TN GOLD-ARCTURUS MINE (PRIVATE) LIMITED
versus
ZVANYADZA PARI
and
ENVIRONMENTAL MANAGEMENT AGENCY

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 3 November, 2021

Urgent Chamber Application for an Interdict: Ruling on Points *in Limine*

D Sigauke, for the applicant
P Nhokwara, for the 1st respondent
No appearance for the 2nd respondent

CHITAPI J: The applicant is TN Gold-Acturus Mine (Private) Limited, a duly incorporated company registered under the Companies Act [*Chapter 24:03*]. The first respondent is Zvanyadza Pari, a female adult and owner or occupier of Jongwe Farm, Acturus, Goromonzi District. The second respondent is the Environmental Management Agency, a corporate body created by s 9 of the Environmental Management Act, [*Chapter 20:27*]. The second respondent has the power to sue and be sued. In broad terms the second respondent is the body which *inter-alia* regulates, monitors and approves environment impact assessments before activities which impact on the natural resources may be undertaken. This is done to ensure the sustainable management and protection of natural resources of the country.

The dispute in this application revolves around the second respondent's functions of issuing an environmental assessment certificate in regard to a disputed mining claim which sits on the first respondent's farm. The dispute over the ownership of the mining claim called Esperanza 20 as between the applicant and the first respondent does not fall for determination in this application. What concerns me in this application is the undisputed fact that the first respondent is the one in possession and use of the claim. The applicant alleges that the first respondent has taken steps to obtain an environmental impact assessment certificate in respect of the disputed mining claim. If the second respondent issues the certificate then the first respondent will be good to commence exploitation or mining on the disputed claim

legally. The applicant therefore seeks in this application an order interdicting the second respondent from issuing the environmental impact assessment certificate over the disputed claim in order to protect its rights and avoid financial prejudice in the form of lost proceeds from mining activity which the first respondent may engage in. The second respondent did not file any opposing papers and was in default at the hearing. Mr *Sigauke* advised that the second respondent had indicated to counsel that it would abide by the court's judgment.

The applicant crafted the draft of the provisional order which it seeks as follows:

> "TERMS OF FINAL ORDER SOUGHT
> That you show cause to this Honourable Court why a Final Order should not be made on the following terms:
> 1. The 2nd respondent is hereby barred from granting any regulatory approval or certificate to 1st respondent authorizing her or any person acting through or under her to conduct any exploration or mining activities at Esperanza 20, certificate of registration no. 39878, or any area falling under Applicant's Mining Lease Title No. 33 pending the determination of any appeal lodged by 1st respondent with the Minister of Mines and Mining Development against the notice of intention to cancel certificate of registration No. 39878.
> 2. 1st respondent, her employees, agents, invitees, and all or any person acting under or in association with her are barred from conducting any exploration or mining activities at Esperanza 20, certificate of registration no. 39878 or any area falling within applicant's Mining Lease Title Registered No. 33 without a valid certificate issued by 2nd respondent in terms of section 100 of the Environmental Management Act [*Chapter 20:27*] approving such mining activities.
> 3. 1st respondent shall pay costs of this application.
>
> INTERIM RELIEF GRANTED
> Pending determination of this matter, the applicant is granted the following relief:
> 4. The 2nd respondent is hereby barred from proceeding to issue any environmental impact assessment certificate or any other approval to 1st respondent or any person or entity acting under her relating to Esperanza 20, certificate of registration No. 39878, pending determination of any appeal against the notice of intention to cancel certificate or registration No. 39878 lodged with the Minister of Mines and Mining Development.
> Or alternatively;
>
> 5. The 2nd respondent is hereby barred from proceeding to issue any environmental impact assessment certificate or any other approval to 1st respondent or any person or entity acting under her relating to Esperanza 20, certificate of registration No. 39878 in the absence of a properly convened stakeholders consultative process to which applicant is invited in writing to attend and lodge its objections."

The first respondent opposed the application by notice of opposition and attached documents thereto. The first respondent raised three points *in limine*, firstly the authority of the deponent to the founding affidavit to represent the applicant, secondly the urgency of the matter and thirdly, material non-disclosure. In the course of arguments on the point *in limine* another point *in limine* arose for argument namely whether the application was not founded

on inadmissible hearsay evidence and if so, whether there was therefore an application for the judge to determine.

In regard to the authority of the deponent to the founding affidavit, to represent the applicant, Mr *Nhokwara* submitted that in the absence of a board resolution of the applicant nominating and authorizing the deponent to the founding affidavit to represent the applicant in this application, the *locus standi* of the deponent to represent the applicant had not been established. It was further submitted that whilst the deponent Mr Shingirai Mwanza who styled himself the mine manager purported to have personal knowledge of the facts of the matter, this did not entitle him to represent the applicant. It was also submitted that the deponent to the founding affidavit had not referred to any board resolution authorizing him to act for the applicant.

In response to the objection on the authority of the deponent to the founding affidavit to represent the applicant, it was submitted by Mr *Sigauke* for the applicant that this application had been made in terms of r 40 of the Commercial Court Rules S.I. 123/20. Rule 40(1) provided as follows:

> "40(1) An urgent chamber application shall be in Form No C11 and shall be clearly labelled as an urgent chamber application stating clearly and concisely on the face of it the nature and grounds of the relief sought and the grounds upon which the matter is urgent and shall be accompanied by an affidavit by any person who can swear positively to the facts together with any documents which may be used in support thereof."

Mr *Sigauke* argued that it was sufficient that the deponent to the founding affidavit had stated that he is duly authorized to depose to the affidavit. Mr Sigauke submitted that the rules did not require that a resolution should be produced in cases where a deponent to the founding affidavit purported to represent a corporate body. He referred to the case of *Tian Ze Tobacco Company (Private) Limited* v *Muntuyedwa* HH-626-15 as authority that what is important in relation to the deponent's authority to represent a company is that there should be evidence to show that it is company and not the deponent to the affidavit who is litigating.

In the quoted case, the learned MATHONSI J (as he then was) held that it was not always necessary that the deponent to an affidavit made in a representative capacity on behalf of a company should attach a company resolution to that effect. The respondent in that case had sought the dismissal of the applicant's application for the registration of an arbitral award on the basis that the deponent to the founding affidavit had not produced a resolution of appointment to represent the company by the board of directors. The learned judge noted that it had become fashionable for respondents to raise the issue of the absence of a company resolution authorizing a deponent to act for the company as a defence. The learned judge then

referred to his earlier decision in *African Banking Corporation of Zimbabwe Ltd t/a Banc ABC* v *PWC Motors and Ors* HH 123-12 in which he stated that it was not in every case that the production of a company resolution as proof that the deponent has authority to represent the company is necessary. The learned judge stated in that case that each case should be considered on its merits. After making reference to the *South African decision in Mall (Cape) (Pty) Ltd* v *Merino Ko-opraise* Bpk 1957 (2) SA 345 (c) the learned judge stated as follows on p 3 of the cyclostyled judgment:

> "All the court is required to do is to satisfy itself that enough evidence has been placed before it to show that it is indeed the applicant which is litigating and not an unauthorized person."

The learned judge further states as follows on the same p 3:

> "Indeed where the deponent of an affidavit has said that she has the authority of the company to represent it, there is no reason for the court to disbelieve her unless it is shown evidence to the contrary and where no such contrary evidence is produced, the omission of a company resolution cannot be fatal to the application. That is as it should be because an affidavit is evidence acceptable in court as it is a statement sworn before a commissioner of oaths… where it states that the deponent has authority, it can only be disbelieved where there exists evidence to the contrary. It is not enough for one to just challenge the existence of authority without more as the respondent has done."

As I understand the *dicta* of MATHONSI J, the learned judge did not hold that it is unnecessary for a deponent who purports to represent a company to produce a resolution of the company authorizing that deponent to represent it. In my reading of the *dicta*, the learned judge noted that the absence of the production of the resolution would not necessarily be fatal to every case. Therefore whether or not the non-production of the resolution would prove fatal to the applicant's case would depend on the facts and circumstances of each case. The facts of circumstances of each case would in a given case give rise for doubt on whether or not the deponent to the affidavit has the authority to represent the company. The respondent needs to allege facts and circumstances of the case from which an inference can be drawn to doubt the deponent's authority to represent the company contrary to what the deponent would have alleged. The learned judge found that the respondent had simply prayed for the dismissal of the application on the mere basis that the deponent to the founding affidavit had not filed or produced a resolution of the company without further ado. The *dicta* in the *Tian Ze* case *supra* should be understood within the context of the factual scenario which presented itself before the learned judge. The judgment is not authority that where a juristic persona *viz* a company, is litigating and is represented by a natural person, that natural person is not required to prove his or her authority moreso where such authority is put in issue. As a

point of note I would say that where a person who presents himself or herself before a legal practitioner purporting to represent a company, the legal practitioner who is astute and knowledgeable in company law first ascertains the authority of the person to represent the company before doing anything further. Therefore if the authority of the company is integral to the legal practitioner being satisfied that he will be acting for the company and not the individual, it should be produced to the legal practitioner. There would appear to be no reason for the legal practitioner not to attach it as proof of the authority of the deponent to represent the company in the affidavits filed before the court.

It must be noted that r 227 (4) of the High Court Rules 1971 provides as follow:

> "(4) An affidavit filed with a written application-
> (a) Shall be made by the applicant or respondent, as the case may be, or by a person who can swear to the facts or averments set out therein; and
> (b) May be accompanied by documents verifying the facts or averments set out in the affidavit, and any reference in this order to an affidavit shall be construed as including such documents."

The provisions of r 227 (4) were substantially repeated in r 26 of the High Court (Commercial Court) Rules which the applicants purported to have relied on in mounting this application. Rule 26 (5) especially provides as follows in relation to applications to be filed in terms of the Commercial Court Rules.

> "26 (5) An affidavit filed with a written application-
> (a) shall be made by the applicant or respondent as the case may be, or by a person who can personally swear positively to the facts or averments set out therein; and
> (b) shall be accompanied by all material and relevant documents verifying the facts or averments set out in the affidavit, and any reference in this Rule to an affidavit shall be construed as including such documents."

An interrogation of the rules relating to urgent and ordinary applications under both the High Court Rules (1971) and High Court (Commercial Court Rules 2020) clearly reveals that the rules do not speak to the legal capacity of the person who can represent a company or other juristic *persona* who may be the applicant or respondent as the case may be. Contrary to the submission of Mr *Sigauke* that the rules allow that it is not necessary that a resolution of a company authorizing the deponent to an affidavit be produced, the correct position is that the quoted rules speak to the need for the deponent to be able to swear positively to the facts. The rules do not detract from the requirement that in proceedings involving a company, the deponent to the founding or opposing affidavit as the case may be should plead and establish the basis for such person's authority to represent the company. Whilst the non-production of the actual written resolution of authority may not be fatal to the applicant's case or

respondent's defence as the case may be, it still remains necessary for the deponent to the affidavit to speak to the nature and content of the resolution as well as give details of by whom, where and when it was made. The details are important because the passing of a resolution is a process in which the company to be represented ordinarily convenes a special meeting of the board of directors to discuss and pass a resolution of authority. Therefore, it is in my judgment wholly inadequate for a representative deponent who files an affidavit on behalf of the company to simply plead that he or she is authorized to represent the company without more and leave it at that. Some evidence of the existence and nature of the authority must be pleaded. A failure to do so renders the ensuing affidavit inadmissible as evidence by the company.

I must therefore comment on that part of the *dicta* by MATHONSI J in the *Tianze Tobacco Co. (Pvt) Limited* v *Mutuyendwa* case where the learned judge stated that:

> "If a deponent to an affidavit states in the affidavit that he or she has the authority of the company to represent it, "…there is no reason for the court to disbelieve her unless it is shown evidence to the contrary and where no such contrary evidence is produced, the omission of a company resolution cannot be fatal to the application. That is as it should be because an affidavit is evidence acceptable on court as it is a statement sworn before a commissioner of oaths…..".

With all due deference to the learned judge, I have to hold that the mere fact that an affidavit is sworn before a commissioner of oaths means no more than that, it is admissible in evidence. The admissibility of the affidavit and truthfulness of the depositions made therein are distinct issues. Indeed many a time deponents to affidavits as indeed witnesses who give oral testimony will swear by the Almighty God or affirm if they do not believe in the Christian oath that their depositions are all truth and nothing but the truth, only for such depositions to turn out to be all lies and no truth.

In my view, therefore, a general statement by a deponent to an affidavit made on behalf of the company or indeed any juristic entity that the deponent is authorized to represent the company or juristic person *simpliciter* or without pleading further details of the authority is totally inadequate to establish the authority. A respondent or applicant as the case may be is justified to take issue that the deponent has not established authority to act for a company or juristic entity where the deponent has simply pleaded a bold assertion that such deponent acts under authority to represent the company or juristic person leaving it at that. He who alleges must prove. It would therefore be procedurally improper to hold that a mere allegation by a deponent who purports to act for a company to the effect that he or she is

authorized by the company to act for it, places an evidential *onus* on the contending litigant to place evidence before the court to disprove the assertion. Indeed to do so would be to lay a rule that in proceedings involving a company or other juristic person all that is required is for a would be representative to aver that he or she is authorized to represent the company or juristic person, full stop and that this allegation is proof of such authority on a balance of probabilities. I respectfully disagree with such position for reasons I advert to below.

Rule 230 of the High Court Rules 1971 provides as follows:

> "A court application shall be in form 29 and shall be supported by one or more affidavits setting out the facts on which the applicant relies."

In the case of a deponent to a founding affidavit or opposing affidavit who claims that he or she is duly authorized to represent the company or other juristic *persona*, the deponent is upon a reading of r 230 required to set out the facts on which reliance is made for the averment of authority. In other words short of attaching the instrument of authority, the deponent would be required to give details of the instrument of authority. It is in my view not the duty of the respondent to disprove a mere allegation by the deponent that he or she is authorized to act for the company or other juristic entity as the case may be. The deponent who relies on authorization must therefore set out the details of the authority because the details constitute the facts or evidence of which reliance is placed by the deponent for making the allegation that the deponent is authorized to act for the company.

The grant of authority and the nature of the authority itself are *facta probanda* in that they require not just to be alleged but to be established or proved by the person who relies on the authority to act for another. It is in this respect important to take note of the trite position in law that an application stands or falls on its founding affidavit. The principle was recently restated by the learned BHUNU JA in *Yunus Ahmed* v *Docking Station Safaris (Private) Ltd t/a CC Sales* SC 70/18 where on p 3 of the cyclostyled judgment, it is stated:-

> "It is trite that an application stands or falls on its founding affidavit. *(See Fuyana* v *Moyo* SC 54/06; *Muchini* v *Adams & Ors* SC 47/13 and *Ansterlands (Pvt) Ltd* v *Trade Investment Bank Ltd & Ors* SC 80/06…."

See also decisions of this court on *Godfrey Chiparaushe and 60 Others* v *Triangle Limited & 2 Others* HH 504-16 where MATANDA-MOYO J stated at p 3 of the cyclostyled judgment:-

> "The founding affidavit should contain all facts upon which an applicant relies in seeking relief. Courts will not normally allow or permit a mere skeleton of a case sought to be supplemented in an answering affidavit. It is trite that all facts and the basis of seeking a relief must be established in the founding affidavit; See also *Titty Bar and Bottle Store (Pty) Ltd* v

> *ABC Garare (Pty) Ltd and Ors* 1974 (4) SA 362 (T); *Pountas Trustees* v *Lahanas* 1924 WLD 67; *Austerlands (Pvt) Ltd* v *Trade and Investment Bank and 2 Ors* SC 92/05 and *Bushu* v *GMB & Ors* HH 326-17 and the *South African decisions in Jozistat (Pty) Ltd* v *Topaz Sky Trading 217 (Pty) Ltd & Anor* 2011 ZAGPJHC 91 and *Mokoena and Ors* v *Lengoabala*; In re: *Lengoabala* v *Nhlapo and Ors* [2016] ZAFSHC4."

In my judgment, the deponent to the founding affidavit was required to not only state that he was authorized to act for the applicant company, he being the Mine Manager. It was necessary for the deponent to plead the nature of his authority even though such authority if written did not need to be attached to the deponent's affidavit. I therefore hold the position that the alleged authority of the deponent to the founding affidavit to represent the applicant company amounts to a bold allegation and is wholly inadequate.

In the case of *Madzinare & Ors* v *Zvaridza & Ors* 2005 (2) 514 (S) at 516, it is stated:

> "….. a company, being a legal *persona* 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 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 *Burstein* v *Yale* 1958 (1) SA 768 it was held that the general rule is that directors of a company can only act validly when assembled at a board meeting…"

In the case of *Dendeuka* v *Paper Place (Pvt) Ltd* HH 195-2011, BHUNU J (as he then was) stated as follows:-

> "…….. The position in our law is that a company being a fictitious legal *persona* cannot act on its own. There is therefore need for a company resolution to legalize and validate any company acts…."

In casu, the deponent to the founding affidavit does not even mention the word resolution of the applicant company as the basis for the authority to act for the company. A distinction must be drawn between the production of the resolution and the pleading the basis of the claimed authority. The deponent to the founding affidavit *in casu* did not in my judgment establish the basis of the authority he claimed to have to represent the company. Being employed as a mine manager of the company does not clothe the incumbent of that position with authority to represent the company in legal proceedings as a matter of law or fact.

The finding that the deponent to the founding affidavit did not on a balance of probabilities establish his authority to represent the applicant company means that there is no valid founding affidavit of the applicant's company. There is no valid application therefore before the court on which relief may be sought. The application must be struck off the roll with costs. It is not necessary in my view to determine the remaining two points *in limine*

relating to urgency and material non-disclosure because the two can only follow upon a determination that I have a valid application before me. The decision I reached is that there is no valid application before me. Since the application is invalid and a nullity, nothing arises from a nullity and the matter ends there.

The application is therefore disposed of as follows:

"The application be and is hereby struck off the roll with costs."

Musengi and Sigauke, applicant's legal practitioners
Madzingira and Nhokwara, first respondent's legal practitioners