ZIMBABWE PETROLEUM AND ALLIED
WORKERS UNION

Versus

NATIONAL EMPLOYMENT COUNCIL FOR
ZIMBABWE ENERGY INDUSTRY

And

ZIMBABWE ENERGY WORKERS UNION

And

NATIONAL ENERGY WORKERS UNION
OF ZIMBABWE

And

ENERGY SECTOR WORKERS UNION

HIGH COURT OF ZIMBABWE
BACHI MZAWAZI J
HARARE 23 January 2023-15 February 2023

Opposed Application

R, Mutero, R Mutindindi, for the applicant
A. Mugandiwa, for the respondents

Introduction

[1] BACHI MZAWAZI J: Applicant, a duly registered Trade Union in the Energy industry, has approached this court by way of a court application seeking a mandamus order, in the main, compelling the first respondent, a duly incorporated National Employment Council in the same sector, to admit it to its membership. In the alternative, that the 1st respondent be ordered to allow the applicant to negotiate as a petroleum subsector. The application is opposed.

Summarised factual background

[2] The common cause facts are that the applicant, in common with 2nd to the 4th respondents is a registered Trade Union, in terms of section 33 of the Labour Act [Chapter 28:01], representing the rights and interests of the workers in the petroleum, gas and biofuels industries. All three have corporate body status governed by their individual constitutions. However, whilst the other two have been registered with the first respondent, the applicant has not, which forms the source of the current dispute.

[3] Correspondingly, on the other side of the spectrum is the 1st respondent a registered National Employment Council, established in terms of s56 the Labour Act [Chapter 28:01] (hereinafter referred to as NEC) whose mandate as the umbrella body, is mainly to represent the interests of workers and employers in the Energy sector and it is comprised of representatives of both sides.

[3] It is also an undisputed fact that, one of the tasks of the 1st Respondent is to negotiate, conclude and register Collective bargaining agreements and to set some of the conditions of employment of the industry as stipulated by the Labour Act [Chapter 28:01]. The Collective bargaining agreements involve the input of all member representative groups in the Energy industry.

[4] The common denominator of all the parties is that they are in the Energy sector, and are evidently created by the provisions of the said enactment. Hence, tentatively are all creatures of statute, though they all exhibit characteristics of a *universitas*.

Applicant's case

[5] The applicant's case is premised on three aspects. Firstly, they contend that, section S29(4)(f) of the Labour Act [Chapter 28:01], spells out, that, subject to the Act, a registered Trade Union or Federation of such unions shall be entitled- to form or be represented on any Employment Council. In that regard, they have an entitlement *cum* statutory right, as a registered Trade Union to be affiliated to an existing National Employment Council in their industry (in this case the 1st respondent).

[6] Secondly, they posit that their right to sue or be sued is unquestionable as countenanced in, section 29(2) of the Labour Act, which bestows a Trade Union with body corporate status to sue or be sued as an entity.

[7] Thirdly, they submit that, section 58(g) of the Act, stipulates that, National Employment Councils, in any given sector, must make a provision in their governing constitutions for the admission of new players in the field such as the applicant as evidenced by clause 5 of the first respondent's constitution. As such, the 1st respondent is enjoined to admit them into their membership without qualification.

[8] It is their grievance that, they cannot be an effective Trade Union representing a known sect of employees in the Energy sector when they cannot be part and parcel of an organisation that makes decisions over their members without their input. They relate that all their efforts to be taken abode the first respondent has been frustrated by a cold shoulder, illustrated by the numerous applications written on diverse occasions since their registration in 2020, seeking admission into the membership of the first respondent which have been ignored without the courtesy of a response.

[9] They lament, that, even the complaint they lodged with the Registrar of Labour within the Ministry of labour, received no answer. Action was only triggered when they threatened collective job action alleging a threat to their existence by the first respondent in contravention of s104(4) of the Labour Act through several letters written to both the Ministry and the 1st respondent. It was through a letter from the 1st respondent, written on the 28th of February 2022, that they learnt of the reasons for their non-admission and their disclaimer in the threat to applicant's existence. Thereafter, no other action was taken by the first respondent or the Labour Registrar resulting in the launching of this law suit.

[10] Lastly, they advert that the quantity of their membership should not be used as weapon to counteract their statutorily given rights as encapsulated in section 29 of the Labour Act.

Respondent's case

[11] In opposition, the 1st respondent argues on the merits that, that as a voluntary Employment Council admission to its membership is not automatic nor a right, but discretionary. Therefore, a court can only interfere if that decision is irrational. In that regard, as a registered association they have a Constitutionally guaranteed right of freedom of association. That is, they are at liberty to elect their affiliates. They therefore, advance that they are within their rights to deny membership to the applicant. Further that, clause 5 of their constitution, in tandem with s58 of the Labour Act, is couched in such a way that it gives them an option as to who to affiliate with

or not. Clause 5(3) of their association's constitution gives them a discretion to allow or to deny membership by the use of the word "may".

[12] As it where, in accordance with that discretion they concluded that the applicant does not represent a significant number of employees in the industry to make a meaningful contribution. Furthermore, that applicant's scope of coverage is already covered by other registered Trade Unions already on board. Therefore, their inclusion will not advance the interests of the industry in any manner.

[13] It is their submission that the application for the applicant's membership was considered at a Special General Council Committee Meeting of National Employment Council, held on the 11th and 12th of November 2021. Members, which struck the matter of the roll on expressing the view that, the applicant, was representing constituencies already being represented by existing Trade Unions in the NEC. In support of their argument they cited the case of *National Employment Council for the Catering Industry v Catering & Hospitality Industry Workers' Union of Zimbabwe* SC08/08. This is the same stance taken by the rest of the respondents.

[14] Conjointly, they raised five technical objections, that is, lack of *locus standi* and absence of authority to represent, non- joinder of the Employer Organisation and the Registrar of Labour, lack of jurisdiction and the need to exhaust internal remedies, as stumbling blocks that will inevitably derail applicant's claim.

Issues for determination

[15] From the foregoing, the issues to be resolved are, whether or not the applicant has made a case for the relief sought? And, or, whether or not the application should stand or fail on the basis of any of the technical points raised?

[16] At the hearing the parties by mutual consensus proposed that both the preliminary objections and merits be argued and determined in one go as opposed to in piecemeal. The court did not find anything amiss and allowed the proposition.

Evaluation of the facts evidence against the underpinnings of the law

[17] On analysis, the applicant is evidently seeking the main relief of a mandatory interdict this court. In other words, it is asking this court to remedy a wrongful state affair caused by the respondents. However, this remedy is not there for the taking. A person who seeks such a relief must satisfy the presence of a clear right, irreparable harm actually committed or reasonably

apprehended and the absence of an alternative remedy. These were clearly delineated in *Movement for Democratic Change (Tsvangirai) & Ors v Lilian Timveos & Ors SC9/22* and the case cited therein. See, *Setlogelo v Setlogelo* 1914 AD 221.

[18] In this case, it is beyond doubt that by virtue, 29 of the Labour Act [Chapter 28:01] applicant has several recognised legal rights. They have shown that they have a real right defined by statute, to be admitted to a National Employment Council within their industry in terms of section 29(4)(f). In terms of this proviso, a registered Trade Union or Federation of such Union shall be entitled to form or be represented on any employment council. In this case the first respondent is the only organisation in existence fitting that description. Thus, the use of the word "entitled" is an illustration that there is no negotiation it is an absolute statutory right.

[19] Having said that, it is clear that whether an association's constitution spells it out or not the section has to be complied with as a matter of statute or principle. An Association's constitution cannot override a legislative provision. See, *Cluff Mineral Exploration Ltd v Union Carbide management Services (Pvt) Ltd* 1989(3) ZLR38 (S) As such, the respondents point that applicant did not attach its Constitution or plead the provision that empowers it to join a National Employment Council does not hold water and it fails.

[20] Not only that, section 29(2) of the Labour Act [Chapter 28:01] section 29(2) bestows a Trade Union with body corporate status to sue or be sued as an entity. That being so, Applican*ts* have also demonstrated that they have a legal right to sue as a registered body corporate. This finds expression in decided cases such as *Tel-One (Private Limited v Communications and Allied Services Workers Union SC26/06,* and in *ZESA Technical Employees Association v ZESA Holdings (Private) Limite*d SC51/16, where it was stated that,

"It is clear from the reading of s29(2) of the Act that once a trade union is registered it becomes a body corporate, having the power to sue or be sued."

Again, this right to sue cannot be curtailed or overridden by a Union's Constitution as it is a Statutory right.

[21] In addition, in terms of section 58(g) of the Act, National Employment Councils, in any given sector, are enjoined to make a provision in their governing constitutions for the admission

of new players in the field such as the applicant. This is evidenced by clause 5 of the first respondent's constitution.

[22] In that regard the combined effect of the above self- explanatory provisions of the Labour Act accords the applicant an indefeasible right and *locus standi* to make this application. The said provisions are also clear evidence that the applicant has a real, direct and substantial interest in this matter. In that light, the preliminary attack on *locus standi* is literally laid to rest.

[23] It is an established legal principle that ordinarily if a party has some real and direct interest in a matter or will be adversely affected with its outcome then that person has *locus standi in judicio*. In *Makarudze & Anor v Bungu & Ors 2015 (1) ZLR 15(H),* the court reasoned that *locus standi in judicio* refers to one's right, ability or capacity to bring legal proceedings in a court of law. In other words, one must justify such right by showing that one has a direct and substantial interest in the outcome of litigation. See, *Stevenson v Minister of Local Government and National Housing and Ors* SC38/02, *Allied bank Ltd. V Dengu &Another* SC52 of 2016.

[24] In *Makarudze & Anor V Bungu (supra),* it was further, highlighted that the court will be slow to deny *locus standi* to a litigant who seriously alleges that a state of affairs exists within the court's area of jurisdiction. The applicant's *locus standi* is therefore unquestionable.

[25] In progression, the fact that there is irreparable harm or injury actual or apprehended cannot be overstated. Since, the applicant's registration in 2020, they have not been incorporated in the sole national employment council in the energy sector yet they have a considerable number of employees who look up to them for the fulfilment of all what is stated in section 29(4) of the Labour Act thereby representing their interests. It is on record that they have ceaselessly and tirelessly impressed on the respondents the need for their rights to be recognised to no avail. Inevitably, they have satisfied the second essential element of the relief thus sought. See, *Movement for Democratic Change (Tsvangirai) & Ors,* above and *Econet Wireless Holdings and Others v Minister of Finance and Others* 2001(1) ZLR373(S).

[26] On the third element to be established for an application for a mandamus order to be successful, is the lack of an alternative remedy open to the applicant. It is the respondents' argument that the alleged violations are those of the Labour Act, therefore, there are remedies stipulated therein, as such, the right platform should have been the Labour Court. They

therefore posit that the applicant did not exhaust the available domestic remedies nor does this court have jurisdiction to entertain matters in the domain of the Labour Court.

[27] On that note, this court finds that it is not disputed that not only where letters written to the Registrar of Labour not responded to, but there was no other action taken by the same office pursuant to that. What that shows is that, even if that route was the internal dispute resolution avenue it was illustratively ineffective in the circumstances of their case. See, *Makarudze & Anor v Bungu & Ors 2015 (1) ZLR 15(H)Cargo Carriers (Pvt) Ltdv Zambezi & Ors 1996 (1) ZLR 173 (H) at 613(S).* See, *Movement of Democratic Change & Ors v Mashavira & Ors, SC56/20.* Hence, there is no alternative remedy to talk about or exploit.

[28] Further, even if it where to be argued that, the review recourse through the Labour registrar of the Labour Court channel was open, the respondent's response to the applicant's application for admission, even though decided timeously was withheld from and only communicated to the applicant on the eleventh hour. This is clearly seen on the distribution list of the minutes of the11th and 12th of November 20. Nevertheless, the applicants are not precluded to approach this court as a body corporate with the right to sue and be sued.

[29] As regards jurisdiction, I am not convinced that this is a matter restricted to the jurisdiction of the Labour Court, though the violated provisions are those of the Labour Act. The applicants are seeking a mandamus interdict. The Labour Court has no jurisdiction to adjudicate over interdicts and declarations. *Stylianou & Others v Mubita & Ors* SC7/17, is authority that, Labour court as a creature of statute derives its powers from the Labour Act, and in terms of section 89 of the said enactment, it has no powers to deal with interdicts and declarations.

[30] The same was reverberated in *National Railways of Zimbabwe v Zimbabwe Railway* Artisans *Union &Others* SC8/05, where it was noted that, "It is thus clear that the Labour Court has no power or jurisdiction to grant an interdict. When a court issues an order which it is not empowered to grant, that order is a nullity.''

[31] In *UZ-UCSF Collaborative Research Programme in Women's Health v David Shamuyarira* SC10/10, it was also pointed out that,

"...Nowhere in the Act is the power granted to Labour Court to grant an order of the nature of a declarator sought by the respondents in the court aquo nor have I been referred to any enactment . So too, in this case, there is no provision in the Act (nor have I been referred to any

provision in any other enactment) authorizing the labour Court to issue the declaratory order sought by the respondent. It is my view therefore my view that the Labour Court ought to have dismissed the application for want of jurisdiction authorising the labour court to grant such an order.

[32] In, *Stylianos* above, it was further, concluded that, "It is therefore evident that the court a quo, acted outside its jurisdiction. Consequently, the declaratory order like the interdict it granted was null and void…" See *Air Zimbabwe (Private) Limited v Mateko and Others* SC180/20.

[33] From the above authorities, it is self- explanatory that the applicant is entitled to bring this action before this court, as this court is a court of inherent jurisdiction whose jurisdiction in applications of this nature has not been ousted by the Labour legislation.

[34] It is follows that, the two remaining *points in limine,* cannot be sustained on the following reasons. On the issue of authority, which I need not elaborate, this court has on diverse occasions admitted the production of such evidence as and when asked or challenged during court proceedings. MAFUSIRE J in the case of *Zimind Publishers and Another v Minister of Local Government, Public Works National Housing and 3 Others* HH464/22, speaking on company resolutions had this to say,

"There are no hard and fast rules as to the form or nature the agent's authority should take. It may be in all situations where the authority is required, there must be some evidence placed before the court to show that the person purporting to represent the company is duly authorised. But documents should not be cobbled perfunctorily without regard to their efficacy."

[35] Indeed, the applicant only attached the resolution of the members giving them authority to embark on this lawsuit on their answering affidavit. The bottom line is, initially there was no resolution of the members which had been attached but when challenged it was brought to the attention of all the parties and the court in the manner it was brought. That alone was sufficient proof that the actions of the deponent had the blessings of the members of the applicant. The resolution though impugned indicates compliance with s35(a)(v) of the Labour Act which provide for wide consultations amongst all its stake holders when assigning an official to represent it in a particular matter that is of considerable significance.

[36] In the case of *Cuthbert Elkana Dube v Premier Service Medical Aid and Another* SC73/19 on para 38.

it was remarked that,

> 'The above remarks are clear and unequivocal. A person who represents a legal entity, when challenged, must show that he is duly authorised to represent the entity. His mere claim that by virtue of his position he holds in such entity he is duly authorised to represent the entity is not sufficient. He must produce a resolution of the board of that entity which confirms that the board is indeed aware of the proceedings and that it has the authority to act in the stead of the entity. I stress that the need to produce such authority is only necessary in those case where the authority of the deponent is put in issue. This represents the current status of the law in this country.'

[37] The rationale for the production and or attachment of a resolution from the body of directors being to authenticate whether the actions by the deponent are sanctioned by the majority of the stakeholders in a body corporate or legal entity. It is a safeguard measure to protect the legal interests of the body corporate against the peril of a one- man action which will adversely affect those of others with vested interests in the Company, organisation or association. See, *Beach Consultancy (Private) Limited vs Obert Makonya and The Sheriff ZWHHC 69/2021*.

[38] The cases of *Air Zimbabwe Corporation & Ors v ZIMRA 2003 [2]ZLR 11[H] and Madzvire & Others v Zvaridza & Ors 2006[1] ZLR 514 [S*] speak to a situation where there is non-production whatsoever of written authority by an agent purporting to represent a company and the attendant right of the other party to challenge that fact.

[39] The court is alive to what the law says on annexures or evidence in answering affidavits as stated in the case of *Mpofu* v *ZERA & 2 Others v The Reformed Church in Zimbabwe Trust & Ors* SC71/14. Even if the resolution where to be expunged as the law dictates that no further evidence is to be attached to the answering affidavit, the fact still remains that a resolution was produced when asked for.

[40] Further, contrary to the 1st respondent's averments, there are two signatures on the resolution, one belongs to the president of the association. *Madza & Others v The Reformed Church in Zimbabwe Trust & Ors* SC71/14, is authority that, the insufficiency of evidence

contained in a founding affidavit is not in itself fatal to the establishment of *locus standi,* since the deficiency can in given circumstances be remedied by further evidence.

[41] One of the respondent's technical point is that of the nonjoinder of the Labour Registrar and the other National Employment Council in that arena. I need not labour this aspect as the rules of this court are very clear. Particularly, rule 32(110 of the 2021 High Court Rules that stipulates, no cause or matter shall be defeated by reason of the misjoinder or no-joinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter. In *pari materia, rule* 87(1) of the 1971 High Court Rules explicitly stated the same as explored in the case of *Wakatama & Ors v Madamombe* SC10/12. See also the case of *Sobusa Gula Ndebele v Chinembiri Bhunu* SC29/11.

[42] However, justice to this case will not be seen to have been done if the reasons for the respondent's non-admission of the applicant are not interrogated. They state that they have the freedom of choice as to who to admit to the board therefore, the applicant's insignificant number of members makes their membership unattractive. Lastly that those bigger players already on board speak on their behalf. In my view this is down right discrimination. They are saying only the majority as opposed to the minority have a voice. This is undemocratic and should be nipped in the bud. Even if their constitution gives them the power to elect that power should not be contrary to the clear provisions of the Labour Act as already stated above. In rendition, their constitution cannot override clear enactment provisions. Thus, anything done outside the parameters of the governing statute which is the law, is a legal nullity. See the oft quoted case of *Macfoy v United Africa Ltd* [1961] 3 ALLER 1169 (PC) at page 1121. In A*ir Duct Fabricators Pvt Ltd v AM Machado And Sons* (Pvt)Ltd HH54/2016, it was pronounced that, failure to comply with a mandatory provisions of the law invalidates the thing

In the premises, their reasons for the non-admission of the applicant are baseless.

Disposition

In conclusion, the first respondent, as a National Employment Council in the energy industry is enjoined as a matter of statute, to make an (unqualified) provision in their cons tuition for the admission of new players in the field in terms section 58(g) of the governing enactment. The provisions in their constitution that gives them latitude to discriminate the applicant cannot override the legislative provisions already canvassed herein.

Accordingly, the applicant as a registered Trade Union in terms of s33of the Labour Act which is entitled to be affiliated to an existing National Employment Council in the Energy Industry in accordance with s29(4)(f), must be admitted to the membership of the first respondent so as to give a bargaining voice to those whom they represent no matter how small their numbers are.

I find nothing turning on the alternative remedy sought. I also find no justification in punitive costs.

Resultantly, it is ordered that;

1. The 1st respondent be and is hereby ordered to admit and join applicant as a member of the National Employment Council.
2. The 1st Respondent to pay cost of suit.

Caleb Mucheche and Partners, Applicant's legal practitioners

Wintertons, Respondents' legal practitioners