WAVERLEY PLASTICS (PVT) LTD
versus
CBZ BANK LIMITED
and
STANBIC BANK LIMITED
and
FIRST CAPITAL BANK LIMITED
and
STANDARD CHARTERED BANK LIMITED
and
ARON VICO

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 12 & 17 July 2019

Urgent Chamber Application

S. M. Hashiti, with him *T. Mazikana*, for the applicant
V. Mhungu, for the first respondent
H. Mutasa with him *B. Ziwa* for the fifth respondent

ZHOU J: This is an urgent chamber application for an order interdicting the first, second, third and fourth respondents from honouring any instruction, payments, withdrawal of cash or any transaction whatsoever by the fifth respondent in respect of the bank accounts of the applicant or allowing or permitting the fourth respondent to operate the bank accounts in any manner whatsoever. The basis of the application, as appears from the founding affidavit deposed to by one Belynda Halfon (nee Cohen), is that the fifth respondent was dismissed from his employment as the applicant's manager. The final order sought is for the four banks "and any person acting through them" to be ordered to remove the fifth respondent from being a signatory to the applicant's bank accounts and to replace him with persons to be appointed by the applicant through its board of directors.

The application is opposed by the fifth respondent. A notice of opposition was filed on his behalf.

The fifth respondent raised objections *in limine* to the determination of the matter on an urgent basis, and also contended that the matter be dismissed on the basis of fatal non-disclosure of material facts and want of authority by the deponent to the applicant's founding affidavit to institute the proceedings on behalf of the applicant. After my brief conversation with the firth respondent's legal practitioner it was conceded that having regard to the relief being sought the matter could be dealt with as an urgent chamber application. I therefore proceeded to deal with it as such. The other objections were inextricably linked to the merits of the matter such that by agreement they were to be considered together with the rest of the merits of the application.

The facts which are material to this application are as follows. The applicant holds accounts with the first to fourth respondents which are commercial banks. The deponent to the founding affidavit is a director of the applicant. The fifth respondent is the sole signatory on all the bank accounts of the applicant which are held with the cited banks. There is a dispute over control of the applicant between the fifth respondent on the one hand and the deponent to the founding affidavit and Amanda Berkowitz (nee Cohen). The deponent to the founding affidavit and Amanda Berkowitz held a meeting on 7 June 2019. At that meeting they resolved, *inter alia*, that the fifth respondent be suspended from being manager of the applicant with immediate effect without salary and benefits. A hearing commissioned by the two directors, which the fifth respondent did not attend, found him guilty of misconduct. The hearing officer dismissed the fifth respondent from his employment "with effect from the date of suspension". Pursuant to that dismissal letters were written to the banks by Lunga Investment and Corporate Attorneys, the legal practitioners for the applicant in this matter. The letter informed the banks that the fifth respondent had been dismissed from employment and directed the banks that he was not to be a signatory on the accounts of the applicant. The letter stated further that the fifth respondent was in any event not a director of the applicant and was not in any way allowed to represent the applicant. The letter stated that the applicant "shall be grateful if the changes referred to in this letter are implemented with immediate effect", and that all transactions sanctioned by the fifth respondent would be null and void and the banks would be held liable for any loss arising from such transactions. The changes which the letter expected the banks to implement are obviously the signature mandate. It is clear from the letter that it was an instruction for the bank to change the signing mandate based on the letter from the legal practitioners. CBZ Bank, the first respondent herein, responded to the letter by stating

that the bank's records showed that the fifth respondent was the only signatory on the account and that no changes had been effected to that signing arrangement. The bank also pointed out that according to its records the first respondent was the majority shareholder and one of the directors of the applicant. They therefore advised that the account would be frozen until the dispute pertaining to the shareholding and directorship of the applicant had been resolved by a court of law.

It is common cause that the dispute regarding the directorship and shareholding of the applicant has not been resolved.

In the opposing affidavit the fifth respondent has challenged the authority of Belynda Halfon to institute the proceedings on behalf of the applicant. It is the settled position of the law that a company can only act pursuant to a resolution of the directors of the company taken in accordance with the law, see *Madzivire & Ors* v *Zvarivadza & Ors* 2006 (1) ZLR 514(S); *Madzivire & Ors* v *Zvarivadza & Ors* 2005 (2) ZLR 148(H). Where, as *in casu*, a director alleges that he is authorized to represent the company in instituting proceedings is challenged on that authority it is up to the company to prove that indeed the proceedings are authorized by the company and are not the concerned director's adventure.

Belynda Halfon relied on what is presented in the applicant's papers as a resolution of the meeting of the directors of the applicant held on 7 June 2019. That document authorizes her "in her capacity as a director of the company . . . to take any and all legal action on behalf of the company." The resolution relied upon is the product of a meeting of two directors and a person who is not a director, Zweli Lunga, who is stated as having attended the meeting "by invitation". Clearly, it is not a resolution of the directors. The attendance of the stranger would vitiate the proceedings especially as his role at the meeting is not stated but it is clear from the document that he attended the meeting. But there are more fundamental problems not just with the resolution but with the basis upon which the deponent to the founding affidavit claims authority to institute the proceedings on behalf of the applicant. The resolution purports to be of a meeting of 7 June 2019. There are minutes which are attached to the founding affidavit which are said to be of a meeting of that same day. There is nothing in those minutes to support the contention that such a resolution was taken in that meeting. There is no reference to it in that meeting. When confronted with that glaring reality Mr *Hashiti* suggested that there could have been more than one meeting held on the

same day. The only notice of a meeting (annexure C) which is attached is in respect of the meeting to which the attached minutes (annexure D) relate. In any event the suggestion that there could have been a second meeting on 7 June 2019 was made by counsel from the bar. It did not come from the applicant's papers. It was speculative and was clearly a creation of "a fertile legal mind". On account of these facts I am convinced that the applicant did not authorize the instant application. It also did not authorize the deponent to the founding affidavit to institute the application on its behalf.

The application is also founded upon patent falsehoods and fraudulent material non-disclosure. The deponent to the founding affidavit proceeds on the false premise that the fifth respondent was a mere manager. The letter to the banks even stated that the fifth respondent was not a director of the applicant. But the Form CR 14 which is attached to the opposing papers clearly shows that the fifth respondent has been a director of the applicant since 12 September 2013. The original of this form was exhibited to me at the hearing. It bears the stamp of the Registrar of Companies. I am unable to accept that the Registrar of Companies was unaware of that Form CR 14 because it bears his signature. Also, there were company returns which were submitted after that day in which the fifth respondent is listed as a director. The applicant's counsel questioned the authenticity of the Form CR 14 on the basis of a statement therein under "Any Former Names" where it is stated, "Nee Cohen" in respect of the fifth respondent. This statement is not material to the validity of the Form. The documents attached to the opposing papers also show that the applicant is a shareholder. The respondent sought to question the authenticity of the Form CR 14 dated 12 September 2013. On the other hand, the company documents produced through the founding affidavit completely discredit the applicant's case. The Form CR 14 states that the directors listed therein were appointed on the date of incorporation of the company. The Certificate of Incorporation shows that the company was incorporated on 17 January 2013. However, the Form CR 14 relied upon predates the incorporation of the applicant company in that it is dated 15 January 2013. No explanation was given about that apparent anomaly even though it was raised by the fifth respondent's legal practitioner in his submissions.

The application is predicated upon the allegation that the fifth respondent was a mere manager of the applicant. However, the documents show that he was also a director and shareholder. The applicant cannot seriously seek to convince the court that a mere manager would

be made the sole signatory of a company which has bank balances running into millions of dollars according to the founding affidavit. But the fact is that the application is founded upon a patent falsehood and deliberate non-disclosure of material facts. Because of the premise upon which they proceeded the deponent to the founding affidavit and her colleague did not serve any notice of the meeting of the directors upon the fifth respondent. Instead, they held the meeting with one Zweli Lunga who is not even a director whose attendance, as dealt with above, invalidates the proceedings of that meeting.

In any event, the least that could be said is that there is a material dispute of facts. The dispute relates to the directorship of the applicant. There are two distinct Forms CR 14 which have been produced by the parties. The correct directorship of the applicant would have been resolved first before any of the directors can purport to institute proceedings in the name of the applicant.

Arising out of the dispute over control of the applicant, the question of the signature mandate on the applicant's accounts would have to be resolved as well. The first to fourth respondents have signature mandates which would no doubt be supported by a resolution of the applicant's board of directors. The letter from Lunga Attorneys instructs the banks to implement a change of signatures without a valid resolution to that effect. Banks cannot take instructions from a firm of attorneys to change the signatures on those accounts as that would be unlawful. A company acts through resolutions passed by its directors not through correspondence from the attorneys of some of the directors. The final order sought is for this court to remove the fifth respondent from being a signatory on the applicant's accounts. It is not the court's responsibility to do that. The relief is incompetent. This means that the interim relief is founded upon an invalid final order being sought. The court cannot grant interim relief pending the occurrence of an invalid act.

The fifth respondent has asked for attorney client costs. The special order of costs is justified by the vexatiousness of the claim which has unnecessarily caused the first respondent to incur costs in defending this matter, see *Chadoka* v *Chombo & Others* 2012 (2) ZLR 15(H) at 23B-E; *Guard-Alert (Pvt) Ltd* v *Mukwekwezeke & Another* 2012 (2) ZLR 83(H) at 89G-90B. I do not believe, however, that the applicant should be made to incur the costs of this application. It is clear that this application was instituted by Belynda Halfon together with Amanda Berkowitza and Zweli Lunga upon whose purported resolution the application is justified. They were acting on a

frolic of their own. They ought to know that a bank cannot lawfully stop a signatory to an account from transacting in the absence of a valid resolution to that effect and a change of the signature mandate properly executed in accordance with banking practice. The application is meant to vex the banks and the fifth respondent. The letter from the first respondent makes it clear that the first respondent is bound by the signature mandate in its records. The special order of costs is also justified by the fact that the application is founded upon falsehoods and material non-disclosure. After the deponent became aware that the bank has in its records a Form CR 14 which shows that the fifth respondent is a director and a Form CR 2 which shows him as the majority shareholder it was reckless of her and the other two to proceed to institute the instant application seeking the relief being claimed. The legal practitioner is party to a resolution which authorized these proceedings even though he is not a director. He associated himself with the cause of his clients in passing the resolution. There is no reason why he should be excused from paying the costs *de bonis propriis*.

In the result, IT IS ORDERED THAT:

1. The application be and is hereby dismissed.
2. The costs shall be paid on the attorney-client scale by Amanda Berkowitz (nee Cohen), Belynda Halfon (nee Cohen) and Zweli Lunga *de bonis propriis*.

Lunga Attorneys, applicant's legal practitioners
GN Mlotshwa & Co, first respondent's legal practitioners
Gill Godlonton & Gerrans, fifth respondent's legal practitioners