EASY CREDIT (PRIVATE) LIMITED
and
JUSTIN ARTWELL TICHIWANGANA
and
MAXINE MANYOWA
and
SHINGIRAYI MAFARA
and
KUDAKWASHE ZUMBIKA
and
TINASHE HERBERT DZARAMBA
and
BRUCE TARUVINGA
versus
INFRASTRUCTURE DEVELOPMENT BANK OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 29 March and 15 May, 2017

Opposed Matter

P Kawonde, for the applicant
O Mutero, for the respondent

MANGOTA J: The applicants filed their notice of appearance to defend three (3) days outside the *dies induciae.* They were, at the time of filing the notice, automatically barred. This application aims at the removal of the bar.

The respondent opposed the application. It anchored its opposition on two grounds. These were that the applicants did not:

(i) give a clear and convincing explanation as to why they did not file their appearance to defend within the *dies induciae* – and

(ii) explain what caused them to delay in applying for the upliftment of the bar when they became aware of its existence.

The *in limine* matter which the applicants raised is double – edged. They submitted, in their answering affidavit, that the respondent was out of court. They stated that the deponent to its affidavit did not have the authority to speak for, and on behalf of, the respondent. They insisted that, by reason of such deficiency, there was no opposition to their application. They moved the court to deal with the same as an unopposed matter.

The applicants are guilty of the conduct which they accuse the respondent of. They did not produce any proof which showed that the deponent to the founding affidavit was clothed with authority to speak for, and on behalf of, the first applicant. Their work was hurried and, to the stated extent, untidy. The supporting affidavits of the fourth and fifth applicants were not commissioned. The second, fourth and fifth applicants did not file any answering affidavit(s). No reasons were given for the shoddy work which was observed.

The first applicant is as much a legal *persona* as the respondent is. Both of these entities can only speak on the strength of resolutions which their directors pass clothing the deponents to their respective affidavits with authority to sue, or defend, any suit in which they have an interest.

This court has, in the past, made pronouncements which suggested that such legal entities as the first applicant and the respondent can, in some instances, dispense with the production of proof of authority in the form of a company resolution when they sue, or defend, any suit. Such pronouncements are, with respect, unfortunate and untenable. They create a free for all situation. They allow a person to come forward and merely allege that he has the authority of a company to represent it when he has no such authority.

The pronouncements are, at any rate, not in *sync* with the precedent which the Supreme Court laid in *Madzivire & 3 ors* v *Zvarivadza & Anor*, 2006 (1) ZLR 514. CHEDA JA's remarks which appear at p 516 C are pertinent. They succinctly clarify the position of the matter which is under discussion. I, for the avoidance of doubt, repeat them hereunder as follows:

> "….. a company, being a separate legal *persona* 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 ignore,…… 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. In *Barstein* v *Tale*, 1958 (1) SA 768 (W) it was held that the general rule is that directors of a company can only act validly when assembled at a board meeting" [emphasis added]

The above citation is clear and unambigous. It stresses the point that affidavits which are made by deponents who claim to represent a company but have no proof of authority in the form of a directors' resolution are, to the extent that they purportedly relate to the legal entity, invalid. They are of no force or effect. The company which the deponent claims to represent is, for lack of proof of authority, outside the court. Proof of authority in the form of a directors' resolution is, in my view, a *sine qua non* aspect of affidavits by persons who claim to speak for, and on behalf of, a legal *persona.*

It is clear, from the foregoing matters, that the first applicant and the respondent are out of court. It is also evident that the fourth and the fifth applicants are not before the court.

The above observation leaves the second, third, sixth and seventh applicants as the only persons who are in court. These applied for the upliftment of the bar. They based their application on r 84 (1) (a) of the High Court Rules, 1971.

The four applicants submitted that the miscommunication which took place between the third and the seventh applicants caused them to file their appearance to defend three days outside the time which the rules of court prescribed. It is common cause that the third applicant received the summons which the respondent issued. He received it on behalf of the applicants. He received the summons on 29 August, 2016. He, for some unexplained reasons, told the seventh respondent who deposed to the founding affidavit that he received the summons on 8 September, 2016.

The misinformation which the seventh respondent received caused him to labour under the genuine but mistaken belief that the applicants' notice of appearance to defend would be within the *dies induciae.* He, on the mentioned basis, instructed counsel to draw the notice of appearance to defend and this was duly drawn as well as filed with the court albeit some three days out of time.

The third applicant should have explained what caused him to misinform the seventh applicant as he did. His supporting affidavit should have been more expanded than those of the other applicants who filed supporting affidavits in regard to the application which is before me. Counsel's probing of that matter with him would, in all probability, have elicited the desired result.

The court accepts that there was this misinformation which remained unprobed. Be that as it may, however, the court remains satisfied that it was always the intention of the four applicants to defend the respondent's suit. Their delay of three days is, at any rate, not inordinate.

It is common cause that the four applicants filed the present application thirty days after they became aware of the bar. The existence of the bar was drawn to their attention on 19 September, 2016. They filed the application on 4 November, 2016.

The applicants' explanation for the thirty-day delay was that neither the third applicant [who received the respondent's summons] nor the deponent to their founding affidavit was available to instruct counsel to react to the issue of the bar. The explanation is, in my view, a plausible one.

Whilst it is accepted that all the four applicants are directors of the first applicant, they must have agreed between them that the seventh applicant would speak for all the four of them. The fact that all three applicants – the second, third and sixth – deposed to affidavits in support of the seventh applicant's founding affidavit settles this matter to a point where no further debate is required of it.

The four applicants were automatically barred. They expressed an intention to defend the suit which the respondent filed against them. They must have their delay in court. They are, after all, being sued in their capacity as guarantors of the loan which the respondent advanced to the first applicant on 4 August, 2015.

Whether or not they have a sustainable defence to the respondent's claim will depend on the plea which they will file in preparation for the trial. The fact that they expressed a desire to defend the action shows that they are not being frivolous and/or vexatious.

I am, in view of the foregoing, satisfied that the second, third, sixth and seventh applicants proved their case on a preponderance of probabilities. It is, accordingly, ordered that:

1. The bar which is operational against the second, third, sixth and seventh applicants in case number HC 8486/2016 be and is hereby uplifted.
2. The second, third, sixth and seventh applicants be and are hereby granted leave to file their plea within ten (10) days of the grant of this order.
3. Costs be and are hereby ordered to be costs in the cause.

Sawyer & Mkushi, respondent's legal practitioners
Kawonde & Company, applicants' legal practitioners