ZIMBABWE SUGAR MILLING INDUSTRY
WORKERS UNION (ZSMIWU)
versus
ALFRED MAKWARIMBA
and
KENNIAS RUSUNUNGUKO SHAMUYARIRA
and
ELIAS MADZIVA
and
FREEDOM MUDUNGWE
and
MINISTER OF PUBLIC SERVICE,
and
THE REGISTRAR OF LABOUR
and
TONGAAT HULLET ZIMBABWE

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 24 February and 4 March, 2015

**Urgent Chamber Application**

*C Ndlovu*, for the applicant
*P Mangwana*, for the 1st 2nd 3rd and 4th respondents
*A Rutanhira*, for the 7th respondent

MANGOTA J: The applicant represents workers in the sugar industry. It allegedly carries a membership of 16 000 workers. It is an affiliate of the Zimbabwe Federation of Trade Unions (emphasis added).

The National Executive Committee is the applicant's governing body. The committee manages the affairs of the applicant. Its elected office bearers comprise:

(a) the President
(b) the Vice-President
(c) the Secretary-General - and
(d) three other committee members.

In or about 24 February, 2014 the deponent to the applicant's affidavit, one Simbarashe Nyemba, and members of his National Executive Committee were removed from

their positions and replaced by the fourth respondent and his team of committee members. Mr Nyemba and members of his committee made an urgent chamber application to the court. The application was filed under case number HC 1603/14. The court granted a provisional order to the applicant. It, in effect, directed that paras 3, 4, 5 and 6 of the letter which the second respondent addressed to the seventh respondent on 24 February 2014 should not be executed until proceedings which pertained to case number HC 1603/14 had been completed. The court mentions in passing that the proceedings in question are still pending determination.

The present urgent chamber application was premised on the allegations that, on 14 February 2015, the first and second respondents visited Chiredzi in the company of persons who, it was claimed, were from the office of the fifth respondent. The visitors, the applicant averred, appointed the third and fourth respondents as members of the applicant's Executive Committee. The fourth respondent, it said, was appointed president of the applicant's governing body. It, accordingly, made every effort to move the court to prohibit the fourth respondent and the latter's committee members from representing the applicant until case number HC 1603/14 has been conclusively dealt with.

The applicant attached to its application Annexure D. The annexure is a letter which the fifth respondent addressed to the applicant's secretary- general. The letter is erroneously dated 16 January, 2014. It should have read 16 January, 2015 which the applicant said was the correct date.

In the letter the fifth respondent prohibited the applicant from deducting union dues from the seventh respondent. The fifth respondent stated that, from reports which had been submitted, she had reasonable cause to believe that the funds of members of the applicant were being abused and misappropriated. She said she would appoint an investigator who would look into the affairs of the applicant. She prohibited the applicant's national executive committee from using the funds for any purpose other than what the investigator or she herself would have directed. The fifth respondent copied her letter to, among other authorities, the seventh respondent.

The applicant appealed to the Labour Court against the decision of the fifth respondent. It did so on 22 January, 2015 under case number LC/MS/03/15. The appeal is pending before the Labour Court.

The first, second, third and fourth respondents opposed the application and so did the seventh respondent. The fifth and sixth respondents did nothing about the application. They

remained uncommitted to the matter notwithstanding the fact that they were served with the application. The Sherriff's returns of service showed that both respondents were served on 19 February, 2015. Their attitude to the application, therefore, remained unknown. It was, in the premise, assumed that they would abide by the decision of the court as they did not appear in person or through legal representation.

The first four respondents raised some preliminary issues after which they proceeded to deal with the substance of the application. The seventh respondent adopted a pattern which, to all intents and purposes, was similar to that of the first, second, third and fourth respondents.

The first four respondents' *in limine* matters were that:

(a) the application was not compliant with the rules;
(b) the certificate of urgency was defective;
(c) the application was not urgent – and
(d) Simbarashe Nyemba did not have the authority to represent the applicant.

The seventh respondent's preliminary matters were that:

(i) the citation of the seventh respondent by the applicant was defective – and
(ii) the application was not urgent.

In so far as the urgency or otherwise of the application was concerned, the court noted that the conduct which the applicant complained of occurred on 14 February, 2015 and the applicant filed the present application on 17 February, 2015. There was, therefore, no doubt that the applicant treated its application as urgently as it reasonably could. The seventh respondent's submissions which were to the effect that "the facts giving rise to the application at hand must have arisen on or about the 16th of January 2015" was, therefore, misplaced. Equally, the first four respondents' assertion which was to the effect that the cause of action arose on 4 February 2015, was not a true reflection of the correct position of the matter. The respondents laid a lot of emphasis on an obvious typographical error and sought to advance an argument around it. The argument could not, for the stated reasons, hold. That was so because the action complained of, it was agreed, occurred not on 16 January 2015, or on 4 February, 2015 but on 14 February, 2015.

The seventh respondent stated, as one of its preliminary matters, that:

> "3. The citation of the seventh respondent by applicant is defective as there exist at law no such entity as Tongaat Hullet Zimbabwe. The companies who could only have been cited by the applicant in this matter are Hippo Valley Estates Limited and Triangle (Private) Limited. This can be seen on p 1 of the

> applicant's constitution, being Annexure A herein. To lump up the two together is legally impossible as the former is a listed entity on the Zimbabwe Stock Exchange whilst the latter is a private limited company. To that extent the applicant's case if any against the seventh respondent is therefore fatally defective in that regard. (emphasis added).

The court took judicial notice of the fact that the seventh respondent was cited as such in case number HC 1603/14. The court was not privy to the arguments', if any, which were advanced towards the citation of the seventh respondent in the mentioned case. Whatever those arguments were, if such were ever raised, the court noted that the seventh respondent was cited in that case as such as it was cited *in casu* and it would, therefore, be treated as such in the present application. That would be so the argument of the seventh respondent on that matter notwithstanding.

The application appeared to have been hurriedly prepared and filed with the court. The haste with which it was prepared caused the applicant to overlook a peremptory provision of the rules of this court. The first four respondents submitted, correctly so, that the application was not filed in Form No. 29B. A mere examination of the application showed that it was totally non-compliant with r 241 which provides that applications of the present nature must be in Form No. 29B. The court would have been prepared to invoke r 4C of its rules and condone the applicant's non-compliance with r 241 if it was satisfied that the application had some measure of merit. It would have done so in the interests of attaining real and substantial justice as between the parties. However, for reasons which will appear in the following part of this judgment, the court remained convinced that the respondents' preliminary matter on this point holds.

The deponent to the applicant's affidavit stated that he was the applicant's President and as such he had the mandate and capacity to represent the applicant in these proceedings. He attached to the application Annexure A. The annexure is the applicant's constitution. (emphasis added)

The court went through the contents of the annexure. It saw nothing which showed that Mr Nyemba, as President, did have the mandate and/or capacity to represent the applicant in the application. Section 12:0 of the annexure makes reference to Powers and Duties of the National Executive Committee. It reads, in part, as follows:

"The duties of the Office Bearers shall be as follows:

(a) President

> The president shall preside at all meetings of which he is present, enforce observance of the Constitution of the Union, sign minutes of meetings after approval by the National Executive Committee, sign all cheques on the banking account of the Union and perform such other duties as by usage and custom pertain to the office. He shall not have deliberate vote but shall in the event of equality have a casting vote."

The first four respondents submitted, correctly so, that Mr Nyemba did not have the authority to institute the application on behalf of the applicant. They stated, and the court accepted, that no resolution was tendered to show that the deponent to the affidavit of the applicant was clothed with the authority to institute the proceedings on behalf of the applicant.

The duties of the president were stated in clear and categorical terms. Those duties, it was observed, did not confer any authority on the president to act for, and on behalf of, the applicant in any lawsuit or in criminal proceedings. His duties are confined to his or her work inside and not outside the applicant. If Mr Nyemba did have the authority of the applicant to represent the latter in this or any other matter as he would have the court believe, members of his committee would have conferred him with the requisite authority to so act. They would, as did the first four respondents, have made a resolution to that effect. Mr Nyemba did not offer any reason as to the fact of why his committee members, if they existed, did not make the resolution allowing him to represent the applicant in this case. There was no application which was before the court under the observed set of circumstances.

The law says he who avers must prove. The applicant stated that its membership has a total number of sixteen thousand (16 000) workers. It produced no register of its membership to substantiate its claims in the mentioned regard. The court was left in the dark on that matter, so to speak.

Production of the register of its members would have been the earliest of matters for the applicant to have done. That was so as it was one of the functions of the applicant's Secretary General to keep a register for the members of applicant. As is stated in s 13(b) (iv) of the applicant's constitution, the Secretary-General records:

(i) the member's name

(ii) the member's number - and

(iii) the member's address, occupation, employer's name and date of joining the applicant.

The applicant did not give any reason as to why the register of its membership was not produced. The first four respondents, on the other hand, remained of the view that the applicant's membership was between eleven and twelve thousand workers. They attached to their opposing papers annexure D which they said was a register of workers who attended the special general meeting where a vote of no confidence was passed against the National Executive Committee in which Mrs Nyamba, who until 14 February 2015, was President of the applicant, was together with members of his committee removed from office and replaced by an interim committee headed by the fourth respondent and his team of office bearers.

Because the applicant's membership was not established, the court could not accept the applicant's claims which were to the effect that it commanded a total membership of sixteen thousand (16 000) workers. The first four respondents' assertions on the matter were that the applicant's membership was between eleven and twelve thousand workers *in toto.* The court, therefore, remained in the dark as regards the correct position of this aspect of the case.

There was no doubt that the parties' positions on the issue of numbers which the applicant enjoyed as its total membership placed the application into a material dispute of fact which the court could not resolve on the papers which the parties placed before it. That dispute was compounded by the fact that the workers membership to the applicant was, in terms of its constitution, not compulsory but voluntary. Section 6 of the applicant's constitution was relevant in this regard. It, in part, read:

> "6.0. MEMBERSHIP
> Membership of the union shall be open to non-managerial employees in the sugar milling company. Application for membership shall be made on the official form which shall be lodged with the secretary and be accompanied in each case by the appropriate membership fees as prescribed in section 7 of this constitution. Application for membership shall be considered by the Executive Committee within one week of receipt." (emphasis added)

It was evident, from the foregoing, that the workers' membership into the applicant is not automatic. It was also not compulsory. A worker who was or is in the Sugar Milling Company acquired membership of the applicant through a process of filing an application with the secretary together with a membership fee with the end result that the applicant's office bearers would consider to accept or reject the application.

The fact that a rival union which operates under the name Sugar Production And Milling Industry Workers Union of Zimbabwe was registered on 8 December, 2014 did not make matters any better for the applicant's claims. That new union, it was obvious, draws its

membership from the same pool of workers from which the applicant drew or draws. Its existence had and still has the effect of depleting the applicant's claimed membership.

Such matters as were stated in the foregoing paragraphs placed the court into a very invidious position. It had no means of ascertaining the fact of who between the applicant and the third and fourth respondents enjoyed a total majority of the Applicant's membership. The court had, on the one hand, Mr Nyemba's unsubstantiated claims and the first four respondents' averments, on the other.

The applicant did not state in a clear and concise manner what harm it would suffer if its application was not granted. The fifth respondent prohibited it from collecting union dues from the seventh respondent. She also prohibited it from using those dues without her authorization or that of the investigator whom she would appoint to look into the affairs of the applicant. She copied her letter which related to the issue in point to the seventh respondent for the latter's information as well as attention. That situation would remain obtaining until the Labour Court determines the appeal which the applicant mounted against the fifth respondent's decision. The applicant was, therefore, being economic with the truth when it stated that if its application was not granted chaos would result. The court saw no chaos which would ensue as the fifth respondent's letter allowed the situation to remain under control.

The applicant stated that the fourth respondent and his team of office bearers were appointed and not elected. The fourth respondent stated to the contrary. He stated that his office bearers and him were elected into the applicant's national executive committee on 14 February, 2015. He attached to his opposing papers Annexure B. The annexure was a copy of the minutes of the meeting to which members of the applicant were invited to, among other matters, pass a no-confidence vote on Mr Nyemba and members of his National Executive Committee and replace them with the fourth respondent and his team of office bearers. He also attached to his papers annexure D which was a register of the workers who attended the meeting of 14 February 2015.

The meeting which ushered into office the fourth respondent's national executive committee was convened in terms of s 9.2 of the applicant's constitution. The section reads, in part, as follows:

> "A Special Annual General Meeting may be called whenever desired by a member of the Executive Committees……

> The business of the special meeting shall be confined to the matter that necessitated its calling" [emphasis added]

It was in the spirit of the section that the third respondent who was a member of the out going committee called the meeting of 14 February 2015. The attendees of the meeting were registered in the attendance register, Annexure D. The applicant did not make any reference to the annexure let alone challenge its contents. The court, therefore, accepted that persons who were mentioned in the annexure attended the meeting, passed a no-confidence vote on Mr Nyemba and his team and replaced the latter with the fourth respondent and his office bearers.

The deponent to the applicant's affidavit raised a complaint as regards the manner in which the meeting of 14 February 2015 was convened. He stated that the fifth and sixth respondent did not advise his team of office bearers and him of the calling of the meeting. He said his members and him had a constitutional right to be heard at the meeting.

It is accepted that Mr Nyemba and his team were, for some time, office bearers of the applicant. They were, therefore, aware of the existence of s 9.8 of the applicant's constitution. The section reads:

> "The proceedings of any meeting shall not be invalidated by reason of the non-receipt by any member of the notice of that meeting"

The above stated provision of the applicant's constitution was, and is, in direct conflict with what Mr Nyemba stated. It was at best undemocratic and at the worst very oppressive. Mr Nyemba and his team did nothing to make it more user friendly than it currently is couched. They allowed it to remain as it is. They cannot, therefore, be heard to be crying foul if they were not invited to the special general meeting.

The conveners of the meeting of 14 February 2015 must have been aware of the provision's existence in the constitution. They, not unnaturally, took advantage of it and proceeded to call, as well as hold, the meeting in the absence of their adversaries secure in the knowledge that the business of the day would not be subsequently invalidated by such a complainant as Mr Nyemba raised.

The position of the deponent to the applicant's affidavit and his office bearers appeared to be a very precarious one. They were and are fire-fighting left, right and centre, so to speak. They have a court case pending under case number HC 1603/14. They have an appeal which they mounted in the Labour Court against the fifth respondent's decision. They

also did have the present application to content with and they were voted out of office in a very convincing manner. All the above must have weighed heavily on them to a point where they prepared the present application hurriedly and haphazardly, so it would appear. Their argument remained very weak and thoroughly unconvincing. They failed to establish their case on a balance of probabilities. The application is, in the result, dismissed with costs.

*Ndlovu & Hwacha*, applicant's legal practitioners
*Mangwana & Partners*, 3rd respondent's legal practitioners
*Scanlen & Holderness*, 7th respondent's legal practitioners