

NATIONAL ENGINEERING WORKERS UNION
and
WISE GARIRA
and
SHEPHERD MASHINGAIDZE
versus
NATIONAL EMPLOYMENT COUNCIL FOR THE ENGINEERING
IRON & STEEL INDUSTRY
and
ENGINEERING IRON & STEEL ASSOCIATION OF ZIMBABWE
and
BEKEZELA MANGENA
and
BEN MAMABARA
and
SILAS MKODZA
and
RIGHTON MOYO
and
DENNIS MUCHENU
and
ABEL GUMPO
and
CLEMENT KAUSA

HIGH COURT OF ZIMBABWE
MUSHORE J
HARARE, 30 October 2020

Opposed Motion-Special Plea

S Ushewokunze, for the plaintiffs
T Danana, for the 1st defendant
Z Mazikani, for the 2nd & 3rd defendants
K Masasire, for the 4th to 9th defendants

MUHORE J: The first plaintiff is the National Engineering Workers Union. The second plaintiff is the elected President of the first plaintiff and the third plaintiff is the Secretary General of the first plaintiff.

The 1st defendant is the National Employment Council for the Engineering and Iron and Steel Industry. The 2nd defendant is the Engineering and Steel Association of Zimbabwe with the 3rd defendant being the second defendant's current President. The 4th to 9th defendants are employees in the industry.

The plaintiff's instituted a court action against the defendants in which they sought the following order:

THAT:

1. It is hereby declared that the 4th to 9th defendants are not legitimate members or holders of any office position in the 1st plaintiff and/or 1st Defendant;
2. It is hereby declared that 2nd to 9th Defendants, or anyone claiming through them, have no *locus standi* to act for or represent, in any capacity whatsoever, the 1st plaintiff and/or the 1st Defendant or any institution/without the express approval of the 1st Defendant;
3. Defendants are hereby interdicted whatsoever in the management/affairs in the 1st Plaintiff or deciding who should represent the 1st plaintiff or deciding who should represent the 1st Plaintiff in the 1st defendant;
4. It is hereby declared that the 2nd Plaintiff (or any person succeeding him as President of the 1st Plaintiff) be allowed to chair the proceedings/business of the 1st defendant up to the 31st of the month of December that follows the lapse of a period of 12 calendar months from the date of this court's order after which the chairmanship of the 1st Defendant shall proceed on a rotational basis and in terms of 1st Defendant's constitution.
5. The 4th to 9th defendants (or anyone acting through them) are hereby interdicted from entering the 1st plaintiff's property/premises or using the 1st plaintiff's name, letterhead or logogram.

6. The 1st, 2nd and 3rd defendants (or anyone acting through them) are hereby ordered not to deny the Plaintiffs/1st Plaintiff's officials full and unfettered access to all the premises /property and business of the 1st defendant.
7. In respect of all acts, meetings, negotiations, decisions, resolutions, building contracts, collective bargaining agreements, payments or transactions conducted or executed by the Defendants (or some or one of them) at/or in the name of the 1st Defendant or 1st plaintiff, without the participation and approval of the plaintiffs from 1st November 2018 to the date of this court's order, be and are hereby declared null and void.
8. The chairing of the meetings/business of the 1st defendant by the 3rd defendant or any person who succeeds him before the grant of this order is hereby declared null and void.
9. The 1st defendant pay to the plaintiff the industrial outreach monetary disbursements computed at 1% if the Engineering Monetary Fund's monthly takings, plus 1% of the defendants' monthly takings, with effect from the 1st November 2018 to the date of this court order.
10. Any monetary payments purportedly made to the 1st plaintiff through the defendants or through modes/accounts other than 2nd plaintiff, 3rd plaintiff or the 1st plaintiff's official bank accounts, are hereby declared void.
11. The 2nd to 9th defendants shall bear the costs of this suit on an attorney and client scale"

The plaintiffs' claims were met with a special plea being filed by the defendants on 3 aspects. The first aspect being a special plea on a lack of *locus standi in judicio* by all three plaintiffs stating that the first plaintiff body was a bogus union and a fabrication and that it belonged to the 2nd and 3rd plaintiffs who had been ousted by the entire engineering industry. Further it was specially pleaded that the 2nd and 3rd plaintiffs were no longer office bearers in the genuine workers' union and that they had been dismissed from employment and therefore the 2nd and 3rd plaintiffs had no capacity to sue on behalf of the National Workers Engineering Union. The second special plea was that the matter was pending in another court (*lis alibi pendens*) under case number HC 8051/19; in which the defendants claim was to cause the 2nd and 3rd

plaintiffs to be barred from instituting proceedings from filing suits in the name of the 1st plaintiff. Lastly the defendants specially pleaded that matter had already been determined in part (*res judicata*) in that some of the claims in the declaration had already been determined and disposed of by the Magistrates Court. The defendants sought a dismissal of the plaintiffs' claims in their entirety, if all or any of those special pleas were upheld.

Thereafter, the defendants seemed to have abandoned taking the next procedural steps in pursuing the determination of the special pleas immediately as laid out under O 20r138 (a) and (b) of the High Court Rules, 1971; in that they failed to set the matter down for the hearing of their special pleas separately. O 21 r 138 reads as follows: -

“138. Procedure on filing special plea, exception or application to strike out

When a special plea, exception or application to strike out has been filed—

- (a) the parties may consent within ten days of the filing to such special plea, exception or application being set down for hearing in accordance with subrule (2) of rule 223;
- (b) failing consent either party may within a further period of four days set the matter down for hearing in accordance with subrule (2) of rule 223;

In the result, the special pleas would be held over for determination at the trial in this matter; but in the meantime and in terms of (c) the defendants were required to have plead over the merits of their respective cases in terms of r 138 (c) which prescribes that: -

“(c) failing such consent and such application, the party pleading specially, excepting or applying, shall within a further period of four days plead over to the merits if he has not already done so and the special plea, exception or application shall not be set down for hearing before the trial”

When no pleas on the merits were forthcoming from the defendants, on the 17th January 2020 the plaintiffs filed a notice to plead and intention to bar and served the same on the defendants. The defendants elected deliberately to withhold their pleas on the merits and cited their reason for that decision as being that they had pending special pleas which were yet to be disposed off by the court. Such an irreverent approach by the defendants resulted in the defendants being barred from pleading and appearing in accordance with O 12 r 83 which states:-

“83. Effect of bar

While a bar is in operation—

- (a) the registrar shall not accept for filing any pleading or other document from the party barred; and
- (b) the party barred shall not be permitted to appear personally or by legal practitioner in any subsequent proceedings in the action or suit; except for the purpose of applying for the removal of the bar”

Strictly taken, the Registrar ought not have accepted any further pleadings from the defendants; but assumedly the Registrar’s office would have been hard pressed to pick this up, given the voluminous court filings which are processed in that office, and also because filings on the defendants’ behalves were being done by registered legal practitioners.

Be that as it may, the matter ended up being enrolled on my opposed roll for determination. Strangely the defendant’s counsel audaciously appeared to argue their cases and avoided informing the court that their clients had no right of appearance in accordance with O12 83 (b) *supra*. The defendants’ counsel ought to have been fully aware that they had no right of audience with the court on the opposed roll of matters.

See: *General Leasing (Pvt) Ltd v Allied Timbers Zimbabwe (Pvt) Ltd* HH76-15 at pages 2 and 3.

Furthermore, none of the defendants filed Heads of Argument within the *dies* stated in the rules, which further exacerbated their attempt at appearing to argue the matter.

Also, at the hearing of the matter the defendants represented that the plaintiffs’ counsel had consented to waive the late filing of all the defendant’s heads of argument. However, the indictment against counsel for the defendants was that they avoided informing the court about the status of the bar pertaining to their clients’ pleas; which I was already in effect. The latter issue was brought to my attention by the plaintiffs’ counsel who then made an application for judgment to be entered in favour of the plaintiffs, given that the defendants had not made the merits of their respective cases known to the court.

The court agreed with the plaintiffs’ submissions in that respect.

Accordingly, I granted the plaintiffs judgment in their favour as prayed and as elaborated above. What I did add to the order was a reference to the specific rules which had guided my determination as is shown on the order which I granted on the 23rd January 2020.

Ushewokunze Law Chambers, plaintiffs' legal practitioners
Caleb Muccheche & Partners Law Chambers, 1st defendant's legal practitioners
Lunga Attorneys, 2nd & 3rd defendants' legal practitioners
Musoni Masasire Law Chambers, 4th – 9th defendants' legal practitioners