AROSUME PROPERTY DEVELOPMENT (PRIVATE) LIMITED
versus
FARAI OLIVIA MASHONGANYIKA (1)
and
MINISTER OF LOCAL GOVERNMENT AND PUBLIC WORKS (2)

HIGH COURT OF ZIMBABWE
DEMBURE J
HARARE; 3 & 7 March 2025

Opposed Chamber Application

S M Bwanya, for the applicant
L Uriri, for the 1st respondent
No appearance for the 2nd respondent

DEMBURE J:

[1] This is a chamber application for joinder wherein the applicant seeks to be joined as a party to the proceedings in Case No. HCH 884/24, a court application for review. The relief sought by the applicant is captured as follows:

> "1. The application be and is hereby granted.
> 2. Applicant be and is hereby joined as 2nd respondent in HCH 884/24.
> 3. The Applicant be and is hereby ordered to file its opposing papers, if any, in HCH 884/24 within 5 days of the granting of this order.
> 4. The opposing respondents shall pay the costs of this application."

FACTUAL BACKGROUND

[2] The applicant is Arosume Property Development (Private) Limited, a company registered in accordance with the laws of Zimbabwe. The first respondent is Farai Olivia Mashonganyika, a female adult Zimbabwean. The second respondent is the Minister of Local Government and Public Works, the administrative authority whose decision is the subject of the pending application for review.

[3] It is common cause that the first respondent filed a court application for review of the second respondent's decision in Case No. HCH 884/24. In that matter, the first respondent

(as the applicant therein) is seeking a review of the second respondent's administrative and statutory decision to direct the Registrar of Deeds to cancel the first respondent's title under Deed of Transfer No. 25690/2011 registered over an immovable property known as stand 91 Kidron Valley Road, Carrick Creagh Estate, Borrowdale, Harare.

[4] In the said court application for review, the present applicant is not cited as a party. The applicant averred that it has a direct and substantial interest in the matter and seeks to be joined as a party thereto. It averred that the applicant is a party to the Public-Private-Partnership Tripartite Agreement with the second respondent and Sally Mugabe Housing Cooperative. The agreement regulates the acquisition of rights and interest in the development known as Carrick Creagh Estate under which stand 91 Carrick Creagh is located. The stand is the subject matter in the matter HCH 884/24 to which the applicant seeks joinder. The said matter is still pending. The applicant further averred that under the Tripartite Agreement, it is entitled to recover the cost of development from beneficiaries of the land who included the first respondent. It was also alleged that the first respondent failed and or refused to pay her pro-rata share of the land development costs due to the applicant.

[5] This application is not being opposed by the second respondent. However, the first respondent strenuously opposed this application. She raised a point *in limine* in her opposing affidavit that the act of cancellation of the deed of transfer in her favour was unlawful. On the merits, she contended that the applicant has no substantial interest in the matter. It was further averred that the applicant is a developer in terms of the Tripartite Agreement which has since been terminated by the disposal of the stand to the first respondent. In the heads of argument filed for the first respondent, the following were raised as points *in limine:*

1. That the applicant's interests over the property in dispute in the main application have since prescribed.
2. That there is a fatal non-compliance with s 18 of the Deeds Registries Act [*Chapter 20:05*] by the second respondent.
3. That there is an admission by the applicant of material averments made by the first respondent in the opposing affidavit.

[6] At the hearing of this application, the first respondent raised a further point in *limine* which her counsel submitted goes to the root of the matter and is dispositive of this application. The point taken by Mr *Uriri*, counsel for the first respondent, was that the board resolution was invalid and consequently, there is no application before this court. It was submitted that all the other points in *limine* are adopted as argued in the papers and if this first point is not resolved in the first respondent's favour, the other points in *limine* were being persisted with. The parties also made further oral submissions on the issue of prescription.

ISSUE FOR DETERMINATION

[7] The first issue I have to decide is whether or not the board resolution in *casu* is valid and consequently, whether or not the application is valid. The point goes to the root of the matter and can dispose of this application.

1. WHETHER OR NOT THERE IS A VALID BOARD RESOLUTION AND CONSEQUENTLY, WHETHER OR NOT THERE IS A VALID APPLICATION

FIRST RESPONDENT'S SUBMISSIONS

[8] Mr *Uriri* submitted that the matter is disposed of on the point of the invalidity of the application before the court. It was argued that the board resolution purportedly authorising these proceedings is void. An application must be founded on a valid founding affidavit. Where one disposes to an affidavit on behalf of the company there must be a valid board resolution authorising the specific litigation.

[9] It was further argued that in para 2 of the founding affidavit, the deponent alleged that the authority to prosecute all litigation between the applicant and the first respondent relating to stand number 91 of Carrick Creagh Estate, Borrowdale, Harare was under a board resolution attached at p 11 of the record. The deponent alleged that the board resolution is specific to the litigation between the applicant and the first respondent. That is false. At p 11 is a blanket resolution which does not relate to the specific litigation between the applicant and the first respondent. This court has persistently held that a blanket resolution is invalid and that a resolution must relate to a specific litigant and the relevant facts. He referred the court to the case of *Romeo Mkandla v PPC Zimbabwe Ltd & Anor* HB 151/24. In that case, KABASA J referred to the judgment of MAKOMO J in *Beach Consultancy (Pvt)*

Ltd v *Makonya & Anor* HH 696/21. Reference was also made to the case of *Leechiz Investments (Pvt) Ltd* v *Central Africa Building Society* HH 259/23.

[10] Mr *Uriri* further submitted that more recently in *Latifa Sidat & Ors v Nazirf Lambat & Ors* HH 50/24 CHITAPI J deals with the specificity that is required in the resolution. The resolution is invalid. There is no authority that is valid. There is no founding affidavit and the application is fatally defective.

APPLICANT'S SUBMISSIONS

[11] On the other hand, Mr *Bwanya*, counsel for the applicant, submitted that the point in *limine* is an ambush as it was raised for the first time at the hearing. A point of law can be taken at any time but it cannot be taken to the prejudice of the other party. The first point is that it causes prejudice to the applicant. The first respondent had over eleven months to raise the issue.

[12] Counsel further argued that the resolution must identify the cause and the other party against whom litigation is being taken. At p 11 the board resolution identifies a specific class of persons against whom action is to be taken. There are fourteen persons listed in the gazette and the first respondent is the eleventh of those persons. The resolution identifies the cause of action. There is no doubt that the present application and the other matter deal with stand 91 Carrick Creagh Estate. Both the cause and the identity of the parties are there. The first respondent does not deny that the name Olivia Mashonganyika and the stand are listed in the Government Gazette. What is being litigated on is an application for joinder and the resolution is specific to those fourteen persons involved including the first respondent who is number eleven on the list of the fourteen persons.

FIRST RESPONDENT'S SUBMISSIONS IN REPLY

[13] Mr *Uriri*, in his reply, submitted that there was no ambush as notice of the point *in limine* and the authorities the first respondent would rely on was given to the applicant's counsel before the court sat. There is no prejudice as contemplated by the law. It was also argued that the applicant's submission that the resolution relates to a class of persons is a concession as it becomes a blanket resolution. As required, the issue of specificity is that the company's attention must have been drawn to the application for joinder. The resolution in the case of *Sidat* mirrors the one in this case. The parties and the specificity

must appear *ex-facie* the resolution i.e. these must appear on the face of the application. The resolution itself must be clear that it relates to this litigation. The applicant is not before the court.

THE LAW

[14] The law is settled that a company being an artificial or legal person must be represented in any legal proceedings by a person who has been authorized by the company to do so. It is also trite that the person must be authorized by a valid company resolution to institute proceedings on its behalf. This legal position was authoritatively set out in *Madzivire & Ors v Zvarivadza & Ors* 2006 (1) ZLR 514 (S) at 516 B-E where CHEDA JA said:

> **"It is clear from the above 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. 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." [My emphasis]

[15] The above position was also confirmed in *Dube* v *Premier Service Medical Aid & Anor SC* 73/19 where on para 38 of the cyclostyled judgment the court held that:

> "The above remarks are clear and unequivocal. 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 is put in issue. This represents the current status of the law in this country."

ANALYSIS AND DETERMINATION

[16] Before I could consider the preliminary point on the validity of the board resolution, I have to consider the issue that had been raised by counsel for the applicant. Mr *Bwanya* argued that there was an ambush and that the point could not be raised as it was prejudicial to the applicant. Mr *Uriri*, on the other hand, contended that counsel for the applicant was notified of this legal point and the authorities upon which it would be argued before the court sat. Mr *Bwanya* did not rise to object to this position. It is a trite law that a point of law can be

raised at any stage of the proceedings. In *Muchakata* v *Netherburn Mine* 1996 (1) ZLR 153 KORSAH JA (as he then was) stated that:

> "It is proper to raise a point of law, which went to the root of the matter, at any time, even for the first time on appeal, if its consideration involved no unfairness to the party against whom it was directed. If the order was *void ab initio*, it was void at all times and for all purposes. And the question of its validity could be raised at any time."

[17] The point as conceded by Mr *Bwanya* was a legal point and could be raised at any time as it goes to the root of the matter. He did not object that he was notified in advance of this hearing and in fact, he was prepared to argue the point. In any case, the legal point raises a question about the validity of this application and is resolved from the papers filed of record. It did not require any further evidence which could have caught the applicant off guard. The issue related to the validity of these proceedings and its consideration does not involve any unfairness on the applicant. Parties had the chance to make full arguments on the point. I will, therefore, proceed to determine the issue.

[18] As outlined in the *Madzivire* and *Dube* cases *supra*, a resolution of the board filed must show that the company is indeed aware of the proceedings and that it has authorised the specific proceedings before the court. The resolution must also in clear terms give the deponent to the founding affidavit the specific authority to act on its behalf in commencing the instant application. In this regard, it has been expressed by several authorities that a blanket resolution is invalid. It is, therefore, trite that a board resolution must authorise the specific litigation involving the parties before the court. One which purports to authorise all litigation by the company in the future cannot meet the requirement of specificity and is, therefore, fatally defective and a nullity. Thus, in *Mkandla v PPC Zimbabwe supra* KABASA J had this to say:

> "In *Beach Consultancy (Private) Limited* v *Makonya & Anor* HH 696-21 MAKOMO J had occasion to deal with the issue regarding blanket authority. The learned Judge acknowledged that convenience may dictate that a blanket authority be given in some cases as it may be onerous for big corporates to routinely convene board meetings to pass resolutions granting an official to represent it each time such a corporate is engaged in litigation.
> Having said that the learned Judge proceeded to say:-
>
> > "Unfortunately, this apparently convenient practice is in my view not supported by law. 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 unauthorized person who is dragging it to court without its knowledge."

Such reasoning cannot be faulted and I associate myself with it as resonates with the position enunciated in *Madzivire* v *Zvarivadza & Anor* 2006 (1) ZLR 514 (S) where CHEDA JA said:-

> "It is clear from the above 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 authorized 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."

[19] The law is, therefore, clear that it is impermissible for a board resolution to purport to give blanket authority. In *casu*, in para 2 of the founding affidavit, the deponent averred that his authority to prosecute the current litigation between the applicant and the first respondent was under a board resolution passed on 14 January 2024. This application was filed on 8 March 2024. The resolution at p 11 of the record reads as follows:

> "The Board Resolves to **commence litigation against <u>all</u> persons listed in the government gazette** GN2402/22 in **continued occupation, constructing on or otherwise dealing with** the various pieces of land at Carrick Creagh Estate, Borrowdale, Harare.
> The further resolves and appoints Director CALVIN MPOFU to draft, sign and approve all documents **relating to such necessary litigation** and to prosecute same in the name of the company." [My emphasis]

[20] Mr *Bwanya* conceded that the resolution relates to a class of persons. The resolution refers to all litigation involving all persons listed in the government gazette. It does not specify the persons it relates to by their names. It further relates to all such litigation involving the alleged unnamed persons. Clearly, the resolution gives blanket authority to commence all necessary litigation against all the unnamed persons and for the deponent to do so on behalf of the company. This is impermissible or improper. This position was further confirmed in *Leechiz Investments* supra where MHURI J had this to say:

> "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 <u>all legal matters</u>, to sign on its behalf <u>all</u> and any documentation or affidavits necessary in <u>all</u> 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."

"… **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."**

[21] I agree that the resolution must never be a blanket authority but one which authorises specific litigation. It must appear *ex facie* the resolution itself that the company is aware of the specific litigation in question and that the authority to act on its behalf is in respect of a specific cause or matter. In this case, the application is for a joinder. The resolution does not speak to such an application. It rather refers to some disputes with all persons listed in the government gazette "in continued occupation, constructing on or otherwise dealing with the various pieces of land at Carrick Creagh Estate". There is no specific mention of the respondents and the current application or cause between the applicant and the first and second respondents. The resolution must stand on its own. It cannot simply refer to persons listed elsewhere. The resolution, does not, therefore, support para 2 of the founding affidavit that the applicant duly authorised this instant application. The litigation referred to related to the persons "in continued occupation and constructing on or otherwise dealing with the various pieces of land at Carrick Creagh Estate" not the present application which

is merely for joinder to the application for review. The resolution does not speak to the cause that had arisen and the facts relevant to the institution of the current proceedings. Such a resolution is invalid.

[22] CHITAPI J in *Latifa Sidat supra* further restated the legal position remarkably well as follows:

> "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 maybe**. 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 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…"

At p 17 the court concluded that:

> "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…" [My emphasis]

[23] I fully associate myself with the remarks made in the *Sidat* case above. This matter is equally resolved on the same basis. As alluded to above, the resolution does not meet the specificity requirement for a board resolution required for purposes of litigation. The

resolution in *casu* is not independently valid. The resolution does not show that the commencement of these proceedings for joinder was duly authorised by the company or that it is aware of them. The purported resolution is, accordingly invalid or a nullity.

DISPOSITION

[24] In the premises, there being no valid board resolution, there is no valid founding affidavit. Consequently, this application is a nullity. It cannot stand. The applicant is not properly before the court. It is a settled principle of the law that once a pleading is void *ab initio* it is void at all times and for all purposes. It does not matter when and by whom the issue of its validity is raised; nothing can depend on it. This position was aptly stated by LORD DENNING MR in *MacFoy* v *United Africa* Co Ltd [1961] 3 All ER 1169 at 1172 as follows:

> "If an act is void, then, it is in law a nullity. It is not only bad but incurably bad … And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

[25] It is unnecessary to determine the other points in *limine* raised by the first respondent. The matter was disposed of on the first preliminary point. Costs shall follow the cause. There was no prayer for costs on a punitive scale. In any case, such costs may not be justified in the circumstances.

[26] In the result, it is ordered that:

1. The point in *limine* that the application is fatally defective be and is hereby upheld.
2. Consequently, the application be and is hereby struck off the roll with costs.

DEMBURE J: ……

Jiti Law Chambers, applicant's legal practitioners
Chimwamurombe Legal Practice, first respondent's legal practitioners