GRAIN MILLING EMPLOYERS ASSOCIATION OF ZIMBABWE
versus
SMALL TO MEDIUM ENTERPRISES ASSOCIATION OF ZIMBABWE
and
MILLING INDUSTRY WORKERS UNION
and
NATIONAL EMPLOYMENT COUNCIL FOR THE FOOD AND ALLIED INDUSTRIES
and
REGISTRAR OF LABOUR N.O.

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 30 March & 5, 14 & 21 April 2022

Urgent Chamber Application-Interdict

B. Magogo, for the applicant
L. Madhuku, for the 1st and 2nd respondents
J. Sande, for the 3rd respondent

MUSITHU J: The applicant seeks interim relief staying the registration of a Collective Bargaining Agreement (CBA) negotiated between the first and second respondents. The relief sought is set out in the draft order as follows:

> "**TERMS OF THE FINAL ORDER SOUGHT**
> That you show cause to this Honourable Court, why a final Order should not be made in the following terms:-
> 1. Applicant be and is hereby declared to be a duly registered employer's association for the third Respondent's Milling sub-sector with competence to negotiate collective bargaining agreements in the undertaking.
> 2. Pending verification of its membership, the first Respondent is hereby declared an incompetent party for purposes of negotiating collective bargaining agreements on behalf of employers in the third Respondent's Milling Subsector.
> 3. The Collective Bargaining Agreement: Food and Allied Industries (Milling Sub-sector) between first and second Respondent dated 22 March 2022 be and is hereby declared to be null and void and consequently incapable of registration with the fourth Respondent.
> 4. The fourth Respondent be and is hereby ordered and directed not to register the Collective Bargaining Agreement: Food and Allied Industries (Milling Sub-sector) between first and second Respondent dated 22 March 2022.
> 5. Alternatively; if, at the time of issuance of this order fourth Respondent has already registered the Collective Bargaining Agreement: Food and Allied Industries (Milling Sub-sector) between first and second Respondent dated 22 March 2022, then in that event such registration be and is hereby set aside.

6. The first and second Respondent shall, jointly and severally the one paying the other to be absolved, pay Applicant's costs of suit on the attorney client scale.

INTERIM RELIEF GRANTED

Pending the finalisation of the matter on the return day, Applicant is granted the following relief:-

1. The registration of the Collective Bargaining Agreement: Food and Allied Industries (Milling Sub-sector) between first and second Respondent dated 22 March 2022 be and is hereby stayed;
2. First Respondent be and is hereby temporarily interdicted from further participating in any collective bargaining negotiations for the Milling sub-sector.

SERVICE OF THIS PROVISIONAL ORDER

The Sheriff or alternatively Applicant's legal practitioners be and is hereby granted leave to serve this interim order on the Respondent."

The application was opposed by the first to third respondents. The applicant is an employer association registered in terms of the Labour Act (the Act).[1] The first respondent is also an employer association registered in terms of the Act. The second respondent is a trade union also registered in terms of the Act. The third respondent is an employment council registered in terms of the Act. It regulates the activities of its affiliated members. The fourth respondent is an official appointed in terms of the Act. His responsibilities includes the registration and supervision of the activities of trade unions and employment councils.

The Applicant's Case

Applicant was registered by the fourth respondent as an employers' association on 29 December 1998. Over the years, it has participated in collective bargaining negotiations on behalf of employers in the milling sector. The applicant claims that at some point it incorporated a separate legal entity known as the Grain Millers Association of Zimbabwe (Private) Limited (GMAZ). That entity has the mandate to handle labour related matters that concerns the applicant and its membership. The applicant claims that although the two entities are distinct legal personalities, their leadership is substantially similar. As a result of this position, there has been a conflation of the two by stakeholders in the industry. The applicant avers that such conflation did not cause any problems until the birth of the first respondent.

The applicant claims that the first respondent is a product of disgruntled former employees of the applicant. It acquired registration status as an employer association in 2021. Such registration entitled it to admission as a member of third respondent provided it met certain criteria

[1] [*Chapter 28:01*]

established under the third respondent's constitution. The secondment of its members to committees of the third respondent was subject to the proportional sharing of seats with existing employers' associations after verification of its membership. Soon after its registration, the first responded pushed for its inclusion in the collective bargaining council, as well as demanding the sharing of seats in third respondent's committees.

A meeting was convened for 7 February 2022, at which the seat sharing and verification process was supposed to be done. At the meeting, the question of the membership and representation of the applicant and GMAZ arose, with the first respondent alleging that the applicant was now defunct. This was on account of the fact that the applicant was at all material times represented in the council by members of GMAZ. The third respondent was requested to make a ruling on the issue of the applicant's status in the council before the verification exercise could commence. The third respondent's chairperson declined to make a ruling on the issue in light of the applicant's registration. The issue was referred to a representative of the fourth respondent who was also in attendance. That representative also declined to deal with the matter at that point as the complaint had not been formally registered with the fourth respondent's office.

The first respondent sought an adjournment of the meeting to allow it time to take up the matter with the fourth respondent. Accordingly no membership verification was then carried out. The applicant claims it had brought along to the meeting, a complete register of its own membership. It further claims that the first respondent failed to produce a register of its own members. The applicant claims that the first respondent only had one member.

Following the aborted meeting, on 11 February 2022, the third respondent's General Secretary wrote to the fourth respondent seeking his intervention in the matter. The letter reads in part as follows:

> **"RE: STALEMATE IN THE MILLING INDUSTRY**
> ……..
> We hereby seek your intervention in resolving the verification of Registration Certificates and other attendant issues among the Milling Industry parties.
> We thank you for your usual support and guidance.
> ……."

The fourth respondent responded through a letter of 17 March 2022. The letter reads in part as follows:

"REF: VERIFICATION OF REGISTRATION CERTIFICATES OF PARTIES TO THE MILLING INDUSTRY

……

Reference is made to your letter dated 11 February 2022 in which you requested for our intervention through the verification of Registration Certificates among milling industry parties. May you please clarify the sort of intervention required and also provide the names of parties whose Registration certificates you require.

Please be guided accordingly

……."

The applicant claims that the letter did not elicit a response from the third respondent. The applicant asserts that it received an alert from one of its members that there was communication from the United Food and Allied Workers Union of Zimbabwe, (UFAWUZ) suggesting that the meeting of 7 February 2022 was all but conclusive as regards the matters discussed thereat. The letter dated 8 February 2022, and addressed to the third respondent read in part as follows:

"RESUMPTION OF COLLECTIVE BARGAINING MEETINGS IN THE MILLING INDUSTRY SUBSECTOR UNDERTAKING: WAGE STALEMATE FOR 2021 AND GOING FORWARD

Following Trade Union enquiry on sharing of seats between Grain Millers Association of Zimbabwe and Small to Medium Millers Employers Association of Zimbabwe, and the feedback thereto and notwithstanding the 2021 wage stalemate, the Trade Union observes the following:

1. The issue of whether Grain Millers Association of Zimbabwe is a registered employer Association or not is a fundamental issue in that the Trade Union at law is supposed to deal and work with a duly registered employers Association, registered in the industry or Subsector undertaking. This conclusion ought not and should not be construed as Trade Union interference in the intra challenges within the employer parties.
   It is a simple affirmation of what the law states and requires.
2. The Trade Union is available and ready to resume wage negotiations as soon as employer party is properly constituted.
3. We further acknowledge the feedback of the meeting of the employer party on sharing of seats, which feedback shows that the employer party notwithstanding some housekeeping issues is now properly constituted.
4. …….
5. The so called dispute between the two employer Associations cannot and will not scuttle any prospects of wage negotiations in the Milling Industry going forward.
6. The so called dispute between the two can still be resolved while wage negotiations and other subsector undertaking related issues are ongoing.
   It is against this background and observation that the Trade Union wishes to inform the General Secretary of the N.E.C, the following:-
7. There is a registered employer Association whose certificate of registration is not subject to dispute by all.
8. The workers in the Milling Industry can no longer wait for the resolution of the so called dispute while they wallow in employer induced poverty as their wage was last reviewed in October 2020.

9. Milling Industry Workers Union has thus resolved that forthwith they begin negotiations and other subsector undertaking related business with an Employer Association whose certificate of registration is not in dispute. In line with the lawful position the Union will not deal with an Employers Association without a registration certificate or one which is renting a certificate of a now defunct employer Association.
10. In light of this take notice that a meeting for Collective Bargaining by agreement has been slated for Friday 11 February 2022 at a venue to be communicated.
……."

The letter was copied to both third and fourth respondents. Neither reacted to the letter. The applicant approached its legal practitioners, who on 17 February 2022 wrote to the third respondent reiterating the applicant's position on the matter. The material part of the letter reads as follows:

"RE: NEC FOOD MILLING SUBSECTOR-EMPLOYER PARTIES SHARING OF SEATS
……
Pursuant to the meeting that was held on the 7th of February 2022, at the NEC offices for sharing of seats between the employer parties in the milling sub-sector in terms of which the meeting was adjourned because the Small to Medium Millers Association of Zimbabwe SMMAZ challenged the presence of our client in the meeting. The challenge was based on the allegation that ours did not exist and was not entitled to be in the said meeting because they had specifically requested to meet with GMAZ. We wish to expressly state that we stand as directed by the Chairman that he did not have any authority to adjudicate on the legality of the existence of GMEAZ and therefore directed any aggrieved parties to follow the legal channels to have the issues determined.

Despite the clear directive by the Chairman, SMMAZ proceeded to meet with U.F.A.W.U.Z and misled the union that it was representing the employers' organization and misrepresented that it had taken up all seat in the subsector for the employer party. This is evident from the letter to the NEC by the Trade Union dated 8 February (See annexure A) in terms of which paragraph 3 stated that the employer party had been properly constituted. Seat where not shared at the meeting for sharing of seats so one fails to understand how the trade union asserts that the employer organization was properly constituted.

This is definitely not a true record of what transpired because parties did not share any seat after the same SMMAZ sought an adjournment of the meeting. SMMAZ cannot legally take up all seats because it represents only 1 employer, the other company it purported to represent denies being it member and we have confirmation to that effect. On what basis and on whose mandate does it purport to represent employers. The provisions of the NEC Food and Allied Industries Constitution Amendment No 1 is clear. Clause 5.3 is clear regarding sharing of seats and states that same is done on verifiable employership for each registered employer organization party.

Our client is a registered employer organization and on what basis is SMMAZ allowed to meet with the trade Union and state that it occupies all seats in clear disregard of our client which has 56 members in the Northern Region and 43 members in the Southern Region……

We want to clearly state it and have it on record that any meetings and negotiations done by SMMAZ with unions in the absence of our client are illegal and therefore void. Any outcomes

> thereof will not bind our clients' members as SMMAZ does not have mandate to represent our clients' members. Our client is legally registered and the allegation that it is defunct is yet to be confirmed by a competent court of all. ……
>
> We call upon your competent office to call SMMAZ to order and to put the record straight especially with the Unions because it is misrepresenting the outcome of the meeting which you chaired. SMMAZ should forthwith stop misrepresenting to the Unions as its behaviour is criminal and illegal, the trade unions should be directed by the NEC as it is the regulating body over all parties. If the behaviour and illegal action does not stop, we want to have it on record that our client will approach the court for relief against the rogue elements that continue on the illegalities……"

The letter was copied to GMAZ, first and fourth respondents and UFAWUZ. The applicant claims that none of the parties responded to the letter, and it assumed the parties were content with the position as expressed in the aforementioned letter. The applicant asserts that it also took comfort in the belief that the parties concerns were being attended to by the fourth respondent. It therefore came as shock when the applicant received a memorandum from the third respondent addressed directly to the applicant's members, the NEC chairperson, the fourth respondent and the UFAWUZ. The memorandum which was inadvertently dated 24 March 2024, reads as follows:

> **"REF: MILLING INDUSTRY COLLECTIVE BARGAINING AGREEMENT**
> I am glad to announce that the Collective Bargaining Agreement for the Milling Industry sub-sector undertaking for the period January 2022 to March 2022 has been concluded as per the copy attached. The agreement has since been sent to the Registrar for gazetting.
> ……."

The attached CBA made reference to a meeting that was held on 22 March 2022, where the new structure for wages and allowances was agreed upon. That memorandum drew the ire of the applicant. The applicant reacted by writing to both third and fourth respondents querying the circumstances under which the agreement was reached in the absence of the applicant who represented the majority of the employers in the sector. It is that communication that triggered an approach to this court on an urgent basis for the interim relief sought herein.

First Respondent's Opposition

The first respondent's opposing affidavit was deposed to by one Alois Sengwe in his capacity as National Administrator of first respondent. He raised the following in *limine*: absence of jurisdiction; that a lawful process cannot be interdicted; failure to exhaust domestic remedies and lack of urgency. I will deal with these latter in the judgment.

As regards the merits, it was averred that the applicant had not laid out a case for the relief it sought. It had failed to plead the four requirements of an interdict as required by the law. In any

case, the applicant had no cause before the court as it had not operated as an employers' association for the past six years. The applicant had not participated in any CBA for a couple of years now. The applicant was now defunct and the objections that had been made concerning its status were valid. The officials behind the applicant were the same people behind the GMAZ. It was the entity that used to participate in the affairs of the third respondent, albeit as an unregistered association.

First respondent also contended that the *declaraturs* sought were meaningless, primarily because the CBA was protected by the principle of private of contract. The applicant could not seek to derive rights from an agreement that it was not party to. First respondent was registered in terms of the law, and as such it enjoyed the full protection of the law. Further, the court could not be invited to interfere with the statutory functions of the fourth respondent. No irreparable harm had been established by the applicant. The balance of convenience favoured non-interference by the court as the livelihoods of affected employees were at stake. The court was urged to dismiss the application with costs on the legal practitioner and client scale.

Second Respondent's Opposition

The opposing affidavit was deposed to by the General Secretary of the United Food and Allied Workers Union of Zimbabwe (UFAWUZ). It is a federation of Trade Unions to which the second respondent is affiliated. A resolution of the National Executive of UFAWUZ confirming such authority to depose to the affidavit was also attached. The opposing affidavit raised similar preliminary points as those raised by the first respondent. As regards the merits, the second respondent associated itself with the responses made on behalf of the first respondent.

Third Respondent's Opposition

The opposing affidavit raised two preliminary points at the outset. These are absence of jurisdiction and failure to exhaust domestic remedies.

As regards the merits, it was contended that the applicant was all but defunct as officials of GMAZ actively participated in the affairs of the applicant. It was further averred that although the third respondent had sought the fourth respondent's intervention in the dispute, it was entirely up to the parties to push for a resolution of the matter as the aggrieved parties. That explained why the fourth respondent's letter requesting further details on the dispute did not receive a response from the third respondent. Third respondent averred that the CBA was adopted following a meeting held on 22 March 2022. The applicant was allegedly made aware of the meeting through a

telephone call to a Mr Shumba. Verification of the attendees was done and negotiations proceeded thereafter.

The third respondent averred that the applicant had failed to establish its right to participate in the CBA. Such right did not exist as its membership was not even verified. The applicant had failed to establish a *prima facie* case. Neither did it have any existing, future or contingent right arising from the unregistered CBA. The CBA had not yet been operationalized, and as such no rights accrued therefrom.

It was also averred that the matter was not urgent. The CBA which was being challenged had not yet been registered. There was nothing on record to show that its registration was imminent. The fourth respondent who was aware of the dispute had not yet applied her mind to the agreement. The internal remedies accorded by the labour laws had not been exhausted. Representations could still be made to the fourth respond to block the registration of the CBA. The urgency was self-created. The application was bad in law. The applicant had not made out a case for the granting of the relief sought. The court was urged to dismiss the application with costs on a higher scale.

At the commencement of the oral submissions, Mr *Magogo* for the applicant submitted that the second respondent was not properly before the court as its opposing affidavit was deposed to and filed by a party that had no interest in the proceedings. This objection shall be determined together with other objections raised on behalf of the respondents. The court must however consider the question of whether it has jurisdiction to entertain this application at the outset.

SUBMISSIONS AND ANALYSIS ON THE PRELIMINARY POINTS

Jurisdiction

Mr *Madhuku* for the first and second respondents submitted that what was before the court was clearly a labour dispute. The applicant was seeking the resolution of a dispute that had arisen in the milling industry. The Act provided an inbuilt mechanism for the resolution of such disputes. The Act provided for the negotiation and registration of a CBA. The same Act also established the office of the fourth respondent. Mr *Madhuku* further submitted that the applicant ought to have utilized the procedure for the resolution of labour disputes provided under s 93 of the Labour Act.

The court was referred to decisions of the Superior Courts which have resolved that the High Court has no jurisdiction over labour matters.[2]

In her submissions on the same point, Ms *Sande* for the third respondent averred that the manner in which the application was couched suggested that applicant's complaint was so much about the procedural defects that afflicted the manner in which the CBA was negotiated. The substantive relief sought on the return date was clearly one obtainable through a review disguised as a *declaratur*. The court was referred to the cases of *Kuchena v Scientific Industrial and Development Centre*[3] and *Kabichi v Minerals Marketing Corporation of Zimbabwe*[4], in which this court declined to exercise its inherent jurisdiction, asserting that labour matters must remain the domain of the Labour Court.

In reply, Mr *Magogo* submitted that this court must be slow in declining jurisdiction in labour matters where the Act makes no provision for the resolution of a labour related dispute between the parties. He further submitted that the Act did not make provision for the resolution of disputes of this nature and for that reason, the inherent jurisdiction of this court was not ousted.

This court is aware that the position of the law is now settled that the High Court cannot exercise its original jurisdiction in labour matters.[5] There remains residual matters in respect of which the High Court is still imbued with jurisdiction to deal with such matters notwithstanding the fact that they fall within the domain of labour matters. In determining whether the dispute before it is exclusively a labour matter, the court must not look at the relief sought by a litigant alone. It must have regard to the grounds upon which the application is premised as substantiated by the material averments of evidence made in the founding affidavit. In *Muchenje v Mutangadura & Ors*[6], MUREMBA J articulated the position as follows:

> "The fact that the applicant is seeking a particular relief is not itself decisive. In other words what is important or what matters are the grounds on which the application is based rather than the order or relief that is being sought. Regard should be heard to the substance of the application and the averments contained therein instead of the relief that is being sought…"

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[2] *Nhari v Mugabe & Others* SC 161/20; *Chingombe v City of Harare* SC 177/20; *Baking and Allied Workers Union & Four Others v National Employment Council for Food and Allied Industries and Seven Others* HH 148/22
[3] HH 180/16
[4] HH 38/18
[5] *Nhari v Mugabe & Ors* (supra)
[6] HH 21/21

The views of the learned judge are quite apposite. It is not unusual for litigants to disguise matters under some appellation that would ordinarily take it out of the labour domain, when for all intents and purposes, such a matter must be dealt with in terms of the labour laws. A perusal of paragraph 23 of the founding affidavit shows that the applicant in essence seeks several *declaraturs* which fall for determination on the return date. Mr *Madhuku's* submission that s 93 (7) of the Act accords the applicant sufficient remedies that he ought to have pursued instead of approaching this court is indeed persuasive. However what takes this case outside the ambit of s 93 of the Act is the nature of the application as amplified by the evidence placed before the court. I am of course minded that at this stage this court cannot interrogate the merits of the application as regards the substantive relief sought on the return date. That is a matter for the court to consider on the return date. Suffice it to note that the Labour Court does not have the powers to issue *declaraturs* or grant interim interdicts of the nature sought herein.[7]

The court's attention was also drawn to the judgment of my brother DEME J in *Baking and Allied Workers Union & Four Others* v *National Employment Council for Food and Allied Industries and Seven Others*[8] where this court amongst other reasons given, declined jurisdiction on the basis that the parties had agreed in their constitution that all disputes that may arise must be resolved in terms of the Labour Act as amended from time to time. That finding was made after the court had considered the matter on the merits. That issue was not argued before me and I must hazard to also point that this court is not concerned with the merits of the dispute at this stage. Suffice it to observe though that the jurisdiction of the court cannot be easily ousted by an agreement between the parties.

For the foregoing reasons, I find that this court has jurisdiction to deal with this matter.

Whether the Second Respondent is properly before the court

The second respondent's opposing affidavit was deposed to by the General Secretary of UFAWUZ. That entity is a federation of trade unions to which the second respondent is affiliated. Mr *Magogo* submitted that there was no opposition on behalf of the second respondent as its affidavit was deposed to by an official representing an entity that was not a party to the proceedings. He further submitted that the decision to oppose the application could not be taken

[7] *Stylianou and 2 Others v Mubita and 25 Others SC 7/17*
[8] supra

by any other party other than the second respondent. He referred to section 29(2) of the Act which states that:

> "**29 Registration of trade unions and employers organizations and privileges thereof**
> (1) Subject to this Act, any trade union, employers organization or federation may, if it so desires, apply for registration.
> (2) Every trade union, employers organization or federation shall, upon registration, become a body corporate and shall in its corporate name be capable of suing and being sued, of purchasing or otherwise acquiring, holding or alienating property, movable or immovable, and of doing any other act or thing which its constitution requires or permits it to do, or which a body corporate may, by law, do." (Underlining mine for emphasis).

Mr *Magogo* argued that the second respondent did not lose its autonomy or identity by virtue of its affiliation to UFAWUZ. Counsel drew the court's attention to clause 2.3 of the UFAWUZ constitution which states as follows:

> "Affiliates, including affiliates that are being oriented about the Federation, remain autonomous bodies governed by their own constitution but they must abide by this Constitution and policies of the Federation."

Mr *Magogo* further submitted that in light of the above provision, the deponent to the affidavit ought to have produced a resolution by the second respondent granting UFAWUZ authority to represent the second respondent. In the absence of such authority, the second respondent's attitude to the application was unknown. To support his submissions on the point, counsel cited the cases of *Madzivire & Ors* v *Zvarivadza & Ors*[9] and *Dube* v *Premier Service Medical Aid Society & Another*[10]. In the *Dube* case, the court followed the *ratio decidendi* in the *Madzivire & Ors* v *Zvarivadza & Ors* judgment where the court said:

> "A company, being a separate legal person from its directors, cannot be represented in a legal suit by a person who has not been authorised to do so. This is a well-established legal principle, which the courts cannot be ignored. It does not depend on the pleadings by either party. The fact that the person is the managing director of the company does not clothe him with the authority to sue on behalf of the company in the absence of any resolution authorising him to do so. The general rule is that directors of a company can only act validly when assembled at a board meeting. As exception to this rule is where a company has only one director who can perform all judicial acts without holding a full meeting."

As regards the third respondent, Mr *Magogo* submitted that the General Secretary who deposed to the opposing affidavit needed to attach a resolution of the third respondent's Council to confirm his authority to represent the third respondent. That council was made up of

[9] 2006(1) ZLR 514 (S);
[10] SC 73/19

representatives of the applicant, first and second respondents. Counsel submitted that the council was the ultimate authority in making a decision whether or not to oppose the application. On the strength of the *Madzivire* and the *Dube* cases, counsel submitted that it was incumbent upon the deponent to furnish the court with the authority to represent the third respondent.

In his response on behalf of the second respondent, Mr *Madhuku* submitted that sections 27 and 29 of the Act had liberalized the rights of trade unions to legal representation. A trade union could surrender its rights of defence and representation in legal proceedings. That was the reason why the Act had gone out of its way to create an institution called a federation. Counsel referred to the case of *Baking and Allied Workers Union & Four Others v National Employment Council for Food and Allied Industries and Seven Others*[11], where the court determined that it was proper for a federation to represent its trade union members.

Mr *Madhuku* further submitted that a notice of opposition need not be deposed by an official of the second respondent. He submitted that the applicant was raising a technical objection with no merit. He referred to r 58(4)(a) of the High Court Rules which provides that:

> "(4) An affidavit filed with a written application—
> (*a*) shall be made by the applicant or respondent, as the case may be, or by a person who can swear to the facts or averments set out in therein; and
> (*b*) may be accompanied by documents verifying the facts or averments set out in the affidavit, and any reference in this Part to an affidavit shall be construed as including such documents."

In her response, Ms *Sande* for the third respondent submitted that no resolution was attached to the third respondent's affidavit because the deponent derived his authority from the constitution. She referred to clause 7.3 of the third respondent's constitution which provides as follows:

> "Whenever the exigencies of council business on a day to day basis demands, the General Secretary shall, make decisions necessary in the day to day administration of council affairs provided that such decisions shall be ratified in the meetings of the Executive Committee."[12]

Counsel submitted that the urgency of litigation matters necessitated that the General Secretary be accorded such powers as the convening of Executive Committee meetings would delay the taking of decisions on such urgent matters. Ms *Sande* also referred to paragraph 21 of

[11] Supra
[12] Page 64 of the application

the third respondent's constitution which authorizes the General Secretary or his appointed deputy to sign all documents on behalf of council.

In reply Mr *Magogo* submitted that there was nothing in the law that allowed a federation to substitute itself for a party that was involved in litigation, unless the federation itself was cited. He further submitted that the interpretation of the law submitted on behalf of the second respondent would lead to an absurdity where for instance the party cited would be involved in litigation that it was unaware of.

As regards the third respondent's submission, Mr *Magogo* maintained the applicant's position that an entity required a resolution permitting a deponent to represent it in litigation proceedings. He further submitted that the day to day business of an entity referred to in clause 7.3 of the respondent's constitution did not apply to litigation proceedings. Counsel also submitted that the powers to sign all documents referred to in clause 21 did not extend to litigation documents.

Section 29(2) of the Act provides that once a trade union, employers organization or federation is registered, it becomes a body corporate and shall in its corporate name be capable of suing and being sued. An official who purports to represent such a body corporate must assert their source of authority to act in that manner. The current position of the law was reaffirmed by GARWE JA (as he then was) in *Dube* v *Premier Service Medical Aid Society & Another*[13]. Having cited with approval the dictum in the *Madzvire & Ors* v *Zvarivadza & Ors,* the learned judge went on to state:

> "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 the position he holds in such an 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 given such a person the authority to act in the stead of the entity. I stress that the need to produce such proof is necessary only in those cases where the authority of the deponent is put in issue. This represents the current state of the law in this country."

I associate myself with the exposition of the law as expounded by the learned judge. The starting point is that once registered, a trade union and a federation become bodies corporate capable of suing and being sued in their own right. If the federation is going to claim authority to represent a trade union, then that authority must be grounded in a resolution passed by the trade union, which in its own right is at law capable of suing and being sued. In my respectful view, it

[13] supra

would be stretching the scope of s 35(a) (v) too wide, to accord it an interpretation that bestows on a federation the right to represent a trade union without the express authority of the trade union. As regards the allusion to r 58(4)(a) of the High Court rules, I do not believe that the provision substitutes the need for authority where that person is deposing to an affidavit in a representative capacity. Anyone would claim that they can swear positive to the facts as set out therein but without the requisite authority.

For that reason, I am persuaded by Mr *Magogo's* submission that the notice of opposition filed on behalf of the second respondent is irregular. The notice of opposition purportedly filed on behalf of the second respondent by the General Secretary of UFAWUZ is hereby expunged from the record of proceedings.

As regards the notice of opposition filed on behalf of the third respondent, I agree with Ms *Sande's* submission that the starting point must be the constitution that established the third respondent. In my view clause 7.3 as read together with clause 21 of the third respondent's constitution authorizes the General Secretary to represent the third respondent. The decisions made by the General Secretary in the exercise of his day to day functions of Council business as provided by clause 7.3 of the Constitution are subject to ratification by the Executive Committee. Clause 21 authorises the General Secretary to *"sign all documents on behalf of the Council*." In terms of clause 8.2 of the third respondent's constitution, the Council of the third respondent *"shall meet at least twice annually at such times and places as the Chairperson or the General Secretary may from time to time determine*". I agree with the observations by my brother DEME J in the *Baking and Allied Workers Union & Four Others v National Employment Council for Food and Allied Industries and Seven Others*[14] case that given the intervals at which the Council is obliged to meet, it comes as no surprise that the General Secretary is endowed with powers to make key decisions as well as sign all documents on behalf of the Council subject to ratification by the Executive Committee. I accordingly find the objection meritless and it is hereby dismissed.

That a lawful process cannot be interdicted;

It was submitted on behalf of the first respondent that there was nothing unlawful about the submission of the CBA to the fourth respondent for registration in terms of section 79 of the Act. Mr *Madhuku* further submitted that the Act had an inbuilt process to regulate such matters.

[14] Page 8 of the judgment.

The court would have interfered with a lawful process if it granted the relief sought. In reply Mr *Magogo* submitted that the application challenged the authority of the first respondent to negotiate a CBA with the second respondent. He further submitted that a CBA that was not negotiated in terms of section 74(2) of the Act was not a lawful CBA. There was therefore nothing lawful about the whole process.

It is settled law in this jurisdiction that this court cannot interdict a lawful process.[15] The applicant contends that the CBA was not lawfully concluded. The law which founds that process was violated. It is for that reason that the applicant seeks an interim relief suspending the registration of the CBA to allow the court to interrogate fully the lawfulness of the entire process. There is evidence on record in the form of correspondence between the parties that clearly points to a dispute. The applicant had anticipated that such dispute would be resolved through the intervention of the third and fourth respondents before the negotiations leading to the conclusion of the CBA could commence. It is also clear from the papers that such negotiations leading to the CBA were done behind the applicant's back when all the parties were aware of the applicant's interest in those negotiations. For that reason, it is the court's view that there is merit in the applicant's complaint which warrants the intervention of this court at this stage. I find no merit in the objection and it is accordingly dismissed.

Failure to exhaust domestic remedies

Mr *Madhuku* submitted that the applicant had not exhausted the domestic remedies provided under s 79(2) of the Act. Section 79(2) states that:

> "**79 Submission of collective bargaining agreements for approval or registration**
> (1) After negotiation, a collective bargaining agreement shall be submitted to the Registrar for registration.
> (2) Where any provision of a collective bargaining agreement appears to the Minister to be—
> (*a*) inconsistent with this Act or any other enactment; or
> (*b*) contrary to public interest;
> (*c*) unreasonable or unfair, having regard to the respective rights of the parties;
> he may direct the Registrar not to register such collective bargaining agreement until it has been suitably amended by the parties thereto.

[15] *Judicial Services Commission v Zibani & Others* SC 68/17*; Mayor Logistics (Pvt) Ltd v Zimbabwe Revenue Authority* CCZ 7/14 at page 8 of the judgment

Ms *Sande* submitted that the applicant had prematurely approached this court as the process leading to the registration of the CBA had not been exhausted yet. The Registrar was still to call for representations from interested parties.

In his response, Mr *Magogo* submitted that there was no provision in the Act which allowed a concerned party to make representations to the registering authority before the CBA can be registered. That left aggrieved party exposed.

In *Makarudze and Another v Bungu and Two Others*[16], MAFUSIRE J made the following pertinent observations about domestic remedies:

> "The general view is that it is discouraged for a litigant to rush to this court before he or she has exhausted such domestic procedures or remedies as may be available to his or her situation in any given case. He or she is expected to obtain relief through the available domestic channels unless there are good reasons for not doing so: see *Nokuthula Moyo* v *Norman Gwindingwi NO & Anor*[17].
> However, it is also the general view that the domestic remedies must be able to provide effective redress to the complaint. Furthermore, the alleged unlawfulness complained of must not be such as would have undermined the domestic remedies themselves: see *Tutani* v *Minister of Labour & Ors*[18]; *Moyo* v *Forestry Commission*[19] and *Musandu* v *Chairperson of Cresta Lodge Disciplinary and Grievance Committee*[20]. The court will not insist on an applicant first exhausting domestic remedies where they do not confer better and cheaper benefits: *Moyo's* case, *supra*, at p 192."(Underlining for emphasis).

The observations are quite apposite. There is no point in insisting on the utilization of domestic remedies that do not accord a litigant the kind of reprieve that he would summarily obtain through an approach to courts of law. Section 79 (2) of the Act is only invoked by the Minister if he is of the considered view that the circumstances set out in paragraphs (a) – (c) exist. That provision does not give an aggrieved party the leeway to approach the Registrar. I find no merit in the objection and it is accordingly dismissed.

Lack of Urgency

Mr *Madhuku* submitted that the matter was not urgent. The applicant did not explain why it did not approach the court around 7 February 2022 when it became clear that there was a dispute

[16] At pages 9-10 of the judgment
[17] HB168/11; See also *Musandu v Cresta Lodge Disciplinary and Grievance Committee* HH 115/94; *Moyo v Forestry Commission* 1996 (1) ZLR 173 (H); *Tuso v City of Harare* 2004 (1) ZLR 1 (H); *Chawara v Reserve Bank of Zimbabwe* 2006 (1) ZLR 525 (H) and *Tutani v Minister of Labour and Others* 1987 (2) ZLR 88 (H)
[18] 1987 (2) ZLR 88 (H) at p 95D
[19] 1996 (1) ZLR 173 (HC), at p 191
[20] HH 115/94

between the parties. The applicant had also not demonstrated the prejudice it would suffer if the matter was not dealt with on an urgent basis. Counsel further submitted that the imminence of the registration of the CBA was not the basis of the application. Rather, it was premised on the need to have the dispute resolved expeditiously. Mr *Madhuku* further submitted that urgency was not just confined to the time factor. A matter was also urgent with regards to the consequences that would befall the applicant if the matter was not treated as urgent. The applicant had not alluded to any such adverse consequences.

In reply, Mr *Magogo* submitted that the urgency of the matter stemmed from the memorandum of 24 March 2024 from the third respondent which advised that the CBA had been concluded, and had since been forwarded to the fourth respondent for gazetting. The applicant could not have acted earlier than that.

The question of urgency must be considered in the context of the circumstances surrounding the dispute. These circumstances are peculiar to each case, and for that reason, each case must be considered on its own merits. The remarks by MAKARAU JP (as she then was) in *Document Support Centre (Pvt) Ltd* v *Mapuvire*[21] are apposite in that regard. She said:

> "……In my view, urgent applications are those where if the courts fail to act, the applicants may well be within their rights to dismissively suggest to the court that it should not bother to act subsequently as the position would have become irreversible and irreversibly so to the prejudice of the applicant".

I associate myself with the views of the learned judge. The court will not ignore the consequences attendant upon a failure to deal with a matter on an urgent basis. Of course, adverse consequences to the applicant's cause will not save an applicant where it is clear that the applicant indeed sat on its laurels and was only jolted into action by the impending harm. That cannot be said of the applicant in this case.

Paragraph 1 of the certificate of urgency as read with paragraph 25 of the founding affidavit shows that what triggered an approach to this court on an urgent basis was the memorandum of 24 March 2022. Prior to that date, there was communication between the applicant and third respondent in connection with the dispute. The third respondent on its part also engaged the fourth respondent and copied such communication to the applicant. It certainly came as a shock for the applicant to receive communication advising of the conclusion of the CBA when all along it was

[21] 2006 (1) ZLR 232 (H) 243G; 244A-C

waiting for the resolution of matters that would pave way for the commencement of the collective bargaining negotiations.

This court is satisfied that the matter is urgent and that the applicant did not sit on its laurels. It approached the court immediately upon realising the CBA had been placed before the fourth respondent for registration and gazetting. If this matter is not dealt with urgently, then the impugned CBA will be registered before the applicant's concerns are addressed. The preliminary point has no merit and is accordingly dismissed.

MERITS

The purpose of an interdict was set out in *Mayor Logistics (Pvt) Ltd* v *Zimbabwe Revenue Authority*[22], where MALABA DCJ (as he then was) said:

> "An interdict is ordinarily granted to prevent continuing or future conduct which is harmful to a *prima facie* right, pending final determination of that right by a court of law. Its object is to avoid a situation in which, by the time the right is finally determined in favour of the applicant, it has been injured to the extent that the harm cannot be repaired by the grant of the right.
> It is axiomatic that the interdict is for the protection of an existing right. There has to be proof of the existence of a *prima facie* right. It is also axiomatic that the *prima facie* right is protected from unlawful conduct which is about to infringe it. An interdict cannot be granted against past invasions of a right nor can there be an interdict against lawful conduct. *Airfield investments (Pvt) Ltd* v *Minister of Lands& Ors* 2004(1) ZLR 511(S); *Stauffer Chemicals* v *Monsato Company* 1988(1) SA 895; *Rudolph & Anor* v *Commissioner for Inland Revenue & Ors* 1994(3) SA 771." (Underlining for emphasis).

It is common cause that the applicant is registered as an employer association in terms of the Act. Such registration entitles the applicant to be part of the collective bargaining negotiations involving its membership and trade unions in the Food and Allied Industry (Milling Sub-sector). The birth of the first respondent led to a dispute regarding its status on the eve of the collective bargaining negotiations. The dispute necessitated the verification of its membership before the stakeholders in the sector could meet to commence negotiations.

In *Airfield Investments (Pvt) Ltd* v *Minister of Lands, Agriculture and Rural Resettlement & Ors.*[23] MALABA JA (as he then was) set out the requirements for the granting of a temporary interdict as follows:

> "It must be borne in mind that an interim interdict is an extraordinary remedy, the granting of which is at the discretion of the court hearing the application for the relief. There are, however, requirements which an applicant for interim relief must satisfy before it can be granted. In *L F*

[22] CCZ 7/14 at page 8 of the judgment
[23] *2004 (1) ZLR 511 (S)* at 517 C-E

Boshoff Investments (Pty) Ltd v *Cape Town Municipality* 1969 (2) SA 256 (C) at 267 A-F, CORBETT J (as he then was) said an applicant for such temporary relief must show:

"(a) that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established though open to some doubt;

(b) that, if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;

(c) that the balance of convenience favours the granting of interim relief; and

(d) that the applicant has no other satisfactory remedy."

From a consideration of the papers and the submissions by the parties, this court is satisfied that the applicant has managed to establish a *prima facie* case by virtue of its registration as an employer association. It is entitled to participate in the affairs of the third respondent as a representative of its membership. It is common cause that negotiations which resulted in the birth of the CBA that is now before the fourth respondent for registration and gazetting were done without the applicant's input. The negotiations were held at a time when both third and fourth respondents were seized with the matter regarding the membership status of the first respondent. The meeting of 7 February 2022 which was organized to discuss the sharing of seats to include the first respondent was deferred to allow the verification of its membership. The postponement was also meant to verify the statuses of the applicant and GMAZ amongst other things. In the court's view the applicant has managed to demonstrate that there is a well-grounded apprehension of irreparable harm if the CBA is registered before the pending issues are resolved.

The balance of convenience favours the granting of the interim relief. The applicant asserts that it represents the majority of the employers in the sector, a claim that was not convincingly refuted by the respondents. It is only proper that it be represented in any CBA negotiations whose outcome will bind its membership. The court is also satisfied that the applicant has no other satisfactory remedy. Once the CBA is registered and gazette, it becomes implementable. It has to be complied with by some employers that may not have been represented in its formulation.

It is for the foregoing reasons that the court is satisfied that the applicant is entitled to the relief it seeks.

Accordingly it is ordered that:

Pending determination of this matter on the return date, the applicant is granted the following interim relief:-

1. The registration of the Collective Bargaining Agreement: Food and Allied Industries (Milling Sub-sector) between first and second Respondent dated 22 March 2022 be and is hereby stayed;
2. The first respondent be and is hereby temporarily interdicted from participating in any collective bargaining negotiations for the Milling sub-sector.
3. This provisional order shall be served on the respondents by the Sheriff of the High Court of Zimbabwe or by the applicants' legal practitioners

Takawira Law Chambers, applicant's legal practitioners
Lovemore Madhuku Lawyers, first and second respondents' legal practitioners
Sande Legal Practice, third Respondent's legal practitioners