BAKING AND ALLIED WORKERS UNION
and
FOOD PROCESSI NG WORKERS UNION
and
MEAT, FISH AND ALLIED WORKERS UNION
and
ZIMBABWE MILLING AND ALLIED INDUSTRY WORKERS UNION
and
ZIMBABWE FOOD AND BEVERAGES AND ALLIED WORKERS UNION
versus
NATIONAL EMPLOYMENT COUNCIL FOR FOOD AND ALLIED INDUSTRIES
and
BAKING WORKERS UNION
and
MEAT, FISH, POULTRY, ABATTOIR AND MEAT PROCESSORS WORKERS UNION
and
FOOD MANUFACTURING, PROCESSING AND HANDLING WORKERS UNION OF ZIMBABWE
and
BREWING AND DISTILLING WORKERS UNION
and
SUGAR REFINERY WORKERS UNION
and
SWEETS AND CONFECTIONARY WORKERS UNION
and
MILLING INDUSTRY WORKERS UNION

HIGH COURT OF ZIMBABWE
DEME J
HARARE, 27 January and 10 March 2022

Urgent Court Application

Mr S M Mandizha and Mr B Makururu, for the 1st, 2nd, 3rd, 4th and 5th applicants
Ms J Sande, for the 1st respondent.
Prof. L Madhuku, for the 2nd, 3rd, 4th, 5th, 6th, 7th and 8th respondents

DEME J: The Applicants have approached this court on an urgent basis in terms of Rule 59(6) of the High Court Rules, 2021 seeking the relief of a declaratory order in terms of Section 14 of the High Court Act [*Chapter 7:06*]. In particular, the applicants pray for the following relief:

"1. The Application for a declaratur be and is hereby granted.
2. That the amendment of Section 5.1 of the first respondents does not require that representatives of the Council appointed in December 2020 to be removed from their appointments before the end of their term of office.
3. The appointments by first to eighth respondent be and are hereby nullified and any acts done by the appointees are declared null and void.
4. Costs of suit."

I will proceed to give the brief background of the present application. It is the case of the applicants that the first to fifth applicants and second to eighth respondents constitute the full composition for the first respondent, the National Employment Council for Food and Allied Industries. According to the applicants, sometime in 2021, the full council of the first respondent mandated the interim executive committee at the time to draft the proposed amendments to the Constitution of the first respondent. The amendments related to s 5 of the Constitution, according to the applicants. However the interim executive observed that there were other consequential amendments which needed to be done to sanitise the constitution, the applicants further averred. They also stated that the amendments to s 5.1 were adopted by the Council and subsequently registered with the Ministry of Public Service, Labour and Social Welfare on 23 November 2021.

The applicants affirmed that pursuant to the amendments, the first respondent gave notice for the restructuring of the sub-sector council. The restructuring would replace the council members in office, which was appointed in December 2020, according to the case of the applicants. The applicants also stated that the restructuring process resulted in the appointment of a new sub-sector council on the 23 December 2021. The applicants maintained that the appointments of the second to eighth respondents were prematurely done since the term for the council appointed in December 2020 had not lapsed. According to the applicants, the effect of the appointment and restructuring was inconsistent with Clause 5.2 and 5.5 of the Constitution.

At the meeting of 23 December 2021, the second to eighth respondents were appointed as the sub sector members. However, the applicants allege that there was no need for the dissolving of the council appointed in December 2020 and the right to remain as representatives accrued to them and the constitutional amendment cannot take away the right unless it specifically provides for that.

The applicants averred that attempts were made through the Food Federation and Allied Workers Union (hereinafter called the Federation) and their legal representatives to approach

the first respondent objecting to the restructuring and appointments. According to the applicants, the objections did not yield any result.

The application was opposed by the first to the eighth respondents. The respondents raised points *in limine* against the present application.

The first respondent averred that this matter lacks merit to be heard on an urgent basis because the applicants ought to have filed the application when the restructuring of the council became common knowledge on 10 December 2021. According to the first respondent, the applicants failed to tender reasons in the certificate of urgency and the founding affidavit as to why the applicants failed to act from then till the filing of the Application.

The first respondent further contended that the basis of this matter being heard on an urgent basis has fallen away because the meeting scheduled for 29 December 2021 to ratify the reconstitution was held and the applicants' draft order did not seek cancellation of that meeting. The meeting had already taken place to the effect that the appointment of councillors has been ratified.

The applicants, in response to the issue of urgency, averred that the meeting of 10 December 2021 are not a true reflection of the proceedings which transpired. The applicants further argued that they attempted to challenge the minutes through letters addressed to the first respondent. They only managed to receive the response on 20 December 2021. In reply, according to the applicants, the first respondent highlighted that the meeting for the sharing of seats would go ahead and further apologised for the delay in responding to the matters raised by the applicants. According to the applicants, this delay also saw them delaying to file the present application. The applicants further asserted that failure to get response after writing to the first respondent through their legal practitioner forced them to file the present application.

The first respondent also affirmed that there are material disputes of fact which make it impossible for the matter to be resolved on the papers without hearing oral evidence from the parties and the applicants ought to have used action procedure. According to the first respondent, the applicants have omitted some material facts in their application and such omission does not give the court the true picture of the events that transpired. On the other hand, the applicants denied that material disputes of fact do exist. They further alleged that the first respondent has failed to establish such material disputes of fact.

The first respondent also maintained that the applicants used the wrong procedure, which is not premised in the High Court Rules and did not highlight the specific rule which this application was filed. Further, the first respondent argued that the High Court Rules do not

make provision for an urgent court application. The rules only provide for an urgent application in the form of a chamber application and not a court application. The first respondent highlighted that the applicants gave the respondents three days to file their opposition contrary to the ten days provided for in the rules. The first respondent further contended that the applicants did not attach proof that the court had agreed to such a shorter notice period as provided for by r 59(6). The first respondent further argued that the applicants were present at the meeting held on 10 December and should have sought the review of the decision and made an urgent chamber application to stop all internal processes pending the outcome of the review. In response to the issue of procedure adopted, the applicants insisted that the matter is correct. The applicants drew the court's attention to the proviso to r 59(6) of the High Court Rules, 2021. The applicants argued that the filing of the opposition is not mandatory in the application of this nature. They further averred that the first respondent did file the notice of opposition outside the stipulated time frame of three days.

The first respondent argued that the applicants seek a final order on an urgent basis as opposed to a provisional order. The first respondent further alleged that there is no justification for the matter to be heard on an urgent basis since the allocation and ratification of appointment of council members have already taken place. The Application did not seek to stop the meeting from taking place and such meeting went ahead and ratified the appointment.

In response to the nature of the relief sought, the applicants averred that they are seeking the final order through urgent court application. The applicants further alleged that they filed this present application as an urgent court application as opposed to the urgent chamber application.

The first respondent also challenged, through the point *in limine,* the locus *standi* of the fourth applicant. The fourth applicant has not been admitted as a member of the first respondent, according to the first respondent. Thus, the fourth applicant lacks *locus standi* according to the first respondent's averment.

The applicants opposed this averment with respect to the *locus standi* of the fourth applicant. They claimed that the fourth applicant is affiliated to the first respondent. They further alleged that, Mr *Nyika,* the president of the fourth applicant sat in full council representing the fourth applicant at one time.

The second to eighth respondents also raised their points *in* limine. The second to eighth respondents alleged that the application raises purely labour matters and it had become clear that the Supreme Court has held such matters are outside the province of this Court. According

to the second to eighth respondents, the applicants are essentially seeking a resolution of a labour dispute. According to the second to the eighth respondents, the applicants did couch their labour matter as the application for a declaratory order. In essence, the present matter ought not to be brought before this court as it is purely a labour dispute, the second to the eighth respondents further averred. They further alleged that this court does not have jurisdiction to entertain a labour matter.

The applicants insisted that the High Court does have jurisdiction to hear the matter as it is an application for a declaratory order. They further averred that the Labour Court does not have jurisdiction to hear application of this nature. They further alleged that the court is being asked to interpret the provisions of first respondent's amended constitution. According to the applicants, such a matter raises no labour issue.

The second to the eighth respondents further averred that the applicants should have given the respondents the mandatory 10 day period within which to respond. They required leave of the court to shorten the dies *inducia.* In the absence of leave, the application is fatally defective. The application is neither on Form No. 23 nor Form No. 25. The applicants opposed this averment and insisted that the application of this nature does not have to specify normal *dies induciae*.

The applicants also raised points *in limine* against the notices of opposition and opposing affidavits filed by the first to the eighth respondents. According to the applicants, the deponent for the opposing affidavit of the second to the eighth respondents lacks authority to depose on their behalf because he is the general secretary for the federation which is not a member of the first respondent and is not a party to the proceedings at hand.

The applicants further argued that no constitution has been attached in order to establish that the Constitution empowers it to sue and or defend legal proceedings on behalf of other trade unions. The applicants pointed out that the constitutions of the second to the eighth respondents have also not been attached in order to show that second to the eighth respondents are allowed at law to assign their right to defend legal proceedings to a different trade union or federation of trade unions. A trade union can only act in terms of what its constitution permits, according to the applicants.

The applicants further argued that the deponent of the first respondent's opposing affidavit has no authority to depose onto the affidavit. They further argued that there is no resolution authorising the deponent for the first respondent to defend the present proceedings.

According to the applicants, the present matter is supposed to be treated as unopposed since the deponents of all opposing affidavits filed have no authority to depose to such affidavits.

At the hearing, Professor *Madhuku* made an application for leave to file supplementary affidavit for the second to the eighth respondents. The application was not opposed. Consequently, the application was, by consent, granted and the supplementary affidavit was deemed to be part of the record.

Mr *Mandizha* submitted on behalf of the applicants that the first to the eighth respondents are not properly before the court since their affidavits were prepared by individuals who had no authority to depose to such affidavits. Mr *Mandizha* motivated the court to disregard the affidavits filed by the respondents and treat the matter as unopposed.

In response to the issue of lacking of authority by the deponent of the first respondent, Professor *Madhuku* and Ms *Sande* drew the court's attention to the provisions of the first respondent's constitution. They referred to s 21 of the constitution which authorises the General Secretary to sign all documents on behalf of the first respondent. Ms *Sande* also referred the court to s 7.3 of the first respondent's constitution which gives the General Secretary for the first respondent power to make decisions necessary in the day to day administration of council affairs subject to ratification by the executive committee of the first respondent. She further contended that the General Secretary had authority to depose to the affidavit on behalf of the first respondent.

In response to the submissions that the federation has no authority to represent the trade unions, Professor *Madhuku* submitted that the federation derives its authority to represent its members from the Labour Act [*Chapter 28:01*] and its constitution. He referred the court to s 35(a) (v) of the Labour Act [*Chapter 28:01*] which authorises officials of the federation to represent its members in a particular matter that is of considerable significance to its members. Professor *Madhuku* argued that the federation's members are the trade unions and the second to the eighth respondents happen to be such trade unions. The counsel for the second to the eighth respondents also referred the court to s 27 of the Labour Act [*Chapter 28:01*] which establishes the right to form trade unions, federations and employers organisations.

Professor *Madhuku* also submitted that the constitution of the federation authorises it to represent the interests of its members. He referred to the preamble of the constitution which gives the federation power to organise the workers and build effective sector trade unions based on the democratic organisations of workers in the workplace.

In reply, Mr *Mandizha* and Mr *Makururu*, on behalf of the applicants submitted that ss 27 and 35 of the Labour Act [*Chapter 28:01*] are irrelevant. They do not authorise the federations to represent their members, according to the submissions of the counsel for the applicants. They further argued that s 7.3 of first respondent's constitution does not authorise the General Secretary to depose to the affidavits. According to their argument, s 7.3 of the first respondent's constitution only refers to day to day documents and not to documents related to law suits since these are not day to day issues.

I will firstly deal with applicants' points *in limine* raised by the applicants because of their effects upon the present application if the court finds favour with such points *in limine.* According to the applicants, the deponents for the affidavits of the respondents do lack authority. However, Ms *Sande* is of the different view. She argued that the General Secretary of the first respondent is authorised to represent the first respondent by virtue of the provisions of the first respondent's constitution. Reference was made to s 7.3 and 21 of the first respondent's constitution. Section 21 of the first respondent's constitution provides as follows:

> "The General Secretary or his or her duly appointed Deputy shall sign all documents on behalf of the Council."

In my view, this provision empowers the General Secretary to sign the documents on behalf of the first respondent. The counsel for the applicants submitted that opposing affidavit is not one of the documents contemplated by s 21 of the first respondent. In the absence of further argument, I find no favour with this submission. According to Merriam – Webster Dictionary[1], a document is defined as follows:

> "a written or printed paper that gives information about or proof of something".
> Further, according to the Wikipedia2, a document is defined as follows:
> "A document is a written, drawn, presented, or memorialized representation of thought, often the manifestation of non-fictional, as well as fictional, ..."

Given the two definitions highlighted above, I find no reason why the opposing affidavit together with notice of opposition may not qualify to be regarded as documents contemplated in terms of s 21 of the first respondent's constitution. Thus, I am of the opinion

[1] https://www.merriam-webster.com › dictionary › docu... (Accessed on 2 March 2022).

[2] https://en.wikipedia.org › wiki › Document, (Accessed on 2 March, 2022).

that the General Secretary for the first respondent did have, at the material time, authority to, on behalf of the first respondent, depose to the opposing affidavit by virtue of his office.

Further, s 7.3 of the first respondent's constitution allows the General Secretary to make decisions on behalf of the first respondent subject to ratification by the Executive Committee of the first respondent. Section 7.3 of the first respondent's constitution provides as follows:

> "Whenever the exigencies of council business on a day to day basis demands, the General Secretary shall, make decisions necessary in the day to day administration of council affairs provided that such decisions shall be ratified in the meetings of the Executive Committee."

Thus, s 7.3 provides for a procedure of what happens after the General Secretary has made a decision on behalf of the first respondent. Section 8.2 of the first respondent's constitution provides that first respondent shall meet at least twice annually. Given the intervals of the meetings of the first respondent, it would be imperative for the organisation like the first respondent to authorise someone to make decisions on its behalf. Decisions of such organisations cannot wait for meetings to make a resolution authorising someone to represent it in the pending case before the court. Doing so may have the effect of paralysing the organisation. This would be worse if the matter under review concerns the first respondent's right to appear before the court. Waiting for the meeting of the first respondent may lead to default judgment being entered against the first respondent as such matters do have time frames within which parties are to file their papers. It becomes even worse when the pending case is of urgency like the present application.

I do agree with Professor *Madhuku* who argued that the Federation is empowered by s 35(a) (v) of the Labour Act, [*Chapter 28:*01] to represent its members. In my view, there is no need for the Federation to draft a resolution authorising an official to represent a trade union in a particular matter. Section 35(a) (v) of the Labour Act, [*Chapter 28:*01] provides as follows:

> "The constitution of every registered trade union or employers' organisation or federation shall, in addition to the matters referred to in section 28 provide for consultation between the various governing bodies or branches of the trade union employers organisation and members thereof before such trade union or employers organisation or federation assigns an official to represent its members in a particular matter that is of considerable significance to its members."

The right to form a federation is established in terms of s 27(3) of the Labour Act [*Chapter 28:01*] which provides as follows:

> "Subject to this Act, any group of trade unions or employers organisations may form a federation."

It is my considered view that the Federation's General Secretary did have, at the appropriate time, authority to represent the second to the eighth respondents. Accordingly, I dismiss the points *in limine* raised by the applicants.

Having made a finding that the deponents for opposing affidavits do have authority to depose to the affidavits, I will now shift my attention to the preliminary points raised by the respondents. I will proceed to determine the question of jurisdiction because of the potential consequence that it may have upon the instant matter. The present application has been made in terms of s 14 of the High Court Act, [*Chapter 7:06*] which provides as follows:

> "The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination."

MANZUNZU J, in the case of *Robbert Samaya* v *Commissioner General of Police N.O & Ors*[3] quoted with approval the case of *Johnson* v *Afc*[4], where GUBBAY CJ commented as follows:

> "The condition precedent to the grant of a declaratory order under Section 14 of the High Court of Zimbabwe Act 1981 is that the applicant must be an "interested person", in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court. The interest must concern an existing, future or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated thereto… At the second stage of the enquiry, the court is obliged to decide whether the case before it is a proper one for the exercise of its discretion under Section 14 of the Act. It must take account of all the circumstances of the matter."

In my view, the applicants do have direct and substantial interest in the matter. Thus, the case for the applicants meets the test of the first stage of the inquiry as propounded in the case of *Johnson* v *AFC* (supra). The second stage of inquiry requires the court to thoroughly examine whether the matter may be determined in terms of s 14 of the High Court, [*Chapter 7:06*] Professor *Madhuku* argued that the instant application is a labour matter which should never be brought before this court. He drew the court's attention to the cases of *Nhari* v *Mugabe & Ors*[5], *Cainos Chingombe & Anor* v *City of Harare & Ors*[6] and *Geddes Ltd* v *Taonezvi*[7].

The counsel for the applicants submitted that the High Court does have jurisdiction to hear the present matter. They further submitted that the Labour Court does not have jurisdiction. They drew the court's attention to the case of *Sibanda and Anor* v *Chinemhute*

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[3] HH272-21
[4] 1995 (1) ZLR 65 (S) at p 72E.
[5] SC161-20.
[6] SC117-20.
[7] 2002 (1) ZLR 479 (S) at 484G-485D.

N.O[8]. According to the counsel for the applicants, the court is being called upon to interpret the first respondent's constitution.

Section 5.1 of the first respondent's constitution before the amendment was as follows:

> "Sub-sector council shall consist of not more than six representatives of each employers and employees."

After the amendments, the same provision now provides as follows:

> "The sub-sector undertaking as contained in the certificate of registration of NEC Food and Allied Industries shall consist of not more than six each from the employer party and the employees party."

According to the prayer for the applicants as captured by the draft order filed, the applicants pray for the nullification of the appointments made at the meeting of 23 December 2022. It is critical to mention that all the applicants walked out of meeting where subsector undertaking representatives were elected. In para 16 of the first respondent's opposing affidavit, the first respondent averred that the applicants walked out of the meeting of 23 December 2021. The applicants did not dispute this averment. Thus, the effect of the relief sought is to set aside the decision of 23 December meeting. In particular, the appropriate provision from the applicants' draft order provides as follows:

> "The appointments by 1st-8th Respondent be and are hereby nullified and any acts done by the appointees are declared null and void."

In the absence of the allegations that the meeting was improperly constituted, it is difficult for the court to make an order that will have the effect of setting aside the decision made by a properly constituted meeting. By wilfully and freely refraining from attending the 23 December meeting up to its logical conclusion, the applicants voluntarily lost their right to contest the lawfulness of such meeting's outcome. Challenging such a meeting's outcome is a flagrant affront to the rights of those who religiously attended the meeting.

Further, the result derived from the interpretation sought by the applicants has the effect of setting aside the outcome of the meeting held on 10 December 2021. It was on 10 December 2021 that the meeting resolved that the first respondent was supposed to be reconstituted. According to the applicants, before the reconstitution of the first respondent, the representatives who were in office had only served for one year. In terms of the first respondent's constitution, such representatives were supposed to serve for a period of two years. In para 2 of their draft order, the applicants motivated the court to declare that:

[8] HH131-04

> "That the amendment of Section 5.1 of the 1st Respondents does not require that representatives of the Council appointed in December 2020 to be removed from their appointments before the end of their term of office."

Appointments of subsector members to their respective council is a preserve of our labour law. The first respondent is established in terms of s 56 of the Labour Act, [*Chapter 28:*01] and is registered in terms of s 59 of the same Act. Section 56 of the Labour Act provides as follows:

> "Any—
>
> (a) Employer, registered employers organisation or federation of such organisations; and
> (b) Registered trade union or federation of such trade unions;
>
> May, at any time, form an employment council by signing a constitution agreed to by them for the governance of the council, and by applying for its registration in terms of section 59."

Thus, the constitution of the employment councils must provide for the governance system of such organisation. The constitution of the first respondent does have a dispute resolution mechanism in s 14 which provides as follows:

> "All disputes that may arise in Food and Allied Industries shall be dealt with in terms of the Labour Act Chapter 28:01 as amended from time to time and also as agreed by parties to the dispute."

Thus, the parties agreed that the disputes which may erupt within the organisation must be resolved in accordance with the provisions of the Labour Act or alternatively according to agreement between the parties to the dispute. The parties to the constitution chose not to use other laws, other than the Labour Act, [*Chapter 28:01*] or agreement, to resolve their disputes. The applicants are members of the first respondent and hence are equally bound by the provisions. This court cannot interfere with their arrangement as reflected by s 14 of their constitution. In the circumstances, the present matter should accordingly be resolved in terms of the Labour Act. It cannot be resolved by way of the declaratory order sought by the applicants. The application fails to meet the test for second stage for the inquiry as enunciated in the case of *Johnson* v *AFC* (*supra)*.

In the case of *Chingombe & Anor* v *City of Harare and Ors*[9], the Supreme Court held that:

> "The fact that they clothed the application as a
> declaratur is not material. The result they sought is what guides the court."

[9] SC177-20.

The applicants had crafted their application as the application for the declaratory order praying for this court to breathe meaning upon the amended provision. However, a deeper analysis of the application reveals that the order sought seeks to resolve the pending dispute between applicants and the respondents. The interpretation prayed for by the applicants will have the effect of setting aside the decisions of 10 December 2021 and 23 December 2021. The dispute, in my view, is a labour matter. The court, in the case of *Chingombe & Anor* v *City of Harare & Ors* (supra), further remarked as follows:

> "The High Court was wrong in assuming jurisdiction in a matter where the issues for determination involved the resolution of an employment dispute. It should have declined jurisdiction."

Similarly, the present matter is an employment dispute. It is wrong for this court to assume jurisdiction in this matter. It has to be resolved by the appropriate labour structures charged with that responsibility.

With respect to costs, the applicants had prayed for an order of costs on an ordinary scale. The respondents prayed for the dismissal of the application with costs on a higher scale. In my view, an order of costs on an ordinary scale against the applicants is just and fair in the circumstances. Costs ordinarily follow the outcome. Such costs are reasonably sufficient.

Accordingly, it is ordered that the application be and is hereby dismissed with costs on an ordinary scale.

Makururu and Partners, applicants' legal practitioners
Sande Legal Practitioners, first respondent's legal practitioners
Lovemore Madhuku Lawyers, second to eighth respondents' legal practitioners