

BERRINGTON ZVANYANYA
and
SAMUEL JINJIKA
and
NYARARAI DEMBO
and
MADHUVURA EMMANUEL
and
MADZURO STIRIKI
and
LOVEMORE MUTEURWA
and
VENGAI MASUNGWINI
and
NGONIDZASHE MABINA MUDAMBANUKI
and
JOE GASVA
and
MASACHA TAPIWA
versus
ZIMBABWE SUGAR MILLING INDUSTRY WORKERS UNION
and
GODFREY KATERERE
and
BRAWL CHIKANDIWA
and
TAVANGA VANDIRAI
and
LUCIA CHIRILELE
and
NOKHUTULA DUBE
and
TONGAAT HULETT LTD t/a TRIANGLE LTD or HIPPO VALLEY ESTATES LTD

HIGH COURT OF ZIMBABWE
MAFUSIRE J
MASVINGO, 23 May 2019 & 27 June 2019

Date of written judgment: 28 August 2019

Opposed application

C. Ndlovu, for the applicants

G. Dzitiro, for first to sixth respondents
No appearance for seventh respondent

MAFUSIRE J

- [1] Applicants 1 to 10 are one faction of a trade union. Respondents 2 to 6 are the other. The trade union is the first respondent. The seventh respondent is the undertaking or industry in which the trade union is established. It is the employer. It is cited as a nominal party. It did not file any papers, electing to abide by the decision of the court.
- [2] Respondents 2 to 6 are members of the national executive committee of the trade union. The applicants allege respondents 2, 3 and 4 are no longer employees of the seventh respondent. For that reason, they allege, these respondents are automatically disqualified from continuous membership of the trade union. So the applicants seek two inter-related orders as follows:
- that respondents 2, 3 and 4 are no longer members of the trade union by virtue of the termination of their contracts of employment with the employer, and
 - that respondents 2, 3 and 4 are disqualified from holding positions in the trade union's national executive committee.
- [3] The applicants also seek two inter-related orders in respect of the trade union. They want it to hold elections to choose members of its national executive committee and to hold annual general meetings in terms of its constitution.
- [4] Costs of suit are sought against respondents 2, 3 and 4 on an attorney-client scale.
- [5] The applicants allege they derive their power to sue from their membership of the trade union and in terms of its constitution.
- [6] The respondents, except the employer, have all vehemently opposed the application. Their grounds are multiple and disparate. They are both technical and substantive. Initially, the technical grounds, or points *in limine*, were these:

- that in effect there is only one applicant before the court, the first applicant, all the others having filed defective affidavits in their efforts to support the first applicant;
- that the matter is *res judicata*, allegedly this court having previously issued two orders, essentially and among other things, recognising, among other members, respondents 2, 3 and 4 as legitimate members of the trade union, and therefore capable of holding executive positions in it;
- that the applicants lack the requisite *locus standi in judicio* to move the court in the manner they have done, and
- that the applicants should be non-suited for failure to exhaust such of the domestic remedies as are provided for in the constitution of the trade union, for example, the right of any member to sponsor or motivate a two-thirds ($\frac{2}{3}$) majority of the other members for a general meeting to vote anyone out of office.

[7] The points *in limine* were patently bogus. A few moments into argument, and following exchanges with the Bench, Counsel for the respondents abandoned all of them. Argument ensued on the substantive ground of opposition. This was that the loss of employment by members of a trade union did not automatically translate into losing their membership of the trade union, or becoming ineligible to hold positions in the national executive committee.

[8] The respondents expanded their argument on the substantive ground of opposition above. They said membership to a trade union was not confined to employees in the respective undertaking only. Continued membership, or loss of it, depends on the wording of the constitution of the trade union. Ex-employees can remain members of a trade union. Even students can become members of a trade union. By custom and precedence, members of this particular trade union who in the past have lost their employment in the undertaking have continued with their membership, especially where they have been challenging their loss of employment and the case would be pending in the courts. With respondents 2, 3 and 4 in particular, they are still challenging their termination of their contracts of employment and therefore, there is no basis for the applicants to pursue the orders they are seeking.

- [9] With regards the non-holding of general elections, the respondents argue that the issue has been relegated to the periphery owing to the endless legal fights that have dogged the trade union. But plans are underway to hold the general meetings.
- [10] It is common cause that respondents 2, 3 and 4 lost their employment three years ago in 2016. However, they allege they are challenging their dismissal and that their cases are pending at the Supreme Court.
- [11] The substantive issue before me is whether the respondents 2, 3 and 4 forfeited their trade union membership upon their loss of employment. Corollary to that, or concomitantly, did they become ineligible to hold positions in the executive committee of the trade union? I have dealt with a similar situation before in *Makarudze & Anor v Bungu & Ors* 2015 (1) ZLR 15 (H). I held that employment in the relevant undertaking or industry is a pre-requisite for membership by any person to a trade union in that undertaking or industry.
- [12] Mrs *Dzitiro*, for the respondents, argues that *Makarudze's* case above is distinguishable in that the constitution of the trade union in question excluded non-employees from becoming members of the trade union. She says, in contrast, the constitution of the first respondent *in casu*, is wide enough to accommodate as members anyone who may be prepared to abide by its conditions of membership, more so, ex-employees who may still be fighting against their dismissal.
- [13] Mrs *Dzitiro* further argues that the applicants have sought to rely on clauses of the trade union's constitution on eligibility of membership instead of relying on those dealing with the termination of membership. She says once someone becomes a member of the trade union, his or her termination of that membership depends on those clauses dealing with termination of membership and that termination of employment is not one of the criteria.

- [14] The answer to this case lies in the wording of the constitution of the first respondent and the Labour Act, *Cap 28:01*. I find no material difference between the scenario in *Makarudze's* case above and the present. The substantive provisions of the constitution in that case dealing with the eligibility of membership to a trade are similar to those of the constitution of the trade union *in casu*. For example, *in casu*, clause 6.0 of the constitution says membership of the union shall be open to non-managerial employees in the sugar milling industry. Thus, first and foremost, one has to be employed in the sugar milling industry to be eligible for membership of the first respondent.
- [15] Mrs *Dzitiro* says clause 6.0 is irrelevant. She says it merely opens the door for membership. It does not shut it up against anyone, especially those that have already entered. She says the clauses dealing with shutting the door against members are 10.6 and 10.7.
- [16] Clause 10.6 of the first respondent's constitution says a member of the national executive committee vacates his seat upon resignation, suspension or expulsion from membership of the trade union. He or she also vacates his seat for absenteeism from any three consecutive meetings without reasonable cause or on non-payment of subscriptions for a period of more than three months. Clause 10.7 says any member of the national executive committee may be removed from office if a vote of no confidence is passed against them by a majority of members at a general meeting. Undoubtedly, none of these provisions is relevant to the respondents' situation.
- [17] But Mrs *Dzitiro's* argument is a ruse. In *Makarudze* I said opening up membership of a trade union to anyone not employed in the particular industry or undertaking is alien to trade unionism in Zimbabwe. By virtue of s 4 of the Labour Act, the entitlement to membership of a trade union and to hold any office in it is that of someone called an employee. An employee is not just any person. In terms of s 2 he or she is any person who performs work or services for another person for remuneration or reward. A non-employee or ex-employee is not an employee. In terms of section 27, the right to from trade unions is that of employees.

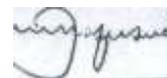
- [18] Clauses 10.6 and 10.7 of the first respondent's constitution that form the bedrock of Mrs *Dzitiro's* argument are irrelevant. They are dealing with the wilful cessation of office by a member of the national executive or upon breach by him or her of some term or condition of the constitution or upon loss of confidence in him or her by members. But before one gets to that one has to have been qualified first to be a member of the trade union. If he or she was not, but had got in anyway, that does not stop disgruntled members like the applicants from challenging his or her eligibility.
- [19] At all relevant times, respondents 2, 3 and 4 were not employees in the sugar milling industry, or anywhere else for that matter. They were ineligible to become or remain members of the first respondent. How they might have lost their employment or that three years on they were still fighting their dismissal, are issues of no moment. Incidentally, the facts of the alleged appeal by the respondents have not been ventilated before me. All that the respondents have said is that the appeals for respondents 2 and 3 are pending at the Supreme Court and that respondent 4 has lodged an application for leave to appeal. But it is trite that an appeal against the decision of a judicial body or quasi-judicial body that is not a superior court does not suspend the decision. It is also trite that an application for leave to appeal is not an appeal: *Makarudze's case, supra*.
- [20] Evidently, as a last-ditch effort, Mrs *Dzitiro* stitched together the argument that the spirit of the first respondent's constitution was such that a member's loss of employment does not lead to an automatic cessation of membership of the trade union. She pointed to clause 7.0 of the first respondent's constitution. This clause says a member shall be exempt from payment of subscriptions in respect of any particular months during which he is unpaid (his salary) on account of suspension without pay or is unemployed for two months. But even if this argument had any semblance of probity, which it does not, the cut-off period in terms of the clause is a maximum of two months. And this is only in relation to the payment of subscriptions.
- [21] Plainly, the applicants have a right to be represented by genuine trade union members. One who is not a member or one whose membership has lapsed for one reason or other

cannot hold a position on the first respondent's national executive. Clearly the applicants are entitled to relief as against respondents 2, 3 and 4.

- [22] The argument in respect of the relief sought against the first respondent, relating to the holding of general meetings, has not been fully developed. Both parties seem to have just ignored this aspect of the case. The draft order on this aspect is open ended. An order is sought directing the first respondent to hold elections to choose members of the national executive committee. When should these elections be held? The other relief sought is that the first respondent should hold annual general meetings in terms of its constitution. Again when? How many such annual general meetings?
- [23] An order of court is not a pious exhortation. It must be efficacious. It must not be a *brutum fulmen*. Evidently, the energy and primary focus of the applicants have been on the disqualification of respondents 2, 3 and 4, against whom costs are sought on an attorney and client scale.
- [24] However, and be that as it may, given that the respondents have all but admitted breach of the first respondent's constitution by not holding general meetings as prescribed, I consider that even though open ended, the remedies sought against the first respondent can also be granted, albeit with slight modifications. Members elected to the executive committee of the trade union must cause the holding of general elections as prescribed by the trade union's constitution.
- [25] But even though the applicants have largely succeeded against respondents 2,3 and 4, I do not see anything warranting a penal order of costs against them alone, especially given that the first respondent is itself riddled with factionalism and has been embroiled in endless litigation over the same issues for a long time. Furthermore, the first respondent has opposed this application to the hilt. I find it irrational that only respondents 2, 3 and 4 alone should be made to bear the costs.
- [26] In the premises I make the following orders:

- i/ The second, third and fourth respondents ceased being members of the first respondent upon the termination of their contracts of employment with the seventh respondent.
- ii/ By reason of paragraph i/ above, the second, third and fourth respondents are hereby disqualified from holding any positions in the first respondent's national executive committee.
- iii/ The first respondent shall hold elections to choose members of the national executive committee within sixty (60) days of the date of this order, or within such other time frame as may be agreed upon.
- iv/ The first respondent shall hold an annual general meeting in terms of its constitution by not later than the 31st of December 2019.
- v/ The costs of this application shall be borne by the first, second, third and fourth respondents, jointly and severally.

28 August 2019



Ndlovu & Hwacha, applicants' legal practitioners

Mutumbwa Mugabe & Partners, first to sixth respondents' legal practitioners