

LATIFA SIDAT
and
ZEEDEN ENTERPRISES (PRIVATE) LIMITED
and
ELAF INVESTMENTS (PRIVATE) LIMITED
and
JELELEEN INVESTMENTS (PRIVATE) LIMITED
and
ASKREG ENTERPRISES (PRIVATE) LIMITED
and
WILDAW ENTERPRISES (PRIVATE) LIMITED
and
YAHAN ENTERPRISES (PRIVATE) LIMITED
and
LARCHWOOD INVESTMENTS (PRIVATE) LIMITED
and
TRENAZ INVESTMENTS (PRIVATE) LIMITED
and
HONEY BAGS INVESTMENTS (PRIVATE) LIMITED
and
MEGEARA INVESTMENTS (PRIVATE) LIMITED
and
HAKATEA INVESTMENTS (PRIVATE) LIMITED
and
TOSTALL INVESTMENTS (PRIVATE) LIMITED
and
MANIZA INVESTMENTS (PRIVATE) LIMITED
and
NESHRO INVESTMENTS (PRIVATE) LIMITED
and
DEEDLES INVESTMENTS (PRIVATE) LIMITED
and
KEMLER INVESTMENTS (PRIVATE) LIMITED
and
SIBKEY INVESTMENTS (PRIVATE) LIMITED
versus
NAZIRF LAMBAT
and
FATIMA AHMED DALAL N.O
and
SERGEANT TICHAINZANA MUKOTO
and
THE COMMISSIONER-GENERAL OF POLICE
and
MASTER OF THE HIGH COURT

and
THE REGISTRAR OF DEEDS
and
OFFICE FOR THE REGISTRATION OF COMPANIES
AND OTHER BUSINESS ENTITIES

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 1 February 2024

Urgent Chamber Application

E Mubayiwa, for the applicants
T Zhuwarara, for the 1st respondent
G E Hoyi, for the 2nd respondent
F Chimunoko, for the 3rd & 4th respondents

CHITAPI J: The first applicant Latifa Sidat is a female adult and deponent to the founding affidavit. She averred in the founding affidavit that she represents herself as well as seventeen (17) other applicants as listed in paragraph 2 of the founding affidavit to the application. It is however noted that the first applicant listed herself and 20 other applicants in the citation of the parties' *ex facie* the founding affidavit. The court will deal with only those applicants cited in paragraph 2 of the first applicants founding affidavit and they number 18 including herself. Litigants must always pay attention to their papers when preparing them to avoid confusion for the court and the opposing party. For purpose of brevity, I shall not list the individual applicant by name. It suffices that the seventeen (17) co-applicants of the first applicant are dully registered companies in terms of the laws of Zimbabwe. The first applicant attached as annexure 1 to the founding affidavit, a copy of a Power of Attorney dated 12 October 2021 which purported that the first applicant was duly authorized to represent the entities listed therein.

The first respondent Nazir Lambat is a son to the late Mohamed Shaheed Lambat (deceased). He is one of five children sired by the deceased. The first applicant is the biological sister to the deceased. She is therefore a paternal aunt to the first respondent. The dispute in this matter arises from a complaint by the applicants of an alleged interference by the first

respondent in the administration of the estate of the late Mohamed Shaheed Lambat and in the running of the second to the eighteenth respondent.

The second respondent is Fatima Ahmed Dalal cited in her capacity as the executor testamentary in the estate of the late Mohamed Shaheed Lambat. She stays in Florida, United States of America. She is a sister to the late Mohamed Shaheed Lambat and therefor a sister to the first applicant and aunt to the first respondent. The second respondent filed an affidavit in which she indicated that after reading the applicants' papers she did not wish to oppose the application and would abide the decision of the court.

The third respondent Tichainzana Mukoto is a police sergeant in the Zimbabwe Republic Police whilst the fourth respondent, the Commissioner General of Police and Head of the Police Service is the third respondent's ultimate commander in the police chain of command. No specific relief is sought against the fourth respondent. The founding affidavit does not relate to the reason for citing the fourth respondent.

The fifth respondent is the Master of the High Court. No relief is sought against the fifth respondent. The founding affidavit does not relate to any reason for citing the fifth respondent. It is the same with the citation of the sixth respondent and the seventh respondent who is the Registrar of Deeds. It is similarly so with the seventh respondent. The seventh respondent is described as "Office for the Registration of Companies and Other Business Entities". In addition to there being no cause for the seventh respondents' citation having been proffered and no relief being sought against his respondent, the validity of citing an office is questionable. My doubts notwithstanding, it suffices to express my doubt only but refrain from making a pronouncement of validity of the citation since argument on it was not addressed by any of the parties to the litigation. I also did not bring my doubts to the attention of the parties for comment. It would be irregular to make a determination on issues which the parties did not address and on any event did not comment on. Fortunately, the court's doubts do not present any discomfort to it because the fifth, sixth and seventh respondents did not file any papers and are barred. They did not appear at the hearing nor make any representations on the bar. They are therefore non-participants or actors in the application on account of being barred.

In passing and for posterity, I comment on the citation of the fourth, fifth and seventh respondents. Note was made from the papers that no relief was sought from the applicants and that no reasons were proffered for citing the said respondents. It is improper pleading for a ligating party to simply cite a party without pleading the reason or basis for citing the party as

to do so embarrasses the cited party who will not appreciate why the cited party is being dragged into litigation where no relief is claimed from it.

Reverting to the dispute before the court, its genesis is founded in the estate of the late Mohamed Shaheed Lambat, the first respondent's father. The said deceased died on 17 September 2014 at Masvingo of hypertension. The first applicant attached to the founding affidavit, the certificate of death of the deceased as an annexure. The other document filed by the applicants were the death notice dated 21 June 2016. The first respondent's name was omitted on the portion, clause 10 of annexure 2, where full names of the deceased's children are required to be listed.

The preliminary executor's inventory was also attached to the founding affidavit and was completed by the same person who completed the death notice. The person is described as accountant. In the preliminary inventory, the deceased did not have much to his name. His remaining property was listed as:

"2 x Samsung cellphone	-	\$ 800.00
2 x watches	-	\$ 200.00
1 x Laptop	-	\$ 650.00
1 x Tv and Decorder	-	\$1 250.00
Personal clothes	-	<u>\$ 700.00</u>
Sub Total	-	\$3 600.00
Add amount in CBZ Bank	-	<u>\$ 515.75</u>
Total	-	<u>\$4 115.75"</u>

The \$4 115.75 was the recorded worth of the deceased's estate on the preliminary inventory.

Also attached to the founding affidavit by the first applicant was a copy of the Letters of Administration issued to the second respondent as Executor Testamentary. The letters were issued on 26 April 2017 by the fifth respondent in terms of the law.

The first applicant in the founding affidavit also attached to the founding affidavit a copy of what she describes as the deceased's last will and testament which was registered with the fourth respondent. The first applicant averred that the first respondent "recognized the validity of the will". The first applicant on para 8 of the founding affidavit averred that the first respondent had by letter dated 21 October 2022 addressed to the second respondent, saluted or addressed the second respondent as executor testamentary and she opined that by addressing the second respondent as such, the first respondent had submitted himself to the second respondent's jurisdiction in the administration of the estate in issue. Although the first applicant indicated that the alleged letter by the first respondent was attached to the founding affidavit and marked annexure 3, the consolidated papers do not contain annexure 3. I failed

to find the annexure upon my full perusal of the applicants' papers. Annexure 3 is marked on a title deed No. 00558/2009 dated 16 March 2009 in the name of the ninth applicant. I should again for posterity state that it is the duty of counsel to meticulously settle his or her clients' papers to avoid an embarrassing situation as in the present case where argument is placed on a document not produced to the court. The argument of the first applicant then that there was this unproduced letter from the first respondent whose contents conveyed an implied submission to jurisdiction by the applicant is put paid to rest by the absence of the primary evidence which albeit pleaded by the first applicant as having been produced, was not in fact produced or in-as-much as it does not constitute part of the papers.

In relation the nature of the application, the first respondent described the *causa* in paragraph 6 of the founding affidavit as follows:

“6. This is an urgent court application for declaratory orders bearing on the state of and rights, interests and entitlements of first respondent in the estate of the Late Mohamed Shaheed Lambat and on ownership of various properties that are at the centre of the parties' dispute. Consequential relief barring 1st respondent from interfering with these properties in *inter-alia* also sought.”

Relating to the nature of the application to the relief sought, the first applicant in the founding affidavit prayed for a final order which she worded as follows:

“WHEREUPON after reading the papers riled of record and/or hearing counsel,
IT IS DECLARED:

1. That the rights, interests and entitlements, if any, of first respondent to and in the assets constituting the estate of the Late Mohamed Shaheed Lambat shall be determined in terms of the Last Will and Testament of the deceased as duly accepted by third respondent on 6 July 2017 and administered by second respondent as executor testamentary.
2. That the following immovable properties listed below are owned by second and fourteenth applicants and therefore not any part of the estate of the Late Mohamed Shaheed Lambat, namely:
 - (i) 287 Fort Victoria T/Ship held under Deed of Transfer Number 959/2002
 - (ii) 404 Fort Victoria T/Ship held under Deed of Transfer Number 10664
 - (iii) 102 Fort Victoria T/ship held under Deed of Transfer Number 1110/1999
 - (iv) 7446 Masvingo T/Ship held under Deed of Transfer 7449/2000
 - (v) SubD A of 2328 Salisbury held under Deed of Transfer 6546/2005
 - (vi) 403 Fort Victoria T/Ship held under Deed of Transfer Number 558/2009
 - (vii) 11192 Salisbury T/Ship held under Deed of Transfer Number 61/2013
 - (viii) 11213 Salisbury T/Ship held under Deed of Transfer Number 1502/2013
 - (ix) 698 Fort Victoria T/Ship held under Deed of Transfer Number 3784/2002
 - (x) 64 Fort Victoria T/Ship held under Deed of Transfer Number 10182/2000
 - (xi) 7999 Masvingo T/Ship held under Deed of Transfer Number 4192/2002
 - (xii) 30 Clipsham T/Ship held under Deed of Transfer Number 8841/2002
 - (xiii) 27 Clipsham T/Ship held under Deed of Transfer Number 965/2002
 - (xiv) 3079 Salisbury T/ship held under Deed of Transfer Number 3142/2013

3. That first respondent has no rights, interests or entitlements to any of the assets set out in paragraph 2 above.
4. That the warrant of arrest issued against first applicant on 18 July 2023 is unlawful and consequently set aside.
5. That the search and seizure of documents of applicants done by third and fourth respondents or their agents or assigns at 27 and 30 Enniskillen Circle, Clipsham Park Masvingo on 19 July 2023 was unlawful.

ACCORDINGLY, IT IS ORDERED:

6. First respondent shall not access any of the properties listed in paragraph 2 above or interfere with, hinder or disturb any activities that are carried out at those properties or by the owners of those properties in respect of those assets.
7. Whilst the registration of the Will of the Late Mohamed Shaheed Lambat and the deeds of title in favour of applicants remain extant, first, third and fourth respondents, their agents or assigns shall not make threats of any kind, including threats of arrest, against first applicant in respect of anything that arises from and/or is connected with the estate of the Late Mohamed Shaheed Lambat or properties listed in paragraph 2 above.
8. Third and fourth respondents are directed, within 48 hours of this order, to return and restore all documents which they uplifted from number 27 and 30 Enniskillen Circle, Clipsham Park Masvingo on 19 July 2023.
9. First respondent shall pay costs on the scale of legal practitioner and client.”

In relation the alleged conduct of the first respondent which the applicants complain of against the first respondent, the first applicant stated in the founding affidavit that although the first respondent has not taken issue with the acceptance and registration of the estate of the deceased Mohamed Shaheed Lambat by the fifth respondent, the first respondent has demanded a stake in the properties on the basis that the deceased from whom the first respondent inherits owned shares in the companies which hold the properties, yet the deceased did not. The first applicant in para. 11 averred that the deceased in his Will bequeathed his entire estate to his surviving wife Firoza Banu Lambat (nee Momoniat). She was, however, not cited in this application. In the same paragraph, the first applicant confirmed that the only assets of the deceased were as per the inventory of assets which means as already noted that the worth of the deceased was I daresay, insignificant and if not already distributed so insignificant by today's inflation that it may be fair to say, with respect, that there is no estate to distribute. The surviving wife going by the inventory which the applicant has relied upon as evidencing the deceased's worth would be the only beneficiary of the insignificant worth of the estate is the deceased's estate. The children including the first respondent on the deposition of the first applicant and accepted as the position by the executor testamentary, who is the second respondent, have no claim against the estate. I understand from the first applicant's deposition, the position regarding the deceased's estate of the late Mohamed Shaheed Lambat is that he

owned to his name the items listed in the inventory against value which comprised and I repeat for certainty: 2 x Samsung cellphones (\$800.00), 2 x watches (\$200.00), 1 x Laptop) (\$650.00); 1 x TV and decorder (\$1 250.00), personal clothes (no value) and cash (515.75) in CBZ Bank. It is noted that there has been no explanation proffered by the applicants and the executor testamentary as to why the estate remains open for the seven (7) years plus.

In relation to the second applicant through the eighteen applicants, the first respondent stated in relation to them that they authorized her by virtue of board resolutions attached to the founding affidavit marked as annexures 1A to 1N. However, in her settlement of the applicants' papers, the resolutions were not attached. In fact, there is no reference to annexure 1A to 1N on the applicants' consolidated index nor is there any document listed and described as annexure 1A to 1N. There is, however, attached to the applicants' affidavit, annexure 1 on p 23. It is a Power of Attorney passed in favour of the first applicant by one Fairoza Banu Lambat. It is dated 10 December 2021. The Power of Attorney grants the first applicant limited powers as agent and general attorney of Fairoza Bamu Lambat to manage and transact the principal's affairs and only related to "eleven companies and only in regard to "sign all company statutory returns, Board resolutions and all matters connected therewith".

As I understand the extent of the first applicant's powers granted to her the first applicant were limited to signing on behalf of the principal documents constituted by Statutory returns and Board resolutions and in addition thereto to sign on the principal's behalf documents connected or ancillary to those statutory returns and board resolutions. The companies in relation to which the first applicant could sign on behalf of Fairozabamu Lambat, the documents authorized for signature, they comprised:

"Firaran Investments (Private) Limited	-	(not party herein)
Jeleleen Enterprises (Private) Limited	-	4 th applicant herein
Elaf Investments (Private) Limited	-	3 rd applicant herein
Kemler Investments (Private) Limited	-	17 th applicant herein
Kiyabu Investments (Private) Limited	-	(not party herein)
Larchwood Investments (Private) Limited	-	8 th applicant
Naclee Enterprises (Private) Limited	-	(not party herein)
Tostall Investments (Private) Limited	-	13 th applicant
Trenaz Investments (Private) Limited	-	9 th applicant
Yahan Enterprises (Private) Limited	-	7 th applicant
Jaalsan Enterprises (Private) Limited	-	(not party herein)"

It will be noted that only seven (7) of the seventeen (17) applicants' companies are listed in the Power of Attorney. It is also observed that the nature of the interest of Fairozabantu Lambat in the companies listed in the power of attorney was not set out in the founding

affidavit. Upon a perusal of the annexures attached to the founding affidavit I noted for example from the annual return date franked 14 April 2008 by the Registrar of Companies that Fairoza Banu is listed as a co-director with Mohamed Shaheed Lambat in the company Kiyabu Investments (Private) Limited. This company is not a part to this application. It is listed in para 13 of the founding affidavit as a shareholder in the company Yahan Enterprises (Private) Limited the seventh applicant herein. I must again note that, it does not assist a litigant to just lump and annex documents to an affidavit without explaining them and relating them to the case for which relief is sought or the defence sought to be pleaded as the case maybe. The first applicant did not meticulously list the attached annexures and explain them. In para 14 of the founding affidavit, the first applicant stated:

“4. I attach the deed of title as Annexures 3A to 3N and the official company returns on shareholding as Annexure 4A to Annexure 4N”

In para 13, the first applicant listed companies 1 to 14. These are then alleged to be owners of properties described against them and the title deed number and shareholder. Annexures 4A to 4N would logically relate chronologically to the deeds for example from para 13, the first property to be listed is 287 Fort Victoria Township, Title Deed number 959/2000; Owner Sibkey Investment (Private) Limited Shareholder Ceruse Investment (Private) Limited. When one considers the annexures, Annexure 3A relates to stand 403 Fort Victoria Township, Title Deed number 0558/2009 in favour of ninth applicant. The company returns for the ninth applicant were not attached or I could not find them because the annexures are bunched up. The court cannot settle documents for a party or create a relationship between documents and piecing them together. If attached documents are not settled in such a manner that there is an expressed harmony or congruency then the party who has bunched the documents has only himself or herself to blame if the courts fail to find coherence of thought and expression in the documents.

The first applicant deposed that the deceased did not hold shares in any of the fourteen (14) companies listed in para 13 and therefore had no interest in the properties owned by these companies. The first applicant averred that the deceased had been the administrator of the three companies. The first applicant also averred that the shareholding in these companies was held by family trusts or other companies. The first applicant averred as follows in para 17 of the founding affidavit:

“17. These issues have been brought to the fore by the fact that first respondent is demanding a stake in the above properties. He does so on the bases that the properties were owned by deceased and consequently he is entitled to a stake in them by being the deceased’s son.”

The first applicant averred that the first respondent had colluded with the third respondent to issue threats against her and that the third respondent had addressed her with aggression without however spelling out any charge against her. The first applicant averred that the third respondent was acting on the direction of the first respondent and was intent only on being aggressive against her. The first applicant averred that she believed that the first respondent was the stumbling block and thought that as the administrator of most of the properties, the first applicant was using her position to resist the first applicant’s demands to the properties. She also averred that the inheritance issues were governed by the deceased’s will and that the executor testamentary had not laid any claim to the properties. The first applicant also averred that the title deeds to the properties were extant and did not include the deceased as owner. The first applicant therefore prayed for the declaratur on the summarized grounds.

In relation to the third respondent in particular, the first applicant averred that the third respondent had obtained a warrant of search and seizure, a copy of which was attached to the founding affidavit. The first respondent described the warrant as making ‘interesting reading’. It was averred among other things that the warrant was illegal. The first applicant averred that the warrant was directed at her or her co-applicants, that the complaint grounding the issuing of the warrant was that there had been effected an unlawful change of directorships of companies to exclude the deceased, that a forged will had been registered with the fifth respondent and that first respondent and that first respondent had suffered actual prejudice of USD\$30 000 000.00.

The first applicant averred that the search warrant was illegal and had been issued illegally because, firstly it was issued to seize documents which belonged to the co-applicants where the underlying process did not involve them; secondly that the seizure extended beyond documents relating to the deceased’s directorship in that documents pertaining to shares and other documents falling outside the subject of investigations and thirdly and lastly that the seizure of documents was done in a dragnet manner in that there was no focus on specific documents being seized. The applicant averred that the seizure of company documents as appeared on the face of the warrant rendered it irregular and that the court should make an order for the return of the documents.

The first applicant listed what she termed other considerations for the court to consider in para 30-35 to the founding affidavit. She averred that the application was of “serious importance” to her and the co-applicants because it pertained to threats of arrest made against her and the intrusion of the co-applicants’ properties. The first applicant averred that the threats and intrusions were caused by the first respondent. She opined that a resolution of whether the first respondent has any rights in the properties would terminate threats against her. The first applicant further averred that the seizure of the co-applicants’ documents was prejudicial to them since the companies could not be properly administered without the seized documents. It was also averred by the first applicant that the seized documents included lease agreements without which it would be difficult to administer the properties and tenants on the properties. Lastly the applicant submitted that the balance of convenience favoured the granting of the declaration in favour of the applicants and would stop the first respondent from making threats and interfering with applicants’ properties.

The applicant addressed an urgency. She averred that the search in question happened on 19 July 2023 and that thereafter the applicants and the first respondent’s legal practitioners engaged after the seizure but there was no resolution of the matter although threats of arrest by the third respondents were not made for a while before they were resumed. The attempts at settlement whose details were not outlined were given as the reason for delay in filing the application. The first applicant averred that the co-applicants rented out their properties and needed their seized documents to operate effectively.

The first applicant thus prayed for an order in terms of the draft order which also sought against the first respondent punitive costs as between legal practitioner and client. She justified the costs scale on the basis that the first respondent sought to abuse the criminal justice system against her in circumstances where the dispute at play was “clearly civil in nature”. She also averred that the first respondent had necessitated the institution of the current proceedings over matters which could be confirmed by a mere reference to public documents in the Deed and Companies Registries.

The first, third and fourth respondent opposed this application in separate affidavits. The first respondent took five objections *in limine* to the application. These were as follows:

- a) Matter not urgent
- b) Improper joinder
- c) No cause of action
- d) Material non-disclosure
- e) Material disputes of fact

In relation to urgency, the first respondent averred that the applicants did not act with urgency because the warrant of search and seizure which appears to have been the primary cause for launching the application was executed on 18 July 2023 yet the applicants only approached the court on 15 August 2023. The first applicant in the answering affidavit which is however referred to as a “founding affidavit” on p 225 of the consolidated papers responded that the need to act arose on 8 August 2023. The founding affidavit in para 8 deals with this issue wherein the first applicant averred that the need to act was the date when threats of arrest were made against her with the intention to extort assets and that she lived under fear from then onwards. She averred that she had been administering the properties of the applicants and that any threats or attacks made upon her would be detrimental to the rest of the applicants. Her deposition that there were held several meetings to resolve the issue post 18 July 2023 when the warrant was executed was not denied.

In relation to the third and fourth respondents they also raised the issue of urgency. The fourth respondent adopted the depositions of the third respondent in that regard. The third respondent averred that he applied for and was granted two warrants of search and seizure, one in Masvingo and the other one in Harare by different provincial magistrates on 18 July 2023. On 19 July 2023 both warrants were executed. The first respondent averred that whilst the searches made in Harare on the strength of the warrant did not result in recovery of any documents, the searches in Masvingo led to the recovery of documents relevant to the investigations which the third respondent is investigating. The third respondent questioned why the first applicant did not come to court immediately thereafter.

The third respondent averred that he is the one who first contacted the first applicant by whatsapp on 26 July, 2023 inviting her to report at Harare Central Police Station for interviews. He attached copies of the whatsapp communications between him and the first applicant who gave the excuse that her husband was unwell and that she was tending to him. The communications show that the third respondent understood the first applicants’ plight and instead requested the applicant to provide a list of properties in Harare, Masvingo and Bulawayo as well as records of rental collections. The first applicant then responded that she needed to gather the information requested and would deliver it. The third respondent then gave the first applicant a cut-off date for the requested information of 21 November 2021. This was on 31 July 2023.

On 3 August 2023, the third respondent again sent a whatsapp message to the first applicant advising that he still awaited the information requested to which the first applicant responded that her husband's health had to be priority and that she would on the following day be meeting with her lawyers and ZRP. She also asked the third respondent to withhold any further calls or communications "until then." When asked as to which ZRP meeting the first respondent was referring to she then responded that her husband's condition had become critical. She stated that she was not ignoring messages and that she now had no wifi and could communicate. She further responded that she was not in charge of rental collections until November 2021. By whatsapp message of 29 July 2023, the first applicant was advised that she was required for interview by the third respondent.

A striking feature of the whatsapp communications between the first applicant and the third respondent was that the third respondent would ask the first applicant on how her husband was faring. The first applicant would in turn ask the third respondent on his health and that of his family and vice-versa. In the whatsapp exchanges there was nothing in them to suggest any animosity threats or overbearing conduct made or exhibited to the first applicant by the third respondent. In the founding affidavit, there were no details of what could reasonably be deemed a threat made by the third respondent to the first applicant.

In relation to the alleged threats and as far as the first respondent is concerned, the first applicant did not detail the threats made by the first respondent. Threats and intimidatory conduct cannot be inferred. Where they are alleged, the complainant must detail the nature of the threats and the conduct complained as well as the time and place of their alleged making. The first applicant just generalized the threats. The same applies to what the first applicant has stated as the demanding of a stake in the properties by the first respondent. No details of how the demands have been made, where and when and their contents were disclosed by the first applicant in para(s) 17-20 of the founding affidavit. Neither the *facta probanda* or *facta probantia* to establish the threats and demands allegedly made by the first respondent or by the third respondent were set out but were left to conjecture. Where a party attributes to another wrongful physical conduct and seeks to bring an action against the errant party based on that conduct, then, such facts and evidence as would prove the conduct on a balance of probabilities must be pleaded and supported by the applicant.

In the light of the lack of detail of the alleged unlawful conduct, I must decide whether the application is still urgent. Whether or not a matter is urgent has been subject to various pronouncements by courts. The case of *Kuvarega v Registrar General and Anor* 1998(1) ZLR

188(HC) is generally considered as illuminative to the extent that it correctly in my view makes the timing of the conduct of the applicant faced with an urgent situation the key consideration. The case of *Kuvarega* concerned allegations of violation of the Electoral Act. The court was called upon to answer whether or not in the light of the provisions of s 118(1)(c) of the Electoral Act [*Chapter 2.01*] which prohibited the uttering of slogans within 100 metres of a polling station, the wearing of attire displaying party slogans or symbols did not amount to uttering a slogan of that party. The applicant filed an urgent application seeking a declaration that the wearing of attire with party slogans and symbols was unlawful.

The learned judge is dismissing the application discussed the issue of the urgency of the matter. It was noted that an explanation was required in the certificate of urgency to explain any delay in filing the application. Of note however, is the attempted definition of urgency wherein the learned judge stated at p 193 F-H.

“.....What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent, if at the time the need to act arises; the matter cannot wait. Urgency which stems from a deliberate or careless absence from acting until the deadline draws near is not the type of urgency envisaged in the rules.....”

What simply arises from the above *dicta* is that a person who brings an urgent application must not wait for the day of reckoning. Secondly when referring to this judgment, legal practitioners tend not to place emphasis upon the fact that the learned judge referred to urgency arising from a deliberate and careless absence from taking action until the deadline draws near. It is important that the *dicta* is read within the context of facts of the case which the learned judge determined.

In *casu*, there were admitted consultations between the parties. The issue of a deliberate and careless absence from taking action did not arise. There was no inordinate delay by the applicants in coming to court in my view because as MATHONSI J (as he was) reasoned in the case of *The National Prosecuting Authority v Busangabanye & Anor* HH 427/15 p 3 again referred to by the same judge in *Telecel Zimbabwe (Pvt) Ltd v Portraz & Ors* 2015(1) ZLR 651:

“In my view this issue of self-created urgency has been blown out of proportion. Surely, a delay of 22 days cannot be said to be inordinate as to constitute self-created urgency. Quite often in recent history we are subjected to endless points *in limine* centered on urgency which should not be made at all. Courts appreciate that litigants do not eat, move and have their being in filing court process. There are other issues they attend to and where they have managed to bring their matters within a reasonable time they should be accorded audience. It is not good to expect a litigant to drop everything and rush to court even when the subject matter is clearly not a

Courts must therefore be sensitive to the fact that whilst court business should be prioritized if a party seeking urgent relief wants his or her case to jump the queue, the court should go beyond the time of action factor and consider it with other factors, generally accepting that even the urgent cases need proper drafting and settling the papers. The objective approach must be used to determine whether in a particular case, the applicant has treated the matter with urgency. In relation to the objective approach, it is stated in my judgement in the case *Andrew John Pascoe v Ministry of Lands & 2 Ors*: So, 17(1) ZLR at 222 G.

“.....Whether or not a matter is urgent is a value judgment which a judge reaches upon a consideration of all the objective facts surrounding the matter to be determined.....”

Considering the arguments on urgency which were advanced and facts set out in those arguments, I hold in my value judgment that the application passed the urgency test. In this regard I have considered the issue of the paucity of facts alleged by the first applicant as grounding alleged threats made against her and alleged intrusion and of her co-applicants’ business affairs. At this stage I do not consider the merits of the application in any greater depth. The first applicant alleged that she was faced with threats and intrusions of her work in administering the affairs of her co-applicants’. The third respondent armed with a warrant took away documents pertaining to the affairs of the co-applicants’ and also asked the first applicant to attend at the police station for interview. The first applicant was panicky and came to court on an urgent basis. It would not be unreasonable for a person in her position to have come to court. Whether or not her application has merit is a different consideration. Merits of a matter do not form a material requirement in considering the urgency of a matter, save for example, where the cause of actions is unlawful or not recognized at law. The urgency objection consequently fails.

The next objection on misjoinder of the applicants’ co-applicants’ pertained to the authority of the first applicant to represent the co-applicants’. The objection was one of the *locus standi* of the first applicant to represent the co-applicants. I already commented on the power of attorney which the first applicant produced as not amounting to authority bring these proceedings before the court. The first applicant sought to cure the defect in the answering affidavit. The Supreme court in the case *Cuthbert Elkana Dube v Premier Service Medical Aid and Anor* SC 73/19 at para 38 of the cyclostyled judgment stated the following in relation to authority of an urgent to represent a company:

“..... A person who represents a legal entity when challenged, must show that he is duly authorized to represent the entity. His mere claim that by virtue of his position he holds in such an entity he is duly authorized to represent the entity is not sufficient. He must

produce a resolution of the board of that entity which confirms that the board is indeed aware of the proceedings and that it has given such a person the authority to act in the stead of the entity. I stress that the need to produce such authority is only necessary in those cases where the authority of the deponent put an issue. This represents the current status of the law in this country.”

It was therefore procedurally permitted for the first applicant faced with a challenge to her *locus standi* to represent her co-applicants to seek to produce the authorities in the answering affidavit. Where such course has been followed, the court should allow the respondent who has raised objection to *locus standi* to comment on the new information provided. In *casu*, respondents did not seek leave to file supplementary affidavits to address the supplied resolutions of the applicants’ co-applicants.

The first applicant filed resolutions of the second to the eighteenth applicants. The first applicant averred that in the hurry to file the application, she forgot to attach the resolutions. The court must consider the resolution for conformity with the law. In the case of *Beach Consultancy (Private) Limited*, HH 696/21, MAKOMO J when dealing with an urgent chamber application for stay of execution had to decide upon the validity of company board resolutions to sue or defend. On p 4 of the cyclostyled judgement, the learned judge stated:

“..... the current position of the law is that it must be shown that the corporate is aware of the proceedings that it is authorizing. The reason for insistence on the company being aware of the proceedings is to confirm that it is indeed the company that has taken the decision to participate in the court case and that it is not an authorized person who is dragging it to court without its knowledge. Knowledge on the part of the company is required for the purpose of binding it to all the consequences of the litigation

The learned judge on p 5 of the cyclostyled judgement continued;

“Thus, a company resolution is required for two reasons, first to prove that the entity is aware of the legal proceedings and has authorized them, and secondly, that the person representing it has been clothed with the required authority to represent it in the proceedings. The role of the resolution in confirming the entity’s awareness of the existence of the legal proceedings and that it has authorized its participation therein is paramount and more important than authority granted to the person to represent it. The position in South Africa is that what must be authorized are the proceedings and not the person deposing to the affidavit. In *Ganes v Telecom Namibia Ltd* (2004) ZA11 SA 609 (SCA), STREITCHER J lays the position to the following effect:

‘[19]. In my view it is irrelevant whether Hanke had been authorized to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorized by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof

At p 8 of the cyclostyled judgement, MAKOMO J further stated:

“.....the decision to participate in litigation must be carefully considered in the best interests of the entity, only when the cause had arisen and the facts thereof known to the board for its proper exercise of discretion. The directors can discharge this paramount duty to take decisions

on behalf of the company and in its best interests where they are properly informed of all the facts relating to the case.”

I must also apply the principle of law exposed by the Supreme Court in the case *Madzivire v Zvaruvadza & Anor* 2006 (1) ZLR 514 (S) to the effect that the issue of the authority of a person to represent a corporate entity and institute proceedings on its behalf is a substantive matter which a resolution of the board should deal with. It is not a matter of pleading.

Following on the above narrative, it must follow that for a company or juristic entity’s board resolution relating to litigation by it to be valid, it must be specific in its reference to the particular cause to be litigated upon and the person or entity against whom the proceedings are to be instituted. A corollary is that it is the same where the entity resolves to defend a litigation against it. A blanket authority to represent the juristic entity and litigate is not valid unless it relates to a specific cause or matter that must be instituted or defended as the case may be. Thus, whilst the authority to represent the company may be generalized, when it comes to litigation, the entity must specially authorize the institution of litigation or the defence of a litigation.

Reverting to the purported resolutions which the first applicant attached to the answering affidavit and filed the same on 25 August, 2023, the court considered the resolutions *ex facie* and read the contents thereof. The first point to note was that each of the first applicants’ seventeen co-applicant companies purported to have held a virtual meeting on 15 August 2023. The resolutions are similar in wording save for the company name. The same director F.A. Dalal signed the resolutions. The resolutions state that “the company intends to approach the High Court of Zimbabwe for relief”. The approach is not specific to any matter nor is there mention of the persons or entities to be sued. With due respect the powers of attorney are so generalized as to be vague and embarrassing if not meaningless. They hardly pass the requirement that it must be clear from the resolutions that the companies are aware of the specific case to be litigated on and that the resolutions must be specific. There is nothing to indicate that each of the companies passed a resolution to institute proceedings for the recovery of their seized books and records and against whom the litigation was to be directed. The issue of the first applicant being granted power to represent the companies is subject to the decision to institute or defend a specific litigation having been reached.

It does not matter that the litigation was instituted on the same day that the application was prepared filed. The clear authorities of the court are to the effect that the pleadings filed consequent to the resolution do not become infused. Therefore, the applicants cannot seek to

validate an invalid resolution by adopting the position that the resolution must be read as referring to the litigation which was subsequently filed, in this case, contemporaneously with the passing of the resolutions. As a stand-alone document, the resolution needs to be independently valid. In *casu*, the resolutions unfortunately for the second to the eighteenth applicants are invalid or fall short of what the law requires to characterize a valid resolution passed for purposes of litigation.

The effect of the invalid resolutions is that the second to the eighteenth applicants are not properly before the court. Their *lis* or cause must be struck off the roll and it shall be so ordered. In so far as these applicants are concerned the matter ends there. There is no scope for determining as against them, the rest of the points *in limine* or the merits against them as they have ceased to be visible, to the court. A striking off order shall ensue.

The application however proceeds as against the first applicant. Her cause remains that of the alleged threats and demands made by the first and third respondents acting in connivance with the third respondent allegedly acting on instructions to harass the first applicant being given to him by the first respondent. The first respondent raised the objection that there was no cause of action raised by the first applicant against him because she generalized the alleged threats. I do not agree that the first applicant did not have a cause of action. She alleged that she was threatened and undue demands were made against her. Whether or not her cause of action can be sustained or is proved is a different matter. The issue of *facta probanda* and *facter probantia* come in. I have already dealt with the issue of non-particularization of the alleged threats and demand. The first applicant's answer to the objection did not assist. She simply responded in para 6 of the answering affidavit that the draft order showed that adverse relief against the first respondent is sought and that the first respondent had opposed the application because a cause of action described "potent" was made out in the papers. The applicant missed a golden opportunity to specify the nature of the threats when and where they were made as would enable the court to determine whether any threats and /or undue demands made against her by the first applicant as would merit the courts intervention and protection. On the pleadings filed of record herein the first applicant did not prove or establish the threats allegedly made by the first applicant.

As against the third and fourth respondents they did not explicitly plead the no cause of action objection. It is however convenient to deal with their response. The fourth respondent rode on the back of the third respondent's deposition. The fourth respondent confirmed that the police were investigating the authenticity of the WILL of the deceased and that the third

respondent was the investigating officer. The first applicant has averred that the will is genuine and that the first respondent should not challenge it because he accepted it by implication. The third and fourth respondents averred that the WILL read different names from the names appearing on the deceased's birth certificates accused passport. The WILL bear the names Mohamed Shaheed Ahmed Lambat. The deceased according to his identity documents was not registered by that name as the name Ahmed does not appear.

The third respondent averred that he had never met the first applicant and did not threaten her. He stated that he communicated with the first applicant by whatsapp. I have already detailed the whatsapp communications and also the cordial tone in them. The third respondent confirmed that he wanted to record a warned and cautioned statement from Hannif Nanabawa the accountant for the deceased and to interview the first applicant who however responded by instituting these proceedings. Just in passing because the co- applicants of the first respondent are out of court the third respondent averred that the warrant of search and seizure related to the investigation on changes of directorship and shareholdings to exclude the deceased. The third respondent averred that the involvement of the first applicant in the investigation of her co- applicants was that she collected income/ rentals generated from the hire of the properties.

The first applicant has not reported to the police station nor offered to do so. It is really improper for the court to interfere with a lawful process of police investigation. The magistrates court Masvingo and Harare issued warrants of search and seizure and police acted on them. The orders to set aside the warrants and returned documents seized at least at the instance of the first applicant if she persists in her personal capacity cannot be granted because the documents are not personal to her but relate to companies not before the court.

As for the making of threats the court cannot make an order against the first and third respondent regarding threats whose details have been given by the first applicant. Therefore, the objection that there is no cause of action is dismissed. However, on the substance of the cause of action, it has not been proved or established on the balance of probabilities. For this reason, the court cannot make an order stopping unproven threats and nether can it issue an order stopping an investigation albeit it peripherally involves the first applicant. It follows as well that the court cannot properly anticipate police investigations on the authenticity of the WILL which police are investigating. There has been produced to court a questioned document examiner report which indicates that the signature on the WILL is not that of the deceased.

The report becomes subject of evidence to be tested and a decision made. The fact the WILL may have been accepted does not bar a challenge to it where new facts emerge concerning its authenticity. The order barring police from investigating their case is contrary to law. It cannot be a lawful or justified order on the facts of this case.

The objection that there was material non-disclosure of another pending case does not invalidate the case before the court. It may be an issue relevant to urgency but I have already disposed of the urgency issue. I however dismissed the urgency objection.

In relation to the objection on material disputes of fact, it is academic to delve into the issue in any depth because since police are investigating the matter, they must be allowed to do their work. Disputes of fact if they are said to be there will be answered in the investigations. This includes the dispute concerning the authenticity of the WILL. The court cannot without compromising and anticipating police investigations order that the estate continues to be administered under an impugned will. If all parties are well intentioned in the matter there must really be amicable resolutions because the deceased is no longer available to give evidence which is direct.

Turning to the case against the second respondent the first applicant has submitted that she has in fact sued herself and consented to the order which she seeks. The position of the second respondent as executor testamentary is surprising because where matters which impact on the estate which she is administering arise she must at least consider them, investigate them and reach a conclusion and advise all beneficiaries. The attitude she has adopted is one of a disinterested *executor* testamentary. However, in view of the fact that what remained for the court to decide is the individual case of the first applicant regarding her alleged threats and demands allegedly made by the first and third respondents, the executor testamentary is of no relevance to this.

The issue of costs is the last issue to determine. A holistic view of the matter is that what is before the court is the usual family feud over estate property allegedly left by a deceased person. The application has failed. Costs are in the discretion of the court. The costs also generally follow the event. Costs should be paid by the applicants. It will be so ordered but they are to be levied on the party and party scale. I dispose of the application as follows:

IT IS ORDERED THAT:

1. As against the second to the eighteenth applicants the application is struck off the roll with costs.
2. As against the first respondent, the application is dismissed with costs.

3. The costs to be levied on the party and party scale shall be paid by the applicants jointly and severally the one paying for the others to be absolved.

Venturas & Samkange, applicants' legal practitioner
Tabana & Marwa, respondents' legal practitioner
Civil Division, third & fourth respondents' legal practitioner