ABAZIYO CONSULTING ENGINEERS (PVT) LTD

Versus

CITY OF BULAWAYO

And

SHERIFF OF THE HIGH COURT OF ZIMBABWE N.O.

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 15 MAY 2023

Opposed Application

N. Ncube for the applicant
P. Ncube for the 1st respondent
No appearance for 2nd respondent

KABASA J: This is an opposed application in which the applicant sought the following order:

> "1. The applicant be and is hereby declared to be the legal owner of stands 14786, 14787 and 14788 Selbourne Park, Bulawayo.
> 2. The cancellation of the agreement of sale entered into between the applicant and the City of Bulawayo over the purchase and transfer of stands 14786, 14787 and 14788 Selbourne Park, Bulawayo to be declared unconstitutional, unlawful, null and void and of no force and effect and is set aside.
> 3. The City of Bulawayo's decision to repossess and sell applicant's stands 14786, 14787 and 14788 Selbourne Park, Bulawayo is hereby declared unconstitutional, unlawful, null and void and of no force and effect and is set aside.
> 4. The City of Bulawayo be and is hereby interdicted from repossessing, selling and/or advertising the applicant's stands 14786, 14787 and 14788 Selbourne Park, Bulawayo.
> 5. Respondents shall pay costs of suit on an attorney – client scale."

The application was opposed. In opposing the application the 1st respondent raised two points *in limine*. However at the hearing of the matter *Mr P. Ncube,* counsel for the 1st respondent argued the point on *locus standi,* an indication that this was the only point *in limine* counsel was seeking a determination on.

After hearing the parties I upheld the point *in limine* and proceeded to strike the application off the roll with an order for punitive costs. This decision was handed down in an *ex tempore* judgment.

The parties have not asked for written reasons but I decided to provide them all the same. These are the reasons.

The applicant's founding affidavit was deposed to by one Danisa Zulu who had this to say.

> "I am the applicant's director and duly authorized to depose to the affidavit by virtue of a shareholders resolution attached hereto and marked annexure 'A'."

The applicant being a body corporate with a legal persona had to be represented. It was in fulfillment of this legal requirement that Danisa Zulu deposed to the founding affidavit and sought to show what authority he had to do so.

In opposing the application, the 1st respondent's chamber secretary deposed to an opposing affidavit wherein she took issue with the fact that the deponent to the applicant's founding affidavit alluded to the fact that he was authorized to litigate by virtue of a resolution and directed the other party to "Annexure A" being such resolution. Annexure A was however not a resolution but a document which appears to be a bill statement.

The deponent to the applicant's founding affidavit filed an answering affidavit and in response to the matter which the 1st respondent had taken issue with said.

> "No issues arise save to state that I am duly authorized to depose to this affidavit on behalf of the applicant."

Counsel for the 1st respondent contended that the applicant stands or falls by his founding affidavit. The founding affidavit expressly stated the authority applicant was relying on in deposing to the founding affidavit. Such resolution ought therefore to have been attached in line with the assertion made in the founding affidavit.

Counsel relied on the case of *Muchini* v *Adams* 2013 (1) ZLR 67 (S) for this proposition. In that case ZIYAMBI JA had this to say:

> "It is trite that an application stands or falls on the averments made in the founding affidavit. See Herbstein and Van Winsen *Civil Practice of the Supreme Court In South Africa* 3ed where the authors state:

> "The general rule however, which has been laid down repeatedly is that an applicant must stand or fall by his founding affidavit and the facts alleged therein, and that although sometimes it is permissible to supplement the allegations contained in that affidavit, still the main foundation of the application is the allegation of facts stated therein, because these are the facts which the respondent is called upon either to affirm or deny. If the applicant merely sets out a skeleton case in his supporting affidavit any fortifying paragraphs in his replying affidavit will be struck out."

As regards the importance of a resolution granting authority to act, counsel relied on the case of *Madzivire and Ors* v *Zvarivadza and Ors* 2006 (1) ZLR 514 (S) where CHEDA JA had this to say:

> "It is clear from the above that a company, being a separate 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 legal principle, which the courts cannot ignore. … The fact that the first appellant is the managing director of the fourth respondent 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." (See also *Crown and Anor* v *Energy Resources Africa Consortium (Pvt) Ltd and Anor* SC-3-17, *Mall (Cape) (Pty) Ltd* v *Merine Ko-operate Bkp* 1957 (2) SA 347 (*C*).

In the absence of such resolution there was no application before the court, so counsel argued. Counsel consequently prayed for the dismissal of the application with punitive costs. The punitive costs were justified in light of the fact that the applicant had an opportunity to address the issue when it was raised by the 1st respondent but chose not to.

Counsel however conceded that in the event that the court was persuaded by his argument, the appropriate order would be a striking off of the matter and not a dismissal as the court would not have based the decision on the merits.

In response to counsel for the 1st respondent's contention, *Mr N. Ncube* for the applicant conceded that it was a mistake to have referred to "Annexure A" as the resolution which authorized the deponent to the founding affidavit to so act on behalf of the company as "Annexure A" did not speak to that.

Counsel however urged the court to be cognizant of the fact that what had to be looked at was whether it was the applicant litigating and not some unauthorized person. Danisa Zulu signed the agreement of sale in 2008 and was duly authorized to do so on behalf of the

applicant. It follows therefore that he had the requisite authority to litigate on behalf of the applicant, so counsel argued.

The 1st respondent had not shown that the deponent was on a frolic of his own and that it was not the applicant litigating. Counsel relied on a judgment by MATHONSI J (as he then was) for the proposition that a resolution is not always necessary for as long as there is no basis to hold that the deponent to the founding affidavit is not who he says he is and consequently derives authority from that position.

In *Tian Ze Tobacco Company (Private) Limited* v *Muntuyedwa* HH-626-15 MATHONSI J had this to say:

> "The respondent has not shown that it is not the applicant that is litigating but an unauthorized person. All he wants is a dismissal of the application because a resolution of the board of directors of the applicant has not been produced.
>
> It is now fashionable for respondents who have nothing to say in opposition to question the authority of the deponent of a founding affidavit in order to appear to have a defence. I stand by what I stated in *African Banking Corporation of Zimbabwe Ltd t/a BancABC* v *PWC Motors (Pvt) Ltd and Ors* HH-123-13 that the production of a company resolution as proof that the deponent has authority is not necessary in every case as each case must be considered on its merits. 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."

Mr N. Ncube pleaded with the court to give the deponent the benefit of the doubt and hold that he was authorized to depose to the founding affidavit and it was therefore the applicant which was litigating.

I must say a distinction must be made between a deponent who merely states his position in the company and proceeds to say it is by virtue of the said position that he is authorized to depose to an affidavit and one who states his position but specifically anchors the authority to litigate on a resolution by shareholders. In *Zimbabwe Open University v Magaramombe & Anor* HH61-2002 KUDYA J (as he then was) held that insisting on a resolution authorizing the deponent to file the founding affidavit in a matter where the parties had been involved in previous litigation and the deponent had filed founding affidavits on behalf of the applicant was carrying formality too far. I would have said the same *in casu* if those were the facts but they are not. The fact that some 15 years ago the deponent had signed the agreement of sale between the applicant and the 1st respondent is no reason to hold that he

has the authority to litigate on the applicant's behalf. If he had by virtue of such previous engagement he ought to just have said so and leave it there.

Where the authority is anchored on a resolution such resolution ought to be attached. More so in a case where the respondent had raised the issue regarding the non-attachment of such resolution. The court and the respondent are being invited to look to the resolution for the deponent's authority. The deponent to the founding affidavit ought therefore to have attached the resolution as per the assertion in such affidavit. This is not putting emphasis on form rather than substance for the simple reason that the deponent had to show on whose authority he was deposing to the affidavit. He stated such authority and ought therefore to attach it as clearly stated in the founding affidavit.

The applicant had an opportunity to address the issue in an answering affidavit but chose not to. The answering affidavit could have acknowledged the "mistake" in referring to "Annexure A" as the resolution when it was not and then attach the resolution. To merely repeat that the deponent has authority and not specifically address the very resolution issue upon which such application was anchored leaves the court wondering whether such resolution existed or the deponent was merely stating that which he believed was necessary to state in order to clothe him with the requisite authority.

If the deponent merely made such an assertion with no intention of availing the said resolution it begs the question as to whether he has such authority. Was he caught in an untruth when the respondent raised the issue of the "Annexure A" not being what it was purported to be and instead of meeting that issue in the answering affidavit conveniently decided to gloss over it?

This, in my view, was not an issue which could just be glossed over. To gloss over this and make as if it was a non-issue makes one doubt whether the deponent is authorized to act on behalf of the applicant or he is on a frolic of his own.

I am not persuaded to hold that the 1st respondent's insistence on the resolution which the deponent himself anchored the application on is indicative of a litigant who has nothing to say and therefore hiding behind the resolution issue in order to appear as if it has a defence.

In any case the thrust of the application relates to the re-possession of pieces of land unprocedurally and in violation of the *audi alteram partem* rule and the 1st respondent's

contention is that the agreement stipulated what the applicant was supposed to do and the time frames in which that was supposed to be done, the applicant breached these times and due notice was given of the breach and the consequences thereof. The re-possession was done after such notifications which were allegedly met with no action to rectify.

I merely gave a brief background of the matter not because the court is considering the merits but just to illustrate the point that it cannot be said the 1st respondent is not prepared to deal with the matter on the merits because it has nothing to say. It has shown that it has something to say in response to the applicant's application.

I was consequently persuaded by counsel for the 1st respondent's argument that with the anchoring of the application on a resolution authorizing the litigation, the failure to then produce such resolution cannot be ignored. The applicant stands or falls with the averment made in the founding affidavit. In the absence of such resolution the application's foundation collapses and with such collapse the application likewise collapses.

The matter need not have ended before it started had the applicant attended to the issue once it was raised by the 1st respondent. Ignoring the 1st respondent's legitimate concern unnecessarily stalled the proceedings, leaving the parties to fight on some future date when such was avoidable.

It is because of this reason that I am persuaded to award punitive costs. A party who fails to address a legitimate issue resulting in a matter stalling ought to be visited with punitive costs as a sign of the court's displeasure.

Costs are entirely at the discretion of the court (*Kerwin* v *James* 1958 (1) 400 (SR), which discretion must be exercised judiciously.

A case for punitive costs was made. It is for the foregoing reasons that I struck the matter off the roll, with costs on attorney-client scale.

Mathonsi Ncube Law Chambers, applicant's legal practitioners
Coghlan & Welsh, 1st respondent's legal practitioners