

NOBUHLE NCUBE
Herein represented by Ezra Sibanda
By virtue of a Special Power of Attorney

And

SIFISO NGWENYA

And

SILIBAZISO NCUBE

And

SEHLULE NCUBE

And

MANDY BETOZA CEVERTON

Versus

QOKI ZINDLOVUKAZI INVESTMENTS (PVT) LTD

And

SETHULE TSHUMA

And

REGISTRAR OF DEEDS N.O

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 7 AND 22 MARCH 2024

Urgent Chamber Application

T. Chimusaru, for the applicants
Z. Ncube, for the 1st respondent
No appearance for the 2nd and 3rd respondents

KABASA J: - This is an Urgent Chamber Application in which the applicants, all represented by Ezra Sibanda by virtue of a Special Power of Attorney, seek the following relief:

“Terms of the Final Order Sought

1. That the Provisional Order granted interdicting the respondents from dealing with the remaining extent of Lot 21 Riverside Estates Agricultural Lots situate in the district of Bulawayo in extent 7, 8569 hectares (*sic*) pending finalisation of HCBC .../24 be and is hereby declared final.
2. Costs of suit

Interim Relief Granted

1. That respondents be and are hereby ordered not to subdivide, sell, develop, occupy or deal in any way with the remaining extent of Lot 21 Riverside Estates Agricultural Lots situate in the district of Bulawayo in extent 7 8569 hectares (*sic*) pending finalisation of the dispute between the parties.
2. That 2nd respondent be ordered to register a caveat on the title deed No. 89/21.

Service of the Provisional Order

This Provisional Order shall be served upon the respondents by the applicants’ legal practitioners or their lawfully appointed agents or the Sheriff.”

The background to the matter as given by the applicants’ representative stems from an agreement the applicants had with the 1st respondent wherein funds were to be pooled together for a co-operative venture. The co-operative was to purchase land for the benefit of all the applicants.

To that end the applicants and twenty-five others contributed a total amount of US\$193 172. Of this amount the applicants’ contribution was US\$34 960. The 1st respondent purchased the property in issue and registered it in its name. This registration was contrary to the parties’ agreement. The land was to be owned by the co-operative. The applicants were not advised of this development and their request for such information was not met with a response. That notwithstanding the applicants’ contributed money for conveyancing fees, subdivision and council charges, pegging of the land, water and sewer as well as for roads construction. The 1st respondent later requested for more money ostensibly for the rectification of poorly constructed roads. The applicants requested for paperwork to no avail. A search at the deeds office revealed that the land had been purchased in the 1st respondent’s name. Aggrieved by this revelation, the applicants advised the 1st respondent of their intention to pull out of the agreement and with that requested a refund of their contributions.

The 1st respondent offered to give a portion of the land to the applicants but nothing came of it. The 1st respondent proceeded to obtain a subdivision permit creating a total of 13 stands which are inadequate given the number of women who contributed to the acquisition of the land, who are in excess of 30 in number.

The applicants are apprehensive that the 1st respondent may proceed to sell the stands to their prejudice. This fear informed the present application.

On receipt of this application I ordered that it be served on the respondents and the matter be set down. On the date of hearing counsel for the 1st respondent requested time to file opposing papers. Due to the short notice afforded to counsel as the set down was barely 2 days from the date of receipt of the application, I acceded to the request. The 1st respondent subsequently filed a notice of opposition wherein it raised several points *in limine*. The issues raised are:-

1. The application is invalid due to the deponent of the founding affidavit's lack of knowledge of the facts.
2. The lack of *locus standi* of Ezra Sibanda.
3. No cause of action against the 2nd respondent.
4. Non-compliance with the rules of court.
5. Material non-disclose and dishonesty.
6. Non-joinder of interested parties.
7. Lack of urgency.
8. Lack of prejudice.

At the hearing of the application the applicants' counsel took a point *in limine* attacking the absence of a board resolution clothing the deponent to the opposing affidavit with authority to act.

Counsel's argument was that a company is a separate legal entity with a persona separate from its directors. There was no board resolution authorising the deponent to depose to the affidavit. Counsel further submitted that the notice of opposition is therefore invalid effectively rendering the application unopposed.

I will briefly consider the point *in limine* taken by the applicants' counsel but for reasons that will become clear later on, the issue of Ezra Sibanda's knowledge or lack thereof of what he was deposing to in the founding affidavit will determine whether there is an application before me.

In *Madzivire & Ors v Zvarivadza & Ors* 2006 (1) ZLR 514 (S) CHEDA JA held 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 authorised to do so.

The learned Judge had this to say:-

“It is clear from the above that a company, being a separate legal persona cannot be represented in a legal suit by a person who has not been authorised to do so. This is a well-established legal principle, which the courts cannot ignore. It does not depend on the pleadings by either party. The fact that the first appellant is the Managing Director of the fourth appellant does not clothe him with the authority to sue on behalf of the company in the absence of any resolution authorising him to do so. In *Burstein v Yale* 1958 (1) SA 768 (W), it was held that the general rule is that directors of a company can only act validly when assembled at a board meeting”

Granted there may be circumstances where to insist on a resolution where the authority of the deponent is not in issue may be insisting on form rather substance but where the authority of the deponent is challenged then a board resolution authorising the deponent to represent the company becomes a must otherwise without it, it renders the decision to represent the company invalid.

Whilst the argument by counsel for the applicants may have substance, does it necessarily follow that the application should therefore proceed as unopposed and consequently be granted on that basis. I think not. I return now to the point regarding Ezra Sibanda's founding affidavit.

I hold the view that an application is not granted for the mere asking even when it is unopposed. The court need not act at the invitation of the opposing party in a case where the issue to be decided is one which the court itself must exercise its mind on without any invitation by any party.

In *Hiltunen v Hiltunen* HH 99-08 MAKARAU JP (as she then was) had this to say: _

“Before I deal with the substance of the arguments submitted by the applicant in this matter, there is an issue that has exercised my mind. It is the manner in which the founding affidavit has been deposed to. My dilemma is that both counsel in the matter

did not see anything wrong with the manner in which the affidavit was deposed to and so I did not have any meaningful debate on the issue.”

The foregoing makes the point I have alluded to. On receipt of the application Ezra Sibanda’s founding affidavit exercised my mind and it is a point I would have raised without being invited to by either party.

Rule 58 (4) of the High Court Rules, 2021 provides that:-

“An affidavit filed with a written application –

- (a) shall be made by the applicant or respondent who can swear to the facts or averments set out therein.”

The applicants’ founding affidavit was deposed to by Ezra Sibanda who said:-

“I, the undersigned, Ezra Sibanda, do hereby state and take oath that I am the representative of the applicants by virtue of Special Powers of Attorney. I attach as Annexure “A – D1” in this matter and facts contained herein are to the best of my knowledge correct and to my belief true.”

Ezra Sibanda has authority to act on behalf of the applicants by virtue of a Special Power of Attorney but where does Ezra get the information he deposes to in the founding affidavit.

Granted Ezra has a Special Power of Attorney unlike the *Hiltunen v Hiltunen* case (supra) where the deponent had a general power of attorney. I however am of the view that the issue of how the deponent comes to have or know the information he deposes to is important, especially where he does not identify himself with the cause of the applicants.

Quoting with approval decisions from other jurisdictions, MAKARAU JP had this to say:-

“Like KRAUSE J in *Pountas’ Trustee v Lahanas* 1924 WLP 67, I find that the manner in which the evidence of the applicant has been placed before the court is eminently irregular and that the evidence is rendered inadmissible. In deciding the matter that was before him, the learned Judge relied on the earlier decision of the same division in *Grant – Dalton v Win & Ors* 1923 WLP 180 in which it had been held, following the English practice on the admissibility of statements of belief and information, that generally speaking affidavits must be confined to such facts as the witness is able of his own knowledge to prove, except in interlocutory motions, in which statements as to belief with the grounds thereof may be admitted.” (My emphasis)

Granted this is an Urgent Chamber Application seeking interim relief. Does this mean in such applications a deponent to the founding affidavit is at liberty to make averments without

so much as stating where he obtained that information and why he, believes in the truthfulness of the same? I think not.

In *Glenwood Heavy Equipment (Pvt) Ltd v Hwange Colliery Company Limited & 2 Ors* HH 664-16 DUBE J (as she then was) articulated circumstances where first hand hearsay is admissible in terms of section 27 (1) of the Civil Evidence Act [Chapter 8:01]. The learned Judge makes the point that the source of such information must be disclosed, the reason why that source is unable to depose to the affidavit and the basis of the belief by the deponent of the given information.

The learned Judge quoted with approval from *Hiltumen v Hiltumen* (supra) wherein BEADLE CJ's remarks in *Johnstone v Wildlife Utilisation Services Ltd* 1966 RLR 596 (G) were quoted with approval. In that case BEADLE CJ dealt with the admissibility of hearsay evidence and said:-

“It is accepted in our practice, that the rules of admissibility of hearsay evidence applicable to interlocutory proceedings are not the same as those that apply to trial actions. Such evidence, given in affidavit form in such applications, is not necessarily excluded because it is hearsay, provided the source of information is disclosed. As I understood our practice, it is this: first the court must examine the evidence given in this form and ascertain the prejudice which might result to the opposite party, if the evidence is later shown to be incorrect, would be irremediable, second, the court must examine to see whether there is some justification, such as urgency, for the evidence being placed before it in hearsay, and not in direct form.”

In casu the applicants appeared before a Notary Public and gave the Special Power of Attorney to Ezra Sibanda. There is absolutely no explanation as to why the founding affidavit was not deposed to by one of them with direct knowledge of the information in Ezra's founding affidavit. The applicants were dealing with the 1st respondent and paid for subdivision permit and all other ancillary charges related to the acquired land. They requested for information relating to the registration of the land which information was not forthcoming. The progression of the matter leading to the current application does not, in my considered view, justify the placing of evidence before me by Ezra whose source of information and belief therein is not disclosed.

DUBE J in the Glenwood case goes on to say:-

“In *Gulp v Tansley and Anor* 1966 (4) SA 555 the court dealt with admission of hearsay evidence in urgent applications. The court held that for hearsay evidence to be admissible in urgent applications, the deponent to the founding affidavit must disclose

his source of information and swear that he believes such information to be true and furnishes the grounds for his belief. See also *Mia's Trustees v Mia* 1944 WLP 102.”

In his affidavit Ezra at some point uses the first person narrative as if he was the one who was making the application as a party to the matter. It was obvious however that it must have been information from some undisclosed source which source was speaking as if they were Ezra. Whoever was stating such facts through Ezra was not identified. The list of contributions and amounts contributed by the 30 or so women was simply tabulated with no indication as to where that emanated from.

Ezra could have done more in order to meet the threshold of what could be deemed acceptable in placing hearsay evidence before the court. He did not and I am not persuaded to hold that there is an application before me.

An application stands or falls with the founding affidavit. Unfortunately this application fell with the court's rejection of the founding affidavit.

That said, this is not a matter which calls for punitive costs.

With the finding that there is no application before me, the appropriate order is to strike the matter off the roll.

In the result I make the following order.

The application be and is hereby struck off the roll, with costs.

Dube-Tachiona & Tsvangirai, applicants' legal practitioners
Messrs Ncube and Partners, 1st respondent's legal practitioners