

RATIDZAI BADZA
And
UPENYU CHITUMBA
And
JEREMIAH MPOFU
And
MOSES GWAUNZA
And
BENENIA MURURI
And
MAVIS KATURUZA
And
JONAH MUSHONGA
And
ESHAWEDI CHAMUNOGWA
And
MARCH MAKANYA
Versus
LUCKY MUSUSA
And
JOUBERT MUDZUMWE
And
COMMERCIAL WORKERS UNION OF ZIMBABWE

HIGH COURT OF ZIMBABWE
BACHI MZAWAZI J
CHINHOYI

06 July-22 September 2023

Opposed Application

B. Magogo, for the applicants
F. Murisi, for the 1st respondent
S. Ushewekunze, for the 3rd respondent
No appearance, for the 2nd respondent

BACHI MZAWAZI J: This is an opposed application wherein, applicants seek rescission of a default judgment of this court under case HC199/22, delivered on the 24th of November of the same year. It has been brought in terms of rule 29 (1) (a) of the High Court rules, 2021. The justification being that, applicants were interested parties with direct and substantial interest but were not made part to the lawsuit with adverse consequences.

Applicants submit that, had their existence been made known to the presiding court, it would not have granted the default order sought. In that regard they contend that the order in

question was erroneously sought and erroneously granted warranting rescission in terms of the rule so cited above.

The brief background is that, the parties have been embroiled in protracted legal battles to assume the reigns of the 3rd respondent for over a decade. These court battles gave birth to numerous extant High Court decisions and have infiltrated to the Appellate Court.

At the epicentre of this dispute is the 3rd respondent, a duly incorporated and registered Trade Union in terms of the laws of Zimbabwe, whose functionality has been incapacitated and marred by the power struggles of different power-hungry factions also including applicants and the 1st and 2nd respondents.

On one hand are the applicants, who recognise themselves as the legitimate National Executive Committee office bearers of the 3rd Respondent. They claim to have been so legitimized by an election from a Congress conducted on the 5th of March 2021.

On the other, there is the 1st respondent, a subscription member of the 3rd respondent, by virtue of his employment with OK Zimbabwe limited, which falls under the National Employment Council for the Commercial Sector of Zimbabwe. He is the one who filed a court application under case HC199/22, which decision is in dispute.

Cited as the 2nd respondent, is Joubert Mudzumwe, a General Secretary of an executive committee of the 3rd respondent, elected in 2010. His term of office, in accordance to the 3rd Respondent's Constitution and other decided High Court decisions filed of record, is said have ceased in 2014. The impugned order to the chagrin of the applicants, restored his and his co-executives 2010 positions at the helm of the 3rd respondent, prior to or pending the institution of a properly summoned Congress and election of the executive committee in terms of the 3rd respondent's Constitution.

The said order was as a result of an application brought by 1st respondent, against the 3rd respondent only, seeking a declarateur for the reinstatement of an executive whose term of office had expired by effluxion of time to, temporarily manage the affairs of the 3rd respondent pending the properly election of an Executive Committee from a legally summoned Congress in accordance to the dictates of the operating Constitution.

It is the applicants' case that on the merits, since there was no valid Executive Committee in existence prior to March 2021, for various reasons outlined in decided cases by Musithu, Chikowero and Makoni JJJ and several others, in related cases over the leadership issues of the 3rd respondent against some and other different parties herein, they were legitimately elected in a legally constituted congress.

In rebuttal the respondents in brief and in unison, propagated two main objections which they submitted will dispose of the matter. The first hinges on a common cause fact of the withdrawal of the applicant's affidavit and its effect on the current proceedings. The second is a two pronged attack on the *locus standi* of the applicants.

The first objection on *locus standi*, is applicants had no right and or interest in the 3rd respondent as they belong to a rival corporate body known as the Aggrieved Commercial Workers Trust with the same characteristic as that of the 3rd respondent.

Secondly, that since they came into office as a result of a Congress which had been invalidly summoned, that is through a Memorandum of Agreement and presided over by a General Secretary, instead of a President they acted contrary to the entity's Constitution. They argue that the applicants are therefore neither legitimate nor recognised leaders of the 3rd respondent. Thus they lack both direct and substantial interest in all the matters pertaining to the 3rd respondent. Parties are not in dispute that Makoni J in the case of *Barbra Tanyanyiwa 2B & Commercial Workers Union of Zimbabwe-v-David Tunhira & Ors HC 5473/13* also spoke to the invalidity of a congress summoned ultra vires its constitution.

Both parties admit that Chikowero J in the case of *David Tunhira & Ors-v-Commercial Workers of Zimbabwe & Ors under case HH477/19*, had the occasion to determine the legality of Congresses that had been held in a bid to take over the reigns of the administration of the 3rd respondent which involve some of the parties who are applicants herein. As a result of that judgment, it is also not in question that the 2010 Executive continued at the helm of the 3rd respondent's affairs. -

Musithu J in the case of *Godwin Munjoma & Ors-v-The Minister of Labour N.O & Ors HH465/22*, is said to have dealt with the leadership issue of the 3rd respondent but concluded the matter on a preliminary point, that the applicants herein lacked *locus standi* on the basis of their affiliation to a rival splinter group with the same mandate and characteristics as the 3rd respondent. It is also on record that several other lawsuits pertaining to the leadership

wrangle of the 3rd respondent were filed and dealt with by this court though with different facets.

On the merits, the respondents argue that, the applicants had no direct and substantial interests in the affairs of the 3rd respondent as their appointment and legitimacy was in issue. Therefore, there was no reason for them to be made part to that suit or to be served. As such the order was not sought or granted in error.

Applicants maintain that, they had *locus standi*, as they had a direct and substantial interest in the matter in question. They argue that the fact that they were in existence as an Executive body of the 3rd respondent at the time the application and the impugned decision was made meant they were an interested party and ought to have incorporated to the lawsuit to exercise their right to be heard

It is their argument that since that decision deposed them of their leadership irrespective of the alleged illegality or flaws of the machinery or mechanisms that placed them into office, they were still interested parties by virtue of their other portfolios of being members in the Commercial Sector. As such, the order warrants intervention through rule 29(1) (a).

In any event, they argue that the illegality or validity of the Congress that ushered them into office, which in their view is neither here nor there, is still to be challenged before and determined by a competent Court of law.

In that regard, the arising issues are, firstly, whether or not there is a competent court application before this court? Secondly, Whether or not the applicants have the requisite *locus standi* to bring this suit or to challenge that which is in dispute? Lastly, Whether or not the impugned court order was granted in error warranting its rescission in terms of rule 29 as cited by the applicants?

At the commencement of the hearing, by mutual consensus an omnibus approach was proposed and adopted for the purpose of a composite judgement, in view of the numerous *points in limine* saddling the application.

My approach will be to deal with each issue, the accompanying arguments and counter arguments, my analysis and conclusion on that point.

In addressing the first issue, it is an undisputed fact that the deponent of the founding affidavit, the first applicant, Ratidzai Badza, by virtue of a notice withdrawal filed of record

dated the 31st of January 2023, withdrew the founding affidavit with attached reasons for doing so. It is also a common fact that the supporting affidavits of all the applicants were premised on the founding affidavit. They too came tumbling down as their edifice was no more. A further, irrefutable fact is that as a result of that withdrawal the answering affidavit was then deposed by a different individual altogether, the second applicant.

Given that scenario, the court is swayed by the respondent's submission that, it is established law, that an application falls or stands on its founding affidavit. It is the cornerstone or pedestal of an applicant's case. It lays the foundation of the injured party's claim, outlines the nature of the harm and remedy sought from the court. In the absence of this key document then there is nothing before the court.

The honourable Gowora JA in *Zimbabwe Posts (Pvt) Ltd above*, that;

“An application must be deposed on the basis of the founding affidavit.”

This whole application is now like a door without hinges. It falls.

This has been a well traversed road with a trail of authorities as illustrated in the Supreme court case, where the Honourable, Justice Chatukuta JA, in *CABS-v-Finormagg Consultancy (Pvt) Ltd, SC 56/22*, had this to say, “It is trite that an application stands or falls on its founding affidavit. The founding affidavit sets out the case that a respondent is called upon to answer”

The same sentiments were aired in the cases of *Austerlands (Pvt) Ltd-v-Trade 7 Investments Bank Limited and Others SC 92-05*, *Yunus Ahmed-v-Docking Station Safaris, SC 70/18*, *Zimbabwe Posts (Pvt) Ltd-v-Communication and Allied Services Union SC 20/16*, to mention but a few.

The court rejects Mr Magogo's two-pronged defence that the withdrawal was forged, it did not emanate from Ratidzai Badza but from the respondent's lawyers. From another, angle the import of their argument is that if indeed it originated from the applicant, then it was not procedurally filed. The applicants cannot have their cake and eat it.

No evidence was placed before the court of any fraudulent and or any underhand dealings in respect to the preparation or filing of the said withdrawal notice. No evidence of the issue being raised when the questioned document was filed and served on the applicants. There is no proof of any legal action or otherwise criminalising the alleged underhand

dealings. No forensic evidence was conducted as to the authenticity or otherwise of the signature on the notice of withdrawal to back the applicants challenge on that aspect. As it is, that line of argument remains a bare and unsubstantiated allegation. In the absence of an expert faulting the signatures on the withdrawal affidavit as compared to that on the founding affidavit, the court is convinced that the withdrawal affidavit emanated from and was deposed by Ratidzai Badza.

In courts of law, it's all about evidence. He who avers must prove, that is the doctrine borne by the *latin phrase ei incumbit probatio qui dicit, non quo negat*. Mr Mugogo failed to discharge this burden of proof See *Curem Overseas (Private) Limited Zimbabwe Platinum Mine (Private) Limited and CCZ 6/2019 Constitutional Court application CC254/18 and Liberal Democrat & Ors-v-President of the Republic of Zimbabwe E. D. Mnangagwa N. O & OR CC 27/18*. For these reasons it is this court's finding that, the founding affidavit was withdrawn. The notice of withdrawal is part of the record. The court dismisses Mr Mugogo's argument that the notice of withdrawal was filed irregularly as an afterthought brought at the argument stage but was never raised at the time of its filing. Therefore, nothing turns on this point.

As a result, there is no founding affidavit before this court. The application is not competent. There is therefore no application before this court. The moment the deponent of the founding affidavit withdrew the same, there was no longer any founding document. The answering affidavit could not cure the defect as it has no power of resuscitation. As is glaringly clear, the rest of the supporting affidavits relied on the founding affidavit which is no more.

The first point *in limine* is upheld. I am of the considered view that this point alone is sufficient to dispose of this matter. Proceeding to deal with all the issues raised and the merits is futile as it is a clear contradiction of the finding already made that there is nothing to decide on as there is no application before the court. In *Gwaradzimba-v-CJ Preton Mapanya (Proprietary) Limited SC 12/2016*, it was noted that though it is crucial to address all issues raised, it is not a rule of thumb. If one issue disposes of the matter then it should be adopted.

Accordingly, the application is struck of the roll with no order as to costs.

Makuwaza & Gwamada, applicant's legal practitioner

Murisi & Associates, 1st respondent's legal practitioner

Samundombe & Partners, 2nd & 3rd respondent's legal practitioners