BEACH CONSULTANCY (PRIVATE) LIMITED
versus
OBERT MAKONYA
and
THE SHERIFF OF HIGH COURT

HIGH COURT OF ZIMBABWE
MAKOMO J
HARARE, 22 November 2021 & 6 December 2021

Urgent Chamber Application

T. Mazikana, with her *S. Mapanje*, for the applicant
1st Respondent in person
No appearance for the 2nd Respondent

MAKOMO J: This is an urgent chamber application for stay of execution of a judgment delivered by this court on 1 October 2021. The Applicant seeks a provisional order in the following terms:

> **"A. TERMS OF THE FINAL ORDER SOUGHT**
> That you show cause why if any, a final order should not be made in the following terms:
> 1. The property that has been attached by the 2nd Respondent pursuant to the aforementioned judgment and the writ of execution be and is hereby released from attachment.
> 2. That the costs of this application shall be borne by the 1st Respondent at an attorney client scale.
>
> **B. INTERIM RELIEF GRANTED**
> Pending determination of this matter, the Applicant is granted the following relief:
> 1. That the 2nd Respondent be and is hereby ordered to stay any execution against the Applicant's property pursuant to the writ of execution pending finalization of the application for a declaratory order under case number HC 6274/21.
> 2. That the 2nd Respondent be and is hereby ordered not to remove and sell in execution the property of the Applicant that he seized and attached on the 17th of November 2021.
> 3. That in the event that the removal of applicant's goods has already been effected, the 2nd Respondent be and is hereby ordered to return the goods belonging to applicant.
> 4. That should 1st Respondent oppose this application, he shall bear the costs on an attorney client scale."

A brief history of the case puts the dispute into perspective. The Applicant, Beach Consultancy (Private) Limited, is a company duly registered in terms of the laws of Zimbabwe and trades as the Aviation Ground Services. The first Respondent is a former

employee of the Applicant. In 2013, the first Respondent was dismissed from his employment following some disciplinary procedures. Since then, the parties have been engaged in protracted litigation both in the Labour court and in this court. In April 2018, the parties negotiated and reached an out of court settlement wherein the Applicant would pay the first Respondent USD60 000 in full and final settlement of the first Respondent’s claim. Pursuant to that agreement the parties concluded a deed of settlement on 11 April 2018. In terms of the agreement, the applicant would liquidate its dues to first Respondent in three equal installments of USD20 000 starting 28 February 2019. Unfortunately, nothing was recorded as to when the other two installments would become due. The date of 28 February 2019 is crucial in the determination of the matter as I will demonstrate later due to the seismic legal developments that took place in the country effective 22 February 2019, that is, about six days before the first installment was due and payable.

For reasons not stated, the Applicant did not pay on 28 February 2019 as agreed, neither did it do so on any subsequent date until 21 July 2021. In the meantime, the first respondent took steps to have the deed of settlement filed with the Labour court as its judgment on the dispute between the parties under case number LC/H/APP/216/2017. Again, no explanation is offered as to why this took inordinately long until 17 July 2019 when the deed of settlement was finally incorporated as the Labour Court’s judgment by consent of the parties. The order of the Labour Court is expressed in United States Dollars and has no alternative to pay in RTGS at the prevailing interbank rate. Critically, although the order was issued on 17 July 2019 that same order states that the first installment would be paid by February 2019. It can only be assumed that the intention of the court was to give effect to the deed of settlement signed by the parties.

Like a game of chess the parties sought to checkmate each other and sought to occupy the most advantageous position in this legal contestation. On 21 July 2021 the Applicant deposited RTGS60 000 into first Respondent’s bank account, following which its lawyers addressed a letter to first Respondent advising him of the payment and that Applicant was taking the position that this was the full and final settlement of its indebtedness to him. After a further flurry of communications between the parties, Applicant then filed with this court an application seeking a *declaratur* to the effect that the RTGS60 000 that it deposited into first Respondent’s bank account has extinguished the debt it owed to the first Respondent in line with the case of *Zambezi Gas Zimbabwe (Pvt) Ltd* v *NR Barber & Anor* SC3/20. The Application is filed under HC6274/21 and is yet to be set down. On the other hand, as stated

above, the legal battle continued with the first Respondent filing his own application for registration of the Labour Court judgment under case number HC6981/21, which order was registered by CHIRAWU-MUGOMBA J on 1 October 2021. Soon thereafter, the first Respondent sued out a writ of execution against the property of the Applicant. On 17 November 2021 the Sheriff was at the premises of the applicant to attach its property. It is for the stay of this execution that the Applicant has now approached this court on an urgent basis.

First Respondent has raised two points *in limine*. The first is that the founding affidavit by the Applicant's deponent is not properly commissioned as the Commissioner of Oaths simply signed but failed to put a stamp stating that he/she is a Commissioner of Oaths and that his/her designation has not been specified. For this, it is argued that the affidavit is defective and must be disregarded. At the hearing it turned out that the copy on record had the stamp showing that the affidavit had been commissioned by one Pepukai Mabundu, a legal practitioner and Commissioner of Oaths. So was the copy being used by the Applicant. The omission on the first Respondent's copy was acknowledged by *Ms. Mazikana* for the Applicant. She argued however, that the omission was not fatal since the court's copy was properly commissioned and the error, which she blamed on the Commissioner of Oaths, could easily be rectified by handing a properly commissioned copy to the first Respondent. The point was not persisted with thereafter.

The second preliminary point is a challenge to the deponent's authority to represent the company. First Respondent argues that the authority is defective in that the deponent was given blanket or general authority to represent the company in any legal proceedings involving the company when authority was supposed to be given for this specific case. The board resolution being challenged is drafted in the following terms:

> "**RESOLUTION OF THE DIRECTORS OF BEACH CONSULTANCY [PRIVATE] LIMITED T/A AVIATION GROUND SERVICES**
> **IT IS HEREBY RESOLVED AS THAT:**
> Caleb Mudyawabikwa as the Managing Director be and is hereby authorized to represent Beach Consultancy (Private) Limited on behalf of the company in all court cases thereof."

As is clear from the resolution, it does not state the names of the parties neither does it state for which case the deponent has been authorized to represent the Applicant. It is a blanket authority giving the deponent mandate to represent Applicant in any court case, pending or any that may arise in future.

The cases of *Madzivire* v *Zvarivadza & Another* 2006 (1) ZLR 514 (S) and *Cuthbert Elkana Dube* v *Premier Service Medical Aid Society & Another* SC73/19 were cited as the

basis for challenging the resolution. The essence of first Respondent's argument is that Applicant could not have authorized to be represented in this case on 10 June 2021, which is the date when the resolution was made, because as at that date it was not aware that these proceedings would arise. In other words, it could not validly authorize proceedings whose existence it was not aware of on 10 June 2021.

I do not read the two cited cases as propositions that authority to represent a company must be given for each specific case. All they say is that any person representing an artificial person such as a company in litigation must have been properly authorized to do so by the board through a valid company resolution. In *Zvarivadza* (*supra*), which is the leading case in the country on the point, the learned judge of appeal states that:

> "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 authorised 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 authorising him to do so."

See also *Harold Crown & Anor v Energy Resources Africa Consortium & Anor* SC 3/17.

Convenience may dictate that a blanket authority be given in some cases. For instance, practice has arisen that the company secretary or a director may be authorized in a resolution to represent the company particularly in big corporates and other institutions which, because of the nature and size of their operations, may find themselves frequently engaged in litigation. It may be argued that in such a scenario, it would be too onerous for the board to convene and pass resolutions granting such official or director authority to represent it each time the company is sued or it intends to institute litigation. Commercial and common sense may direct otherwise.

Unfortunately, this apparently convenient practice is in my view not supported by law. The current position of the law is that it must be shown that the corporate is aware of the proceedings that it is authorising. The reason for insistence on the company being aware of the proceedings is to confirm that it is indeed the company that has taken the decision to participate in the court case and that it is not an unauthorized person who is dragging it to court without its knowledge. Knowledge on the part of the company is required for the purpose of binding it to all the consequences of the litigation including payment of costs. Once it properly authorizes its participation in the litigation, it is estopped from denying liability once such adverse orders are made against it. This also protects the other parties in

the litigation. In this regard, it was stated in *Cuthbert Elkana Dube* v *Premier Service Medical Aid and Another* SC73/19 on para 38 of the cyclostyled judgment that:

> "[38] The above remarks are clear and unequivocal. A person who represents a legal entity, when challenged, must show that he is duly authorized to represent the entity. His mere claim that by virtue of his position he holds in such an entity he is duly authorized to represent the entity is not sufficient. He must produce a resolution of the board of that entity which confirms that **the board is indeed aware of the proceedings and that it has given such a person the authority to act in the stead of the entity**. I stress that the need to produce such authority is only necessary in those cases where the authority of the deponent is put in issue. This represents the current status of the law in this country." (bold for emphasis).

Thus, a company resolution is required for two reasons, first, to prove that the entity is aware of the legal proceedings and has authorized them and, secondly, that the person representing it has been clothed with the requisite authority to represent it in the proceedings. The role of the resolution in confirming the entity's awareness of the existence of the legal proceedings and that it has authorised its participation therein is paramount and more important than authority granted to the person to represent it. The position in South Africa is that what must be authorized are the proceedings and not the person deposing to the affidavits. In *Ganes* v *Telecom Namibia Ltd* [2004] 2 All SA 609 (SCA), Streitcher J lays the position to the following effect:

> "[19] In my view it is irrelevant whether Hanke had been authorised to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised."

See also *Staar Surgical (Pty) Ltd* v *Lodder* J1333/12, a judgment of the Labour Court of South Africa.

Despite the clear exposition of the law in the above authoritative and persuasive texts, the question that still confronts me in the instant case is whether an entity may give a general authority to a deponent for whatever litigation, that may not be known now but which may arise in future? The cases of *Madzivire* (*supra*) and *Cuthbert Elkana Dube* (*supra*) cited by the first Respondent for his objection to the founding affidavit by Applicant's deponent do not answer this question. My diligent search in this jurisdiction has not taken me to a case that directly dealt with this question. The issue arose recently in *Musa Kika and Another* v *Luke Malaba and 18 Others* HH264/21 where the authority of the Secretary of the Judicial Service Commission to depose to the affidavit on behalf of the JSC was challenged. In that case, the Secretary Mr Walter Chikwana had produced a blanket authority given to him by the JSC in his capacity as Secretary "to sign documents on behalf of the JSC in litigation

matters". Unfortunately, the court left the question open as it found it unnecessary to directly answer this question in the circumstances of that matter.

I am aware that there are two divergent approaches by this court on production of a deponent's authority to represent a company. The first takes a liberal approach to the effect that a resolution may not always be necessary in every case as each case must be considered on its own merits. See *African Banking Corporation of Zimbabwe Limited t/a Banc ABC* v *PWC Motors (Pvt) Ltd & 3 Ors* HH123/13; *Bulawayo City Council* v *Button Armature Winding (Pvt) Ltd* HB 36/15; *Tianze Tobacco Co. (Pvt) Limited v Muntuyadzwa* HH 626/15; *Trustees of The Makomo eChimanimani Share Ownership Community Trust* v *Minister of Lands and Rural Resettlement & Anor* 2016 (2) ZLR 324 (H). Thus, the format of the resolution or even its existence may not even be of any consequence. This is the South African approach. This line of cases rides on the persuasive authority of *Mall (Cape) (Pvt) Ltd* v *Merino KO-Oprasie Bpk 1957 (2) SA 345 (C)*. In the *African Banking Corporation* case (*supra*) MATHONSI J (as he then was) outlines the position as follows:

> "However, it occurs to me that that form of proof is not necessary in every case as each case must be considered on its own merits. *Mall (Cape) (Pvt) Ltd v Merino KO-Oprasie Bpk* 1957 (2) SA 345 (C). All the court is required to do is satisfy itself that enough evidence has been placed before it to show that it is indeed the applicant which is litigating and not an unauthorised person.
> To my mind the attachment of a resolution has been blown out of proportion and taken to ridiculous levels. Where the deponent of an affidavit states that he has the authority of the company to represent it, there is no reason for the court to disbelieve him unless it is shown evidence to the contrary. Where no such contrary evidence is produced the omission of a company resolution cannot be fatal to the application. I therefore reject the point *in limine*."

With respect, the requirement for the production of a company board resolution, as opposed to authority to represent a natural person, may not be replaced by a claim by the deponent in the affidavit that he is authorized to represent the company. Pleadings may not supplant a company resolution as proof of authority. The rule is strict and admits of only one exception, that is, where the company has only one director. This is the import of *Madzivire* case where the Supreme Court, as already quoted above, stated that:

> "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 authorised 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**." (my emphasis)

The opposing school of thought maintains the strict approach. See *National Social Security Workers Union & Anor* v *Mthuli Ncube N.O. & Anor* HMA 21/20; *Deputy Sheriff, Chinhoyi*

v *Appointed Enterprises & Ors* HH 450/13; *First Mutual Investments (Pvt) Ltd* v *Roussaland Enterprises (Pvt) Ltd t/a Third World Bazaars & Ors* HH301/17 and also the Supreme Court judgment in *Harold* (*supra*).

With regards the above divergent approaches of the High Court, Garwe JA (as he then was) had occasion to sound a caution in *Cuthbert Elkana Dube* case and re-emphasised the binding authority of *Madzivire* case. The learned Judge of Appeal stressed, at paragraphs 36 and 38, that "the conflict in the High Court on this aspect was completely unnecessary" and confirmed that the proposition in *Madzivire* case "represents the current status of the law in this country". The need to make this confirmation appears to have come from His Lordship's realization that none of the cases which adopted the liberal approach had adverted to, let alone mentioned *Madzivire* case.[1]

In my view, the starting point is to recognize that directors or any other persons entrusted with the management of the affairs of their entities are fiduciaries who must act in the best interests of the company or entity which they represent or act for. See *Burlows Manufacturing Co. Ltd & Others* v *RN Barrie (Pty) Ltd & Others* 1990 (4) SA 608 (C) at 610-611; *Atlas Organic Fertilizers (Pty) Ltd* v *Pikkewyn Ghwano(Pty) Ltd* 1981 (2) SA 173 (T) at 198; *Sibex Construction (SA) (Pty) Ltd* v *Injectaseal CC* 1988 (2) SA 54 (T) at 65; *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378 at 388. In *Howard* v *Herrigel* 1991 (2) SA 660 (A) at 678 the court succinctly states the principle in the following terms:

> "...at common law, once a person accepts an appointment as a director, he becomes a fiduciary in relation to the company and is obliged to display the utmost good faith towards the company and in his dealings on its behalf."

Authors Cassim *et al* in their seminal work *Contemporary Company Law* 2nd ed, 2012 (Juta) at p514 state that:

> "The fundamental and paramount or overarching duty of company directors is to act *bona fide* in what they consider – and not what the court may consider – to be in the best interests of the company as a whole, and not for a collateral purpose."

This position has now been codified in the *Companies and Other Business Entities Act* [*Chapter 24:31*]. Section 54 thereof provides:

> "**54 Duty of care and business judgment rule**
>
> (1) Every manager of a private business corporation and every director or officer of a company has a duty to perform as such in good faith, in the best interests of the registered business entity, and with the care, skill, and attention that a diligent business person would exercise in the same circumstances."

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[1] At paragraph 35.

As stated above, the company's authority is required for the purpose of binding it to all the consequences of the litigation including payment of costs. And at times the consequences may indeed be catastrophic. Once it properly authorizes its participation in the litigation, it is estopped from denying liability once such adverse orders are made against it. This also protects the other parties in the litigation. The decision therefore needs to be carefully and informedly made.

For that reason therefore, directors of an entity may not authorize, on behalf of the company, participation in litigation whose existence and facts thereof they are not aware of at the time of the authorization, and whether the company will have any material interests in that litigation. To do so would be to act without due diligence and constitutes a breach of their duty to act in the best interests of the company for purposes of expediency. The purpose of the board properly sitting to authorize a particular litigation or to be involved in such litigation is to consider whether there are any interests of the entity that may be served by instituting or defending the litigation. It is also to carefully consider the consequences of the litigation. Such an exercise is a fiduciary duty of the directors to which they may not divest themselves of by giving a *carte blanche* authority to the individual director or officer. The duty is inextricably tied to the office of a director who may delegate the duty only in very strict and exceptional circumstances but not totally abdicate on it.[2] Thus, to grant a particular director or officer blanket authority to exercise discretion on whether to institute or defend litigation whenever it arises in future is to delegate the function which must be that of a properly constituted board to such individual director or officer. That, the board cannot do. The decision to participate in litigation must be carefully considered, in the best interest of the entity, only when the cause has arisen and the facts thereof known to the board for its proper exercise of discretion. The directors can only discharge this paramount duty to take decisions on behalf of the company and in its best interests when they are properly informed of all the facts relating to the case.

Courts are called upon to strictly enforce fiduciary duties of company directors. On this proposition and citing the case of *Parker v McKenna* (1874) LR 10 Ch App 96 Casim *et al* (*supra*) emphasize the duty of the court in strictly holding directors to their fiduciary duties as follows:

> "The general principle is clear: a director is a fiduciary and as such his or her paramount and overarching duty is to act in good faith and for the benefit of his or her company. The basic

[2] McLennan J S "No Contracting Out of Fiduciary Duty" 1991 *South African Mercantile Law Journal* 86-88.

> duty of loyalty is unbending, inflexible and 'must be applied inexorably by [the] court'…. For this reason, a lax attitude towards the observance of fiduciary duties must be avoided. **The courts must continue to insist on a strict and scrupulous observance of fiduciary duties**." (bold for emphasis)

From the foregoing, I venture to state that a company may not grant general authority to a director or employee to represent it in future court cases that have not yet arisen at the time when the authority is granted. That would be a breach of the directors' fiduciary duty to the company to act diligently and in its best interests both in terms of the common law and section 54 of the *Companies and Other Business Entities Act* [*Chapter 24:31*].

On the facts of this case the matter does not end there, however. The long history of this case as illustrated in the introductory paragraphs above shows that the instant case is inextricably linked to all the litigation that was between the parties both in the Labour Court and in this Court. It is axiomatic that once one secures a court order, what follows is execution. This case involves execution of an order against the Applicant following the long-drawn litigation between the parties as explained. It cannot be argued therefore that the board of the Applicant did not envisage this stage in litigation being reached between the parties. I thus hold the view that when the deponent was authorized to represent Applicant against the 1st Respondent's litigation, it must also have contemplated all stages of the litigation up to execution, which includes the present matter. Thus, the authority granted at the inception of litigation between the same parties suffices for all the stages of such litigation, including the present case. In the result, the preliminary point ought to be dismissed.

On the merits, for an applicant to succeed in an application for interim relief, the following requirements must be met:

i. That the right which he or she seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established though open to some doubt;
ii. Well grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he were to ultimately succeed in establishing his/her right;
iii. The balance of convenience favours the granting of the interim relief; and
iv. That the applicant has no other satisfactory remedy.

See: *Airfield Investments (Pvt) Ltd* v *The Minister of Lands, Agriculture & Rural Resettlement and 4 Others* 2004(1) ZLR 511 (S).

The dispute in the present case revolves around the interpretation of the order of the Labour Court as between the parties. It also relates to what the legal effect of the payment on

21 July 2021 of RTGS60 000 by Applicant into first Respondent's account is, taking into account the Labour Court judgment. The question is whether that payment has extinguished the Applicant's indebtedness to the first Respondent in light of the *Zambezi Gas* case.

As already stated, it is common cause that the deed of settlement between the parties was signed on 11 April 2018 and the first installment was due on 28 February 2019. It is also common cause that the order of the Labour Court was made on 17 July 2019, which order incorporated the deed of settlement between the parties. The operative part of the order states as follows:

> **"IT IS ACCORDINGLY ORDERED AS FOLLOWS:**
> 1) The dispute be and is hereby terminated by consent of the parties.
> 2) The respondent shall as more fully reflected in the deed of settlement, pay to the Applicant the sum of US$60-000 (sixty thousand United States Dollars) in damages.
> 3) The payment shall be made in three (3) equal installments of US$20 000 <u>with effect from February 2019</u>.
> 4) Each party to bear its own costs." (my emphasis)

Clearly, the Applicant owed an obligation to pay damages in the sum of USD$60000 to the first Respondent and this has not been disputed by the Applicant who has not appealed the judgment of the Labour Court, and further, its conduct of paying in RTGS on 21 July 2021 evinces that position. There are now three crucial dates in the determination of whether this obligation has been affected by the *Zambezi Gas* case. It is trite that if the obligation arose on 11 April 2018 (the date of signing of the deed of settlement) then it stands to be paid in RTGS on a rate of one is to one with the USD. Yet if it arose on 28 February 2019 (the date when the first installment was due and payable) or some other later date when the Applicant would have been placed in *mora*, then the debt would be payable in USD at interbank rate because this was after the effective date of 22 February 2019.[3] Finally, if the order of the Labour Court took effect on 17 July 2021 without retrospective effect as it did, again, USD denominated debt would be payable.

I make no finding on this question herein, for to do so would be to pre-empt judgment of this court in the pending matter between the parties for declarator in HC6274/21. I have only explored the above possible arguments for the purpose of demonstrating that there will be indeed a live dispute before the court which will determine the application for a *declaratur*. To that end, the Applicant has therefore demonstrated a *prima facie* right for the granting of the interim relief sought.

[3] *Maranatha Ferrochrome (Pvt) Ltd v RioZim Ltd* HH 109/21.

With regards apprehension of irreparable harm and availability of other satisfactory remedies, it has been argued on Applicant's behalf that the first Respondent is a man of straw and narrow means such that should the Applicant's property be removed and sold in execution, that will seal the applicant's fate for the reason that first Respondent has no means to compensate for losses incurred. He himself did not contest this averment neither did he take the court into his confidence as to how such possible losses may be obviated.

Finally, I find merit in the need to move slowly rather than hastily in this matter. On the facts of the case, the balance of convenience favours the staying of execution pending the hearing of the application for a declarator which will definitively spell out the positions and rights of the parties. If the first Respondent succeeds then execution may still resume. There will therefore be no prejudice to the first Respondent.

DISPOSITION

In the result, it is accordingly ordered that:

1. The 2nd Respondent be and is hereby ordered to stay execution against the property of the Applicant pursuant to the writ issued under case number HC6981/21 pending finalization of case number HC6274/21.
2. The 2nd Respondent is ordered not to remove from Applicant's premises the Applicant's property attached on 17 November 2021 pending finalization of HC6274/21.
3. Costs to be in the cause.

Lunga Attorneys, Applicant's legal practitioners