

**NJABULO NKOMAZANA  
KENNEDY NDEBELE  
ELIOT PANESU  
TIMOTHY SIBANDA**

**Versus**

**ZENZO TSHUMA  
ZENZO SIBANDA  
MAXWELL MTHUNZANA  
THUNANI MOYO  
ELIJAH NCUBE  
ZWANGENDABA KHUMALO  
SIMON NDI MANDE  
MNCONYWA TSHUMA  
NYAMAZANA SAFARIS  
AGRIBANK LIMITED**

IN THE HIGH COURT OF ZIMBABWE  
TAKUVA J  
BULAWAYO 8 JUNE 2022 & 22 JUNE 2023

**Opposed Application**

*T. Masiye-Moyo* for the applicants  
*L. Chimire* for 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 7<sup>th</sup> respondents  
*N. Ndlovu* for the 10<sup>th</sup> respondent  
No appearance for the 2<sup>nd</sup>, 6<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> respondents

**TAKUVA J:** This is a court application wherein the applicants seek an order in the following terms:

1. 1<sup>st</sup> to 8<sup>th</sup> respondents be and are hereby ordered to forthwith, call for an Annual General Meeting of Gwayi Wildlife Association for the purposes of the following;
  - (i) Presentation of audited accounts and statements of income and expenditure for the years 2015 to date of judgment for approval or rejection by the members.
  - (ii) The conduct of an election of the Executive Committee of the Gwayi Wildlife Association.

- (2) 1<sup>st</sup> to 8<sup>th</sup> respondents or any other person acting in their stead or under their authority be and are hereby interdicted from holding out to be or transacting under the name or in whatever manner, the Gwayi Wildlife Association except if they do so consequent upon a process born out of 1(ii) above.
- (3) 1<sup>st</sup> to 8<sup>th</sup> respondents be and are hereby interdicted from transacting or in any manner dealing with or signing any papers in relation to Gwayi Wildlife Association's banking account detailed under;
- i. Bank - Agribank
- Branch- Lupane
- Account No. FCA - 100000377435
- Account No. ZWD - 100001102002
- (4) 9<sup>th</sup> respondent be and is hereby ordered and directed to hold onto any funds payable to Gwayi Wildlife Association until such time that the process in 1 above shall have been undertaken.
- (5) 1<sup>st</sup> to 8<sup>th</sup> respondents, the one paying the others to be absolved, shall pay the costs of this application on an attorney and client scale.”

The genesis of this matter according to the applicants is that in the Lupanda area there are about 100 or more plots which are owned by individuals and which plots measure approximately 60 hectares. There is various game in this particular area. During the period leading up to 2015 and in the spirit of community development projects, the Department of Parks and Wildlife encouraged the community of these plot holders to form an association in order to qualify for hunting quotas which in turn would generate income for community development projects.

Resultantly, the community members of Lupanda, then formed an association by unregistered constitution. See annexure A. At its inauguration on the 3<sup>rd</sup> of August 2015 the Gwayi Wildlife Association elected 1<sup>st</sup> to 8<sup>th</sup> respondents to their respective positions as the Management Committee of the association.

Clause 5 of the constitution requires elected members of the committee to hold office for a period of 5 years. Also in terms of clause 8, an audited set of accounts must be presented before the Annual General Meeting for approval. Further, in terms of clause 12 (f), the executive committee shall be vested with the power to manage the affairs of the association but subject to approval by the association. In terms of clause 13 'v' the executive committee is obliged to present, in addition to audited books of accounts, an income and expenditure account.

Applicants claimed that over the years, the executive committee in the form of 1<sup>st</sup> to 8<sup>th</sup> respondents have failed to adhere to the terms of the Constitution in that they have not presented any audited accounts, have not presented any budget for approval, have not presented any income and expenditure account notwithstanding the fact that they had received payment of royalties from hunting activities in the name and under the payment issued to the association by the Department of Parks and Wildlife.

On 19<sup>th</sup> June 2020, 1<sup>st</sup> applicant and other concerned members wrote to the Secretary of the Association – see annexure B, requesting certain information from the committee. The response avoided substantive issues raised – see annexure C. The applicants approached Chief Mabhikwa asking for his intervention. Applicants penned another letter on 13<sup>th</sup> August 2020 – see annexure D and E. No response was received from the area Chief.

The executive committee in the meantime sought and obtained hunting permits at least twice before and for the two successful hunts where they received a sum in excess of US\$15 000,00 which they have not accounted for to the association. Notwithstanding the fact that the 1<sup>st</sup> – 8<sup>th</sup> respondents' term of office expired on 2<sup>nd</sup> of August 2020, they have continued to run the affairs of the association in clear contravention of the terms of the association.

In summary, applicants averred that this is an application for an interdict to compel 1<sup>st</sup> to 8<sup>th</sup> respondents to comply with the terms of the Constitution and to interdict them from holding themselves out as committee members of the association and or transacting under the name of the association pending the holding of the Annual General Meeting in compliance with the provisions of the constitution.

The application was strenuously opposed by 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 7<sup>th</sup> and 10<sup>th</sup> respondents, the rest of the respondents are barred. Not only did these respondents file opposing affidavits

they also filed a counter application for an interdict. The respondents raised points *in limine* namely:-

1. The application raises serious material facts which are in dispute hence the applicants adopted the wrong procedure by approaching the court through application procedure.
2. Failure to cite the Association is fatal to the application in that the cited committee members were not acting in their personal capacities.
3. The applicants should have cited all the 15 members of the association.
4. The application is based on a defective affidavit in that the 1<sup>st</sup> applicant just joined the association in 2020 and does not know of anything concerning the operations of the association which was not in existence in 2015.

On the merits, respondents gave a different narration of the salient background facts to the dispute. It was contended that by 2015 there was an association in existence by the name Lupanda West Gwayi Small Scale Farmers Association. In 2017 an association called Lupanda West, Gwayi Wildlife Association was formed.

Respondents disputed annexure A arguing that it was drafted by 2<sup>nd</sup> applicant for purposes of securing donations. It was contended that the correct constitution is annexure H drafted in 2019. It was further contended that meetings were held, accounts presented, budgets debated and approved.

As regards the relief sought respondent submitted that applicants have not satisfied the requirements for a final interdict which they are seeking, let alone a provisional one. The term of office of the committee has not yet expired. There is no basis for the court to interdict the committee from performing its duties. In any event the bank accounts indicated by the applicants are unknown to the association in that they do not belong to the association.

At the hearing of the matter it was noted that the respondents filed a notice of withdrawal of their counter claim on 26 August 2021 and tendered costs. Pursuant to an agreement by the parties, the court granted an order by consent in the following terms;

1. The contents of respondents' opposing affidavits from pages 55 – 58 be and are hereby expunged from the record.

2. The respondents' answering affidavits at pages 131 to 144 be and are hereby expunged from the record.
3. Annexure J1 – J2 from pages 78-85 be and are hereby expunged from the record.
4. The applicants' draft order be and is hereby amended in paragraph 1(1) to read "to the date of judgment" instead of "to 2022."

*Mr Chimire* outlined the three points *in limine* he was relying on as;

1. The founding affidavit by the applicants is fatally defective.
2. There are material disputes of facts which cannot be resolved on papers.
3. There is material non-joinder of the association in question.

### **Defective founding affidavit**

It is trite that motion proceedings are supported by an affidavit which sets out the factual basis upon which such an application is based. The affidavit must be made by a person who can swear positively to the facts verified in an affidavit. In casu, *Mr Chimire* for the respondents submitted both in his heads of argument and oral argument, that the founding affidavit is particularly defective because 1<sup>st</sup> applicant became a member of Gwayi Wildlife Association in 2020 therefore he could not know what happened in 2015 – 2016. On that basis the contention is made by the respondents that the founding affidavit contains inadmissible hearsay.

In my view, the respondents have put the cart before the horse in that 1<sup>st</sup> applicant joined issue and said he was a member. The court therefore must decide where the truth lies taking into account the totality of the evidence placed before it. Put differently, the point *in limine* is interwoven with the merits. No other defect has been pointed out. It seems respondents have issues with the truthfulness or otherwise of the contents of the 1<sup>st</sup> applicant's founding affidavit. If so these issues cannot conceivably be raised *in limine*.

### **Material disputes of facts**

It is the respondents' contention that the court may not resolve the disputes of fact inherent in these papers. The proper approach was set out by PATEL JA (as he then was) in

*Muzanenhamo vs Officer in Charge CID Law and Order & Ors* 2013 (2) ZLR (S) 604, 608, in the following words;

As a general rule in motion proceedings, the courts are enjoined to take a robust and common sense approach to disputes of fact and to resolve the issues at hand despite the apparent conflict. The prime consideration is the possibility of deciding the matter on the papers without causing injustice to either party ...”

The first enquiry is to ascertain whether or not there is a real dispute of fact. As was observed by MAKARAU JP (as she then was) in *Supa Plan Investments (Pvt) Ltd vs Chidavaenzi* 2009 (2) ZLR 132 at 136F-G;

“A material dispute of facts arise when material facts alleged by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence.”

Further, the court went on to say;

“In this regard, the mere allegation of a dispute of fact is not conclusive of its existence .... The respondent’s defence must be set out in clear and cogent detail. A bare denial of the applicant’s material averments does not suffice. The opposing papers must show a *bona fide* dispute of fact incapable of resolution without *viva voce* evidence having been heard.”

It has also been said when a court exercises a discretion reposed in it, it does so judiciously. Put differently, the court must consider what the interests of justice dictate in each case including prejudice to the respondents.

In the instant case, respondents put the factual disputes in the following words;

“... It cannot be disputed that the present proceedings are centered on mainly, the correct constitution as well as the correct association in issue coupled with the correct period during which the said association was formed and when the constitution was adopted and further, the date on which the respondents’ were elected.” See paragraph 4.3 of the respondents’ heads of argument.

The question is, are these real disputes of fact incapable of a resolution without *viva voce* evidence having been heard. I think not. Starting with the two constitutions it must be noted that the documents are identical in all respects, word for word. What distinguishes these two documents is the issue of whether or not audited accounts must be presented at the annual general meeting. This dispute can easily be resolved in that the association being a private

voluntary organization is governed by the Private Voluntary Organization Act [Chapter 17:05].  
Section 19 thereof states:

“19 Audit of accounts

The secretary of every private voluntary organization shall within three months after the end of each financial year of that organization, cause an account of its expenditure and revenue for that financial year to be audited by an auditor registered as a public auditor in terms of the Public Accounts and Auditors Act [Chapter 27:12]”

Accordingly, the question of the audit cannot possibly form part of a dispute of fact. It is a dispute governed by operation of the law. In *Room Hire Co (Pvt) Ltd v Jeppe Street Mansions (Pvt) Ltd* 1949 (3) SA 1185 (T); the court stated that “a dispute envisaged should not be in regard to the law but to material questions of fact.”

Respondents admit that they never audited the accounts. Unfortunately, the law binds them to cause the accounts to be audited.

Also, respondents complained about annexure A (the constitution) as being a fraud but they have not set out a clear and cogent defence in that respect. Curiously, they admit signing the constitution but claim they did not know what they were signing. If they are being truthful one wonders how they managed to reproduce it word for word in annexure H (their alleged new constitution). The only difference is the question of the audit which has been excised in the constitution relied upon by the respondents. While respondents claim that their constitution came to life in 2019, they did not supply minutes of the meeting that adopted such a constitution. Neither did they provide minutes of an elective meeting by which they came into office in 2017. It is absolutely ridiculous for 1<sup>st</sup> respondent to allege that he signed the constitution relied upon by the applicants believing it to be a document meant to assist in fund raising.

As regards the supporting affidavits of Mcloud Mpofo and Zenzo Sibanda, I am not persuaded that they should be expunged. Respondents relied on the case of *Nelson Chamisa v Emmerson Dambudzo Mnangagwa & 24 Ors* CCZ-21-19.

In my view, this case is distinguishable in that in that case the other respondent sought to support the order whereas in casu Mr Sibanda is simply a witness who wants to clarify the position. O337 r234 makes it clear that a supporting affidavit is admissible. Mcloud Mpofo

confirms in his supporting affidavit that the constitution relied upon by the applicants was signed by him in 2016 in his capacity as Village Head. Further, he confirmed that the respondents have never presented audited accounts and that the constitution relied upon by the respondents is a fraud.

In *ZUPCO Ltd vs Parkhorse Services (Pvt) Ltd* SC-13-2017 the court restated the position that in civil matters a court must reconcile conflicting facts on the basis of a balance of probabilities as was stated in *Miller vs Minister of Pensions* [1947] 2 AER ER 342 where the court said, at the end of the day the court must on the evidence say; “We think it is more probable than not.”

The respondents’ bona fides is doubtful. This is especially so when they comment about applicants’ membership. They seem incoherent and incomprehensible in that in para 7 of the opposing affidavit by 1<sup>st</sup> respondent, it is conceded that 1<sup>st</sup> applicant is a member of the association. See also para 14 of the same where it is by implication accepted that 2<sup>nd</sup> applicant is a member. Yet in para 25 of same, he then says of 1<sup>st</sup> applicant, “1<sup>st</sup> applicant knows that the association has no business at all at his plot and is as good as a non-member.”

Yet again, having accepted in that affidavit that the 2<sup>nd</sup> applicant is a member of the association, in the answering affidavit 1<sup>st</sup> respondent turns around and says the 2<sup>nd</sup> applicant is not a member afterall.

For the above reasons, I find that there are no material disputes of fact that the court may not resolve without the aid of *viva voce* evidence.

The respondents’ third point *in limine* is the non-joinder of the association. It was contented that this is fatal because whatever is decided is against the association. Further, it was argued relying on *Christian Faith Terbanacle v Spouse Nest Investments* HH-69-09, that a *universitas* may be sued or sue irrespective of the existence of a constitution. See also *C. T. Bolts (Pvt) Ltd v Workers Committee* SC-16-12.

However, in the present matter, the constitution of the association whichever version one considers does not bestow the association with any legal standing. In terms of s6 (2) of the Companies Act [Chapter 24:03] which was applicable, at the formation of the association;

“No association of persons formed after the 1<sup>st</sup> of April 1952, for the purpose of carrying on any business that has for its object the acquisition of gain by the members thereof shall be a body corporate, unless it is registered as a company under this Act.”

In *Privatization Agency of Zimbabwe & Anor vs Ukubambana Kubatana Investments (Pvt) Ltd & Anor* SC-3/03 the Supreme Court stated that;

“In order to determine whether an association of individuals is a corporate body which can sue in its own name, the court has to consider the nature and objects of the association and its constitution ...”

*In casu*, the constitution is silent on whether or not the association is a body corporate capable of suing and being sued in its own name. In any event in terms of Order 13 Rule 87 of the High Court Rules 1971.

“(1) No cause or matter shall, be defeated by reason of the mis-joinder or non-joinder of any party and the court may in any case or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the case or matter.”

Respondents admit that they are the executive of the Association. Indeed, they have been cited as such and the case against them is firmly grounded on their conduct. Accordingly, this court can determine the rights of the applicants as they relate to the conduct of the respondents.

The 3<sup>rd</sup> point *in limine* lacks merit;

On the merits, respondents contented that applicants have not discharged the onus on their shoulders for the relief they are seeking.

Applicants seek an interdict. The principles applicable to interdicts were set out in *Setlogelo v Setlogelo* 1914 AD 221 a case followed by several judgments which laid the requirements for the granting of an interdict as;

- (a) a right, which though *prima facie* established, may be open to some doubt;
- (b) a well-grounded apprehension of irreparable injury;
- (c) the absence of any ordinary remedy;
- (d) the balance of convenience.

Applying these principles to the proved facts, I find that the evidence has clearly shown that the applicants are members of the Gwayi Wildlife Association. Despite the respondents' prevarication, the record shows that they admitted that applicants are members of the association. As members they have a right to have the affairs of the association run lawfully and properly. They also have financial interests arising from the association's operations. It must be emphasized that these rights flow from annexure A, the genuine constitution of the association.

### **A well-grounded apprehension of injury**

The nub of the matter is the failure by the respondents to account to the rest of the members. Annexure A provides for an audit. This has never been done. No budget has been placed before the court and no minutes have been attached to prove that meetings were conducted. While respondents deny abusing funds they have not presented the accounts. On the other hand page 88 shows that a total figure of \$500,00 was withdrawn. Also on page 89 are shown purchases of items not connected to any activity of the association. See also page 90 where receipts show purchases of barbed wire. It is common cause that the source of revenue for the association is hunting of wild animals. Once a successful hunt is conducted the amount is deposited into the bank account controlled by respondents. The injury feared is the abuse of these funds and other resources and assets.

### **Absence of any ordinary remedy**

The order sought is in two parts. The 1<sup>st</sup> part is in the nature of an interdict. Secondly it seeks compliance with the law by the respondents. In my view there is no other satisfactory remedy.

### **Balance of convenience**

In my view the balance of convenience favours the granting of the relief in that the respondents cannot claim to suffer prejudice by merely complying with the constitution. They claimed that it is costly to produce audited accounts. My view is that this is a necessary evil. Ultimately, the benefits of transparency, accountability and honesty far outweigh the feared costs.

On the other hand, if the order is declined, the association will continue to be run in a shambolic fashion with endless disputes and allegations of fraud and abuse of office and funds.

This will be highly prejudicial to all members except a few in the executive that will be benefitting. For these reason, I find it baffling why respondents want to cling to annexure H, a document that says they shall not account.

It must be noted that the application as against 2<sup>nd</sup> and 8<sup>th</sup> respondents stands withdrawn.

In the result;

It is hereby ordered that:

1. 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, and 7<sup>th</sup> respondents be and are hereby ordered to forthwith call for an Annual General Meeting of Gwayi Wildlife Association for the purposes of the following;
  - i. Presentation of audited accounts and statement of income and expenditure for the years 2015 to date of judgment for approval or rejection by the members.
  - ii. The conduct of an election of the Executive Committee of the Gwayi Wildlife Association.
2. 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, and 7<sup>th</sup> respondents or any other person acting in their stead or under their authority be and are hereby interdicted from holding out to be or transacting under the name or in whatever manner the Gwayi Wildlife Association except if they do so consequent upon a process born out of (ii) above.
3. 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, and 7<sup>th</sup> respondents be and are hereby interdicted from transacting or in any manner dealing with or signing any papers in relation to Gwayi Wildlife Association's banking account detailed here under;
  - i. Bank - Agribank  
Branch- Lupane  
Account No. FCA - 100000377435  
Account No. ZWD - 100001102002

4. 9<sup>th</sup> respondent be and is hereby ordered and directed to hold onto any funds payable to Gwayi Wildlife Association until such time that the process in 1 above shall have been undertaken.
5. 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, and 7<sup>th</sup> respondents, the one paying the other to be absolved shall pay the costs of this application on an ordinary scale.

*Masiye-Moyo & Associates (incorporating Hwalima, Moyo & Association)*, applicants' legal practitioners  
*Mutatu, Masamvu & Da Silva Gustavo Law Chambers*, 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> & 7<sup>th</sup> respondents' legal practitioners