ONE UNION AVENUE OWNERS ASSOCIATION
versus
MIDLANDS STATE UNIVERSITY
and
ATLANTA DRILLING (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 20 May & 30 June 2021

Urgent chamber application

C.C. Mumba, for applicant
Z. T. Zvobgo, for 1st respondent
Mrs *T. Chinganga*, for 2nd respondent

TAGU J: This is an urgent chamber application for an interdict against the 1st and 2nd Respondents, to forthwith stop the drilling and installation of a borehole at a certain piece of land situate in the District of Salisbury called Stand 16876 Salisbury Township, measuring 5 829 square metres (the property) pending a hearing and determination of the dispute between 1st Respondent and other co-owners of the property, as contemplated by the Notarial Deed giving rise to the undivided shares and exclusive rights of occupation in the said property, and/or the determination by a competent court of the dispute.

The Applicant, ONE UNION AVENUE OWNERS ASSOCIATION is an association constituted in terms of the laws of Zimbabwe with full capacity to institute or defend legal proceedings. First Respondent is a public university registered as such in terms of the Midlands State University Act [*Chapter 25.21*] [Act No. 4 of 1999](MSU). The second Respondent is a company duly incorporated in terms of the laws of Zimbabwe. Over the years Midmac Investments (Private) Limited transferred shares to different co-owners at Stand 16876 Salisbury Township. Currently there are seven (7) different entities which own various percentages of the twenty-four (24) undivided shares which are coupled with exclusive rights of occupation at the said Stand. One of them is the first Respondent. A dispute is said to have arisen between the first Respondent and

other co-owners of the property as contemplated by the Notarial Deed giving rise to the undivided shares and exclusive rights of occupation in the said property in that on the 14th May 2021 Mr. Alan Ivor Cordner McCormick, the deponent to the Applicant's founding affidavit who is the director and chairperson in Midmac Investments (Private) Limited received an anonymous tip off that the first Respondent intended to drill a borehole at the property on 15th May 2021. Applicant and other co-owners are said to be opposed to it. The deponent attended at the property on 15 May 2021 but no one attempted to drill or install a borehole as indicated. On the 16th of May 2021 the deponent was called around 1000 hours by security personnel at the premises advising that first and second Respondents were commencing to drill the borehole. He reported to the police who turned him away advising that the matter was a civil matter. He contacted the Applicant's legal practitioners who advised that they were indisposed and would be available on Monday the 17th May 2021. The Respondents proceeded with the drilling of the borehole hence the urgent chamber application for an interdict to stop the drilling and the installation of the bore hole was filed on the 17th May 2021.

The relief sought is couched in the following terms-

"TERMS OF THE ORDER SOUGHT

That you show cause to this Honourable Court, why a final Order should not be made in the following terms:

IT IS ORDERED THAT:

1. The 1st and 2nd Respondents be and are hereby interdicted from proceeding with the drilling and installation of a borehole at a certain piece of land situate in the District of Salisbury called Stand 16876 Salisbury Township, measuring 5, 829 square metres. 1st Respondent is interdicted from making any other structural changes to any portion of the property pending:

a. A hearing and determination of the dispute between 1st Respondent and other co-owners of the property; as contemplated by the Notarial Deed registered against the said property; and/or
b. The determination by a competent court of the dispute.

2. The Applicant be and is hereby ordered to conduct a hearing and produce a determination on the dispute between 1st Respondent and other co-owners of certain piece of land situate in the District of Salisbury called Stand 16876 Salisbury Township, measuring 5, 829 square metres, within thirty (30) days of the Provisional Order being granted.
3. The 1st and 2nd Respondent be and is hereby ordered to pay costs of suit on a legal practitioner and client scale if they oppose this application.

INTERIM RELIEF GRANTED

Pending determination of this matter, the Applicant is granted the following relief:

1. The 1st and 2nd Respondents be and are hereby interdicted from proceeding with the drilling and installation of a borehole at a certain piece of land situate in the District of Salisbury called Stand 16876 Salisbury Township, measuring 5, 829 square metres.

SERVICE OF PROVISIONAL ORDER

> The service of the Provisional Order with the supporting urgent chamber application and annexures shall be effected on all Respondents by the Applicant's Legal Practitioners or alternatively by the Sheriff for Zimbabwe as follows:
> By Hand Delivery."

The Respondents strongly opposed the application. The Respondents raised three points *in limine*. The first point *in limine* was that of lack of authority to depose to the founding affidavit. The second point *in limine* was that the order sought is a *brutum fulmen*. The third point *in limine* was that of non-compliance with Rule 241. All the three points *in limine* were opposed by the Applicant. I will dispose of the points *in limine* first before dealing with the merits of the application.

LACK OF AUTHORITY TO DEPOSE TO THE FOUNDING AFFIDAVIT

The founding affidavit in this application was deposed to by Mr. Alan Ivor Cordner McCormick on behalf of the Applicant. The contention by the respondents is that they are surprised that Mr. McCormick proceeded to institute this application in the name of the Applicant without its authority. The argument being that the first Respondent became a member of the Applicant in 2017. When the 1st Respondent became a member it noticed that Mr. McCormick was running the Applicant as his personal entity. He operated without any committee and did not convene any general meetings as is required in terms of the Applicant's constitution and the notarial deed. The 1st Respondent took issue with the manner in which Mr. McCormick was operating the affairs of the 1st Respondent. The pressure exerted by the 1st Respondent resulted in two Annual General Meetings (AGM) of the members of the Applicant being held on 23rd June 2020 and 10th November 2020, respectively. It was then resolved that a management committee be established and elected to run the affairs of the Applicant. One of the 1st Respondent's officers Mr. Robert Kufa was appointed as a member of the management committee as admitted in paragraph 2 of Mr. McCormick's letter of 7th May 2021 which is attached to the founding affidavit as Annexure E2. It was argued that Paragraph 5.1 of the Applicant's Constitution provides that:

> "The Committee shall exercise all such powers and do all such acts and things as may be exercised or done by the Association, save and excerpt such acts and things as are specifically reserved by this Constitution to be done by the Association in a General Meeting."

The Respondents submitted that the import of the above quoted provision of the Applicant's Constitution is clear that the Applicant can only take action under two circumstances, either as directed by the Management Committee or as done pursuant to a resolution of the General

Meeting of the members of the Association. That means that Mr. McCormick must have been authorized to act for the Applicant in these proceedings either by a resolution of the Management Committee or by a resolution of the Applicant's General Meeting. In this case Mr. McCormick does not have the blessing of an AGM to act in bringing these proceedings. He also does not have the authority of the Management Committee to bring these proceedings on behalf of the Applicant. The Respondents said nowhere in his founding affidavit does Mr. McCormick allege that he has been authorized to bring these proceedings on behalf of the Applicant by its Management Committee. They said where one is deposing to an affidavit on behalf of a corporate body such as the Applicant, in the course of legal proceedings, it is an essential requirement for that person to expressly make the allegation that he is duly authorized to act for that corporate body. Without making such a crucial allegation the application is fatally defective to the extent that Mr. McCormick lacks the requisite authority to depose to the founding affidavit on behalf of the Applicant.

Besides, so the argument went, at 7.24am on Monday 17th May 2021, Mr. McCormick sent out an email to all Committee members, including Mr. Robert Kufa, concerning his grievances against the 1st Respondent. The email reads as follows in the last paragraph-

> "I have instructed my lawyer to get a court injunction this morning to stop them proceeding any further. Please can you all support me in this. I believe the smooth running of the association is at threat by the continued unilateral actions being taken by MSU."

The respondents, therefore, submitted that what stands out clearly from this email is that the decision to institute these proceedings is not that of the Management Committee, but rather, it is solely that of Mr. McCormick himself. The email therefore demonstrates that by the time that Mr. McCormick sent the email to the Management Committee he had already given instructions for the institution of these proceedings before seeking the authority of the Management Committee. Secondly, Mr. McCormick even used his own personal lawyer, and not the lawyers appointed by the Applicant to institute these proceedings. Further, no resolution was ever passed by the Committee to agree to the institution of the proceedings, let alone to authorize Mr. McCormick to represent the Applicant in such proceedings.

` In the circumstances, it was submitted that the interests advanced in this application are those of Mr. McCormick and not those of the Applicant. To that extend it was prayed that the application must fail because the deponent of the founding affidavit has not remotely satisfied the

Court that he has any ounce of authority to institute these proceedings in the name of the Applicant and to depose to the founding affidavit on behalf of the Applicant. The Respondents prayed for the dismissal of the application with costs.

In response to these submissions counsel for the Applicant referred the court to pages 7 and 8 of the application where the deponent said-

> "I am the current Chairperson for the Applicant and it is in that capacity that I depose to the present affidavit."

He said while the Committee has authority to act for the Association, nowhere is it stated that a General Meeting was required for purposes of these proceedings and the deponent's status as the chairperson has not been challenged. He therefore submitted that Mr. McCormick had the requisite authority to institute the present proceedings.

Applicant is a corporate board and a separate legal persona from its members. It is imperative that the deponent says he is authorized to depose to the founding affidavit on behalf of the Applicant. Nowhere did the deponent say he was authorized by the applicant to bring these proceedings. All he said is that he is the chairperson and that it was on that basis that he was deposing to the affidavit. In the case of *Jairos Jozzy Masango* v *Cephas Matambo and Duly's Motors a division of Dulys Holdings Limited* HH 139/16 at p 3 of the cyclostyled judgment MUREMBA J said-

> "I am in agreement with the applicant that the opposing affidavit is fatally defective as it lacks the necessary averments which Melvin Roy Sparrow ought to have made. **He must have stated who he is, what his relationship to the second respondent is and that he has the authority of the second respondent to depose to the affidavit on its behalf. He could have even attached proof of authority to do so…."** (my emphasis)

In casu the deponent did not state that he had authority to depose to the founding affidavit on behalf of the Applicant. All he said was that he was just the chairperson of the Applicant. An averment that he was authorized to depose to the founding affidavit on behalf of the Applicant would have sufficed. The Applicant being a corporate persona, a resolution authorizing the deponent to bring these proceedings would have been necessary. I therefore agree with the Respondents that the deponent to the founding affidavit lacked the necessary authority to institute these proceedings. They are defective.

THE ORDER SOUGHT IS A BRUTUM FULMEN

The application seeks to prevent the 1st Respondent from drilling and installing a borehole at the property. The Respondents' submission was that by the time that this application was instituted on Monday 17th May 2021 at 1646 hours, the process of drilling and installing the borehole was already complete. All that remained was the erection of a water tank and connection of the water tank to the plumbing system of the 1st Respondent's property, both of which are processes that are separate and distinct from the drilling and installation of the borehole.

Counsel for the Applicant submitted that the *brutum fulmen* occurred as a result of the Respondents' conduct in that they continued to drilling until late after they had been served with the application. Further, he submitted that the process of installing the borehole included connection to the electrical systems and demolition of other residents' buildings to install the tank hence the Respondents should be stopped.

In casu the application was filed on the 17th May 2021 at 1646 hours. In his email to the Management Committee Mr. McCormick acknowledged that the drilling of the borehole had already taken place on Sunday the 16th of May 2021. So it is true that by the time that the application was instituted on the 17th of May 2021 the process of drilling and installation of the borehole was already complete. The order which the Applicant seeks is therefore incapable of enforcement because the harm which the application purportedly sought to avert had already occurred. The order sought is therefore a *brutum fulmen*.

NON-COMPLIANCE WITH RULE NO. 241.

The Respondents said this application is defective because the Applicant used an incorrect form. Their contention being that the Rules of the High Court prescribe in Rule 241 that where a chamber application is intended to be served on an opposing party the application shall be in Form No. 29 with appropriate modifications. This means that the notice of motion that is used in chamber application must invite the respondent to oppose the application and advise the respondent of its procedural rights if it intends to oppose the application.

The counsel for the Applicant submitted that in terms of r 229 (c) the use of a wrong Form is not a basis for dismissal of an application. He said any prejudice occasioned was cured by the service on the Respondents and delay by the Registrar to set down the matter for hearing afforded the Respondents time to file their Notice of Opposition.

My reading of the file shows that the Applicant indeed used a wrong Form. Instead of using Form 29 with the appropriate modifications the Applicant used Form 29B. Be that as it may this is not fatal to the application. The failure to comply with the rules is condoned.

I will therefore uphold the first two points *in limine* and dismiss the last point *in limine*. The Respondents asked the court to dismiss the application with costs. However, I am of the view that the appropriate order is to remove this application from the roll of urgent matters. The court will use its discretion and will not visit the Applicant with costs.

IT IS ORDERED THAT

1. The application is struck of the roll of urgent matters.
2. There is no order as to costs.

Corious & Co. Attorneys, applicant's legal practitioners
C Z Attorneys, respondents' legal practitioners