SAMUEL CHARLES TSVANGIRAI
and
TAWANDA MASHONA
versus
BAKING INDUSTRIAL WORKERS UNION
and
BRIAN BONDERAI N.O
and
JEFTA MUVUNZI N.O

HIGH COURT OF ZIMBABWE
CHATUKUTA J
HARARE, 26 July 2017, 11 August 2017 & 21 November 2018

Opposed Matter

L Madhuku, for the applicant
B Makururu, for the respondent

CHATUKUTA J: The first respondent is a registered trade union for the baking industry. The first and the second applicants were in 2015 employed in the baking industry and were members of the first respondent. They were elected into the national executive of the first respondent as President and National Treasurer respectively at the first respondent's National Congress held between 19 and 21 February 2015. Their tenure of office was to expire in 2020. Their employment in the industry was terminated by their respective employers in the same year, that is in 2015. On 24 September 2016, the Bakery Industry Workers Union (BIWU) National Council convened a meeting at which a decision was taken that following the loss of employment in the industry, some of the national executive members, including the first and second applicants, ceased to be office bearers and vacancies had therefore arisen in the national executive. A new president and a national treasurer were appointed into office to complete the remaining tenure of office. It is this appointment of a new president and a new national treasurer that prompted the applicants to file the present application on 26 April 2017 seeking the following relief:

> "1. That it be and is hereby declared that the decision relating to the status of the applicants made at the meeting held on or about 24th September 2016, the minutes of which are attached as Annexure 3, are unlawful, null and void and are set aside.
> 2. That it be and is hereby declared that office holders of the 1st Respondent elected at the 2015 National Congress remain in office.

3. That, for the avoidance of doubt, it be and is hereby declared that the 1st and 2nd Applicants are still the National President and National Treasurer respectively of the 1st Respondent.
4. The respondents (if they oppose this order) shall pay the costs of this application on a legal practitioner and client scale."

The application is premised on two contentions. The first contention is that the applicants remained office bearers of the trade union despite losing their employment in the industry. Consequently there were no vacancies. The appointment of new office bearers was therefore unlawful. The second contention is that the national council did not have the power to remove the applicants from office. The only body so empowered under the first respondent's Constitution to do so is the National Congress. The National Congress did not remove them from office.

The application is opposed. The respondents contend that the applicants ceased to be members of the first respondent upon losing their employment in the baking industry as membership was reserved for employees in the industry. They consequently lost their membership and national executive offices. The meeting convened by the national council is empowered by the first respondent's Constitution to fill in vacancies for the unexpired portion of the tenure of office of an erstwhile office holder.

At the hearing of the application, the respondents raised a preliminary issue on the competency of the relief sought. Mr *Makururu* submitted that the application, though seeking declaratory relief is in fact an application for review. The applicants are not seeking to enforce a right but are in effect challenging the procedure adopted in removing them from office. The fact that it is not the appropriate board that removed them from office or lacks jurisdiction to remove them from office is a cause for review under section 27 of the High Court Act.

Mr *Madhuku* submitted that the applicants were attacking the proceedings as a nullity because the body which purported to remove them from office did not exist. They could only do so by seeking a declaratory order as the court cannot review a nullity.

The criteria for deciding whether an application is for a declaratory order or review was set out in *Geddes Ltd* v *Tawonezvi* 2002 (1) ZLR 479 (S). MALABA JA (as he then was) remarked at 484 F to 485 C that:

> "In deciding whether an application is for a declaration or review, a court has to look at the grounds of the application and the evidence produced in support of them. The fact that an applicant seeks a declaratory relief is not in itself proof that the application is not for review. In *City of Mutare v Mudzime & Ors* 1999 (2) ZLR 140 (S) MUCHECHETERE JA quoted with

approval from *Kwete v Africa Publishing Trust & Ors* HH-216-98, where at p 3 of the cyclostyled judgment SMITH J said:

> "It seems to me, with all due respect, that in deciding whether or not, in an application for damages or reinstatement arising from alleged wrongful dismissal from employment, the provisions of Rule 259 of the High Court Rules, 1971 should be complied with, one should look at the grounds on which the application is based, rather than the order sought. … It seems to me anomalous that one should be permitted to file an application for review well out of time, without seeking condonation, as long as a declaratory order is sought. A declaratory order is, after all, merely one species of relief available on review."

In this case the respondent was not attacking Mrs Madyara's decision to suspend him from work, the disciplinary proceedings she presided over or the decision of the employer to dismiss him from employment. He was in fact treating these decisions and proceedings as a nullity. In other words, they were as good as not having happened and there was no route leading to them upon which they could be reviewed. The ground on which he was treating these decisions and proceedings as a nullity, was that Mrs Madyara had no legal authority or jurisdiction to make the decisions and institute disciplinary proceedings against him. (See also *Mugwebe* v *Seed Co Ltd & Anor* 2000 (1) ZLR 93 (S) 96 H-97 D.)

It is clear from the above that this court is enjoined to consider the grounds of the present application and the evidence in support thereof. The grounds upon which the applicants aver that the decision to remove them from office is null and void are found in paragraphs 15, 16 and 20 of the founding affidavit which reads:

> "15. Some members of the 1st respondent, including the 2nd and 3rd respondents took advantage of the purported termination of my employment to instigate my unlawful removal from the office of President. They started their unlawful actions at meetings I chaired on 20 February 2016 and 20 May 2016. I attach herewith as Annexure 2, the minutes of those meetings.
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> 16. **They then organised an unlawful meeting on 24 September, 2016** at which they purportedly replaced me, the 2nd applicant and one Elizabeth, the Women Advisory Council chairperson. These actions are unlawful. The purported meeting was not a special Congress. **It was simply an unlawful gathering that purported to make decisions binding on the 1st Respondent**. I attach as Annexure 3 the minutes of the meeting.(own emphasis)
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> ……..
>
> ……..
>
> 20. In any event, only a special Congress held in accordance with the provisions of the 1st Respondent's Constitution has power to remove me and the 2nd Applicant from office."

The applicants' averments are therefore that the respondents convened an unlawful meeting or gathering on 24 September 2016. It is this unlawful gathering that removed them from office. What is clear from the applicants' averments is that the nullity of the decision to

remove them from office arise from the fact that the meeting was unlawful. In support thereof the applicants annexed to the application the minutes of the meeting of 24 September 2016. The applicants also attached the minutes of 20 February 2016 and 20 May 2016.

A perusal of the minutes of the meetings discloses that both the applicants and the respondents were operating under a misapprehension that the applicants were removed from office at the meeting of 24 September 2016. The applicants were in fact removed from office at the meeting of 20 May 2016. This meeting, as the one held on 20 February 2016, was chaired by the first applicant. The second applicant was also in attendance in his capacity as treasurer. It is the first applicant who is minuted as having read out the agenda at both meeting. The removal of the applicants was discussed under paragraph 2 of "Matters Arrising (*sic*)". The paragraph reads:

> "2 b) The house requested for update of people with pending cases of terminations by Supreme Court judgment. It was first reported that Samuel Tsvangirai's case was different from the other cases of people who were terminated through the judgment. It was reported that Samuel Tsvangirai's case was in the attention of FFAWUZ legal department and was well informed that there is high possibility that he may come to work any time if the case is done properly.
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> 2 c) There were different views over this issue and Tsvangirai was excused from the meeting for more than two hours in order for the house to discuss his status and Brian Bondera took over chairmanship of the meeting. When he returned he was called back and was informed that the house resolved that he should stop participating from any organisational operations and all his duties were to be carried out by the vice president Brian Bondera
> Samuel Tsvangirai did not accept the resolution citing that it was unconstitutional for him to vacate his post as he is still a member of the trade union however (*sic*)he was told to appeal to the national council of BIWU which he responded by saying there is no such committee currently in the baking industry workers union structure as the members were supposed to be ELECTED from branches as provided by the constitution. Despite the explanation by the president the house imposed a ban on him and instructed him to stop signing to the BIWU business, that is to stop from sitting on CBA negotiations and stop signing to the BIWU bank account.
> ……
> ……
>
> d) The house also deliberated over the employment status of E. Ndarera and T. Mashona of which in their response they said their cases were still pending in the courts awaiting the amendment of the Labour Act since they applied for review of the determination. On this issue the house resolved that since the two were not affiliated to the organisation for more than three months, they can step down from BIWU executive operations. In response, E Ndarera and T. Mashona said the issue of terminating their positions and their operations is not the duty of the Executive but is should be done by the National Council.
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> Despite their response, the house resolved that for the benefit of membership its better for now to work with members who are on employment. Ndarera challenged the resolution saying she was elected by ladies and no man has the right to suspend him (*sic).*

> The issue of not affiliating to the organisation for more than three months also affected T. Watchi and the house agreed to terminate him from BIWU operations and in the Executive again. Tawanda Mashona was asked to stop from attending NEC negotiations and also from being a signatory to BIWU bank account.
>
> h) After above resolutions, the house asked Samuel Tsvangirai, Tawanda Mashona, Elizabeth Ndarera and Taurai Watchi to leave the meeting as they were no longer participants and remaining members elevated Brian Bondera to the position of Acting President, NEC negotiator replacing T. Mashona, and a signatory to BIWU bank account replacing President Tsvangirai."

It is apparent from the minutes that the grounds for the application and the evidence relied on are at variance in two respects. Firstly, the decision to remove the applicants was taken on 20 May 2016 and not on 24 September 2016 as alleged by the applicants. The first and second applicants were referred to in the minutes of 24 September as "former president" and "former treasurer" respectively confirming their earlier removal from office.

Secondly, the concern expressed by the applicants when the decision was taken during the meeting on 20 May 2016 was the absence of jurisdiction on the part of the committee to remove them. The applicants' bone of contention was not that the Baking Industry Workers Union Executive meeting was unlawful. It was that the Committee did not have jurisdiction to remove them from office. The jurisdiction was, in their view vested in the National Congress. It would have been illogical to term the meeting unlawful when the first applicant was the chairperson of the meeting until he was removed from office during the meeting. The Executive Committee was therefore properly constituted under his chairmanship. The second applicant was in attendance and part of that meeting. In any event, illegality is a ground for review under common law.

In my view, the papers reveal that the applicants are essentially seeking review of the proceedings that resulted in their removal as the application is premised on the absence of jurisdiction on the part of the executive Committee.

The decision whether or not the Executive Committee had jurisdiction to remove the applicants from office is therefore reviewable. Recourse, where jurisdiction is questioned, lies in the provisions of s 27 of the High Court Act which provides as follows:

> **"27 Grounds for review**
> (1) Subject to this Act and any other law, the grounds on which any proceedings or decision may be brought on review before the High Court shall be—
> (*a*) absence of jurisdiction on the part of the court, tribunal or authority concerned;
> (*b*) ….....;
> (*c*) gross irregularity in the proceedings or the decision.

> (2) Nothing in subsection (1) shall affect any other law relating to the review of proceedings or decisions of inferior courts, tribunals or authorities."

As alluded to earlier, the evidence relied on by the applicants does not resonate with the grounds for the application. The decision having been made on 20 May 2016, the applicants were required to file their application for review on or before 15 July 2016. This application was filed on 20 October 2016, 14 weeks out of time. It appears in an attempt to escape the consequences of their failure to act timeously, the applicants filed this application for a declaratur. It is therefore clear in my view that this application is a review disguised as an application for a declaratur. The application is therefore improperly before the court.

It is accordingly ordered that the application is dismissed with costs.

Lovemore Madhuku Lawyers, applicant's legal practitioners
Makururu and Partners, respondents' legal practitioners