GRAIN MILLING EMPLOYERS ASSOCIATION
OF ZIMBABWE
versus
NEC FOR THE FOOD AND ALLIED INDUSTRIES
and
UNITED FOOD AND ALLIED WORKERS UNION
OF ZIMBABWE
and
SMALL TO MEDIUM MILLERS ASSOCIATION
OF ZIMBABWE
and
NATIONAL BAKERS ASSOCIATION
and
BREWING AND DISTILLING EMPLOYERS ASSOCIATION
OF ZIMBABWE
and
FOOD PROCESSING EMPLOYERS ASSOCIATION OF ZIMBABWE
and
EMPLOYERS ASSOCIATION OF THE MEAT, FISH, POULTRY,
ABATTOIR AND MEAT PROCESSING
and
SWEETS AND CONFECTIONARY EMPLOYERS ASSOCIATION
OF ZIMBABWE
and
SUGAR REFINING EMPLOYERS ASSOCIATION
and
REGISTRAR OF LABOUR N.O
and
EASTLEA VILLAS (PRIVATE) LIMITED
and
REGISTRAT OF COMPANIES N.O

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 23 May 2021 & 3 June 2022

Urgent Chamber Application

B Magogo, for the applicant
Ms J Sande, 1st and 11th respondent
Mr L Madhuku, 2nd and 3rd respondent
Mr T K Mutambo, 9th respondent

MANGOTA J: The applicant which is an employers' association in the milling industry filed this application through the urgent chamber book. It premised the same on events of 11 May, 2022. It moved me, in the interim, to interdict the first respondent, an employment

council which is registered in terms of s 59 of the Labour Act, from implementing resolutions of its meeting of 11 May, 2022 pending the return date. It further moved me to prohibit the third respondent, also an employment council registered in terms of s 59 of the Labour Act, from attending and / or participating in any meeting of the first respondent, its committees and sub-committees before verification of its membership has been conclusively dealt with. It couched its final draft order in the form of a declarator. It prayed that:

a) the seventh, eighth and ninth respondents which respectively are an employer's association registered in terms of s 33 of the Labour Act, an employers' association which is also registered in terms of s 33 of the Labour Act and an unregistered employers' association be declared not to be parties with the competence to attend and participate in any meeting of the first and eleventh respondents, their committees and sub-committees until they have been registered with the tenth respondent, a government official who is charged with the responsibility of registration and supervision of the operations of trade unions, employers' associations and employment councils.
b) the third respondent be declared to be an incompetent party for purposes of attending and participating in any meeting of the first and eleventh respondents, a legal entity which is wholly owned by the first respondent, their committees and sub-committees.
c) the applicant be declared, through its appointed representatives, to be a competent party to attend and participate at any meeting of the first and eleventh respondents, their committees and sub-committees.
d) the special council meeting of the first and eleventh respondents' shareholders meeting held concurrently on 11 May, 2022 to have been improperly constituted and all their resolutions are declared to be null and void and are therefore set aside.

Only the second and third respondents opposed the application. The other respondents did not. The majority of them took the view that they would abide by my decision.

The second and third respondents sang from the same hymm-book. They raised six (6) preliminary issues. They insisted that these would dispose of the application without the court having to go into the substance of the same. Their notice of opposition did not deal with the merits of the application. They indicated that counsel would make oral submissions in respect of that aspect of the application where the same proceeds to the merits.

The respondents' six *in limine* matters run in this following order:

i. illegibility of some para(s) of the first respondent's constitution as read with its amendments;
ii. the court's jurisdiction or lack thereof;
iii. impropriety or otherwise of applicant's presence before the court;
iv. applicant's *locus* or lack thereof;
v. the ripeness or lack thereof of the application for hearing – and
vi. the urgency or lack thereof of the application.

It is pertinent for me to deal with the above issues, each in turn, as follows:

a) Legibility of some para(s) of the founding papers:

It is a fact that para(s) 56,57,61,62,63 and 64 of the constitution of the first respondent and some amendments thereto are illegible. They cannot not be read. They suffer a defect which the respondents complained of. One could not tell the reason which prompted the applicant to file them in the form in which they appeared. They serve no meaningful purpose in the application. The respondents were within their right to have complained on the illegible para(s) of the applicant's founding papers. They stated, correctly, that they could not do justice to the case when they could not read some relevant portions of the application. They moved me to remove the application from the roll to enable the applicant to put its house in order.

Counsel for the applicant conceded the defects in the papers which had been filed. He apologized to the court and the respondents for the mishap which he attributed to what he termed the faint ink which accompanied the photocopying of the pages complained of. He, with the consent of the respondents, following an application to be condoned, filed papers which corrected the complaint. The filing of Annexures Y and Z put the complaint of the respondents to rest.

b) Jurisdiction:

The issue of my jurisdiction to hear the application took centre stage of the parties' submissions. The respondents' contention was that the application raised labour matters to which the court has no jurisdiction. They referred me to *Nhari* v *Mugabe*,SC 161/20 and *Chingombe & Another* v *City of Harare & 4 Others*, SC 177/20 which they claimed were authority for the proposition that, if a cause of action arises from the Labour Act, the matter should go to the Labour Court and not this court. They insisted that the first respondent was a creature of the Labour Act making the application a

labour matter which the Labour Court must deal with. They stated, as their further argument, that the application had some elements which related to the commercial court. The elements, they submitted, touched on the issue of shareholding which, according to them, fell/falls under the Companies And Other Business Entities Act, [*Chapter 24:31*]. They remained of the view that the application should go to either the Labour Court or the Commercial Court but not to this court which they maintained has no jurisdiction to hear and determine it.

The applicant, on the other hand, submitted that I have the requisite jurisdiction to hear the application which it placed before me. It placed reliance on s 171(1) of the Constitution of Zimbabwe which confers jurisdiction upon me to hear all civil matters. It stressed that the Supreme Court clarified the issue of jurisdiction of the Labour Court when it stated, in *UZ/UCHF Collaborative Programme* v *Shamuyarira*, SC 10/2020, that the Labour Court can only deal with applications and appeals which are brought in terms of provisions of the Labour Act and not outside the Act's provisions. It challenged the respondents to point to a provision in the Act which allows the Labour Court to grant to it the relief of an interdict or a declarator. It insisted that the Labour Count, being a creature of statute, cannot grant such a relief making it mandatory for it to approach the High Court where such relief is catered for. It distinguished *Nhari* v *Mugabe* from the circumstances of this application. It submitted that *Nhari* v *Mugabe* dealt with the issue of unfair labour practice which was provided for in the Labour Act and, therefore, remained a preserve of the Labour Court. It referred to *Chingombe* v *City of Harare* which it also distinguished from this application. It asserted that *Chingombe* v *City of Harare* dealt with an employee who challenged his suspension from work and he moved for a declarator and, the complaint having been provided for in the Labour Act, the Supreme Court ruled that the High Court did not have the jurisdiction to deal with the matter.

It is clear, from a reading of the reasoning of the Supreme Court in both cases, that the Supreme Court made a clear distinction between matters which are provided for in the Labour Act and those which are not. The court re-stated the law by directing that the High Court cannot hear and determine matters which are provided for in the Labour Act. Those, according to it, remain a preserve of the Labour Court. The Supreme Court, on a proper interpretation of the *ratio* of the two cases, did not state that any matter which has bearing on the Labour Act should be referred to the Labour.

A reading of the papers which are filed of record shows that the application has a bearing on the Labour Act and, to a certain extent, on the Companies And Other Business Entities Act. The question which, however, begs the answer is whether or not the applicant's cause of action lies in the Labour Act or outside of it. It is, in my view, the cause of action which defines the forum to which this application should be channelled.

The substance of the application does not show that the Labour Court or the Commercial court has the jurisdiction to hear and determine the applicant's case. I state, for the avoidance of doubt, that this is not a labour, or a commercial, court matter. It is a rights issue. It has everything to do with the applicant's right to attend meetings of the first and eleventh respondents. Its statement, which has not been challenged is that on 28 April 2022 and 29 April, 2022 the first respondent notified it of a shareholders' meeting of the eleventh respondents as well as of the respective special council meeting which meetings were to be concurrently held on 11 May, 2022. Its complaint which is its cause of action is that, having been notified of the two meetings and having gone to the venue of the same to attend both meetings, the first respondent barred it from attending the same. Its second complaint is that, because the two meetings went ahead in its absence and going by the agenda of each meeting as had been furnished to it, resolutions which possibly adversely affect it were passed in its absence and, therefore, without its input. It is such resolutions whatever they were/are which it seeks to impugn on the ground that they were improperly arrived at.

The above-stated matter, it is evident, has nothing to do with the Labour Court or the Commercial Court. It is an ordinary application which falls for determination by this court. Annexures P and Q which the applicant attached to its founding papers are clear evidence of the above-analysed set of matters. They appear at pp 103 and 104 of the application respectively. They show the invitation which was extended to the applicant.

It is my view that, if the applicant did not have the right to attend the one or the other or both of the meetings which had been lined up for 11 May, 2022 the agenda for each meeting would not have been forwarded to it. The agenda of each shows the venue, date, time and items for discussion at the meeting. The applicant, it cannot be disputed, had the right to attend and contribute in the discussion at the meetings. The bar which the first respondent imposed against it was unwarranted. This is *a fortiori*

the case given that the applicant has, in the past, attended meetings of the first and eleventh respondents and has, as recently as 11 January, 2022 had its representatives appointed to the first respondent's full council, executive committee and sub-committees.

The relief which the applicant is moving me to grant to it confirms the area of law which applies to its case. It moves me to grant to it an interdict, in the interim, and a declaratur, as its final order. To succeed in its application for an interdict, it should show that it has a clear right or a right which is open to some doubt. To succeed in its application for a declaratur, it must show that it has a direct and substantial interest in an existing, future or contingent right. Everything about its application is therefore to do with its right vis-s-vis its participation in meetings of the first and eleventh respondents, their committee and -committees.

It follows from the foregoing analysed matters that the respondent's point *in limine* on jurisdiction is without substance. It stands on no leg. It is, dismissed.

c) Impropriety or otherwise of Applicant's presence before the court:

The respondents' contention on this point was that the deponent to the founding affidavit was on a frolic of his own. They based their argument on the fact that he did not attach to the application a resolution of the applicant which showed that he had the authority of the latter to sue as he did. They alleged that, because the applicant did not attach the resolution or a copy of its constitution to the application, the official upon whom the applicant conferred the authority to sue for, and on its behalf, remained unknown to them.

In response to the above-mentioned challenge, counsel for the applicant conceded that no resolution authorizing the deponent to sue had been attached to the application. He prayed that he be allowed to tender the resolution from the bar. He advised that he furnished a copy of the same to the respondents. He, with the consent of the respondents, tendered the resolution which the court marked Annexure X.

The production of the resolution does, in my view, put the *in limine* matter which had been raised to rest. As counsel for the applicant correctly submitted, production of the constitution of the applicant remains unnecessary. *Madzivire* v *Zvarivadza* 2006 (1) ZLR, 514 (S) settles the issue which is under consideration to a point where no further debate is required of it. The contents of the annexure show, in clear and unambiguous terms, that the deponent to the founding affidavit was not on a

frolic of his own as had been alleged. He had the authority of the applicant to institute the proceedings as he did. The third respondent, it is my view, was not candid with me when it raised this preliminary matter. It knows as much as I do that the deponent sued for, and on behalf of, the applicant in HC 2036/22 in which the latter sued it and others. It knows that the deponent deposed to the applicant's founding affidavit in the case. It was, therefore, clear from prior conduct that the deponent has the authority to sue it and others as he did in this application. Its raising of the preliminary matter was therefore without any justification. It appears to have raised it with a view to creating dust on a matter which it knew had no merit at all. The *in limine* point which the respondents raised on the applicant's presence before the court is without merit and it is dismissed.

d) Locus:

The respondents allege that the applicant does not have the *locus* to sue for, and on behalf of, the eleventh respondent. They argue that, to do so, the applicant should have produced a certificate which shows that it is a shareholder in the eleventh respondent. They assert that the applicant has not satisfied the requirements of a derivative action to bring proceedings in respect of the affairs of the eleventh respondent.

In response to the above challenge, counsel for the applicant submitted that the statement of the latter was made in its capacity as a constituent member of the first respondent. He insisted on what he referred to as a common cause matter which was/is that councillors of the first respondent represent the eleventh respondent. He submitted that the word *shareholder* was employed in its loose meaning to refer to councillors of the first respondent. He argued that the applicant was not suing on behalf of the eleventh respondent. It was, he insisted, suing on its own behalf.

Locus, simply taken, refers to a litigant's right to sue another. The applicant cited the eleventh respondent as a party to this application. It sued it together with other respondents. It did not state that it was mounting the suit for, and on behalf of, the eleventh respondent. The allegation of the respondents which is to the effect that the applicant does not have the *locus* to sue for, and on behalf of, the eleventh respondent is, therefore, misplaced. The applicant was, as counsel for it suggested, suing all the respondents, the eleventh respondent included. It was suing them in its own right. All it stated in its founding papers is that it has an interest in the affairs of the eleventh respondent. Its statement in the mentioned regard cannot be said to be without substance. If it did not have the stated interest, the first respondent would not have

invited it to the meeting which related to the affairs of the eleventh respondent. The invitation which it received from the first respondent confirms the applicant's interest in the affairs of the eleventh respondent. The applicant, as counsel for it submitted, cannot be non- suited on the ground that it has not attached a shareholder's certificate to its application. Like the other preliminary points which have been considered before it, the present *in limine* matter is without merit. It is, therefore, dismissed.

e) Ripeness or lack thereof of the application:

It is the case of the respondents that the current application was prematurely filed at court. The applicant, they insist, did not attach the resolutions which it seeks to impugn and/or to suspend. The resolutions and the proposed amendments to the constitution, they argue, remain unknown to the court. They state, in short, that the applicant is moving me to operate in the dark. Hence their statement which is to the effect that the application is not ripe. It would, according to them, have been ripe if the applicant attached to the application the resolutions which it seeks to impugn as well as the proposed amendments to the constitution of the eleventh respondent.

Counsel for the applicant raised a concern on the meaning and import of the above-stated preliminary issue. He insisted that the *in limine* matter went to the merits of the application. He submitted that the court cannot refuse to hear the applicant on the ground that the latter has not attached some documents to its application. The position of the applicant, he argued, was that it was excluded from attending the meetings to which it has a right. Its complaint, he submitted, was against the first respondent and not the second or the third respondent. He asserted that the applicant's position was that, before its exclusion from the meetings, it had been given notices of the same by the first respondent. The applicant, he argued, complains of actual harm or a reasonable apprehension of harm arising out of the resolutions and the amendments to the constitution which were passed, or made, at the meetings. He stated that the applicant's position was that it was not at the meetings and it did not therefore know the resolutions or the amendments. It, he submitted, gave the court a reasonable fear which it wants to be arrested.

The application, it is my view, is not prematurely before me as the respondents seem to suggest. The applicant, it is a fact, was invited to the special council meeting and the shareholders' meeting. These were scheduled for 8.30 am and 11.00 am of 11 May, 2022 at the same venue respectively. The agenda of each meeting was furnished

to it. Both meetings were held in its absence at the scheduled times. The supporting affidavit of one Kudakwashew Mangozho-Chikwanha confirms that the two meetings were held. He states, in para 1 of the same, that he attended the dual meetings set for 11 May 2022 as a representative of employers from the food processing sector. The agenda which was furnished to the applicant for each meeting shows, in para 7 of the special council meeting, that an item which related to the proposed amendments to the constitution was to be tabled for discussion at the meeting. The agenda for the shareholders' meeting shows, in para 4, that the share structure and transfer of shares in the eleventh respondent were to be tabled for discussion at the meeting.

It is from a reading of the agenda of each meeting that the applicant reasonably believes that matters which adversely affected its interests in the first and eleventh respondents were discussed and positions taken in its absence. Its fears are not without substance. They cannot be wished away let alone ignored. They are real. The agenda of each meeting offers guidance to me. It disallows me from operating in the dark as the respondents are suggesting. I remain alive to what must have been discussed at the two meetings. The need to attach to the application documents which relate to the resolutions which the applicant seeks to impugn and/or the amendments which were made or to be made to the constitution is therefore not necessary. The preliminary point which the respondents raised on the current issue is without merit. It is, accordingly, dismissed.

f) Urgency:

That the applicant and the third respondent have been before the court prior to this application requires little, if any, debate. HC 2036/22, for instance, speaks to the stated fact. However, the respondents cannot state, as they are doing, that, because the applicant and the third respondent appeared before the court in or around March, 2022 the current application cannot be urgent. What determines urgency in each case is the date that the cause of action arose. The cause of action in respect of this application arose on 11 May, 2022 when the applicant was barred from attending the two meetings which are the subject of this application. The applicant states to an equal effect. It filed this application five (5) days after the cause of action had arisen. It cannot therefore be regarded as not having treated its case with the urgency which the same deserved. The application is, in the view which I hold of the matter, urgent. The preliminary point

which the respondents raised on this issue is without merit. It is, accordingly, dismissed.

When all has been said and done, therefore, the respondents cannot be said to have proved their case on a balance of probabilities. The *in limine* matters which they raised are each without substance. They are, in the result, dismissed *in toto* with costs.

Takawira Law Chambers, Applicant's Legal Practitioners
Sande Legal Practice, first and eleventh respondents Legal Practitioners
Lovemore Madhuku Lawyers, second and third respondents Legal Practitioners
Lunga Attorneys, ninth respondents Legal Practitioners