 167)”.

Recently, in *Sovereign Empowerment Centre-Tutorial Trust v Old Mutual Investment Group Property Investment Zimbabwe (Pvt) Ltd & Anor*<sup>6</sup> and three other cases that were consolidated and heard together, MANGOTA J considered the dictionary meanings of *locus standi*. At p 10 of the cyclostyled judgment the learned judge said:

“I must confess that the legal practitioner’s argument left me wondering as to what exactly he meant to convey. Because of the confused state in which his argument on the matter was couched, I took the trouble to read around the Latin phrase *locus standi* in an effort to appreciate what he was driving home to.

Wikipedia, the free encyclopaedia refers to the phrase *locus standi* to mean: ‘... the right to bring an action, to be heard in court or to address the court on a matter before it ... *locus standi* is the ability of a party to demonstrate to the court sufficient connection to, or harm from, the law or action”.

Free Dictionary.com states that:

‘... *Locus standi* is the right of a party to appear and be heard before a court...’

Wisegeek.com discusses the phrase and stresses that:

‘... *locus standi* refers to the fact of whether or not someone has the right to be heard in court... As a general rule, a person has *locus standi* in a given situation if it is possible to demonstrate that the issue at hand is causing harm and that an action taken by the court could redress that harm...’”

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<sup>3</sup> 1953 (2) SA 151 (O)

<sup>4</sup> 1972 (4) SA 409 (C)

<sup>5</sup> At p 415H

<sup>6</sup> HH351/13

The debate on *locus standi* in most cases cropped up in situations where proceedings had been brought by someone in a representative capacity, such as a trade union, or some such organisation representing some common interest of its members. In the present case the plaintiffs did not bring the action in a representative capacity. They stated that they were full time members of the Union. They said, as members, they had been aggrieved by the manner in which Excom, which the first defendant chaired and controlled, had continuously flouted the constitution. In their original claim, apart from the complaint about the first defendant's failure or refusal to convene any of the constitutional meetings, the plaintiffs complained further that no books of accounts had been produced since 2007 and that Excom had failed or neglected to amend the constitution which had become out-dated.

In my view, and in the words of BECK J in *Deary NO v Acting President & Ors*<sup>7</sup>, the court will be slow to deny *locus standi* to a litigant who seriously alleges that a state of affairs exists, within the court's area of jurisdiction, where someone in position of authority, power or influence, abuses that position to the detriment of members or followers.

If the plaintiffs seriously felt that the first defendant had become ineligible to hold any office within the Union, let alone to continue clinging onto to the position of chairman, such a state of affairs would be so intolerable that the court would not fetter itself by pedantically circumscribing the class of persons who might approach it for relief. There could be no better demonstration of, or justification for, *locus standi in judicio* than the plaintiffs' position in this matter. Undoubtedly, they had a **direct and substantial interest** in the management of the affairs of the Union. They have demonstrated a **sufficient connection** to the subject-matter of their complaint. If an alien, in the sense of someone having lost the capacity to remain a member of the Union, let alone of Excom, continued to cling onto that position, then a member or members of the Union, individually or collectively, would certainly have the right, power and authority to approach the courts for relief.

The defendants contended that the plaintiffs had been expelled from the Union. They relied on the first defendant's two letters aforesaid. The one addressed to the first plaintiff read as follows:

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<sup>7</sup> 1979 RLR 2090 (G), at p 203A,

“RE: EXPULSION FROM THE HMWU MEMBERSHIP MR J MAKARUDZE  
HM NO. 405043

.....  
This is to advise that the HMWU resolved to expel you from HMWU structures and membership with effect from 23<sup>rd</sup> May 2011 due to the fact that you took the Union to the Court over an internal matter without following the normal procedure due to your enjoinder with M Munondo of Public Safety Dept.

You are and were aware that the issue of the Executive Chairman was a result of the resolution of the HMWU National Council which is Congress in between Congress of which you were party. You were and are also aware that the same meeting resolved that the Elections would be held pending Conclusion of the Executive Chairman’s case vs City of Harare. You were also aware that the City of Harare, following the Labour Court Case involving 75 HMWU representatives of the National Council of which the Employer intended to dismiss them on the ground that they had participated in a job action allegedly against partly the dismissal of the HMWU Executive Chairman.

You are also aware that your name and that of Munondo did not appear on the list of HMWU Workers leaders, the employer intended to dismiss although you were present at Town House and the employer did not include your 2 names due to your relationship with the same which is against the HMWU and its member. You are also aware of the striking similarities between your present High Court Case No. 4406/11 and the employer’s Supreme Court Appeal in Case No. LC/ORD/H/29/10 wherein the employer is opposing the Labour Court Judgement hence this confirms your close relationship contrary to the HMWU ethics and that you are raising similar allegations against the HMWU as those of the employer.

You are also aware that a meeting was held at the Union Office wherein the issue of elections was raised by your colleagues and you also advised that since we have a pending case with the City of Harare it was only logical that we defer the HMWU Supreme Union Committee elections and request our lawyers to advise us on the issues jointly, i.e., election for HMWU Supreme Union Committee and Congress.

The union also learnt that you are party of the people against the HMWU yet you are aware that as a democratic organization we have internal structure which deal with members concerns.

.....”

The other letter addressed to the second plaintiff read:

“RE: EXPULSION FROM THE HMWU MEMBERSHIP MR M MUNONDO HM  
NO. 607851

.....  
The HMWU hereby advises you that it resolved to expel you from the Union membership with effect from 23<sup>rd</sup> May 2011.

This is due to the fact that without the locus standi you have deliberately defied the Union by initially requesting for the HMWU validation from the employer for the purpose of creating a parallel structure to the HMWU being HM 2. Secondly you took the HMWU to court over an internal matter which ought to have been addressed internally since you are aware of the procedures thereof.



You are also aware of the Labour Court Case as regards the intended dismissal of 75 workers leaders of which the Union won the case at the Labour Court LC/ORD/H/29/10 and the employer subsequently appealed and strange enough your name did not appear on the list because of your close relationship with the employer and the similarities between your High Court Case No. 4406/11 and the employer's Supreme Court appeal are not a coincidence.

.....”

The first defendant's letters were patently a dog's breakfast. Demonstrably, they were self-serving. The first defendant was being vindictive against the plaintiffs for having sued him. By whose authority had the plaintiffs' been expelled? In terms of what procedure? The plaintiffs maintained that no hearings had ever been held to try them. The defendants had no answer to this. In any event, in May 2011 there was no office within the Union known as "Executive Chairman". That position was created by the new constitution that was registered only in December 2013. Furthermore, even if I were to recognise the alleged election of the new Excom in 2012, which the plaintiff maintained they did not, the question of the first defendant's eligibility to come back into office in any capacity, let alone as chairman of Excom, very much hung in the balance by reason of his dismissal from employment with Council. Finally, the plaintiffs' summons pre-dated the purported expulsions anyway.

In the premises I find that the plaintiffs had the requisite *locus standi in judicio* to bring these proceedings.

Having disposed of the question of *locus standi* in favour of the plaintiffs, logically the next aspect to consider is that of the jurisdiction of this court to determine the case.

(b) **Jurisdiction of this court**

During argument, in response to a query by myself, Mr *Mambara*, for the defendants, conceded that it was not a question of this court lacking jurisdiction to determine the dispute between the parties, but rather the fact that the plaintiffs had allegedly not exhausted their domestic remedies when they had "*rushed*" to this court. As mentioned earlier, the argument by the defendants was that the constitution provided ways and means of terminating someone's office. It was argued that the plaintiff had not followed those channels.

The general view is that it is discouraged for a litigant to rush to this court before he or she has exhausted such domestic procedures or remedies as may be available to his or her situation in any given case. He or she is expected to obtain relief through the available

domestic channels unless there are good reasons for not doing so: see *Nokuthula Moyo v Norman Gwindingwi NO & Anor*<sup>8</sup>.

However, it is also the general view that the domestic remedies must be able to provide effective redress to the complaint. Furthermore, the alleged unlawfulness complained of must not be such as would have undermined the domestic remedies themselves: see *Tutani v Minister of Labour & Ors*<sup>9</sup>; *Moyo v Forestry Commission*<sup>10</sup> and *Musandu v Chairperson of Cresta Lodge Disciplinary and Grievance Committee*<sup>11</sup>. The court will not insist on an applicant first exhausting domestic remedies where they do not confer better and cheaper benefits: *Moyo's case, supra*, at p 192.

*In casu*, it was rather a long shot for the defendants to pitch an argument on the so-called domestic remedies. There was no such thing. The constitution of the Union had no provision dealing directly or indirectly with the plaintiffs' grievances. Evidently, the defendants had to stitch together some disparate provisions of the constitution in order to craft the "domestic remedies" argument. They relied on the following clauses:

- clause 10(1)(b), which provided for the composition of Excom and the one year tenure of office;
- clause 10(2), which said a member whose subscriptions were in arrears was ineligible for a position in Excom;
- the same clause 10(2) which said a member on suspension was not eligible for election into Excom;
- clause 10(4), which said a member of Excom could vacate office if he resigned, or was suspended or expelled, or if he missed three consecutive sittings.

The defendants' argument was that there was nothing stopping the plaintiffs from requisitioning annual general meetings or triennial general meetings and sponsoring motions to vote out stale office bearers.

The plaintiffs' grievance was that as chairman, the first defendant wielded enormous influence and control of the Union. As part of their proof for that proposition, they pointed to

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<sup>8</sup> HB168/11; See also *Musandu v Cresta Lodge Disciplinary and Grievance Committee* HH 115/94; *Moyo v Forestry Commission* 1996 (1) ZLR 173 (H); *Tuso v City of Harare* 2004 (1) ZLR 1 (H); *Chawara v Reserve Bank of Zimbabwe* 2006 (1) ZLR 525 (H) and *Tutani v Minister of Labour and Others* 1987 (2) ZLR 88 (H)

<sup>9</sup> 1987 (2) ZLR 88 (H) at p 95D

<sup>10</sup> 1996 (1) ZLR 173 (HC), at p 191

<sup>11</sup> HH 115/94

the amended constitution. They said it was contrived to deal with such of the complaints against the first defendant as they had brought to court. That sounded plausible enough to me. Clause 5 (b) of the new constitution, highlighted above, is certainly a curious provision. It is demonstrably an emotional outburst against the employer or his agent questioning any individual's right to membership of the Union. The same emotions are exuded in the first defendant's so-called letters of expulsion to the plaintiffs. Undoubtedly, in this action the first defendant regarded the plaintiffs as nothing more than mere surrogates for Council. According to him their court case, this case, was nothing but a hatchet job to get rid of him.

The plaintiffs complained that using his vantage position as chairman, the first defendant had avoided or prevented the holding of any of the constitutional meetings of the Union. The defendants did not deny that since 2007 no meeting of any sort had been held. The one finally held in 2012 was undoubtedly a response to the plaintiffs' court case. Plaintiffs' action had been instituted in May 2011. Therefore, even if I had been persuaded that there had been adequate or effective domestic remedies to deal with the plaintiffs' grievances, which I was not, still the first defendant had undermined the plaintiffs' rights thereto.

Having disposed of their two technical objections in favour of the plaintiffs, I now deal with the defendants' substantive defence on the merits; namely that the first defendant had not "*legally ceased*" to be a member of the Union, in that firstly, the new constitution had opened up membership of the Union, not only to employees of Council, but also to "... *any other person...*" who wished to abide by it; and secondly that, at any rate, the first defendant had appealed to the Supreme Court against his dismissal from employment and that such dismissal stood suspended.

(c) **That first defendant had "*legally ceased*" to be a member of the Union by reason of his dismissal from employment**

(i) That membership of the Union was open to "...*any other person...*"

Just like employment codes of conduct, governing statutes of private bodies such as the constitution of the Union *in casu* have to be interpreted sensibly. Furthermore, regard must be had to the provisions of the governing statute, in this case, the Labour Act (hereafter referred to as "*the Act*").

In terms of the Act, it is a fundamental right of **an employee** to be a member or an officer of a trade union. Specifically, s 4(1) reads:

**“4 Employees’ entitlement to membership of trade unions and workers’ committees**

- (1) Notwithstanding anything contained in any other enactment, every **employee** shall, **as between himself and his employer**, have the following rights-
- (a) the right... to be a member or an officer of a trade union;
  - (b) .....
  - (c) .....
  - (d) .....
- (2) Every **employee** shall have the right to be a member of a trade union which is registered for the undertaking or industry **in which he is employed** if he complies with the conditions of membership.”

(emphasis added)

Sections 27 and 50 of the Act provide for the rights of employees to form trade unions. Section 54 empowers a trade union to receive an employee’s trade union dues directly from the employer. Thus, the scheme of the Act is such that a trade union is an organisation for employees, not for just “... *any other person*”. The Union was a trade union. Therefore, that “... *any other person* ...” who is not an employee can become a member of a trade union in a particular undertaking is a concept alien to trade unionism. It was also the same concept in both the old and the new constitution of the Union. Membership was open to all employees in those grades as specified.

It is noted that in terms of s 28 of the Act, every trade union is required to adopt a written constitution and that such constitution must provide for, among other things, the right of “... *any person* ...” to membership if he is prepared to abide by the rules and conditions of membership. Presumably, it is such wording as was adopted in the new constitution of the Union. However, the reference to “... *any person* ...” in s 28(1)(b)(ii) of the Act is, in my view, a reference to any person as employed in that undertaking or industry. To open up membership of a trade union in a particular undertaking to “... *any other person*...” who may not be employed by some employer in that undertaking or industry, as the defendants contended, would lead to monstrous absurdities. For example, what would stop an air hostess employed by some airline anywhere in the world, or even some vagabond somewhere, coming forward to become a member of the Union, and even taking up positions in Excom,

for as long as they wished to abide by the conditions of the constitution? Mr *Mambara* said Excom vets any prospective member and screens unqualified aspirants. But using what qualifying criterion other than the fact of employment by Council?

It could not have been the intention of the Legislature in s 28 of the Act, or the drafters of the constitution of the Union, to open up membership of a trade union to all manner of people who may not be employed in the particular undertaking to which the trade union was formed.

The first defendant argued that the position of executive chairman to which he was appointed was a salaried one that did not require him to be a member of the Union. However, that argument was fallacious. The position of executive chairman was created by the new constitution. That constitution was only registered in December 2013. Yet the first defendant's purported appointment had been in 2012. It was a nullity.

At any rate, holistically, the scheme of both the Act and the old constitution of the Union in general, but clause 10 in particular, was such that members of Excom were elected, not appointed, from the generality of the membership of the Union at an elective general meeting. Excom consisted of the chairman, his or her vice, and six members. Among other things, and as I highlighted at the beginning, a member whose subscriptions were three months in arrears, or was on suspension, would be ineligible to be elected a member of Excom. It would be such an anomaly that an important, influential and central position, such as that of chairman, could be occupied by an alien, who, among other things, would be naturally immune to all the disabilities that members might suffer from, such as, for example, ineligibility due to a failure or inability to pay subscriptions, or ineligibility due to suspension.

In the circumstances, I find that despite the seemingly open endedness of the constitution of the Union, membership was restricted to employees of Council. It follows that if the first defendant had been dismissed from Council employment he lost the right to keep his membership, let alone to become an office bearer in Excom, unless he had been conferred with honorary membership in terms of clause 5(k) of the new constitution, in which event he would have no right to hold office or to vote.

(ii) That first defendant had appealed to the Supreme Court

At the close of argument, and seeing that the parties had paid scanty regard to the question of the effect of the first defendant's alleged appeal to the Supreme Court against the decision of the Labour Court, I directed the filing of supplementary submissions to deal solely and squarely with the point. Interestingly, in their supplementary heads of arguments, Counsel have adopted diametrically opposed views. But most ironically, each one's conclusion is the complete opposite of their own cases, and the direct support of the other's!

Mr *Debwe*, for the plaintiffs, gave the matter the most cursory treatment in his brief supplementary heads. In this regard I would like to associate myself with the complaint by GILLESPIE J in *Vengesai and Others v Zimbabwe Glass Industries Ltd*<sup>12</sup> on the conduct of some legal practitioners who do not carry out proper research. He said<sup>13</sup>:

“I have to say that argument on the law, with appropriate citation of all relevant cases, including adverse decisions, is as rare amongst legal practitioners as are hens' teeth. Yet it is to counsel that a judge must look for appropriate research and argument if he is to be able to give judgments efficiently and correctly. It is that duty of him, who would undertake the responsibility of an advocate, a duty owed both to the client and the court, to do all relevant research and to present that research to the court. A judge cannot be expected to undertake himself all the original research in every case.”

From his research, Mr *Debwe* concluded that an appeal to the Supreme Court automatically suspends the judgment of the Labour Court appealed against, in line with the common law rule of practice. Nonetheless, he persisted with his clients' case on the basis that there was no appeal pending by the first defendant, but merely an application for leave to appeal.

On the other hand, Mr *Mambara*, in his more elaborate and well researched heads, concluded that an appeal to the Supreme Court does not automatically suspend the Labour Court's judgment because the common law rule of practice that has that effect only applies to superior courts of inherent jurisdiction. He pointed out that in this jurisdiction there have been divergent and conflicting views on this point.

The common law rule of practice in the superior courts is that execution of a judgment appealed against is automatically suspended unless leave to execute is granted: see *Wood NO v Edwards & Anor*<sup>14</sup>; *Oliphant's Tin 'B' Syndicate v de Jager*<sup>15</sup>; *Verkouteren v*

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<sup>12</sup> 1998 (2) ZLR 593 (H)

<sup>13</sup> At p 596D - E

<sup>14</sup> 1966 RLR 336(G)

*Savage*<sup>16</sup>; *Malan v Tollekin*<sup>17</sup>; *Reid v Godart*<sup>18</sup>; *Levin v Felt and Tweeds Limited*<sup>19</sup>; *Geffen v Strand Motors (Private) Limited*<sup>20</sup>; *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*<sup>21</sup>; *Econet (Pvt) Ltd v Telecel Zimbabwe (Pvt) Ltd*<sup>22</sup> *Vengesai and Others, supra*, and *Chematron Products (Pvt) Ltd v Tenda Transport (Pvt) Ltd & Registrar of Deeds*<sup>23</sup>.

In terms of that common law rule, the party that succeeds in the court of first instance has to seek the leave of the court to execute the judgment whilst the appeal is pending. In *Levin's* case above VAN WINSEN AJ explained the rule as follows<sup>24</sup>:

“The common law is clear that a notice of appeal, save in certain exceptional cases, automatically suspends the execution of the judgment appealed against. No application is necessary to ensure this result. If the party who succeeds in the judgment against which the notice of appeal has been lodged wishes to execute upon the judgment, then it is he who is required to make an application to do so.”

In *South Cape Corporation, supra*<sup>25</sup>, CORBETT JA put it as follows:

“Whatever the true position may have been in the Dutch courts, and more particularly the Court of Holland ... it is today the accepted common law rule of practice in our court that generally the execution of a judgment is automatically suspended upon the noting of an appeal... The purpose of the rule is to prevent irreparable damage from being done to the intended appellant.”

However, as Mr *Mambara* noted, on this point the structure and wording of the Act is a cause of some confusion. Section 92E is headed “**Appeals to the Labour Court generally**”. Subsection (1) then provides that an appeal “... *in terms of this Act* ...” may address the merits of the determination or decision appealed against. It does not say an appeal “... *in terms of this section* ...” It does not refer to other provisions dealing with appeals to the Labour Court, for example, s 92D and s 98(10).

With regards to appeals to the Supreme Court, s 92F of the Act is headed “**Appeals against decisions of Labour Court**”. Subsection (1) expressly provides for appeals from the

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<sup>15</sup> 1912 AD 474

<sup>16</sup> 1919 AD 183

<sup>17</sup> 1931 CPD 214

<sup>18</sup> 1938 AD 511

<sup>19</sup> 1951 (1) 213

<sup>20</sup> 1962 (3) SA 62

<sup>21</sup> 1977 (3) SA 534

<sup>22</sup> 1998 (1) ZLR 149 (HC)

<sup>23</sup> HH 343-13

<sup>24</sup> At p 217F

<sup>25</sup> At p 544

Labour Court to the Supreme Court, but only on questions of law. The confusion may arise in that whilst it seems settled that an appeal from the decision of an arbitrator to the Labour Court in terms of s 98(10) of the Act is not suspended automatically because of the provisions of s 92E, there is nothing expressly stated in respect of the effect of noting an appeal from the Labour Court to the Supreme Court. Yet subsection (1) of s 92E refers to appeals “... ***in terms of this Act***.” This seems to suggest that any appeal whatsoever, to and from wherever, does not automatically suspend the decision appealed against, for as long as that appeal is one “... ***in terms of this Act***”. An appeal from the decision of an arbitrator is one “... ***in terms of this Act***...” But so is an appeal from the Labour Court to the Supreme Court.

However, in my view, the reference in s 92E to “[a]n appeal in terms of ***this Act*** ...” does not include an appeal to the Supreme Court. It is a reference to appeals to the Labour Court only. Section 92F deals specifically and expressly with appeals from the Labour Court to the Supreme Court. But it does not deal with the effect of such an appeal on the decision appealed against as does s 92E.

Some decisions of this court have held the view that subsection (2) of s 92E expressly reversed the common law rule: see *Gaylord Baudi v Kenmark Builders (Private) Limited*<sup>26</sup>; *DHL International Ltd v Madzikanda*<sup>27</sup>; *Samudzimu v Dairibord Holdings Ltd*<sup>28</sup>; and *Senele Dhlomo-Bhala v Lowveld Rhino Trust*<sup>29</sup>. In *Dhlodhlo v Deputy Sheriff of Marondera*<sup>30</sup> and *Mvududu v Agricultural and Rural Development Authority*<sup>31</sup> it was accepted or assumed that in the absence of a legislative provision to the contrary the common law rule applied in respect of appeals to the Labour Court.

Be that as it may, whatever confusion may arise on the interpretation of s 92E and s 92F of the Act, it seems settled that the common law rule of practice only applies to the superior courts of inherent jurisdiction. Contrary to the views in the earlier cases, it seems that in s 92E(2) of the Act, Parliament re-stated, rather than reversed, the common law in regards to an inferior court such as the Labour Court. In *Associated Newspapers of Zimbabwe v Minister of State for Information and Publicity & Ors*<sup>32</sup> CHIDYAUSIKU CJ singled out the

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<sup>26</sup> HH 4-12

<sup>27</sup> 2010 (1) ZLR 201 (H)

<sup>28</sup> 2010 (1) ZLR 357 (H)

<sup>29</sup> HH 263-13

<sup>30</sup> HH 76-11

<sup>31</sup> 2011 (2) ZLR 449 (H)

<sup>32</sup> 2005 (1) ZLR 222 (S), at p 254D - E



High Court and the Supreme Court as the superior courts of inherent jurisdiction in this country. He went on to say<sup>33</sup>:

“Courts created by statute do not have inherent jurisdiction and consequently do not have the power to order execution of their judgment unless such jurisdiction is conferred on them by statute.”

The Labour Court is not a court of inherent jurisdiction. It is a creature of statute. As such, and in my view, the aforesaid common law rule does not apply to it. In *Vengesai, supra*, GILLESPIE J stated<sup>34</sup>:

“In my opinion, the *dictum* of CORBETT JA, cited above and approved in the various judgments referred to, **does not, and was not intended, to apply to a judgment of any court, tribunal or authority other than a superior court of inherent jurisdiction.**” (my emphasis)

In *Longman Zimbabwe (Pvt) Ltd v Midzi & Ors*<sup>35</sup> GARWE JA quoted with approval<sup>36</sup> the further remarks by GILLEPSIE J in *Vengesai, supra*, as follows:

“In *Vengesai & Ors v Zimbabwe Glass Industries Ltd* 1998 (2) ZLR 593 (H), GILLESPIE J, after considering a number of earlier decisions on the matter, remarked at p 598E – F:

‘In stating the common law, CORBETT JA referred to the automatic stay of execution upon the noting of (an) appeal, as a rule of practice. That is not a firm rule of law, but a long established practice regarded as generally binding subject to the court’s discretion. **The concept of a rule of practice is peculiarly appropriate only to superior courts of inherent jurisdiction. Any other court, tribunal or authority is a creature of statute and bound by the four corners of its enabling legislation.**’

“The learned judge continued at p 599A – D:

‘... the grant or withholding of a stay of execution is, at common law, a matter of discretion reserved to a court in which such a discretion is imposed. It follows that, in the absence of any statute specifically conferring such a discretion on an inferior tribunal or authority, or otherwise regulating the question of enforcement of judgments pending an appeal from that authority, no such discretion can exist. Such a court or authority can exercise only the powers conferred by statute. It cannot order the suspension of its own judgment pending an appeal. It has no discretion to enforce its own judgment, notwithstanding an appeal. The only basis upon which its judgment or order

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<sup>33</sup> At p 254D - E

<sup>34</sup> At p 597C

<sup>35</sup> 2008 (1) ZLR 198 (S)

<sup>36</sup> At pp 204G – 205D

can be supposed to be stayed is where its enabling statute provides for the situation.

... the grant, whether automatic or not, of a stay of execution of a judgment pending appeal is an inseparable part of an exercise of discretion by the court from which the appeal lies, to order the enforcement of its judgment notwithstanding the appeal or any temporary stay. **It follows that the question of enforcement pending appeal of judgments from an inferior court or authority cannot possibly be regulated according to a rule of practice, derived from the common law, and applicable in superior courts of inherent jurisdiction.**” (my emphasis)

Thus, in *Longman*, the Supreme Court, on the basis that the common law rule of practice applies to the superior courts of inherent jurisdiction only, reversed the judgment of this court that had held that the decision of the Rent Board, a quasi-judicial body established in terms of the Housing and Building Act, *Cap 22:07*, had automatically been suspended by an appeal against that decision to the Administrative Court. At p 206A –B the Supreme Court said;

“The position may now be accepted as settled in this jurisdiction that, unless empowered by law to do so, an inferior court or tribunal or other authority has no power to order the suspension of its own orders or judgments **and, further, that the noting of an appeal against the judgment or order of such a court, tribunal or other authority, in the absence of statutory provision to that effect, does not have the effect of suspending the operation of the judgment or order that is sought to be appealed against.**” (emphasis added)

It follows that whatever may have been the intention of the Legislature in crafting sections 92E and 92F of the Act, the common law rule of practice that has the effect of automatically suspending the decision appealed against, does not apply in respect of the Labour Court because it is not a superior court of inherent jurisdiction. Although the remarks of the learned Chief Justice in *Associated Newspapers of Zimbabwe* were made in relation to a matter that had been determined by the Administrative Court, GARWE JA, in *Longman*, pointed out that<sup>37</sup> they apply with equal force to judgments and orders made by all inferior courts and tribunals.

In the Act, subsection 92E(3) empowers the Labour Court to make interim determinations pending the determination of an appeal that is pending before it. Mr *Mambara* submitted that in practice the provision has been employed to regulate the execution of

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<sup>37</sup> At p 205G

judgments of those bodies or authorities inferior to it, such as arbitrators. That may be the position. But there is no corresponding provision in s 92F. That seems to fortify the view that the Labour Court has no power or discretion to order a stay or to authorise execution of its decision where it has been appealed against, and that the common law rule of practice does not apply to it. But, as GILLESPIE J noted in *Vengesai*<sup>38</sup>, an aggrieved party who desires a stay of execution, or execution pending appeal, is not without a remedy. He can approach this court for appropriate interim relief, or, in my view, the Supreme Court where the appeal will be pending.

Coming back to the first defendant's situation with regards the status of his appeal to the Supreme Court, it seems that all that was pending at the Labour Court was his application for leave to appeal, not the actual appeal itself. I have gathered from the papers in the court record that such leave was applied for on 22 January 2014. I heard argument in this case on 23 October 2014. The parties filed their supplementary heads of argument on 10 and 12 November 2014. There was no indication as to the fate of the leave application. Despite that, Mr *Mambara* had originally argued that the leave application had the same status as the actual appeal, namely that it had automatically suspended the decision of the Labour Court, because it is a necessary step in the noting of an appeal.

Given the conclusion that I have arrived at above, namely that an appeal to the Supreme Court does not automatically suspend the Labour Court's decision that has been appealed against, and given Mr *Mambara's* concession in his supplementary heads of argument, it follows that his earlier argument that the leave to appeal was on the same footing as the substantive appeal automatically falls away.

(c) **Disposition**

In the premises, judgment is hereby entered in favour of the plaintiffs. Costs were sought against the first and second defendants only. Therefore, it is ordered as follows:

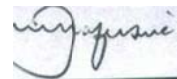
- 1 This court had jurisdiction to determine the plaintiffs' action;
- 2 The plaintiffs had *locus standi* to institute these proceedings;

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<sup>38</sup> At p 599D – E

- 3 The first defendant is not eligible to be a substantive member of the Harare Municipal Workers' Union, let alone to be elected or appointed to any position in it;
- 4 The costs of this action shall be borne by the first and second defendants, jointly and severally.

7 January 2015

A handwritten signature in black ink, appearing to read 'J. Mambarara', written over a horizontal line.

*Debwe & Partners*, plaintiffs' legal practitioners  
*J. Mambara & Partners*, defendants' legal practitioners