Judgment No. 8/08
Civil Appeal No.120/07

NATIONAL EMPLOYMENT COUNCIL FOR THE CATERING INDUSTRY v CATERING & HOSPITALITY INDUSTRY WORKERS' UNION OF ZIMBABWE

SUPREME COURT OF ZIMBABWE
CHEDA JA, ZIYAMBI JA & MALABA JA
HARARE, FEBRUARY 12 & MAY 13, 2008

E T Matinenga SC, for the appellant

M Kamudefewere, for the respondent

ZIYAMBI JA: The appellant, to whom I shall refer as "NEC", is a voluntary employment council formed in terms of s 56 of the Labour Act [*Cap* 28:01] ("the Act") which provides as follows:

> "**56 Voluntary employment councils**
>
> Any –
>
> (a) employer, registered employers organization or federation of such organizations; and
>
> (b) registered trade union or federation of such trade unions;
>
> may, at any time, form an employment council by signing a constitution agreed to by them for the governance of the council, and by applying for its registration in terms of section *fifty-nine*"

Clause 5:3 of the appellant's constitution makes provision, as indeed it is enjoined to do by s 58[1] of the Act, for the admission of new parties to the employment council. It reads:

[1] See paragraph (g).

> "Any employer in the industry and any Employer's Organisation or Trade Union registered in terms of s 36 of the Act, in respect of persons engaged or employed in the industry may be admitted to membership of the Council."

Following its registration as a trade union on 29 December 2000, the respondent sought to be admitted to membership of the appellant. The application having been refused, the respondent sought assistance from the Registrar of Labour. The latter found that:

> "..the NEC does not have valid reasons for not accepting CHIWUZ (the respondent) therefore should consider
> accommodating them" and concluded:
>
> "Having taken cognizance of all issue(s) raised as well as examining CHIWUZ's register of 4590 members, it was decided to give the applicants 2 seats in the council on the Labour side. It is up to the union to decide who is to represent them in the council. It was also decided that the NEC's constitution should be amended to include CHIWUZ."

Aggrieved by the Registrar's decision, the appellant appealed, without success, to the Labour Court which also refused an application for leave to appeal to the Supreme Court. The matter comes before us on appeal with leave of a Judge of the Supreme Court in terms of s 92F[2] of the Act.

The main contention advanced on behalf of the appellant by Mr *Matinenga* is that by virtue of its being a voluntary employment council, admission to its membership is not as of right but dependent on the discretion of the council. The use of the words "may be admitted" in clause 5:3 of the constitution, he said, clearly showed that admission was not as of right. Since the issue of membership was within the discretion of the council, a Court can only interfere with the exercise of that discretion if it was exercised irrationally. The second contention was that s 21 of the Constitution of Zimbabwe guarantees the right

[2] Subs (3)

of the appellant to freedom of association and there was nothing in the Act which entitles the respondent to membership of the appellant as of right or obliges the appellant to admit the respondent to its membership.

The respondent's stance was that the constitution of the appellant does not preclude membership of the respondent and that the word "may" was to be construed as being mandatory in this case since it was mandatory in terms of s 58 of the Act that any constitution of an employment council should contain provisions for admission to that council. It was submitted that it was irrelevant that the appellant was a voluntary employment council since the appellant's constitution could not be superior to the Labour Act.

The Act provides for two types of employment councils, namely, voluntary and statutory. Voluntary employment councils differ from their statutory counterpart in the manner of formation. With regard to the former, the parties, that is, any employer or employers' organization and any registered trade union or federation of trade unions may come together by choice to form a council whereas in respect of the latter, the parties to the council are chosen by the Minister in the manner prescribed in s 57 of the Act. Section 57 of the Act provides as follows:

> **"57 Statutory employment councils**
>
> (1) The Minister may, whenever the national interest so demands, request -
>
> (a) any registered employers organization or federation of such organizations; and
>
> (b) any registered trade union or federation of such trade unions;
>
> to form an employment council and to apply for its registration in terms of section *fifty-nine*.
>
> (2) If within three months of a direction being given in terms of subsection (1), the parties concerned have failed to apply for the registration of an employment council, the Minister may appoint such number of persons as he

considers will represent the employers and employees concerned, and such persons shall, within such period as may be specified by the Minister, form an employment council by signing a constitution agreed to by them for the governance of the council and by obtaining registration of the council in terms of section *fifty-nine*."

The Act sets out in s 58 the provisions which must be included in the constitution of every employment council. There is no statutory duty imposed on voluntary councils to admit new members the only requirement being that provision must be made in the constitution for the admission of new members[3]. Section 58 provides:

"The constitution of every council formed in terms of this part shall provide for -

(a)…
(g) the admission of new parties to the employment council;…"

The constitution of the appellant, in keeping with this requirement, provides that a certain category of persons may be admitted to its membership. The appellant's position is that persons or bodies falling within this category may apply, not necessarily successfully, for admission to membership. The success of the application depends on the discretion of the Council. The respondent however contends, and his contention was accepted by the court *a quo*, that the word 'any' in the appellant's constitution is indicative of the fact that once an applicant falls within the category mentioned in clause 5(3), admission to membership by the appellant is compulsory. The use of the word 'may', so it was submitted, is not intended to be discretionary but mandatory and must be construed to mean 'shall'. He submits further that by requiring the employment council to make provision in its constitution for admission of new members to membership of its council, the legislature was making it mandatory for the appellant to admit whosoever applied subject only to their possession of the qualifications set out in clause 5(3) of its constitution.

[3] S58(g) supra

At common law, the position relating to voluntary associations is as follows:

> "Normally, an association has an absolute discretion as to whether or not it admits a person to membership…….It follows that in the matter of admission to membership no question of *mala fides* or non – compliance with principles of natural justice can arise."[4]

The legislature is presumed to be aware of the common law and any intention to depart therefrom must be clearly and unambiguously stated in the statute concerned. The following passage from *Maxwell on the Interpretation of Statutes*[5] is instructive:

> "It is presumed that the legislature does not intend to make any change in the existing law beyond that which is expressly stated in, or follows by necessary implication from, the language of the statute in question. It is thought to be in the highest degree improbable that Parliament would depart from the general system of law without expressing its intention with irresistible clearness, and to give any such effect to general words merely because this would be their widest, usual, natural or literal meaning would be to place on them a construction other than that which Parliament must be supposed to have intended. If the arguments on a question of interpretation are "fairly evenly balanced, that interpretation should be chosen which involves the least alteration of the existing law."[6]

The use of the word "may" in s 58 does not, in my view, disclose an intention by Parliament to alter the common law relating to voluntary associations. Not only that but the provision in s 56 for voluntary councils, in the absence of an express statement to the contrary, lends weight to the conclusion that Parliament intended these to be voluntary associations to which the common law is applicable. This view is strengthened by the further provision, in s 57 for statutory employment councils. A trade union wishing to be part of an employment council may form one with any willing

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[4] The Law of Partnership and Voluntary Association in South Africa 3rd ed by Bamford at p 139.

[5] 12th ed by P. St. J. Langan at p116

[6] See George Wimpey & Co., Ltd. v. B.O.A.C. [1955]A.C.169, *per* Lord Reid at p. 191

employer organization. Alternatively, recourse may be had to the Minister who may exercise his powers in terms of s 57 to direct certain groups to form employment councils where he deems such to be in the national interest.

I conclude, therefore, that s 58 does not impose mandatory membership on the appellant formed, as it was in terms of s 56, and that membership of the appellant is governed by its constitution.

In its ordinary meaning the word 'may' is discretionary. The starting point in the interpretation of statutes is that words are to be given their ordinary meaning. In the words of LORD REID in *Pinner v Everett* 1969 3 All ER 257 (HL) at 258:

> "The first question to ask always is what is the natural or ordinary meaning of that word or phrase in its context in the statute. It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature that it is proper to look for some other possible meaning of the word or phrase."

Although in the instant case the word sought to be interpreted is not contained in a statute, the same principle is applicable. When given its ordinary meaning the word 'may' as it is used in clause 5:3 of the appellant's constitution does not, in my view, conflict with the intention of Parliament as expressed in the provisions of the Act under mention. The provision in s 29 (4) (f) of the Act that "a registered trade union … shall be entitled to form or be represented on any employment council" does not detract from that view.

The legislature, in providing for the two different categories of employment councils, ensured that all unions and employers organizations could be represented on an employment council. There is no disharmony between s 29 (4) (f) and s 56 by virtue of

which a trade union may, in association with an employers' organization, form an employment council. Reading the two sections together I do not discern, as urged on behalf of the respondent, an intention by Parliament to depart from the common law by imposing, as it is suggested it does, any trade union or employer organization as a member of a voluntary employment council.

It was therefore unlawful for the Registrar to impose the respondent as a member of the appellant and the appeal must succeed on this ground. This conclusion renders it unnecessary to determine the other grounds of appeal.

Accordingly it is ordered as follows:

The appeal is allowed with costs.

The judgment of the court *a quo* is set aside and substituted with the following order:

"The appeal is allowed with costs".

CHEDA JA: I agree

MALABA JA: I agree

Gill, Godlonton & Gerrans, appellant's legal practitioners
Musunga & Associates, respondent's legal practitioners