GODWIN MUNJOMA
and
DAVID TUNHIRA
and
FARAI MUPANGO
and
TAKAWIRA MASOCHA
and
WELLINGTON NCUBE
versus
MINISTER OF LABOUR N.O.
and
COMMERCIAL WORKERS UNION OF ZIMBABWE
and
BARBARA TANYANYIWA
and
KWADZANAYI CHIKAZHE
and
JOSEPH MAMINA
and
GILBERT KATIKUIMBA
and
MICHAEL RUPANGA
and
CUTHBERT CHIKWEKWETE
and
TAWANDA KUWENGA
and
TRYMORE MABVIRAKARE
and
RICHARD DOMA
and
EDNA SIZIBA
and
LANGTON NYEVE
and
WALTER TARANHIKE
and
GRACE MATHE
and
FLORENCE NGOBERA
and
ADAM NHAMO
and
ANGELINE KASUKUWERE

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE: 21 May, 14 June 2021 & 13 July 2022

**Opposed Application - *Declaratur***

*R Matsikidze,* for the applicants
*S Ushewokunze,* for the respondents

**MUSITHU J:** The applicant seeks a *declaratur* and ancillary relief. The relief sought is set out in the draft order as follows:

> **"IT IS HEREBY ORDERED THAT:-**
>
> 1. The Application for a declaratur to the effect that the 1-5th applicants and 3rd -18th respondents cannot hold valid elections or set or restructure the 2nd respondent's structures on their own.
> 2. The ancillary relief is granted to the effect that:
>
> 2.1 The 1-5th applicants and 3rd-18th respondents be and are hereby directed to hold fresh elections, within 3 calendar months of receiving this court order, for all the elected positions of the 2nd respondent as provided for in terms of its constitution, and the elections would be organised, conducted and supervised by a team, set by the 1st respondent, which constitutes not less than 10 Labour Officers headed by the Registrar of Labour.
>
> 2.2 Notwithstanding paragraph 2.1 of the order, the period to conduct fresh elections may be extended by the team assigned in terms of paragraph 2.1 above for whatever reasonable and justifiable reasons to be given in writing.
>
> 2.3 The 1st respondent is hereby ordered to set a team to be headed by the Registrar of Labour with no less that 10 (ten) Labour Officers to conduct elections and supervise elections for the various structures of the 2nd respondent as provided for by its constitution such as branches, regional and national executive committees.
>
> 2.4 The 1st respondent or his or her assignees are hereby authorised to get updated membership registers of the 2nd respondent from the Union or from the employers to enable the 1st respondent or assignees to come up with the Electoral College. The electorate shall be made up of only fully paid up members of the 2nd respondent who have been subscribing for at least 12 months and are employed within the different sub sectors of the commercial sector.
>
> 2.5 The 2nd Respondent be and is hereby ordered to meet the costs for running the elections.
>
> 2.6 The Respondents, if opposes this application, to pay costs of suit on a client-attorney scale".

The application was opposed by the second, fourth-eighth, thirteenth to fifteenth and seventeenth respondents.

**BACKGROUND**

The first applicant deposed to the founding affidavit in his capacity as a subscribing member of the second respondent, and also on behalf of the second to fifth applicants. On their part the second to fifth applicants deposed to supporting affidavits in which they associated

themselves with the averments made in the first applicant's founding affidavit. The first respondent is cited in his official capacity as the Minister responsible for the administration of the Labour Act (the Act).[1] The dispute between the parties herein falls under the purview of that law. The second respondent represents the interests of commercial workers in Zimbabwe. It is constituted in terms of the Act. The third to eighteenth respondents are embroiled in a leadership dispute with the applicants in connection with the management of the second respondent.

In 2010, the second respondent held elections for its office bearers in terms of its constitution. The eighth respondent was elected as president and assumed office from thereon. The applicants allege that in November 2010, the eighth respondent was elevated to the position of Human Resources Manager at his workplace. Apparently, he was required to relinquish his position as the president of the second respondent once he assumed a management position. He did not disclose this development to members of the second respondent. According to the applicants, the fact that he was a managerial employee was confirmed by an arbitral award made on 25 March 2013, in a dispute between him and his employer, Humble Trading (BUSCOD). The dispute was concerned with the underpayment of his salary and unfair dismissal. The arbitrator, one P.A. Chenyika found in favour of the eighth respondent and ordered his reinstatement. The arbitrator further directed that the issue of the salary be resolved through further negotiations between the employer and the employee.

The applicants averred that in terms of the second respondent's constitution the eighth respondent's completed his tenure in 2014. According to the applicants, the eighth respondent's term of office was completed in dubious circumstances since he ought to have relinquished his position the moment he became a managerial employee. It is alleged that members of the second respondent challenged his presidency using internal processes when they became aware of the development. That challenge gave birth to two factions, one led by the eighth respondent and the other led by one March Makanya. On 4 March 2012, the two factions found common ground and executed a memorandum of understanding that gave birth to a steering committee. That committee was a compromise arrangement between the two factions. It was expected to facilitate the holding of fresh elections to elect a new leadership for the second respondent.

The steering committee called for elections at Adelaide Acres in Waterfalls Harare during the period 3-6 July 2013. The elections were attended by the first to fifth applicants.

[1] [*Chapter 28:01*]

The elections gave birth to a new leadership for the second respondent. The other faction represented by the third to eighteenth respondents did not participate in those elections. Apparently, the factions clashed on the dates for holding the elections. The third to eighteenth respondents held their own elections on 1 February 2014 at Courtney Hotel, Harare. They also elected a new leadership for the second respondent.

The first to fifth applicants approached this court under HC 1830/14 seeking a *declaratur* that the third to eighteenth respondents were not the duly elected office bearers of the second respondent. They also sought an order interdicting them from using the second respondent's resources. In response, the third to eighteenth respondents issued their own summons against the first to fifth applicants under HC 1927/14, claiming almost similar relief as their counterparts. The two matters were consolidated and heard by CHIKOWERO J, who on 10 July 2019 granted the following order:

> "In the result, I order as follows:
> A) In respect of HC 1830/14
>  1. The congress held on 1 February 2014 at Courtney Hotel in Harare be and is declared null and void.
>  2. 1st to 16th defendants are not *bona fide* office bearers of the Commercial Workers Union of Zimbabwe.
>  3. The remainder of the plaintiffs' claims are dismissed.
> B) In respect of HC 1927/14
>  4. The meeting held by 1st to 8th defendant and anyone acting through them or on their behalf on 4th to 6th July 2013 and at Adelaide Acres Harare be and is declared not to be a congress of the Commercial Workers Union of Zimbabwe.
>  5. The purported congress meeting held by the 1st to 8th defendants on the 4th -6th of July 2013 was not held in terms of the Commercial Workers Union of Zimbabwe Constitution and is declared null and void.
>  6. 1st to 8th defendants were not duly elected as office bearers of the Commercial Workers Union of Zimbabwe arising from the meeting they held on 4th-6th July 2013.
>  7. All actions carried out by 1st to 8th defendants or their agents on behalf of the Commercial Workers Union of Zimbabwe pursuant to the outcome of the meeting they held on 4th-6th July 2013 be and is hereby declared null and void.
>  8. 1st to 8th defendants are interdicted from purporting to be office bearers of the Commercial Workers Union of Zimbabwe and from in any way purporting to act for or on behalf of the Commercial Workers Union of Zimbabwe in any *fora*.
>  9. 1st to 8th defendants are interdicted from using any of the Commercial Workers Union of Zimbabwe property immovable or movable including letterheads and other intellectual property.
> C) In respect of both case numbers HC 1830/14 and HC 1927/14, each party shall bear its own costs."

The applicants appealed against part of the judgment by CHIKOWERO J, while the third to eighteenth respondents chose not to. On 10 July 2019, the Supreme Court struck the appeal off the roll on the basis that it was fatally defective. On their part, the third to eighteenth respondents reckoned that the judgment by CHIKOWERO J was in their favour, and issued a writ

for the eviction of the applicants from the second respondent's premises. The applicants herein obtained a stay of execution with a concomitant order of costs on the attorney and client scale against the respondents herein. The court adjudged the third to eighteenth respondents' conduct to be an abuse of court process as they were not legitimate office bearers with rights to evict the applicants. The applicants claimed that the respondents' argument was that the judgment by CHIKOWERO J restored the 2010 leadership of the second respondent. According to the applicants, CHIKOWERO J who set aside the writ of ejectment stated that there was no executive leadership for the second respondent.

Meanwhile, the applicants had also applied for condonation and extension of time to appeal against CHIKOWERO J's first judgment. That application was granted by the Supreme Court on 24 February 2020. The applicants filed a fresh notice of appeal with that court under SC 113/20. That appeal, which contained only one ground of appeal, was heard on 13 May 2021.

The ground of appeal read as follows:

> "1) The Court *a quo* erred in granting interdicts to the Respondents and against the Appellants and refusing to grant such interdicts to the Appellants and against the Respondents even though it held that the parties had attained an equal measure of success."

The appeal essentially challenged the court's decision to grant an interdict against the applicants alone instead of granting blanket interdict against both parties. When the parties appeared before me on 21 May 2021, they were not yet aware of the outcome of the appeal hearing which was set down for 13 May 2021. A perusal of the Supreme Court record however shows that the appeal was disposed of as follows:

> "In the result the court made the following order:
> 1. The points *in limine* by the respondents are hereby upheld.
> 2. The matter is hereby struck of the roll for the reason that the Notice of Appeal is fatally defective
> 3. The appellants shall the respondent costs
>
> Reasons for this decision will be availed in due course."

It therefore means that there is no appeal pending at the Supreme Court.

**APPLICANTS' CASE HEREIN**

The applicants claimed to be *bona fide* members of the second respondent with real and substantial interest in its administration. They further claimed to be suffering harm from the leadership vacuum created by the CHIKOWERO J judgment, as the judgment did not provide a remedy to bring an end to that leadership crisis. The judgment declared that both factions embroiled in the fight for the leadership of the second respondent, were unlawful office bearers.

The third to eighteenth respondents did not challenge that judgment, meaning that they were content with that outcome.

The applicants averred that there was need for an election to be held so that *bona fide* office bearers were elected into office. The operations of the second respondent had been crippled. The resources of the second respondent could not be accounted for in the absence of proper structures. There was an urgent need to resolve that crisis through the holding of fresh elections to be conducted by officials of the first respondent. For the foregoing reasons, the applicants averred that they had made a case for the granting of the relief sought herein.

**SECOND, FOURTH TO EIGHTH, THIRTEENTH TO FIFTEENTH AND SEVENTEENTH RESPONDENTS' CASE**

The eighth respondent deposed to the opposing affidavit in his capacity as the current and outgoing president of the second respondent. He also did so on behalf of the second, fourth to seventh, thirteenth to fifteenth and seventeenth respondents (hereinafter collectively referred to as the respondents, or individually where the context requires). He also stated that the third, ninth to twelfth, sixteenth and eighteenth respondents were not represented as they were no longer members of the second respondent for divers reasons.

The respondents raised the following preliminary points at the outset: absence of *locus standi* and secession; dirty hands; lack of *locus standi* on the part of the first and second applicants; that the relief sought was incompetent and *ultra vires* the second respondent's constitution; and lastly they alleged that the matter was afflicted by material disputes of fact which were unresolvable on the papers. I shall revert to these preliminary points later in the judgment.

As regards the merits, the respondents contended that the applicants had no interest in the affairs of the second respondent having seceded from that entity to form their own labour union called Aggrieved Commercial Workers Labour Trust (hereinafter referred as the Labour Trust for convenience). The respondents further contended that the first applicant's subscriptions were actually being paid to the Labour Trust. The Labour Trust held an account with Standard Chartered Bank at its Africa Unity Square Branch in Harare. The applicants were accused of having recruited their own membership which subscribed to the Labour Trust's Standard Chartered Bank Account. The applicants were challenged to prove that their subscriptions were going to the second respondent's bank account. It was also averred that the second applicant was dismissed from TM Supermarkets where he was employed. That meant that he was no longer a member of the second respondent.

The eighth respondent denied that he was leading any faction. He insisted that he was the last duly elected and outgoing president of the second respondent, and the custodian of its constitution. The leadership of the second respondent had reverted to the last duly elected office bearers who were elected at the 2010 congress. Replacements had been made where vacancies had arisen by reason of death and resignations amongst other factors.

The eighth respondent denied that he was a managerial employee as suggested in the arbitral award attached to the first applicant's affidavit. He denied that the award made a finding that he was a managerial employee. The eighth respondent also averred that sometime in 2021, some of the applicants embezzled funds from the second respondent, and the eighth respondent's executive commissioned an audit into the affairs of the second respondent, as well as taking some disciplinary measures against the implicated members. The applicants tried to elbow out the eighth respondent and his executive from the second respondent.

The eighth respondent further claimed that at some point, the applicants wheedled him and other respondents into signing a memorandum of understanding (MOU), which would result in the affairs of the second respondent being run by a steering committee. It was the same MOU that led to the elections that were declared null and void by CHIKOWERO J. The memorandum of understanding had its own frailties that led to its abandonment by the eighth respondent and his faction.

The respondents dismissed the appeal under SC 113/20 as lacking merit. The eighth respondent averred that CHIKOWERO J declared that the applicants' meeting was not a congress of the second respondent since the eighth respondent and his executive were not in attendance. The eighth respondent also averred that the learned judge concluded that the congress held by the eighth respondent's faction at Courtney Hotel though validly convened, was null and void because it had produced an unconstitutionally constituted executive. This meant that the second respondent reverted to the last duly elected executive which was in the process of organising elections for new office bearers. According to the respondents, this position was also confirmed by the statement of agreed facts in the joint pre-trial conference minute signed by both factions on 11 September 2018 in connection with the two consolidated matters.

The respondents urged the court to dismiss the application with costs on the higher scale as it was an abuse of court process. The applicants were meddling in the affairs of the second respondent when they knew that they had seceded from that entity.

**THE ANSWERING AFFIDAVIT**

The applicants raised preliminary points of their own. The points in *limine* pertain to the lack of *locus standi* on the part of the respondents, and the absence of authority on the part of the eighth respondents to represent all the respondents that he purported to be representing. I will deal with these later in the judgment.

The applicants denied that there existed a trade union known as the Labour Trust, or that they were members of such a body. In any case, the Labour Trust was not a trade union. There was a difference between the two. A trade union was formed in terms of the Labour Act and registered by the Registrar of Labour, whereas a trust was registered by the Registrar of Deeds.

The applicants further contended that the national executive of the second respondent and its stakeholders agreed at some point to establish a trust to raise funds in order to resolve the crisis in the second respondent. The deponent referred to resolutions of the second respondent which authorised its members to remit union dues to the Labour Trust.[2] Such resolutions were however not attached to the answering affidavit as claimed. The first applicant insisted that he was a member of the second respondent who had complied with the resolutions of the second respondent's executive to remit funds to the Labour Trust. The objectives of the Labour Trust were clearly set out in the Notarial Deed of Donation and Trust that established the Labour Trust (hereinafter referred to as the Deed of Trust). The applicants insisted that they were subscribing members of the second respondent with a real and substantial interest in its affairs.

The applicants denied that there was an interdict against them, since they had appealed against the judgment by CHIKOWERO J. That appeal was pending at the Supreme Court. The appeal was against all the interdicts granted against the applicants. An appeal to the Supreme Court had the effect of suspending the decision appealed against, unless the court granted leave to execute pending appeal. Accordingly, the question of dirty hands was therefore misplaced.

The applicants further maintained that the relief sought was competent, as it was provided for in s 51 of the Labour Act. At any rate, it was not possible to follow the second respondent's constitution as there was no legitimate executive of the second respondent in place. Only the court could provide a remedy to the leadership crisis. The purported executive

[2] Paragraph 19 of the Answering Affidavit

did not have the capacity to hold the elections since it was declared not to be the *bona fide* leadership of the second respondent.

The applicants further averred that the judgment by CHIKOWERO J did not order the parties to revert to the 2010 leadership structures. The applicants insisted that the eighth respondent was not the president of the second respondent since his tenure ended in 2014. He had also been told so by CHIKOWERO J when the parties attended court under HC 772/20. Further, since the eighth respondent had become a managerial employee, he could not remain as the president of the second respondent. He had disqualified himself. The second respondent was a trade union for non-managerial employees only.

**THE SUBMISSIONS AND ANALYSIS ON THE PRELIMINARY POINTS**

The leadership crisis that the second respondent finds itself engulfed in exemplifies the kind of damage power struggles amongst union leaders can cause to an institution that was formed to protect the interests of its membership. Lord Acton, a revered nineteenth-century English historian and politician, once reflected: "Power tends to corrupt, and absolute power corrupts absolutely." His celebrated *dictum* has been reiterated innumerable times since then. In simpler terms, that adage posits that those with power often do not have the interests of people they purport to represent at heart. That adage seems to apply with compelling force to the circus that has enveloped the second respondent for close to a decade now, with no respite seemingly in sight.

The Constitution of the second respondent has as one of its key objects, the need *"to promote and protect the interests of members in relation to their conditions of service."*[3]. Instead of resolving their differences, the two factions of the second respondent appear determined to exert as much of their energies towards achieving the converse of the second respondent's founding values as espoused in its constitution.

When the parties appeared before me on 21 May 2021, it emerged that the respondents' heads of argument had been filed two months out of time. For the applicants, Mr *Matsikidze* submitted that the respondents' failure to purge their non-compliance with the rules of court demonstrated a wanton disregard of those rules. For the respondents, Mr *Ushewokunze* took the opportunity to apply for the upliftment of the bar, submitting that the filing of the heads of argument had been hampered by disturbances arising from the Covid-19 induced National Lockdown. There was a delay of about 28 days. Counsel appealed to the court to exercise

[3] Para 5.1 of the Constitution on p31 of the record.

discretion and allow the filing of the heads of argument out of time in terms of order 1 rule 4C, of the old High Court rules. Rule 4C permits a departure from the rules by the court in the exercise of its discretion. In the exercise of its discretion and seeing no prejudice to either party, the court uplifted the bar and allowed the tendering of the respondents' heads of argument out of time.

Yet another complication that beset the commencement of proceedings arose. Mr *Matsikidze* was in possession of affidavits in which some of the respondents allegedly denied that they had authorised the eighth applicant to represent them in these proceedings. Those affidavits were attributed to the fourth, fourteenth, fifteenth and seventeenth respondents. The said respondents also allegedly denied that they had instructed Mr *Ushewokunze* to represent them in these proceedings. Mr *Ushewokunze* requested a postponement of the matter in order to verify the authenticity of those affidavits with the respondents concerned. I postponed the matter to 14 June 2021 by consent.

At the resumption of the hearing, Mr *Ushewokunze* advised the court that he had the full mandate to represent all the respondents including those who had purportedly disowned him and the eighth respondent. He had no instructions to renounce agency in respect of the four concerned respondents. Mr *Ushewokunze* further argued that the affidavits pertaining to the four respondents were filed out of order. Those respondents were his clients, and yet the affidavits had been placed before the court by the applicants' counsel. He urged the court to disregard the affidavits and expunge them from the record.

In reply, Mr *Matsikidze* submitted that the affidavits were duly commissioned by the four respondents, who all denied giving the eighth respondent and Mr *Ushewokunze* the mandate to represent them. According to counsel, it meant that the four were not opposed to the relief sought by the applicants. He further submitted that Mr *Ushewokunze* should have procured evidence from the said respondents refuting the contents of the affidavits attributed to them. Counsel further submitted that the eighth respondent had not placed before the court any evidence to confirm that he had authority to represent the four.

The court noted that the applicants had in their answering affidavit, challenged the eighth respondent's authority to represent all the respondents in the absence of authority to confirm that position. The four affidavits placed before the court by Mr *Matsikidze* sought to corroborate the position that the eighth respondent indeed had no authority to represent the other respondents.

It is the manner in which the four affidavits were placed before the court that was irregular. They were coming from the applicants' counsel, who himself had no mandate to speak on behalf of the four respondents. Nothing stopped the four respondents from approaching the court directly to clarify their position if indeed they did not wish to be associated with the eighth respondent and Mr *Ushewokunze*. They were not new to litigation having been involved in the proceedings before CHIKOWERO J on the same side as the eighth respondent. The court finds that the four affidavits are not properly before the court and accordingly they must be expunged from the record.

I now turn to determine the preliminary points raised herein.

***Locus Standi***

In their notice of opposition, the respondents challenged the *locus standi* of the applicants arguing that they seceded from the second respondent to form their own trade union called the Labour Trust. In their answering affidavit, the applicants challenged the *locus standi* of the respondents on two fronts. Firstly, they averred that the eighth respondent's tenure of office had lapsed and it was never renewed. It ran from 2010 to 2014. Secondly, in terms of the second respondent's constitution, no one could represent that entity without being authorised to do so by way of a resolution. No such resolution was placed before the court.

The court will first decide the question of the applicant's *locus standi* as it will determine whether there is a proper application before the court. In *Makarudze & Anor v Bungu & Ors*[4], MAFUSIRE J dealt with the question of *locus standi in judicio* as follows:

> *"Locus standi in judicio* refers to one's right, ability or capacity to bring legal proceedings in a court of law. One must justify such right by showing that one has a **direct and substantial interest** in the subject-matter and outcome of the litigation: see *Zimbabwe Teachers Association & Ors v Minister of Education and Culture*[5]. In that case EBRAHIM J, as he then was, stated[6]:
>
> > "It is well settled that, in order to justify its participation in a suit such as the present, a party … has to show that it has **a direct and substantial interest** in the subject-matter and outcome of the application."
>
> The **direct and substantial interest** test has been followed in a plethora of cases such as those listed in footnote one above. In *Henri Viljoen (Pty) Ltd* v *Awerbuch Brothers*[7] it was held to connote:

[4] 2015 (1) ZLR 15 (H)
[5] 1990 (2) ZLR 48 (HC) See also *Dalrymple & Ors v Colonial Treasurer* 1910 TS 372; *Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O); *United Watch Diamond Co (Pty) Ltd & Ors v Disa Hotels Ltd & Anor* 1972 (4) SA 409 (C); *Deary NO v Acting President & Ors* 1979 RLR 200 (G); *PE Bosman Transport Works Committee & Ors v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 801 (T); *AAIL (SA) v Muslim Judicial Council* 1983 (4) SA 855 (C); *SA Optometric Association v Frames Distributors (Pty) Ltd t/a Frames Unlimited* 1985 (3) SA 100 (O); *Molotlegi & Anor v President of Bophuthatswana & Ors* 1989 (3) SA 119 (B)
[6] At pp 52 - 53
[7] 1953 (2) SA 151 (O)

> "… an interest in the right which is the subject-matter of the litigation and … not thereby a financial interest which is only an indirect interest in such litigation."

CORBETT J, in *United Watch & Diamond Co (Pty) Ltd & Ors* v *Disa Hotels Ltd & Anor*[8], elucidated it as follows[9]:

> "This view of what constitutes a **direct and substantial interest** has been referred to and adopted in a number of subsequent decisions, including two in this Division … and it is generally accepted that what is required is a legal interest in the subject-matter of the action which could be prejudicially affected by the judgment of the Court (See *Henri Viljoen*'s case *supra* at 167)".

I fully associate myself with the views of the learned judges. Direct and substantial interest denotes a significant interest in the subject matter of litigation, as well as its outcome. It must not be fanciful. Court proceedings by their nature are no stroll in the park. A litigant must not just approach the court for fun. They must assert clearly demonstrate their connection to the dispute before the court. On its part, the court will be slow to deny *locus standi* to a litigant. The doors of the courts are open to all, but subject to the caveat that one must clearly assert their legal interest in the issues that fall for determination by the court.

To support their contention that the applicants had seceded from the second respondent, and were no longer members thereof, the eighth respondent attached the Deed of Trust establishing the Labour Trust and an Earning Deduction Breakdown Report presumably from one of the employers whose employees were members of the Labour Trust. The Deed of Trust was registered on 14 April 2014. The founders of the Labour Trust as per the Deed of Trust were the first and second applicants herein. The two together with the third to fifth applicants are also listed as the Trustees, together with others members that are not part to this litigation.[10]

Paragraph 3(f) of the Deed of Trust states that *"the source of funds shall be the individual subscriptions of employee……, they used to tender as union dues, now as trust fund dues."*[11] (Underlining for emphasis). Also attached to the eighth respondent's affidavit are Earning Deduction Breakdown Reports from an entity called Nirana (Pvt) Ltd T/A Donimi Laundrey & Dry Cleaning Services for the period 17/2019 to 18/2019; 01/20 to 02/20; 03/20 to 04/20; 05/20 to 06/20; 07/20 to 08/20. The breakdown shows deductions that were made from the staff payroll with a list of names, in favour of a Trade Union cited on the same document as Aggrieved Commercial.[12] That name suggests that it is the Labour Trust which I have already alluded to above. On his part, the first applicant attached his payslip from the

[8] 1972 (4) SA 409 (C)
[9] At p 415H
[10] See the Notarial Deed of Donation and Trust on pages 134 to 136 of the record.
[11] p137 of the record.
[12] pages 148-152 of the record.

"OK Supervisors Payroll" which shows that he was making union subscriptions to an entity called C.W.U.Z. The word C.W.U.Z is an acronym for Commercial Workers Union of Zimbabwe, the second respondent herein.[13] The respondents denied that the first applicant was making any union subscriptions to the second respondent.

In the answering affidavit, the first applicant does not deny the existence of the Labour Trust. He insisted that he was a member of the second respondent who had complied with resolutions passed by the executive members of the second respondent to deposit money into the Labour Trust's bank account. The resolutions which the deponent referred to as annexures **"1"** and **"02"** were not attached to his answering affidavit. That omission, when considered in the context of para 3(f) of the Deed of Trust and the Earning Deduction Breakdown Reports referred to above, creates a problem for the applicants herein.

Whether or not the Labour Trust is a trade union is not a question that this court can conclusively resolve on the papers placed before it. What is however clear from a reading of the Deed of Trust is that the source of funds of the Labour Trust was to be the individual subscriptions that members used to tender as union dues, but were now to be tendered as trust fund dues. The founders and trustees of that Labour Trust are the applicants herein. If the members were now required to tender trust fund dues instead of union dues, then it means they were no longer union members. They were now members of the Labour Trust, whatever that entity was meant to achieve.

The issue then is whether the applicants have established a direct and substantial interest in the subject-matter and outcome of the application. That issue cannot be resolved on the papers. No sufficient information was placed before the court by the applicants to disprove the notion that the Labour Trust is in fact a union disguised as a trust. The applicants did not even comment on the Earning Deduction Breakdown Reports attached to the eighth respondent's opposing affidavit, which shows that certain deductions were being made on behalf of a union called Aggrieved Commercial. Incidentally, Aggrieved Commercial is the shorter version of the name of the Labour Trust fronted by the applicants. While not much can be attached to a name, the appellation "Aggrieved Commercial Workers Labour Trust", may lend credence to the argument that the entity was formed as an alternative to the second respondent.

In light of the above obscurities in the status of the Labour Trust and its relationship to the second respondent, the court cannot conclusively make a finding that the applicants have a

[13] See para 1 on p29 of the record.

real and substantial interest in the affairs of the second respondent herein, since on paper they now appear to have formed a breakaway union. It was incumbent upon the applicants to place before the court as much information which would leave the court in no doubt that the Labour Trust was not in fact a breakaway union, and that they were still members of the second respondent. The fact that the first applicant was making subscriptions to the second respondent was vigorously denied by the respondents. Further, in his opposing affidavit, the eighth respondent averred that the second applicant was once employed by TM Supermarket but had since been relieved of his duties. In para 21 of his answering affidavit, the first applicant responded as follows: *"This is admitted however he has been challenging his dismissal".*[14]

In his oral submissions, Mr *Matsikidze* appeared to admit that the second applicant's contract of employment was actually terminated by his employer. He tendered to file a notice of withdrawal in respect of that applicant so as to leave the other four applicants before the court. An employee whose contract has been terminated ceases to be a member of the union. Membership of a trade union and the entitlement to hold elective office in a union is the preserve for employees.[15] The second applicant should not have been cited as an applicant at all.

In light of the foregoing observations, the court finds that the first and second applicants have failed to surmount the first hurdle of showing that that they have *locus standi* to institute these proceedings. They failed to establish a real and substantial interest in the affairs of the second respondent. Based on the evidence placed before the court by the eighth respondent, the applicant appear to have formed a splinter union disguised as a Labour Trust. That defect affects all the applicants herein as they are either the founders or the trustees of the Labour Trust. The first applicant who deposed to the founding affidavit is both a founder and a trustee. The other four applicants filed supporting affidavits, which were reliant on the first applicant's deposition. It follows that the finding by the court that the first applicant has failed to demonstrate that he has the requisite *locus standi* to institute the current proceedings affects all the applicants that had filed supporting affidavits. In the premises, the court finds that there is no application before the court.

Even though I have found that there is no application before the court, I must nevertheless comment on the conduct of the eighth respondent, in relation to the other respondents as it has a bearing on the question of costs. Granted, the eighth respondent was

[14] Para 21 on p192 of the record
[15] See *Zinyanya & Ors v Zimbabwe Sugar Milling Industry Workers Union & Ors* HMA 38/19.

obliged to respond to the application having been cited as a party. The judgment by CHIKOWERO J did not proclaim him the current President of the second respondent. That judgment did also not direct that the second respondent must revert to the old structures. If the eighth respondent claims to be clinging to his position as the current president of the second respondent on the basis of the second respondent's constitution, then he ought to have pointed to the specific provisions of that constitution which gives him such powers.

If indeed there was no leadership vacuum in the second respondent, and the leadership elected in 2010 remained in office, until the election of a new leadership, then the eighth respondent ought to have placed before the court a resolution of the second respondent's National Executive Committee authorising him to represent the second respondent in these proceedings.[16] This was more so considering that the application before the court was about a leadership vacuum in the second respondent. In the absence of a resolution of the National Executive Committee of the second respondent authorising him to represent the second respondent in these proceedings, then the eighth respondent must be taken to have been acting on a frolic of his own.

The same logic applies in respect of the other respondents that the eighth respondent purported to be representing in these proceedings. He did not attach proof of such authority to represent them. On their part, the respondents that he purported to represent did not attach any supporting affidavits confirming that they had authorised him to represent them. They did not even associate themselves with his deposition. The mere fact that the eighth respondent had represented them in other proceedings was not sufficient to clothe him with the requisite authority to represent them in the current proceedings. It follows that there was only one respondent before the court. The eighth respondent's conduct is therefore reprehensible to the extent that he sought to mislead the court. For that reason, the court will deny him costs.

In light of the court's findings above, it is needless to traverse the remaining points in *limine* and the merits of this application. The preliminary point pertaining to the applicants' lack of *locus standi* and their secession from the second respondent succeeds.

**COSTS**

Mr *Ushewokunze* urged the court to dismiss the application with costs on the attorney and client scale since it was an abuse of court process. In view of the sentiments expressed by

[16] *Madzivire & Ors* v *Zvarivadza & Ors* 2006 (1) ZLR 514 (SC) and *Dube* v *Premier Service Medical Aid Society & Another* SC 73/19.

the court pertaining to the conduct of the eighth respondent, the court will not make an award of costs in his favour.

**DISPOSITION**

Resultantly it is ordered that:

1. The application be and is hereby struck of the roll.
2. There shall be no order as to costs.

*Matsikidze Attorneys At Law*, legal practitioners for the applicants
*Ushewokunze Law Chambers*, legal practitioners for the second, fourth to eighth, thirteenth to fifteenth and seventeenth respondents