MEDICAL PROFESSIONAL AND ALLIED WORKERS UNION OF ZIMBABWE
and
BOND MATENGA
and
TIMOTHY GUVAVA
and
TECLA BARANGWE
versus
JULIET CHIRENJE
and
MICHAEL SOZINYU
and
NATIONAL EMPLOYMENT COUNCIL FOR THE MEDICAL AND ALLIED INDUSTRY
and
MINISTER OF LABOUR AND SOCIAL WELFARE
and
TAWANDA KAPITA
and
AIDEN KAPITA

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE: 9 August 2023 & 24 July 2024

Opposed Application-*Declaratur*

Mr L. Madhuku, for the applicants
Mr. J. Kodoko, for the 1st, 2nd, 5th and 6th respondents
Mr. R. Madenyika, for the 4th respondent

MUSITHU J: This matter is concerned with a leadership wrangle in the first applicant. The leadership wrangle pits two factions seeking control of the first applicant against each other. The leading characters are the second to fourth applicants and the first, second, fifth and sixth respondents, respectively. These are either current or former members of the National Council of the first applicant. The first applicant is a trade union which represents the interests of employees in the medical and allied industry. It is duly registered in terms of the Labour Act [*Chapter 28:01*] (the Act). The third respondent is an employment council with an interest in the affairs of the first applicant and its membership. The fourth respondent is cited in his official

capacity as the minister responsible for the administration of the Act, and under whose stewardship matters concerning the rights of employees, trade unions and employment councils are reposed. It is also registered in terms of the Act. The fifth respondents and sixth respondents were joined as parties after the commencement of the proceedings. They claim to have an interest in the leadership of the first applicant.

The applicants approached this court seeking a declaratory order and some consequential relief that are intended to ratify certain decisions that were made by the National Council of the first applicant pursuant to judgments of this court and the Supreme Court in their dispute. In summary the applicants wish the court to make the following orders:

- That the fourth applicant is validly in office as the General Secretary of the first applicant and is consequently mandated to exercise such powers that are conferred by the first applicant's constitution which include the sending out of notices for purposes of convening the next congress of the first applicant.
- That the decision of the first applicant's National Council made at its meeting of 7 March 2022, pursuant to the judgment of the Supreme Court in SC 40/22, concerning the convening of the first applicant's next congress within four months of the order of this court be declared valid and lawful.
- That pending the convening of the next congress of the first applicant, the third respondent shall recognise the National Council of the first applicant as the lawful leadership of the first applicant.
- That pending the convening of the next congress of the first applicant, the third respondent be interdicted from recognising the first and second respondents as leaders of the first applicant.

Background to the Applicants' Case

According to the applicants, this application was prompted by a *lacuna* that arose in the affairs of the first applicant following judgments of the High Court in HC 18/21 and the Supreme Court in SC 40/22. The applicants aver that the two courts accepted and recognised the legitimacy of the first applicant's National Council since its meetings were endorsed as valid. The two courts however declared as invalid, the congress of the first applicant held on 3 March 2018. The applicants contend that the National Council of the first applicant therefore existed and was lawfully in place. What remained outstanding was the holding of a congress and it was for that reason that the court had been approached for the orders sought herein.

The applicants' complaint emanated from the first, second and third respondents' refusal to recognise the National Council of the first applicant. The three respondents are also accused of interfering in the affairs of the first applicant for the following ways. The first

respondent, who was the former president of the first applicant continued to sit in meetings of the third respondent, purportedly representing the first applicant. The second respondent continued to hold himself out as the first applicant's General Secretary when there was a new General Secretary in the form of the fourth applicant. The second respondent is alleged to have repudiated his contract of employment when he joined full time legal practice as a registered legal practitioner. The first applicant had accepted his repudiation and appointed a successor. The third respondent continued to recognise the first and second respondents as leaders of the first applicant's National Council and was even taking instructions from the two on matters affecting the first applicant.

The first, second and third respondents were also accused of taking advantage of the invalidity of the 3 March 2018 congress and exploiting what they saw as a vacuum to do whatever they wanted.

The Respondents' Case

The application was opposed by the first, second, fifth and sixth respondents. The fourth respondent opted to abide by the decision of the court through a notice of filing of 12 October 2022. The main opposing affidavit for the first and second respondents was deposed to by the first respondent, with the second respondent filing a supporting affidavit. The first respondent's affidavit raised a point *in limine* concerning the applicants' *locus standi* to institute the present proceedings. It was submitted that from the judgments of the High Court and the Supreme Court alluded to in the applicants' papers, the applicants were not part of the first applicant as they sought to portray in their papers.

As regards the merits, it was averred that from the congress held on 19 April 2018, the second to fourth applicants were not elected to the structures of the first applicant and the position remained the same to the present date. The said applicants are accused of having allocated themselves positions in an organisation that they were not part of. The minutes of the meeting that the applicants sought to rely on in support of their claims were dismissed as irrelevant since they were a product of a meeting that was improperly constituted. The respondents denied that the High Court judgment created a *lacuna* in the law.

The first and second respondents further denied having any influence on the National Council of the first applicant since they had ceased their membership. They denied interfering with the running of the first applicant as alleged. The applicants' accusations were dismissed in the absence of evidence pointing to the alleged violations. The two respondents claimed to

have renounced their positions at the 19 April 2018 congress where a new leadership was then elected. That leadership still existed unless the contrary was proved.

The applicants were accused of trying to hoodwink the court by getting a judgment that favoured their interests herein. According to the first and second respondents, the applicant ought to have approached the lawful leadership of the first applicant rather than non-members. Alternatively, they ought to have pursued internal remedies before approaching this court. The applicants were also accused of trying to use the respondents as scapegoats to further their interests through a court order.

The first and second respondents urged the court to dismiss the application with costs on the punitive scale on the bases that it not only lacked merit but was based on fictitious facts which had no foundation. The two respondents claimed to have been unnecessarily put out of pocket.

Tawanda Kapita, the fifth respondent deposed to the main affidavit, with the sixth respondent filing a supporting affidavit. In his notice of opposition, the fifth respondent averred that the applicants had no powers to apportion constitutionally created positions without following proper procedures. The court had no power to amend or correct the constitution of the first applicant, and neither did it have the power to validate meetings that were convened unprocedurally.

According to the fifth respondent, the leadership of the first applicant which also included himself was validly elected to office on 19 April 2018. Attached to his affidavit were minutes and the attendance register that was held on 19 April 2018. The two respondents averred that the leadership of 19 April 2018 remained in place. The fifth and sixth respondents denied the existence of a vacancy in the first applicant insisting that the leadership elected on 19 April 2018 was firmly in place. The court was urged to dismiss the application with costs as no basis had been set out for the granting of the relief sought.

The Applicants' Answering Affidavit

The second applicant's answering raised the preliminary point that the second respondent had not opposed the application because the notice of opposition referred to the first respondent as the one opposing. The heading was therefore misleading, and the second respondent's opposing affidavit ought to be expunged from the record.

As regards the merits, the applicants denied that they lacked *locus standi*. They further denied that a congress of the applicant was ever held on 19 April 2018 as alleged by the respondents. The only meeting of the first applicant that was meant to be a congress was the

meeting of 3 March 2018, that the courts declared to be invalid. The first and second respondents had, in HC 6012/18 abandoned their initial stance that a congress of the first applicant was held on 19 April 2018.

It was further submitted that the respondents were bound by their defence in HC 6012/18. They had challenged the validity of the congress of 3 March 2018, and their challenge was based on the fact that the meeting of 3 March 2018 was the only meeting that was being regarded as the congress of the first applicant. The respondents were therefore estopped from inventing new facts.

The deponent to the applicants' founding affidavit, being the second applicant insisted that he was duly authorised to depose to an affidavit on behalf of the first applicant as confirmed by minutes of the meeting of the second applicant. He was also an interested party as a member and leader of the first applicant. He was also involved in the proceedings in HC 6012/18.

It was also averred that the admission by the first and second respondents that they were no longer members of the first applicant meant that they had no basis of opposing the application. The applicants could not oppose the application once they declared not to have an interest in the matter.

The Submissions

The matter was postponed on more than two occasions at the instance of the respondents' counsel to allow the joinder of the fifth and sixth respondents herein. The postponements were also intended to enable the two respondents to file opposing affidavits and heads of argument.

Mr *Madhuku* for the applicants submitted that the operations of the first applicant had been crippled by the absence of a general secretary. A congress could not be held in the absence of a general secretary. The steps taken by the applicants were therefore lawful to ensure that the congress could be held on request. Counsel further submitted that there was no opposition to the application because the respondents had claimed not to be members of the first applicant. They had surrendered the leadership of the first applicant following the meeting held on 19 April 2018.

Mr *Madhuku* further submitted that the defendants had, during the pre-trial conference meeting in HC 6012/18, abandoned their defence that a congress of 19 April 2018 had been held for the first applicant. The only issue at the trial before MUNANGATI-MANONGWA J was whether the congress held on 3 March 2018 was valid or not. The respondents were therefore precluded by the operation of the doctrine of issue estoppel, from seeking to rely on a defence

that they had abandoned in past proceedings. The past court proceedings in the High Court and the Supreme Court proceeded on the basis that there was only one meeting of 3 March 2018 that could have been a congress.

In response, Mr *Kadoko* for the respondents submit that one party could not agree to a removal of an issue referred to trial. There was no judgment or court order that impeached the congress held on 19 April 2018. Mr *Kadoko* conceded that the first and second respondents fell away once they confirmed that they were no longer members of the first applicant. A non-member could not oppose an application that was intended for a member.

Mr *Kadoko* submitted on the other hand that the fifth and sixth respondents were elected officials who took positions in the first applicant by virtue of the 19 April 2018 congress. The two were properly elected in terms of the first applicant's constitution and their election was never impeached.

In his brief response to Mr *Kadoko's* submissions, Mr *Madhuku* submitted that the fifth and sixth respondents were barred for not filing heads of argument. They could not make legal arguments once they were barred. Counsel further submitted that the first and second respondents could not be opposing the application because of the position that they had taken in their opposing affidavit. They had only been cited because of their former positions. They could not be allowed to plead a new case.

The Analysis

Before delving into the merits of the parties' submissions herein, I must dispose of certain preliminary issues raised during the oral submissions. The first concerns the fifth and sixth respondents' right of audience before the court. As already stated, these were only joined to the proceedings latter on in the course of oral submissions. The matter was postponed on more than two occasions to allow their legal practitioner time to file opposing affidavits and heads of argument.

The second issue pertains to the *locus standi* of the applicants, a preliminary point raised by the first and second respondents.

Concerning the first issue, r 59(20) provides that where a respondent is to be represented by a legal practitioner at the hearing of the matter, then the legal practitioner shall file heads of argument of argument within ten days of having received the applicant's heads of argument. In terms of r 59(22), where such heads of argument are not filed within the stipulated period, then the respondent concerned shall be barred and the court may deal with the matter as unopposed or direct that it be set down for hearing on the unopposed roll. No heads of argument

were filed on behalf of the fifth and sixth respondents despite the postponement of the matter on several occasions to accommodate the said respondents. Mr *Kadoko* did not even bother to explain why heads of argument were not filed, and neither did seek the removal of the bar to have those heads filed out of time. One thing becomes clear. Such heads of argument were never prepared. The fifth and sixth respondents are accordingly barred and have no right of audience before the court. The application must therefore be treated as unopposed as against them.

The second point relates to the *locus standi* of the applicants herein. The first respondent's opposing affidavit raised a point *in limine* concerning the applicants' *locus standi* to institute the present proceedings. It was submitted that from the judgments of the High Court and the Supreme Court alluded to by the applicants' papers, the said applicants were not part of the first applicant as they sought to portray in their papers.

From a reading of the two judgments, I found nothing that disqualified the second to fourth applicants from holding membership in the first applicant. The finding of this court in HC 6012/18 was that the meetings of 30 and 31 January 2018, were properly convened meetings of the National Council of the first applicant. The court however found that the process leading to the holding of the congress of 3 March 2018 was unconstitutional. This was because the notice for submission of motion items for the congress was not given by the General Secretary as required by Article 8 of the Constitution. The court also found that the notice for motion items had not been given within three months before the date of the congress as required by the constitution. The court also found that following factional fights that bedevilled the first applicant, the Ministry of Labour determined that a congress held in 2015 was a nullity and the legitimate leadership that remained in office was the one elected at the 2013 congress. This is the same leadership that the court determined was rightfully in place between 2016 and 2018.

The first and second respondents argued that there was a congress held on 19 April 2018, at which the said applicants were not voted into office. Nothing was placed before the court to confirm the holding of the 19 April 2018 congress. The applicants vehemently denied that such a congress was ever held. In the absence of proof confirming that such congress was ever held, the court has no basis on which to conclude that there is a new leadership of the first applicant which ousted the second to fourth applicants.

As regards the merits of the matter, the attitude of the first and second respondents as gleaned from their opposing affidavits effectively resolves the matter in favour of the applicants. The following paragraphs of the first respondent's opposing affidavit are critical.

> "6.1 ……I and the 2nd Respondent are no longer members of the 1st Applicant therefore there is no way we are mandated to recognize, or not, the National Council of the 1st Applicant. I understand the Constitution of the 1st Applicant attached to the Application does not provide for duties of non-members of the 1st Applicant.
> 6.2 …….
> 6.3 The manner in which I and the 2nd Respondent relinquished our previous positions is denied. We relinquished those positions at the 19th of April 2018 Congress and a new leadership was formed…….
> 6.4 I and the 2nd Respondent never instructed the 3rd Respondent in any matter that has to do with the affairs of the 1st Applicant following the relinquishment of the previous positions that we held. ……..The Applicants ought to approach the lawful leadership of the 1st Applicant rather than non-members, or alternatively, pursue internal remedies." (Underlining for emphasis)

From the foregoing paragraphs, the first and second respondents' case is easy to decipher. It is simply that they relinquished their membership in the first applicant. They had nothing to do with the first applicant. They dissociated themselves from the activities of the first applicant. The applicants should not have sued them. They had simply washed their hands off the first applicant. In view of the first and second respondents' attitude to the application as captured in paragraph 6 above, the court briefly adjourned the matter during the oral submissions to allow the parties to find common ground. The idea was to allow the parties to come up with an agreed position which would accommodate the feuding parties' collective interests and allow tranquillity to prevail in the first applicant. The parties were unable to agree on the way forward. As I see it, the first and second respondents have nothing to lose if the relief sought by the applicants is granted. They cannot in one breath deny any association with the first applicant, and then in the other seek to challenge the relief sought by alleging that the second to third applicants were non-members of the first applicant's leadership.

For the foregoing reasons, the court determines that the applicants are entitled to the relief they seek. As regards costs of suit, I finding it befitting to order that each party bears its own costs of suit. On the evidence before the court, there was nothing to suggest that the first and second respondents conducted themselves in the manner portrayed by the applicants. As I have already noted, the two respondents dissociated themselves from the first applicant by alleging that they had long ceased to be its members. They seemed surprised that they were even cited as parties to these proceedings.

Resultantly it is declared that:

1. The fourth applicant is validly in office as the General Secretary of the first applicant and has the powers and responsibilities set out in Article 8 of the first applicant's constitution for purposes of sending out required notices for the next congress of the first applicant.
2. The decision of the National Council of the first applicant made at the meeting of the National Council held on 7 March 2022, pursuant to the judgment of the Supreme Court in SC 40/22 pertaining to the convening of the next congress of the first applicant within four months of this order, be and is hereby declared valid and lawful.

As Consequential Relief, it is Ordered That:

3. Pending the convening of the next congress of the first applicant as provided in paragraphs 1 and 2 above, the third respondent shall recognise the National Council of the first applicant (as recognised in High Court Judgment No. HH 18/21) as the lawful leadership of the first applicant for purposes of representation of the first applicant in meetings of the third respondent.
4. Pursuant to the foregoing paragraph 3, pending the convening of the next congress of the first applicant, the third respondent be and is hereby interdicted from dealing and/or recognising the first and second respondents as leaders of the first applicant.
5. Each party shall bear its own costs of suit.

MUSITHU J:……

Lovemore Madhuku Lawyers, applicants' legal practitioners
Jiti Law Chambers, 1st, 2nd, 5th and 6th respondents' legal practitioners
Hallmark Commercial Lawyers, 3rd respondent's legal practitioners