

BUSANISIZWE NDLOVU
versus
ADMIRE MUDZONGA
and
ACKIM MZILIKAZI
and
GIBSON MUSUNJE
and
STEPHEN MWOYOWESHUMBA
and
GIVEN DINGWIZA
and
FLORENCE TARUVINGA
and
TARIRO SHUMBA
and
JOHANNES CHINGOWIRO
and
ENERGY SECTOR WORKERS UNION OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 4 FEBRUARY 2019 AND 28 FEBRUARY 2019

Professor W Ncube for the applicant
L Madhuku for the respondents

Urgent Chamber Application

MOYO J: This is an application wherein the following interim relief is sought

- “1. Applicant be and is hereby declared to be the President of 9th respondent.
2. 1st -8th respondents be and are hereby interdicted from holding themselves out as members and/or offices of the 9th respondent.
3. 1st -6th and 8th respondents be and are hereby interdicted from holding themselves out as and performing functions of acting president, trustee, General Secretary, National organizing secretary, National Youth Chairperson, National Women’s’

Committee Chairperson and Chairperson Harare Branch of 9th respondent respectively.

4. 1st- 8th respondent be and are hereby interdicted from implementing any of these solutions purportedly passed at the meeting purported to be the National Council meeting of 9th respondent including any of the bank signatures of 9th respondent in line with the said resolutions and the payment of allowances to the 1st – 8th respondents.
5. 2nd – 3rd respondents be and are hereby interdicted and barred from signing as signatures to the 9th respondent.”

The facts of this matter are that applicant is the President of 9th respondent which is a trade union and the other respondents are members of 9th respondents who have held various positions therein but whose tenure of office is in dispute by applicant for the reason that they were dismissed from work and consequently in terms of the union constitution, they are no longer members of the union as their membership and positions have fallen away. It would appear that the eight respondents were dismissed from work in April 2018 and letters were only written to them in December 2018 by the applicant advising them of the termination of their membership from the union automatically by virtue of having been dismissed from work.

The letters were written by the applicant in his capacity as president of the union.

These 8 respondents allegedly called a meeting wherein they recalled the applicant from his position on 15 December 2018. The validity of such a meeting and the recall itself are being challenged by applicant as having been done by non-members.

In fact it appears that it is the recall of applicant that gave birth to this application. Arguments have been made by both parties on technical issues surrounding each other's cases.

Applicant avers that 9th respondent is not represented in court as the person purporting to represent it has not been authorized in terms of 9th respondent's constitution. On the other hand, the respondents attack the capacity of the applicant to bring such an application clearly on behalf of 9th respondent but without following the provisions of the constitution in so doing.

Arguments have been made on the form of the application, the competence of the relief sought, urgency, and the capacity of applicant and 9th respondent's representative.

I hold the view that the crux of the matter here is, before we even look at the respondents' stance, the application itself, does it qualify to be entertained on the basis of urgency? Has the applicant shown a *prima facie* right that is in imminent danger for himself? Has applicant shown a *prima facie* right that is in imminent danger for the 9th respondent? Does he have capacity to

bring such an application on behalf of the union looking at the provisions of the 9th respondent's constitution? I hold the view that findings on these questions will settle this matter once and for all and it would therefore not be necessary to ventilate on the rest of the technical points.

The certificate of urgency

The certificate of urgency clearly shows that the urgent need to intervene is because of the irreparable harm and loss that is likely to be suffered by 9th respondent if this court does not intervene in the management of its affairs.

Although at paragraph 2.3, the certificate of urgency does mention the recall of applicant, it however goes on to state that his recall, which is unlawful, will result in the union being in the hands of non-members and this the union will suffer irreparable harm by being run by individuals who have unlawfully executed an ill-conceived *coup d'état*.

At paragraph 2.5 it is also stated that applicant as president together with the genuine members of the union would suffer irreparable harm as they would fall under the leadership of none members.

This means that, applicant as president will suffer irreparable harm if the union is left in the hands of none members. In other words applicant's harm is secondary to the union's harm.

The foundation of applicant's case

In paragraph 10 of the founding affidavit applicant states thus:

“The 9th respondent cited herein only as an interested party in whose interests and for whose benefit relief is herein sought by way of the upholding of its constitution and the protection of its funds.” (Emphasis mine)

A reading of this paragraph clearly shows that this is the very basis of the application before me.

In paragraph 11 applicant states thus:

“This is an urgent chamber application seeking declaratory relief and an interdict against 1st – 8th respondents to stop them from carrying out resolutions that emanated from a meeting which is a legal nullity. Some of the said resolutions have grave adverse financial implications upon 9th respondents.” (emphasis mine)

Again, the harm being emphasized by applicant here is on 9th respondent.

Again, a reading of paragraph 17 of the founding affidavit which is as follows:

“The gravamen of this application is that the 1st – 8th respondents are no longer members of the 9th respondent by reason of the fact that they are no longer employed in the energy sector.”

So in essence what brings this matter to court is that the 9th respondent is now improperly constituted in that there are people purporting to be its members who are in fact not.

Again, this application is clearly about the composition or constitution of 9th respondent and its interests.

In paragraph 26 of the founding affidavit applicant goes further to state that:

- “a) The 9th respondent stands to suffer irreparable loss of \$3600-00 every month from payments the eight respondents are seeking to withdraw from the union to compensate themselves for being unemployed.
- b) The union would be then under control of self-serving individuals who are determined to use the union for their personal gain rather than to advance collective interests of members of the union.
- c) My purported recall from my position as president is illegal and unlawful and has resulted in the union being under the administration of none members and will result in the 9th respondent suffering irreparable damage and harm from being run by individuals who have unlawfully grabbed power for themselves.” (My emphasis)

Again, this shows that the entity likely to suffer harm from applicants’ recall is 9th respondent as an organization.

In paragraph 29 the applicant states thus:

“Furthermore, the resolutions passed are not only a nullity but have financial ramifications on the respondent such that if there is no urgent intervention by this Honourable Court, therein will be grave financial prejudice occasioned.

Again, the financial prejudice herein, although the paragraph just relates to respondent from the context its clearly on the 9th respondent.

A look at the interim relief sought, which I have already quoted herein, will show that paragraph 1 is the only paragraph that relates to applicant. Counsel for the applicant conceded that such relief could not be sought as interim relief obviously as it is final in nature and that he seeks an amendment to delete that clause and re-number the rest of the paragraphs.

A look at paragraphs 2-5 clearly shows that the relief therein pertains to the management of the 9th respondent. It is about the protection of the interests of 9th respondent. In essence it is in tandem with the certificate of urgency as well as the paragraphs I have highlighted from the founding affidavit.

This application is about the interests of 9th respondent. The impending harm is that of 9th respondent. The affairs being sought to be straightened are those of 9th respondent. The other eight respondents are being sought to be interdicted from the affairs of 9th respondent. The question that immediately arises therefore, is, since this application is all about 9th respondent, is 9th respondent properly before the court? Is 9th respondent properly represented before this court? Can applicant bring an application on behalf of and for the benefit of 9th respondent?

I believe the answer to all these questions lies in Article 19 (b) (6) of the Constitution of the 9th respondent which stipulates that the National Executive Committee is the one vested with the power to institute or defend legal proceedings on behalf of the union. (My emphasis).

Applicant is not the National Executive Committee, neither does he aver that the National Executive Committee met and empowered him to act in the interests of the Union. In my view this settles the matter. Legal proceedings for and on behalf of the union can only be brought by the National Executive Committee and certainly not the President.

If the President, as the custodian of the constitution of the union and as the manager of the affairs of the union noticed that things were in discord within the union and its interests were about to be harmed, he should have caused the appropriate committee to sit and make resolutions with regard to taking legal steps to protect the interests of the union. He, in my view, cannot take personal decisions that are vested in a committee.

I accordingly hold that, for the reasons stated herein, applicant has failed to make a case for the relief sought as clearly this application is for and on behalf of the 9th respondent, whose constitution clearly provides as to how its legal affairs should be handled.

The application is accordingly dismissed with costs.