

TONY RENATO SARPO
versus
WAYNE WILLIAMS
and
REGIS MABURUTSE
and
MATEBELELAND ENGINEERING (PVT) LIMITED

HIGH COURT OF ZIMBABWE
MHURI J
HARARE, 15 May and 18 August 2023

Opposed Application

Advocate *R T Mutero*, for the applicant
Mr *W T Mufuka*, for the respondents

MHURI J: A brief background of this matter is that on 14 February 2017 applicant filed an urgent chamber application seeking provisionally an order interdicting respondents and any other persons acting through them from interfering with or otherwise disrupting Applicant from collecting his assets from 3rd respondent's premises at any given time and also that 2nd respondent be interdicted from issuing threats of harm to applicant and preventing or disrupting applicant from carrying out his activities at 3rd respondent's premises.

On the 1st March 2017, this Court issued the Provisional Order in a judgment HH 131/17. Aggrieved by this judgment, the respondents appealed to the Supreme Court and on 11 September 2017 the Supreme Court issued an Order by consent:

- “1. The appeal be and is hereby allowed with costs.
2. The judgment of the court *a quo* is set aside and substituted with the following:
“The application is struck off the roll with costs”.

After the matter had been struck off the Roll by the Supreme Court, on 12 July 2021, applicant filed his answering affidavit to respondent's notice of opposition that was filed on 17 February 2017. Thereafter after filing of Heads of argument by the parties, the matter was

set down on 15 May 2023 as the return date of the Provisional Order issued on 1st March 2017.

On the hearing date, counsels for both parties indicated they had preliminary issues which needed to be determined first before delving into the merits.

Applicant's issues, two in number were:

1. Lack of authority on the part of 1st respondent to depose the opposing affidavit and to represent 3rd respondent.
2. 1st respondent's opposing affidavit not properly attested by a Commissioner of Oaths.

Respondent's issues two, in number, were:

1. The matter is improperly before the court as no leave of the court was sought to re-enrol it after it had been struck off by the Supreme Court.
2. Applicant's heads of argument are fatally defective as they do not contain the factual basis upon which the applicant's case is based.

Turning to applicant's points, firstly it was submitted that 1st respondent did not have the authority to represent and depose an affidavit in opposition on behalf of 3rd respondent, it being a trite legal position that a company can only act through its Board of Directors and the Board being the one that institutes litigation.

Reliance was made on the cases of:

1. *Madzivire vs Zvarivadza* 2006(1) ZLR 514 at 516 B-E.
2. *Harold Crown & Anor vs Energy Resources Africa Consortium P/L & Anor* SC 3/17

It was submitted that without such authority or board resolution, the effect of this irregularity is that it renders the deposition invalid and if the deposition is invalid, there is no proper notice of opposition before this Court.

Secondly, it was submitted that the date 17 February 2017 of deposition of the opposing affidavit was machine generated and was not endorsed by the Commissioner of Oaths. As a result, it was submitted there was no proper notice of opposition, as the opposing affidavit is an irregular process. Applicant urged the Court to find the points with merit and uphold them.

Applicant's prayer was that in view of these points, the application must be treated as unopposed.

Reliance was made on the cases of:

1. *Twin Castle Resources vs Paari Mining Syndicate & 3 Ors* HH 153/21

2. *Mike Mandishayika vs Maria Sithole* HH 798/15
3. *Ndoro & Anor vs Conjugal Enterprises (Private) Ltd & Anor* HH 814/22

In response, 1st respondent's counsel submitted that in this day and age where we have computers, there is no harm in having a date printed for as long as it is commissioned on the same date. No evidence was placed before the Court by applicant to show that 1st respondent and the Commissioner of Oaths did not contemporaneously sign the affidavit in question. The advance organizer of the signature section of the affidavit THUS DONE AND SWORN TO AT HARARE THIS 17TH DAY OF FEBRUARY 2017 means the deponent took the oath and signed the affidavit before a Commissioner of Oaths on the same day, so submitted 1st respondent. 1st respondent distinguished the case of *Mike Mandishayika v Maria Sithole supra* on the basis that in the above case the deponent to the affidavit and the Commissioner of Oaths appended their signatures to the document on different dates. His prayer was that the point *in limine* be dismissed.

As regards the 2nd point, 1st respondent submitted that it is meritless and must be dismissed as applicant broke away and fell out as a director and shareholder of 3rd respondent. As a result of the break away, 1st respondent remained as the only director and new Board members were then appointed and it was no longer necessary to involve applicant in the passing of the resolution authorizing 1st respondent to represent 3rd respondent in this matter. He submitted further that his failure to attach the resolution at the time the affidavit was filed should not be held as fatal.

He relied on the cases of:

1. *African Banking Corporation of Zimbabwe Ltd T/A BANC ABC vs PWC Motors & Ors* HH 123/12
2. *Tianze Tobacco Company (Private) Limited vs Muntuyendwa* HH 626/15
3. *Dawah P/L vs Wildale Ltd & Ors* HH 235/22
4. *Dube v Premier Service Medical Aid Society & Anor* SC 73/19

and by a notice dated 19 May 2023, 1st respondent filed two resolutions, one dated 20 July 2016 accepting applicant's resignation and the other dated 16 February 2017 authorizing 1st respondent to represent 3rd respondent in all court processes.

As regards the first point, the case of *Madzivire vs Zvarivadza (supra)* clearly states the legal position.

The position was reiterated with approval in the case of:

1. *Harold Crown*
2. *Portriver Investment (Private) Limited vs*
 1. *Energy Resources Africa Consortium (Private) Limited*
 2. *Energy Resources Africa (Private) Limited (supra)*

to the effect 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. See also the case of *Cuthbert Elkana Dube vs Premier Service Medical Aid & Anor* SC 73/19. The case of *Beach Consultancy (Private) Limited vs Obert Makonya & Anor* HH 696/21 puts it succinctly that 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.

In the case of *Elkana Dube v Premier Medical Aid Society* (supra) GARWE JA (as he then was) clarified the point when he stated at page 14 paragraph 38 of the cyclostyled judgment that:

“.....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.” (Emphasis added)

In casu, 1st respondent states in paragraph 1 of his opposing affidavit:

“I, WAYNE WILLIAMS, on my own behalf and in my capacity as the 3rd respondent’s director vested with due authority by the 3rd respondent hereby make oath and state

I have read and understood the applicant’s founding papers and wish to respond thereto as follows.....”

The opposing affidavit was filed on the 17th February 2017 and the answering affidavit in which the issue of 1st respondent’s authority to represent 3rd respondent was raised was filed on the 22nd of June 2021. So as far as 2021, 1st respondent was aware that his authority is challenged. He did not address this in his heads of argument neither did he produce the resolution on the day of hearing (15 May 2023). He only filed it on 19 May 2023 when he filed his supplementary heads of argument.

One wonders why, even following the remarks by GARWE JA in the *Elkana Dube's* case, it took 1st respondent so long a period to produce the said resolution only to produce it when judgment was reserved on the points raised. I agree with applicant's submission that the filing of the said resolution was irregularly done, *moreso*, when applicant is challenging same. To that end, I will grant applicant's request that the resolution be expunged from the record.

1st respondent's alternative submission is that by virtue of him representing himself, the matter remains opposed despite lack of authority.

I now turn to deal with the second point raised by applicant. 1st respondent deposed to one affidavit on behalf of 3rd respondent and himself. By virtue of this, what befalls 3rd respondent will equally befall 1st respondent. It is noted that 2nd respondent filed nothing.

In *Mike Mandishayika vs Maria Sithole (supra)* the position was clearly stated, which position was quoted with approval in the case of *Twin Castle Resources (Pvt) Ltd vs Paari Mining Syndicate & 3 Ors (supra)* to the effect that:

"An affidavit is a written statement made on oath before a commissioner of oaths or other person authorized to administer oaths. The deponent to the statement must take the oath in the presence of the commissioner of oaths and must append his or her signature to the document in the presence of such commissioner. Equally the commissioner must administer the oath in accordance with the law and thereafter must append his or her signature into the statement in the presence of the deponent.

The commissioner must also endorse the date on which the oath was so administered.

These acts must occur contemporaneously."

In the *Twin Castle Resources (Pvt) Ltd (supra)* matter, emphasis was made on the words, "The Commissioner must also endorse the date on which the oath was so administered. The acts must occur contemporaneously". I am also inclined to put emphasis on the same words in particular the words "...must also endorse the date These acts must occur contemporaneously". A computer-generated date in my view makes it difficult to know whether the deponent appeared before the commissioner of oaths on the same date printed on the affidavit. As submitted by applicant, correctly so in my view, what is key is that the oath, signing and date should happen contemporaneously. The date portion must be blank so that the Commissioner of Oaths endorses the date.

I am persuaded and hereby reiterate the remarks made by DEME J in the case of *Bruce Ndoro & Fungayi Ndoro vs Conjugal Enterprises (Private) Limited supra*, in which he dealt with a point on all fours with the one raised *in casu*. He aptly remarked thus:

“*In casu*, the opposing affidavit does not bear a computer-generated date just like the opposing affidavit in the case of “*Twin Castle Resources*” *supra*. The opposing affidavit in the relevant portion, simply states:

“Thus, done and dated at Harare this 23rd day of September 2019”.

The commissioner of oaths went to append his signature. The date for the administration of the oath remains a mystery. One wonders whether the oath was administered on the date specified by the computer or on a future date.

.....

It is apparent that one cannot verify whether the deponent took the requisite oath if an affidavit is commissioned in this way. The affidavit prepared under such circumstances becomes incredible.” (underlining my own emphasis)

In casu, I am persuaded that the affidavit was equally afflicted as was the affidavit in the *Ndoro case supra*. The point *in limine* is therefore upheld. This means there is no opposing affidavit in this matter.

In view of the above findings on the points as raised by applicant, it is no longer necessary for me to proceed to consider 1st respondent’s points.

There being no opposition to the application, I shall proceed to deal with it as unopposed.

On the 1st March 2017 this Court issued a Provisional Order whose interim relief was that pending determination of this matter, the applicant is granted the following relief:

- Respondents and any persons acting through them be and are hereby interdicted from interfering with or otherwise disrupting applicant from collecting his assets from 3rd respondent’s premises.
- 1st and 2nd respondents shall pay costs of suit.

The application is before me for the confirmation or discharge of the Provisional Order. As found earlier that the application proceeds unopposed, I will confirm the Provisional Order in terms of the final order as amended in the Draft Order. It is therefore ordered that:

The Provisional Order granted on 1st March 2017 be and is hereby confirmed.

Respondents and any persons acting through them be and are hereby interdicted from interfering with or otherwise disrupting applicant from collecting his assets as listed hereunder from 3rd respondent’s premises, or from the possession of any of the respondents at any given time.

LIST OF T SARPO ITEMS TO COLLECT FROM MSASA (PAGES 22-24 OF THE APPLICATION)

1. CONTAINER

2. ITEMS IN CONTAINER

- 1 x Hydraulic Ram
 - 2 x Landcruiser Seats
 - 4 x Shortwheel base rms
 - 1 x Toyota Backboard Cover
3. Leather Top Desk Set & Chairs
 4. Boardroom Table & chairs
 5. 2 x Brand New Small Fridges – Still in boxes
 6. 1 x Bar Fridge
 7. Glassware in Bar Cupboards
 8. 1 x Teak Case – (behind bar)
 9. Lounge Suite with cushions & coffee table
 10. 4 x New Desktop Computers – printers + UPS
 11. Hothfield Ent – Fiscal Machine
 12. Peppy Motors office/administration documentation
 13. Landcruiser Winch
 14. Electric Hoist
 15. 1 x Perkins Engine
 16. Mobile Crane
 17. Canopy Moulds + Canopies & racks
 18. Landcruiser Short Wheel Base & all body parts
 19. Boat
 20. Mercedes – Mr Musariri
 21. Hilux Double Cab – Chief Charumbira
 22. Vehicle Ramp
 23. Welding Plant/Spot Welder
 24. Tandem Tractor – yellow
 25. Scaffolding
 26. Spray Booth
 27. Mercedes CLS63 Parts
 - = Left Hand Tail Lamp
 - = Right Hand Tail Lamp
 - = Left Hand View Mirror

- = Complete paneling from boot
- = Boot Lock
- = Car Cover
- 28. Toyota Hilux D/Cab Parts
 - = Rear Bumper
 - = Right Hand Door Mirror
 - = Left Hand Door Mirror
- 29. Salini Hilux's
- 30. 3 x Sets Oxygen & Acetlelyne Cylinders complete
- 31. 1 x Oxygen Cylinder
- 32. 2 x Acetylene Cylinders
- 33. Battery Charger – Workshop Spec
- 34. Cell Phone & sim card 0772 272 308
- 35. Office Cabinet
- 36. Porta Power
- 37. 1 x Compressor Nozzle
- 38. 2 x Gauges
- 39. 4 x Cutting Torches
- 40. 3 x Adtor handles
- 41. 8 x Nozzles
- 42. 1 x Air Hose Gun
- 43. 1 x Cutting Torch Complete with hose
- 44. 1 x POP Rivet Gun
- 45. 1 x Tool Kit – Panelbeating
- 46. 1 x Chain Block (1 tonne)
- 47. 1 x Air Line
- 48. 1 x Extension
- 49. 1 set Drill Bits (1-10mm)
- 50. 1 x Air Compressor
- 51. 1 x Socket Set (8-32mm)
- 52. 1 x Pressure Gauge
- 53. 1 x Spray Gun (medium duty)
- 54. 1 x Combination Spanner (6-32mm)

55. 1 x Rubber Hammer
 56. 1 x Polisher Set
 57. 1 x Spray Gun
 58. 1 x Hack Saw (2 blade)
 59. 1 x Backing Pad
 60. 1 x 10m Tape Measure
 61. 1 x Adaptor Set (compressor)
 62. Engine Lifter (Mobi Jack)
 63. 3 x Workshop Benches
 64. Mr Sarpo Snr. Tools – (Workshop Tools Inventory)
Including “Annexure 1 & Annexure 3”
 65. Shelves
 66. Landcruiser Bumper, Roof & Black Table
 67. Trunk Tool Box Contents
“Annexure 2”
 68. Drill Machine
- 2nd respondent be and is hereby interdicted from issuing threats of harm to applicant and from preventing or disrupting applicant from carrying out his activities and discharging his functions at 3rd respondent.
 - 1st and 2nd respondent shall pay costs of suit on a legal practitioner and client scale.

Mutamangira & Associates, applicant’s legal practitioners

Thompson Stevenson & Associates, respondent’s legal practitioners