

COLD STORAGE COMPANY LTD

Versus

**ADDITIONAL SHERIFF OF THE HIGH COURT –
E.M. MAGARA N.O.**

And

HOLLANDS REAL ESTATE

And

AHMED ESAT

And

TREVOR AND TALENT

And

REGISTRAR OF DEEDS

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO11, 16 & 24 MARCH 2016

Urgent Chamber Application

G. Sengweni, for applicant
Nzvere for 1st respondent (in person)
D. Dube for 2nd respondent
P. Madzivire for 4th respondent
N. Mangena for 5th respondent

MAKONESE J: This application purports to be an urgent chamber application. The order sought is couched in the following terms:

“Interim relief sought

1. The process of transfer of stands 11970 and 8195 Bulawayo Township be and is hereby stopped forthwith and if such transfer had already been made it be declared of no consequence.
2. The fourth and fifth respondents are ordered to stop interfering with applicant's right of ownership of stand 11970 and 8195 Bulawayo Township.

Terms of final order sought

1. That the agreement of sale between first and fourth respondents in respect of stand 11970 be and is hereby declared a nullity.
2. That first respondent be and is hereby ordered to comply with Rule 359 of the High Court Rules, 1974 (*sic*), in handling the sale in execution.
3. First respondent to pay the costs of suit."

When I received this urgent chamber application I directed that all the respondents be served. All the respondents had on the day of the hearing filed opposing papers, save for the 3rd respondent, whose role as the auctioneer was peripheral to the real issues at stake. Various points *in limine* were raised by the respondents. I intend to examine each of these issues. The issues were argued at length by all the parties and several decided cases were brought to my attention relating to the principles that govern the form and substance of urgent applications. It is necessary that I set out a brief synopsis of the background to this application.

Factual background

On the 11th November 2015 first respondent conducted a sale in execution in pursuance of a writ of execution obtained by Jacob Mafusire and others, who are former employees of the Cold Storage Company (applicant). On 12th November 2015 first respondent declared the fourth and fifth respondents as the respective bidders for the two properties on sale. Stands 11970 and stand 8195 Bulawayo Township were accordingly sold to the fourth and fifth respondents for US\$35 000 and US\$36 000 respectively. On 20th November 2015 applicant filed an objection to the confirmation of both sales on the grounds that the properties were sold for unreasonably low prices. A meeting was convened on the 17th December 2015 before the Additional Sheriff, Bulawayo to deal with the objections. It is common cause that at this meeting, the applicant was represented by a legal practitioner Mr G. Sengweni. Mr Chagwinya attended the meeting as a

representative of the Cold Storage Company. Mr *D. Dube* attended the meeting on behalf of the judgment creditors. A copy of the minutes was filed at the hearing of this matter and the findings are set out in the following terms:

“After hearing the submission by both parties the Sheriff confirmed the sale of the two immovable properties to the highest bidders based on the following reasons:

1. The sale was properly conducted
2. Even if the sale is to be set aside the applicant does not have any plan to pay the respondent the outstanding amount.
3. The applicant did not bring the prospective buyer who would offer more money.
4. The sale by the Sheriff is a forced sale so rules that apply to a willing seller and willing buyer set up do not apply in this particular case.
5. The objection was filed was only meant to frustrate the process since people purporting to represent the applicant did not have any authority to represent the applicant but were trying To safeguard their interests on the properties since they did not have the resolution by the Board to represent the applicant.”

Although the applicant disputes that at the end of the meeting of the 17th December 2015 a decision was announced, two of the attendees of this meeting confirmed that the outcome of that meeting was announced that same day. There is irrefutable evidence that on 17th December 2015 the first respondent wrote to the applicant’s legal practitioners indicating confirmation of the sale in execution. The applicant filed this urgent application on the 8th March 2015 seeking an order to stay transfers of the properties to the purchasers.

I shall now proceed to deal with the points *in limine*, in turn.

Urgency

The respondents contend that the matter is not urgent. Applicant’s papers confirm that on 2 February 2016, the applicant’s legal practitioners received the Sheriff’s confirmation of the sale. On the same date, the applicants addressed a letter to the Sheriff. The letter was received by the Sheriff on the 4th February 2016. This application was only filed on the 8th March 2016. This is almost one month from the date the applicant became aware of the confirmation of the sale. With respect, the amount of the delay is both inordinate and unjustifiable. It is a delay that,

in terms of the dictates of the law regarding urgent matters is not justifiable. There is no excuse for the delay. The applicant's legal practitioner for his part did not articulate any reasonable justification for such a delay. On this basis alone, the court would be entitled to dismiss the application. See *Kuvarega v Registrar Gen & Anor* 1998 (1) ZLR 188 (H).

Non-compliance with the Rules

Even if the matter were deemed to be urgent, the application before the court is not an urgent application. It is, in fact a court application. Applicant has not conformed to the rules with respect to form when preparing and filing this application. A court application is in Form 29, which is what the applicant has filed. An urgent chamber application is in Form 29B, which is what the applicant ought to have prepared and filed. There is no urgent chamber application before the court. There exists only a cover that purports to contain an urgent chamber application. The application before the court is not an urgent chamber application both in nature and form. Further, and in any event, the application does not set out the facts upon which it is founded. There can be no doubt that the application is fatally defective as it does not comply with the provisions of Rule 241 (1) of the High Court Rules. The provisional order itself does not comply with Rule 247 as it is not in Form 29C as per Rule 247 (1) (a). It is also critical to note that if the interim relief were to be granted it would amount to final relief in that there is no attempt to include stand 8195 Bulawayo Township, in the final order. To that extent applicant would have obtained final relief in respect of stand 8195, Bulawayo Township.

See the cases of *Minister of Higher & Tertiary Education vs BMA Fasteners (Pvt) Ltd & Others* HB-42-14, and *Chief Gampu Sithole v Kennedy Ndlovu* HB-63-13.

In spite of the non-compliance with the mandatory rules noted above, the applicant has not bothered to apply for condonation for the failure to comply with the Rules, in spite of such non-compliance having been brought to applicant's attention by respondents on the 11th March 2016 at the first hearing of the matter.

Once again, this matter could easily be disposed on the basis that the application is fatally defective for non-compliance with the Rules of Court..

No locus standi

It was contended by the respondents that Reuben Chagwinya, the deponent to the founding affidavit has no authority from the Cold Storage Company Limited to litigate on behalf of the company. The provisions of section 9 of the Companies Act (Chapter 24:03) are clear;

“A company shall have the powers of a natural person of full capacity in so far as a body corporate is capable of exercising such powers.”

It is trite law that a company being a separate legal persona, distinct from its directors, it cannot be represented in a legal suit by a person who has not been authorized to do so. The applicant sought to argue that he is the Company Secretary of the Cold Storage Company and that as such he has inherent powers to represent the company. This assertion is, however, not supported by the applicant’s own papers. In paragraph 2 of the founding affidavit, the deponent states as follows:

“I am the Administration Manager of the applicant and as such I am duly authorized to depose to this affidavit on behalf of the applicant.”

I was referred by Mr *Sengweni*, appearing for the applicant to the case of *River Ranch Limited v Delta Corporation Ltd* HH-1-10.

The operative part of the cited case states as follows:

“Under the law of agency, it is trite that the agent’s actions operate to create a contractual or legal tie between the principal and the third party. The agent’s authority to act may arise either by dint of actual authority, whether express or implied, or by way of ostensible or apparent authority or authority by estoppel...”

This decision is no authority for the proposition that the deponent ought not to have secured a Board Resolution authorizing him to act for applicant. The passage of the judgment

that has been referred to deals with the agent's ostensible authority to act in certain contractual relationships. The issue was dealt with by the Supreme Court in the case of *Madzivire and Others v Zvarivadza & Others* SC-10-06.

The learned CHEDA (AJ) stated at page 4 of the cyclostyled judgment as follows:-

“It is clear from the above that a company, being a separate legal person from its directors, cannot be represented in a legal suit by a person who has not been authorized to do so. This is a well established legal principle, which the courts cannot ignore. It does not depend on the pleadings by either party.

The fact that the first appellant is the managing director of the fourth appellant does not clothe him with the authority to sue on behalf of the company in the absence of any resolution authorizing him to do so.” (emphasis mine)

See also, the case of *Burnstein v Yale* 1958 (1) SA 768.

This application is clearly not properly before the court because the deponent to the founding affidavit has not been authorized to act on behalf of the applicant. In my view this point *in limine* was well taken.

Before I conclude, I am constrained to deal with a matter which arose from this application concerning the citation of parties. The second respondent in this matter has been referred to as Jacob Mafusire and others. There is no such party known as Jacob Mafusire and others. It is a basic principle of law that before a litigant embarks on instituting legal action, he should ascertain the correct citation of the party being sued to enable to appropriate party to respond accordingly. We are left to speculate in this matter who the “others” refers to. If Jacob Mafusire is representing the interests of other former employees of the applicant this does not come out of the papers filed. Further, the 5th respondent is referred to as “Trevor & Talent”. It transpired that Trevor Dube and Talent Dube are husband and wife. They confirmed that they purchased one of the properties as husband and wife. The citation of 2nd respondent and 5th respondent is inelegantly crafted and this is not desirable.

In the result, I accordingly, uphold the points *in limine* and dismiss the application with costs.

Messrs T. Hara & Partners, applicant's legal practitioners
Mathonsi-Ncube Law Chambers, 2nd respondent's legal practitioners
Joel Pincus, Konson & Wolhuter, 4th respondent's practitioners
Messrs Coghlan & Welsh, 5th respondent's legal practitioners