

MEDICAL PROFESSIONAL AND ALLIED WORKERS UNION
and
BOND MATENGA
and
TAURAI MAVATA
and
TECLA BARANGWE
versus
JULIET CHIRENJE
and
MICHAEL SOZINYU
and
MUNYARADZI MAREGEDZE
and
NATIONAL EMPLOYMENT COUNCIL FOR THE MEDICAL AND ALLIED INDUSTRY
and
MINISTER OF LABOUR AND SOCIAL WELFARE

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 10 July 2020 & 25 January 2021

Trial

L. Madhuku, for the plaintiffs
W.Jiti, for the 1st to 3rd defendants
N.Mashizha, for the 4th defendant

MUNANGATI-MANONGWA J: The plaintiffs' herein issued summons seeking the following relief.

- “1. An order declaring that the 1st Plaintiff, led by the 2nd to 4th Plaintiffs, is the legitimate Medical Professional and Allied Workers Union of Zimbabwe registered as such in terms of the Labour Act (Chap 28:01).
2. An order declaring that the 1st Plaintiff, led by the 2nd to 4th Plaintiffs, is the Medical Professional and Allied Workers Union of Zimbabwe referred to in section 2 of the Constitution of the 4th Defendant.
3. An order interdicting the 1st to the 3rd Defendants from purporting to be leading the 1st Plaintiff and from participating in the activities of the 4th Defendant under the name “Medical Professional and Allied Workers Union of Zimbabwe.”

4. An order, arising as a consequence of 1 to 3 above, interdicting the 4th and 5th Defendants from recognizing the 1st to 3rd Defendants as leaders of the 1st Plaintiff.
5. Costs, of suit, jointly and severally one paying the others to be absolved.”

The first, second and third defendants’ defended the action. The fourth defendant chose to abide by the court’s decision. Upon the matter being set down the parties agreed that the matter proceeds as a stated case. Accordingly, a statement of agreed facts was duly filed. The agreed facts can be summarised as follows:

A leadership wrangle once arose after a certain faction of the Union convened a congress in 2015 and elected certain persons as leaders of the Union. This was challenged by certain members and the Ministry of Labour through a determination dated 7 April 2015 ruled that the congress was a nullity due to the fact that the processes were not carried in accordance with the constitution. It was ultimately resolved that the recognised leadership was the one elected at the 2013 Congress and consisted of the following people:

President: Juliet Chirenje	first Defendant
Vice President: Munyaradzi Maregedze	third Defendant
Treasurer: Samuel Tasariroona Gwizo	
Secretary General: Mike Sambo	
Organising Secretary: Tecla Barangwe	
Councillor: Taurai Mavata, the third Plaintiff,	

Committee member: Bond Matenga, the second plaintiff and other councillors and committee members who it is not necessary to mention.

This leadership is not disputed as the one in charge between 2016 and early 2018 although the Treasurer T. Gwizo and Munyaradzi Maregedze the third defendant were no longer in the industry at the time the leadership was reinstated. Of note is the following resolution made by these leaders on 8 November 2016 that:

“the leadership of the trade union as outlined in the letter by the registrar of labour shall be responsible for the roadmap leading to the holding of the trade union congress as well as responsible for all the trade union operations and no one else shall act as an agent or trade union representative without being sanctioned by the leadership.”

These are the people who were mandated to spearhead the convening of a fresh congress. It is common cause that they held meetings on 3, 8 and 10 November 2016 and both parties to this dispute have no issues about those developments.

Pertinent to the three meetings are the following resolutions and the dates they were made on:

- the tabling of the motion of holding of the congress at the 8 November 2016 meeting (3 November 2016)
- to hold the trade union congress before the end of the first quarter of 2017 (8 November 2016)
- to expedite the holding of the congress (10 November 2016)

On 14 September 2017 the Organising Secretary, fourth plaintiff sent a Notice to members in terms of article 8 advising them that Congress was to be held on 16 December 2017. The notice among other things requested for submission of motion items as required by the constitution. Apparently, no congress was held in 2017 despite the resolution to that effect.

On 30 January 2018 certain members of Council met and resolved that Congress was to be held on 3 March 2018 and invitations were to be sent three weeks before the date. The meeting continued the following day on 31 January 2018 with preparations for congress on 3 March 2018 being discussed. The first to third defendants did not attend the meetings of 30 and 31 January 2018. Fourth plaintiff issued a notice on 6 February 2018 stating that congress was to be held on 3 March 2018 and sent across congress materials. It is common cause that the purported congress was held and a leadership which comprise of the second to fourth plaintiff was elected. The defendants do not recognise the leadership elected at the congress of 3 March 2018. The plaintiffs have thus approached Court seeking the aforementioned relief.

The parties agreed that the issue to be determined by the court is:

“Whether the congress held on 3 March 2018 by other members of the Medical Professional and Allied Workers Union is valid?”

As the issue for determination centres on the interpretation of the Constitution governing the Medical Professional and Allied Workers Union it was not necessary to hear evidence given the statement of agreed facts filed by the parties.

The plaintiffs’ who were appointed office bearers at that congress contend that the convening of the congress and everything about it was in accordance with the Constitution. The first to third defendants contend that the meetings of 30 and 31 January 2018 were invalid and consequently the setting of the congress date of 3 March 2018 was not in accordance with the Constitution. It is thus argued that, the holding of the congress not being in accordance with the Constitution renders the whole process invalid.

THE LAW

It is now well established that the relationship between a voluntary association and its members is a contractual one, the terms of the contract being contained in the associations’

Constitution. See *Church Province of Central Africa v Diocesan Trustees, Harare Diocese* 2012 (2) ZLR 392 (S) *Dynamos Football Club & Anor v ZIFA & Ors* 200 6(1) ZLR 346 S.

In expanding on the relationship between an organisation and its members, MALABA JA (as he then was) articulated in the *Dynamos Football Club* that:

“The law recognises their freedom to determine the acts by which they intend to be bound, who should perform them, and when, the duty of a court of law is to determine whether what is claimed to have been done is in fact what was prescribed by the members of the club in strict compliance with the procedure laid down for validity to attach to those acts.”

Put simply, validity will attach to the conduct of members only if processes undertaken are in compliance with the dictates of the Constitution.

However there is a pertinent principle pertaining to the interpretation of the constitution of a voluntary organisation. It must be interpreted in a “broadly and benevolently and not in a carping, critical and narrow way” in the process a “practical, common sense approach to the matter” must be adopted. See *Mudzumwe & Ors v MDC & Anor* 2012 (1) ZLR 490 (H). *Mudzengi & Ors v Hungwe & Anor* 2001 (2) ZLR 179.

In essence the constitution of a voluntary association will normally be construed benevolently. It is my view that in spite of the benevolence attached to the interpretation, the essence and objective of the terms must not be lost. The construction must not deviate from the ethos and purpose of the inclusion of the terms.

ANALYSIS

It is the meeting of 30 January 2018 which set the holding of congress as 3 March 2018.

Incidentally a meeting held on 31 January 2018 continued with the purported preparations for the meeting of 3 March 2018. These two (2) meetings precipitated the congress. It is the fourth plaintiff who issued a memorandum on 6 February, 2018 to National Council members inviting them to attend the congress. It is noted that there is no contention by the first defendant the then President that she was not invited. In fact there is proof of dispatch of notice to her by DHL. The first defendant had from the onset challenged the convening of the congress on the basis that it was unlawful.

In determining whether the congress held on 3 March 2018 is valid, resort has to be made to the constitutional provisions. As the defendants submitted, for the congress of 3 March 2018 to be held to be valid, it must be shown that the manner it was convened is consistent with the constitution, that those who called for it had the authority to do that and that the attendees were the ones prescribed by the constitution.

Further the necessary quorum must have been attained. See *Apostolic Faith Mission of Portland Oregon (South African Headquarters) v Reverend Richard John Sibanda & 3 Others* HH 463/15.

The first and third defendants contend that the minutes of 30 January 2018 refer to a resolution by the committee setting 3 March 2018 as the congress date. These defendants query the reference to a “committee” as no committee was ever formed. It is contended that the constitution does not refer to or grant authority to a committee to convene congress. Thus, it is argued that, in so far as the meetings of 30 and 31 January 2018 were called by a committee they are invalid.

The Constitution is clear in article 10 that the National Council is responsible for the affairs and management of the Union. In terms of article 10 of the Constitution it is the National Council that calls for the congress. Article 10 of the constitution bullet three (3) clearly states that

“the affairs and management of the Union shall be vested in a National Council which shall consist of members elected by their regions...”

The composition of the people in attendance of the meetings of 30 and 31 January 2018 shows that it was a meeting of National Council members, 7 of them on 30 January and 8 on 31 January 2018. Minutes of both meetings indicate that they are minutes of the “National Council” of the MPAWUZ. Thus reference to a committee is a misnomer as all deliberations were being done by National Council members. A reading of both sets of minutes show only a single reference to the word “committee.” The court thus does not consider that reference to be fatal given that the meeting was clearly of the National Council and the resolution was by national council members. It is therefore within the national council members’ mandate to set the date for congress and convene congress. It is not for the President to call for the general congress. The Constitution only grants the President authority to call for a special congress upon the meeting of certain criteria.

Notably the leadership of the union had held meetings on 3, 8 and 10 November 2016. The defendants accept the meetings of 3; 8 and 10 November 2016. It is pertinent to note that the number of councillors who attended the accepted meetings is no different from the attendance of the disputed meetings of 30 and 31 January 2018. Notably on 3 November 2016, 5 National Council members attended the meeting, on 8 November 2016, 8 members attended with 4 members apologising for failure to attend and finally on 10 November 2016, 7 members of the National Council attended the council meeting. As rightly contended by the plaintiffs, it

is clear that at least 5 (five) members constituted a quorum going by the precedented meetings. Thus in terms of compliance on quorum issues the court cannot fault the attendance. The meeting of 30 January 2018 was attended by 8 persons and that of 31 January 2018 by 9 persons. It is common cause that the 1st defendant in her capacity as the president did not attend both meetings of 30 and 31 January 2018. I do not find this to impact upon the legitimacy of the meetings. It is also important to note as submitted by the plaintiff's that, 8 out of the 12 National Council members are those who either attended or sent apologies to the 8th November 2016 meeting.

In considering the validity of the meetings in January 2018, it is the rules set out or provided in the Constitution of a voluntary association or its customs and traditions, which determines the validity of a meeting. As stated in *Staple of England v Bank of England* (1887)21 QBD 160, where there are no specific rules in the Constitution nor established customs and traditions resort is then made to the common law. In *casu* there is an established pattern of attendance which runs from the meetings of the leadership since 2016 when the leadership joined ranks to work on the roadmap for the national congress. As duly established, there was a quorum given the standard set by the previous meetings. Thus the meetings of 30 and 31 January 2018 were validly convened. This is buttressed by the fact that the constitution itself does not state a quorum for meetings.

That the first defendant did not attend nor chair the meetings is neither here nor there as there is no requirement for the president to convene meetings neither is it mandatory for meetings to be chaired by the President. The meetings of January 2018 thus remain properly constituted.

The constitution provides in article 8 that:

“The General Secretary shall give notice to all regions requesting for submission of motion items at least three months before the congress date. Motion items should be forwarded to the General Secretary within sixty days from the date of notice.....

It is clear that the notice of the congress has to be given by the General Secretary. It has not been shown that the General Secretary gave such notice for submission of motion items for the congress of 3 March 2018 three months before the date. It is the General Secretary who is obliged to do that as article 8 is peremptory.

It is common cause that the initial intention of the leadership was to hold a congress before the end of the first quarter of 2017 as per the resolution of 8 November 2016. The plaintiff provided a notice for the National Congress for 16 December 2017 allegedly set in line with the resolution of 8 November 2016. The plaintiffs' argue that this notice complied

with the terms of article 8 viz submission of motion items at least 3 (three) months before the congress date. The plaintiffs submitted that whilst there are no minutes on record there were meetings in 2017 (as referred to in the notice aforementioned) and an attempt to hold the congress before the end of 2017. The defendants contend that the 2016 meetings which had set the congress date for the first quarter of 2017 had been overtaken by events and that the previous notices for December 2017 congress were a nullity.

The court identifies with defendants' argument that since the December 2017 congress did not take place, the decision to hold a congress in 2017 emanating from the 2016 meetings was overtaken by events. There are no minutes for 2017 meetings apart from reference of such meetings in the Notice for Congress for 2017. There is nothing on record to indicate why the December 2017 congress was not held. With no minutes available, the advancement of any reason for failure of holding of congress as the defendants sought to do, can only be speculation. Thus reliance cannot be placed on the notice issued on 14 September 2017 which indicated the congress date as 16 December 2017. No congress took place on that date and there is no explanation as to what transpired. Equally there is no evidence of a resolution on extension of dates. If anything, 3 March 2018 was a fresh date hence preparations for such a congress had to be compliant.

A reading of the minutes of 30 January 2018 shows the following resolution:

“the committee agreed that the 3rd of March 2018 be the congress date and invitations were to be circulated three weeks before the date. All council members and outgoing members were to be issued with invitations...” (See p 18 plaintiff's bundles)

If there was to be compliance with article 8, a notice to all regions calling for submissions of motion proceedings should have been done at the beginning of December 2018. In the absence of such a notice, the convening of the congress would be contrary to the provisions of the constitution. Suffice to say, this is a very pertinent component pertaining to the preparation of a congress because it is motion items which form the agenda of congress. There is no evidence that such notice was sent out by the appropriate person within the set period. In the circumstances, the court finds that there was no compliance with the requirements for the convening of such congress in so far as the requisite notices were not sent out as per article 8 of the constitution. A benevolent interpretation of the constitution would not save the plaintiffs because Article 8 is peremptory and a backbone to formalities that guides preparation for congress.

Thus where the leadership resolved on 30 January 2018 to hold its congress on 3 March 2018, this was new process. In that regard there was need for compliance with the

Constitution's dictates. A notice for motion items had to be given at least three months before the congress date. Motion items had to be forwarded to the General Secretary within sixty days from the date of notice as per article 8. This was not done. The time in between the resolution and the convening of congress was simply not enough to ensure compliance. The plaintiffs' desperately seek to carry over the planning meant for the 2017 congress to cater for the March 2018 congress to no avail. It does not escape the court's eye that it is stated in the minutes of 30 March 2018 (date of congress) that all regions confirmed that they had received the notices three months before the congress. This is impossible as the resolution for the congress date had been done less than three (3) months from the set date.

As the defendants correctly submitted, the decision to hold congress in 2017 had been abandoned for unknown reasons thus the notice for the December 2017 congress had been overtaken by events as the date set had lapsed hence it was a "non-event." The setting of a new congress date meant fresh preparations which accord with the constitutional requirements were a must. For want of compliance, the convening of congress on 3 March 2018 was therefore unconstitutional hence a nullity. That being so, it is not necessary for the court to delve into issues of whether there was a proper quorum on 3 March 2018 as the congress itself was not properly convened.

It is noted that the only issue for determination having been narrowed to the validity of a congress held on 3 March 2018, the issues of secession fall away. This is because the defendants are no longer pursuing the issue of their own purported congress held on 19 April 2018 hence there is no issue of which faction is in charge.

In the result, the plaintiff's claims are dismissed with costs.

Lovemore Madhuku Lawyers, plaintiffs' legal practitioners
Zimudzi & Associates, 1st, 2nd & 3rd defendants' legal practitioners