

LEECHIZ INVESTMENTS (PVT) LTD
versus
CENTRAL AFRICA BUILDING SOCIETY

HIGH COURT OF ZIMBABWE
MHURI J
HARARE, 14 February & 4 May 2023

Opposed Application

Mr *MD Hungwe*, for the applicant
Mr *A Muchandiona*, for the respondent

MHURI J: Initially applicant instituted these proceedings against two respondents namely CABS as first respondent and the Operations Manager CABS as second respondent. It then withdrew proceedings against second respondent and tendered wasted costs. This judgment therefore is in respect of the applicant and the respondent CABS.

This is an application for declaratory relief wherein applicant seeks:

1. that it be declared that the interpretation of the warrant of search and seizure WSS 872/2021 by the respondent as stated in its letter authored by its Legal and Government Executive Hardlife Nharingo, dated 12 May 2022 is wrong and not consistent with the wording and intention of the warrant and is to be set aside.
2. that for the avoidance of doubt, it be declared that upon proper construction of the warrant of search and seizure WSS 872/21, the respondent is only required to freeze the amount of ZWL\$ 200 000 which was in applicant's account at the time the warrant was served on the respondent and which constitutes the remaining balance of the amount which was transferred into applicant's account from TM Supermarkets' Steward Bank Account number 1001651613.

Applicant also sought costs against respondent on a higher scale.

Respondent is opposed to this application being granted.

The brief historical background is that, applicant is a holder of a current account number 1129725936 with respondent's Southerton branch. As a result of some alleged fraudulent transfer

of ZWL\$3 million into applicant's account from TM Supermarkets' Steward Bank account number 1001651613, a warrant of search and seizure WSS 872/2021 was issued by the Magistrate Court Harare against applicant. The warrant directed freezing of ZWL\$3 million or the remaining balance of the amount transferred into applicant's account from TM Supermarkets' Steward Bank account number 1001651613 until the matter is finalised.

Upon receipt of the warrant, respondent then froze applicant's account. After some engagement with respondent's Southern Branch Manager Mr Nhidza, applicant was allowed access to its account on the condition that an amount of ZWL\$3 million remained locked in the account. Not satisfied with the condition, applicant engaged respondent again and was given an interpretation of the warrant by the Legal and Governance Executive Mr Nharingo, to the effect that respondent should restrict a maximum of ZWL\$3 000 000 in the account until the matter is finalised. As a result, respondent ring-fenced ZWL\$3 million until it will have received further instructions from the court.

It is this interpretation by respondent that has given rise to this application.

Applicant is of the view that respondent's interpretation of the warrant is not consistent with the wording of the warrant and is wrong. The interpretation prejudices it in that it requires applicant to raise and deposit ZWL\$2 800 000 so that it can be frozen. Applicant will not be able to access the amount until the matter is finalised. In its view, the amount referred to in the warrant is the amount that was transferred into its account from TM Supermarkets' Steward Bank account 1001651613 and not just any amount. The only remaining amount in the account transferred from TM Supermarkets' account as at the date of issuance of the warrant, is ZWL\$200 000 and it is this amount that should be ring-fenced, so goes applicant's case.

Respondent, through Mr H. Nharingo filed an opposing affidavit in which he averred that the deponent to applicant's founding affidavit has not been candid with the court by not explaining the true and correct background where it had been initially directed by Financial Intelligent Unit of Zimbabwe to freeze the account. Applicant did not attach to its application the bank statement to support that there was only ZWL\$200 000 in its account out of the ZWL\$3 million. The warrant was issued by the criminal court and it is only that court which can alter or cancel the warrant. There was non-citation of interested parties, namely the Police and Prosecution and this non-citation is fatal to the application.

In support of his authority to represent respondent Mr Nharingo attached two Board Resolutions, one dated 24 June 2018 and the other dated 10 July 2020.

The one dated 24 June 2018 recommended certain position holders, namely:

- Group legal Executive or her delegate
- Assistant Group Legal Advisors
- Manager Centralised Operations
- Team Leader of Centralised Operations
- Manager of Recoveries
- Area Manager of Mashonaland
- Area Manager of Matebeleland
- Group Human Resources Manager
- Assistant Human Resources Managers

to represent respondent and it was RESOLVED THAT:

“the Roles indicated herein above be and are hereby empowered and authorised to represent CABS in all legal matters, which include but are not limited to, Litigation, Judicial Management and liquidation matters and to sign on its behalf all and any documentation or affidavits necessary in all such cases.”

The one dated 10 July 2020 is similarly worded but only adds certain officers to the list in the first resolution. These are:-

- Managing Director
- Deputy Managing Director
- Chief Finance Officer
- Head of CABS Custodial
- Head of Retail Banking
- Human Capital Business Partner
- General Manger – Operations
- Head of Credit
- Head of Treasury
- Head of Risk
- Head of Compliance

- Marketing Executive
- IT Executive
- Platinum Manager

It is these Resolutions that applicant has taken issue with and has raised the point that there is no opposition to its application as the Resolutions predate the litigation. It was submitted that the litigation was instituted two years after the second Resolution. Such a Resolution given before the facts have arisen is incompetent at law. Reliance was made on the case of:

BEACH CONSULTANCY (PVT) LTD
versus
OBERT MAKONYA
and
THE SHERIFF OF HARARE HH 696/21

in which MAKOMO J (the late) went at length to discuss the issue of blanket authority and:

MADZIVIRE
versus
ZVARIVADZA 2006 (1) ZLR 514

and

CUTHBERT ELKANA DUBE
versus
PREMIER SERVICE MEDICAL AID & ANOR SC 73/19

To this point, respondent's response was that whether or not an officer or director has authority is a question of fact and not law. Nharingo made factual averments that he was authorised to represent respondent which averment was not taken issue with by applicant in his answering affidavit. He cannot now depart from the factual admission. Relying on the case of *Cuthbert Elkana Dube* (supra) it was submitted that where authority has been put in issue, one needs to produce it.

It is noted that respondent did not comment on the real issue that the resolutions are incompetent at law as they are blanket authority which were given way back before facts giving rise to litigation arose.

The determination of this particular point, determines whether Nharingo has the authority to represent respondent.

That Nharingo is one of the officers mentioned on the list of 24 June 2018 as one of the Roles empowered and authorised to represent respondent is not an issue. It is a fact that by virtue of that position he deposed to the opposition notice and is empowered to represent respondent. The issue is the validity of the Board Resolution that empowered him to so act.

MAKOMO J had and occasion to deal and determine this particular issue.

The resolution as adverted to was issued on 24 June 2018. Facts which gave rise to the litigation arose in January 2021, the warrant of search and seizure was issued in March 2021. Respondent acted on the direction given in the warrant in March 2021. As from March 2022, parties started engaging each other vis-à-vis the issue of the warrant and the freezing of applicant's account. This application was filed in July 2022 after the engagements dead locked. It is clear therefore that the Resolution was issued more than two years before the facts arose. It is also very clear from a reading of the Resolution that is a general authority, giving blanket authority to the officers so mentioned in the Resolution to represent it in all legal matters, to sign on its behalf all and any documentation or affidavits necessary in all such matters. That this is a blanket authority is beyond question. This is the blanket authority which was succinctly held to be improper.

In the case of *Beach Consultancy (Pvt) Ltd* (supra) the Learned Judge had this to say at p 8 of his cyclostyled judgment:

“..... The company's authority is required for the purpose of binding it to all the consequences of the litigation including payment of costs..... Once it properly authorizes its participation in the litigation, it is estopped from denying liability once such adverse orders are made against it. This also protects the other parties in the litigation. The decision therefore needs to be carefully and informedly made. For that reason therefore, directors of an entity may not authorize, on behalf of the company participation in litigation whose existence and facts thereof they are not aware of at the time of the authorization and whether the company will have any material interests in that litigation.

To do so would be to act without due diligence and constitutes a breach of their duty to act in the best interests of the company for purposes of expediency.

The purpose of the board properly sitting to authorize a particular litigation or to be involved in such litigation is to consider whether there are any interest of the entity that may be served by instituting or defending the litigation. It is also to carefully consider the consequences of the litigation. Such an exercise is a judiciary duty of the directors to which they may not divest themselves of by giving a carte blanche authority to the individual director or officer.....

Thus, to grant a particular director or officer blanket authority to exercise discretion on whether to institute or defend litigation whenever it arises in future is to delegate the function which must be that of a properly instituted board to such individual director or officer.

That the board cannot do.

The decision to participate in litigation must be carefully considered, in the best interest of the entity, only when the cause has arisen and the facts thereof known to the board for its proper exercise of discretion.

The directors can only discharge this paramount duty to take decisions on behalf of the company and in its best interests when they are properly informed of all the facts relating to the case." (Emphasis added).

The above squarely applies to the case *in casu* and I have no hesitation to fully associate myself with the said remarks by the Learned Judge and in particular his summation that a company may not grant general authority to a director or employee to represent it in future court cases that have not yet arisen at the time when the authority is granted.

To that end therefore, I find the resolution relied upon by Mr Nharingo as authority empowering him to act on behalf respondent incompetent at law thereby affecting his authority to so act. This in turn, has an effect on the respondent's opposition in that there is no opposition to this application. The application therefore proceeds as unopposed.

The warrant of search and seizure the interpretation of which gave rise to this application is worded in the relevant section as follows:

"It is therefore directed that Cabs bank should immediately provide:-

- Full particulars of account holder and certified bank statements for account number 1129725936 for period 28 January 2021 to 05 February 2021.
- Freezing of ZWL\$3 million or the remaining balance of the amount which was transferred into above stated account from TM Supermarkets' steward Bank Account number 1001651613 until the matter is finalized."

It is the last paragraph which respondent interpreted in its letter dated 12 May 2022 in para 2 to this affect:

"Our interpretation of the warrant is that we should restrict a maximum of ZWL 300 000.00 in the account until the matter is finalized, and we believe this is the correct application of the requirements of the warrant of search which will leave CABS not exposed to contempt proceedings."

In para 3 of the letter it is stated:

"It is against this background that CABS will not be able to comply with mutual client's request and will keep the ZWL\$ 3 million ring-fenced until we receive further instructions from the court."

It was applicant's submission that respondent's interpretation was wrong. What the warrant directed is to ring-fence the ZWL\$ 3 million or the balance thereof that was transferred from TM Supermarkets' Steward Bank account and not any other amount held in the account.

The golden rule of interpretation is that words must be given their ordinary grammatical meaning within the text in which they are used unless that would result in an absurdity. See:

ENDEAVOUR FOUNDATION & ANOR
versus
COMMISSIONER OF TAXES 1995 (1) ZLR 339 (S)

in which this golden rule was well canvassed as follows:

“The general principle of interpretation is that the ordinary, plain, literal meaning of the word or expression, that is, as popularly understood, is to be adopted, unless that meaning is at variance with the intention of the Legislature as shown by the context or such other indicia as the court is justified in taking into account, or creates an anomaly or otherwise produces an irrational result.”

What necessitated the issuance of the warrant by the Magistrates Court were criminal charges levelled against three (3) accused persons who it was alleged caused the transfer of a total amount of ZWL\$22 million from TM Supermarkets’ Steward Bank account number 1001651613 to four (4) different companies accounts, applicant being one of them and receiving a sum of ZWL\$3 million in its CABS account number 1129725936. The offence came to light on 3 March 2021 resulting firstly in the issuance of a directive by the Financial Intelligence Unit of Zimbabwe to freeze transactions of in respect of three (3) companies, applicant’s being one of them on 5 March 2021 and secondly in the issuance of the warrant by the Magistrates Court on 8 March 2021.

Considering the above narration, it is clear that the warrant of search and seizure referred to the ZWL\$3 million that had been transferred into applicant’s account from the fraudulent transaction from TM Supermarkets’ Steward Bank account. The wording of the directive is clear and unambiguous. It is also clear from the wording of the directive that it is the ZWL\$ 3 million transferred from TM Supermarkets’ Steward Bank account, as it states freeze ZWL \$3 million or the remaining balance of the amount which was transferred into the above stated account.

If the intention was to ring-fence any amount of ZWL\$3 million, it could have been directed as such without further stating that or the remaining balance of the amount transferred.

All having been considered, I find merit in applicant’s submissions and will grant the application, though with amendments to the relief.

As regards the balance which was in the account at the time of the issuance of the warrant, applicant conceded that it could have been prudent for it to produce the bank statement covering the relevant period to prove the balance of the amount instead of just stating that there was ZWL\$ 200 000.

There being no proof of the balance, I find it difficult to declare as per para 2 of the Draft Order that respondent freezes an amount of ZWL\$ 200 000. I will therefore amend this paragraph

to read that respondent freezes the balance of the amount as at the date of issuance of the warrant. This can easily be ascertained by looking at the bank statement for the relevant period.

Consequently the application for a declaratory relief is hereby granted with costs on the ordinary scale. No reason has been advanced for costs on the higher scale.

It is therefore declared that:-

1. The interpretation of the warrant of search and seizure WSS 872/2021 by respondent as stated in its letter dated 22 May 2022 is wrong and inconsistent with the wording and intention of the warrant. The interpretation is hereby set aside.
2. For the avoidance of doubt, respondent is only required to freeze the amount which was in applicant's account at the time the warrant was issued which constituted the remaining balance of the amount which was transferred into applicant's account from TM Supermarkets' Steward Bank account number 1001651613.
3. Respondent to bear costs on the ordinary scale.

Kadzere Hungwe & Partners, applicant's legal practitioners
Danziger & Partners, respondent's legal practitioners