

REPORTABLE (103)

(1) CASSANDRA MYBURGH (2) COLIN BAKER
v
ADLECRAFT INVESTMENTS (PRIVATE) LIMITED

**SUPREME COURT OF ZIMBABWE
MAVANGIRA JA, BHUNU JA & CHIWESHE JA
HARARE: 20, 21 JUNE 2022 & 3 NOVEMBER 2022**

T. W. Nyamakura, for the appellants

T. L. Mapuranga, for the respondent

MAVANGIRA JA:

1. This is an appeal against the decision of the High Court granting spoliatory relief in favour of the respondent.

FACTUAL BACKGROUND

2. The respondent is a company which engaged in mining activities. It also sometimes hires out its state-of-the-art equipment to other mining companies. The board of the company comprises three individuals being Ofer Sivan, Munyaradzi Gonyora and Gilad Shabtai. Gilad Shabtai is the board chairperson. Sometime in 2011 Ofer Sivan was appointed Director and from around 2015 he spearheaded the company as its Managing Director.

3. The appellants were employees of the respondent who, it is alleged, have since been suspended from employment.

4. At some stage Ofer Sivan allegedly misappropriated trust funds in excess of USD \$1 500 000.00. On 14 August 2021, upon realizing that the matter had been reported to the police, he allegedly fled the country and went to the United States of America. Consequently, the remaining board members resolved that Munyaradzi Gonyora (Gonyora) be appointed the respondent's Acting Managing Director with effect from 18 August 2021. The resolution reads in the relevant part as follows:

- “1. Munyaradzi Gonyora (National ID 63-889609B18) be and is hereby appointed at (sic) the Acting Managing Director of Adlecraft effective 18 August 2021 until the Board has been officially advised of the return of Ofer Sivan and ventilated the appropriateness of him continuing to be the Adlecraft's Managing Director.
2. Munyaradzi Gonyora's duties shall include (but not limited to) the following:
 - a) Overseeing all the companies' day to day operations
 - b) Providing leadership to the Company's employees
 - c) Handling any other administrative functions of the Company and delegating same as sees fit
3. Munyaradzi Gonyora shall continue to operate in the capacity of managing director of Adlecraft until such time as the Board appoints a substantive Managing Director. This position shall not change whether or not Ofer Sivan decides to return to Zimbabwe.”

5. On the same day that the appointment was made, Gonyora, as Acting Managing Director, went to the company's premises to commence his new duties at the head office. The second appellant barred him from accessing the premises and further dispossessed him of his company vehicle keys. Thereafter, in an attempt to avoid a scene, he proceeded to the respondent's workshop which was situated at different premises, for the purpose of

exercising his functions. He met the first appellant who, like the second appellant, verbally abused and barred him from accessing the premises.

6. Pursuant to these actions by the first and second appellants, the board resolved to institute disciplinary proceedings against them. They were suspended from employment. Despite the suspension, the appellants resorted to locking up both the head office and the workshop. The result was that they barred the Acting Managing Director from accessing the premises. The lockout allegedly prejudiced the operations of the respondent.
7. The respondent thereafter sought spoliatory relief against the appellants. The main contention was that Gonyora was prevented from exercising his functions as the Acting Managing Director and that the appellants had taken the law into their own hands as they had no right to barricade his access to either the head office or the workshop and the respondent's assets.
8. The appellants vehemently opposed the application. They argued that Munyaadzi Gonyora had no authority to act in such capacity as the resolution that gave him that acting position was a fraud. They specifically disputed that they denied him access to the premises. They further averred that the operations of the respondent never ceased and that the respondent was never despoiled. They also demanded that he should separate himself from the company.
9. In deciding the issue, the court *a quo* found that the resolution giving Mr Gonyora authority to act as Acting Managing Director was passed by a majority of the directors. It

was also the court *a quo*'s finding that the appellants could not take the law into their own hands and that the evidence before it showed that there was resistance by the appellants to Mr Gonyora taking over and exercising his assigned functions in terms of the board resolution. In the result the court *a quo* issued an order couched in the following terms:

- “1. The respondents shall immediately restore to the applicant through its authorised officials possession of number 1 Belper, Close, Mt Pleasant, Harare as well as 41180 Mazowe Road, Marlborough, Harare.
2. Applicant is granted leave to effect service of this order through its legal practitioners.
3. Costs of this application shall be borne on the higher scale of legal practitioner and own client by respondents jointly and severally, the one paying the other to be absolved.”

THIS APPEAL

The respondents were aggrieved and noted an appeal to this Court on the following grounds;

1. The court *a quo* grossly erred and misdirected itself in finding, in the absence of any evidence, that respondent company had been despoiled by the appellants as no dispossession was proved on a balance of probabilities. (*sic*)
2. The court *a quo* further grossly erred and misdirected itself in finding that the resolution **relied upon by the respondent** to confer authority on Munyaradzi Gonyora to act as managing director was valid in accordance with the Companies and Other Business Entities Act [*Chapter 24:31*]. (The emphasis is added)

1. APPELLANTS' SUBMISSIONS BEFORE THIS COURT

10. Mr *Nyamakura*, for the appellant, submitted that the court *a quo* erroneously dealt with the application for spoliation made by Mr Gonyora as if it was an application made by the respondent. It was counsel's submission that, Mr Gonyora could not prove peaceful possession of the company premises prior to 18 August, 2021 when the alleged dispossession occurred. He referred the court to the evidence filed of record in the form of worklogs of the respondent's employees. He contended that the worklogs showed that operations at the respondent's premises continued and did not cease, hence Mr Gonyora could not prove any kind of spoliation whatsoever. Counsel also argued that Mr Gonyora was only an agent and was not the company itself; and as such, he could not seek a spoliation order.

RESPONDENT' ARGUMENTS BEFORE THIS COURT

11. *Per contra*, Mr *Mapuranga* for the respondent submitted that the court *a quo* did not err when it found that the board resolution giving Mr Gonyora the authority to act as managing director was valid. It was his argument that the fact that Mr Gonyora who was acting as Managing Director on behalf of the respondent was denied access to the company premises meant that the appellants had despoiled the respondent of its premises.

ISSUES FOR DETERMINATION

12. After hearing submissions from both parties, it appears that two issues arise for determination, *viz*
1. Whether the board resolution authorizing Mr Gonyora to act as Managing Director was valid.

2. Whether or not the court *a quo* erred in granting the spoliation order.

I now proceed to deal with the issues seriatim.

1. Whether the board resolution authorizing Mr Gonyora to act as managing director was valid.

13. In relation to the validity of the resolution authorizing Mr Gonyora to act as the Managing Director, the appellants have argued that such resolution was invalid. The submission was made that the resolution was invalid for want of compliance with s 196 (1) of the Companies and Other Business Entities Act [*Chapter 24:31*]. The said section provides as follows;

“(1) A decision that could be voted on at a meeting of the board of a company may instead be adopted by written consent, stating the action so taken, signed by all of the directors entitled to vote on the matter. A decision made in such manner is of the same effect as if it had been approved by voting at a meeting.”

14. The wording of the above provision shows that the legislature intended that any decision that can be made at a meeting of the board, can also be made by adopting a written consent signed by all the directors. From a reading of the record, it appears that there originally were four (4) directors, one of whom resigned leaving the three, being Mr Sivan, Mr Shabtai and Mr Gonyora.
15. Mr Sivan having been unavailable, that left the board with only two available directors. A resolution was emailed by Mr Shabtai to both Mr Gonyora and Mr Sivan. Mr Sivan did not respond. The resolution was signed by the remaining or available two directors,

Shabtai and Gonyora, who, in the circumstances, constituted the majority by way of 2 “yes” votes against 1 non-voter. The resolution having been so passed, was valid. As stated in *First Mutual Investments (Pvt) Ltd v Roussaland Enterprises (Pvt) Ltd and Others* HH301/17 at p 3:

“A company, as a legal person, has no mouth through which it articulates its intentions. It has no ears with which to hear. It has no sense of sight or smell. It has no mind of its own. It speaks to no one except through its directors, not individually but collectively, through resolutions which they pass when they are assembled in one room for the purpose of transacting the business of the company. Directors and no one else are, together, the eyes, ears, nose and mind of the company. [Emphasis added].

16. On the facts of this matter, the resolution giving Gonyora authority to act cannot be said to be not compliant with s 196 (1) of the Companies and Other Business Entities Act. It was passed, by way of signatures, by a majority of the directors. It therefore, in accordance with s 196 (1) the Companies and Other Business Entities Act, had the same effect as if it was approved by voting. The respondent aptly referred to and described it as a round robin resolution. I find no merit in the argument that the resolution was non-compliant with s 196 (1) of the Companies Act. The appellants’ second ground of appeal is accordingly dismissed.

2. Whether or not the court *a quo* erred in granting the spoliation order.

17. On the issue of whether or not the court *a quo* erred in granting the application for a spoliation order, the appellant’s argument was that the requirements for the granting of such relief were not met. They argued that Gonyora’s affidavit did not prove that he was

in peaceful and undisturbed possession of the premises that were the subject of the spoliation proceedings.

18. At this juncture it is necessary to note that this argument necessarily brings to the fore the fact that the applicant in the court *a quo* was not Gonyora. Gonyora is not and has never been the litigant in this matter. The litigant is and has always been the company, Adlecraft Investments (Private) Limited, which was the applicant in the court *a quo*. Gonyora was merely the deponent to the founding affidavit. The possession that was at stake and was denied was thus not Gonyora's possession but the company's possession.
19. The determining factor in spoliation proceedings is that the deprivation of possession is done unlawfully and that the applicant was, before the deprivation, in peaceful and undisturbed possession. It is not in dispute that Gonyora became the Acting Managing Director of the respondent through a board resolution. In their opposing affidavits, the appellants clearly indicated that they would only take instructions from Mr Sivan and not from Mr Gonyora. These averments effectively corroborate Mr Gonyora's averments that they denied him access to the premises thereby hindering his ability to carry out his duties as Acting Managing Director. This hindrance in itself effectively meant that the respondent company, which had appointed Gonyora as the Acting Managing Director responsible for running its day to day affairs, had been denied access to its premises and thus been unlawfully dispossessed. It amounted to denial of access to the respondent, by the appellants.

20. The headnote in *Madzivire & Ors v Zvarivadza & Ors*, 2006 (1) ZLR (S) 514 reads:

“A company, being a separate legal entity 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.... The fact that a person is the managing director of the company does not clothe him with the authority to sue on behalf of the company in the absence of a resolution authorising him to do so. The general rule is that directors of a company can only act validly when assembled at a board meeting. An exception to this rule is where a company has only one director who can perform all judicial acts without holding a full meeting” [the underlining is added]

21. It is a basic tenet that there is need to distinguish between people who control property for their own benefit and people who do so for another’s benefit. In this regard *A J Van der Walt and G J Pienaar in Introduction to the Law of Property 7th edition Juta* at p 231-232 stated the position at law as follows:

“In the latter case, the principal is the one with control and therefore the one who should apply for the remedy, while agents and representatives who control on behalf of a principal can apply for the remedy on behalf of the principal and not in their own names.” [Emphasis added]

In casu, as already noted earlier, Mr Gonyora only acted on behalf of his principal, the respondent company, which had duly authorised him accordingly.

22. In determining whether or not the court *a quo* erred by granting the spoliation order, the case of *Botha & Anor v Barrett* 1996 (2) ZLR 73 (S) GUBBAY CJ at p 79 D-E is instructive. It was stated therein as follows:

“It is clear law that in order to obtain a spoliation order two allegations must be made and proved. These are:

1. That the applicant was in peaceful and undisturbed possession of the land; and,

2. That the respondent deprived him of the possession forcibly or wrongfully against his consent.”

23. In discussing the requirements for a spoliation order this Court, in *Streamsleigh Investments (Pvt) Ltd v Autoband (Pvt) Ltd* 2014 (1) ZLR 736 (S) at p 743 held as follows:

“It has been stated in numerous authorities that before an order for *mandament van spolie* may be issued an applicant must establish that he was in peaceful and undisturbed possession and was deprived illicitly. In *Scoop Industries (Private) Limited v Langlaagte Estate & GM Co Limited (in vol liq)* 1948 (1) SA 91 (W) LUCAS AJ said at pp98-99.

“Two factors are requisite to found a claim for an order for restitution on an allegation of spoliation. The first is that the applicant was in possession and the second that he has been wrongfully deprived of that possession against his wish. It has been laid down that there must be clear proof of possession and of the illicit deprivation before the order is granted.””

24. Mr Gonyora having been duly appointed Acting Managing Director of the company, became the agent of the company who acted not for his own accord but that of his principal, the respondent. It was therefore only the respondent who could and did bring the claim for spoliation. As the board of directors is in charge of the management of the company’s business, it makes the strategic and operational decisions of the company and is responsible for ensuring that the company meets its statutory obligations among other things. By the same token, as the mind is the controlling faculty of a person’s whole being, so are directors the controlling mind of the company. They manage it and they act on its behalf.

25. The resolution passed gave Gonyora authority to act for the respondent. He was

therefore, on the authority of that resolution, an agent who could exercise his powers for the benefit of the company. This Court therefore takes the view that the court *a quo* correctly granted the respondent spoliatory relief in view of the fact that a director who intended to exercise control of the company, as authorised and mandated, was denied access to it and to its premises and assets. The appellant's first ground of appeal to the effect that the court *a quo* misdirected itself in granting the spoliation order is therefore, in our view, without merit and must fail.

26. The resolution authorising Gonyora to act as Managing Director of the respondent meant that he was now the agent of the respondent. Upon his being barred from accessing the respondent and its premises and assets, the respondent could therefore properly and validly bring spoliatory proceedings as it duly did. Gonyora having been authorised to litigate, did so not in his own name but in the name of the respondent company. He deposed to the founding affidavit for and on behalf of the company. The attack on the resolution authorising him to act as being a fraud, was not substantiated. The said attack was made by the appellants who were employees of the respondent and who purported to speak on behalf of, and advance a cause for Ofer Sivan. They did not attach any supporting affidavit by Ofer Sivan. The attack remains in the realm of bare averments by persons who are not authorised to speak on behalf of the respondent company and who purport to challenge the respondent company's authorised agent. They in fact have no basis for resisting the lawful actions and authority of the respondent. Their opposition to the application *a quo* was characterised by an approach that viewed Gonyora as the applicant. He was not, for he was merely the authorised agent and deponent of the respondent's (as applicant) founding affidavit. By adopting such an approach, they, in effect, offered no valid resistance to the respondent's application. The granting by the court *a quo*, of the relief sought, was therefore inevitable on this account as well.

27. The insincerity of the appellant's resistance to the application *a quo* and their

prosecution of this appeal is laid bare by their second ground of appeal as captured at para 9 above. It is reproduced hereunder only for convenience.

“The court *a quo* further grossly erred and misdirected itself in finding that the resolution **relied upon by the Respondent** to confer authority on Munyaradzi Gonyora to act as managing director was valid in accordance with the Companies and Other Business Entities Act [*Chapter 24:31*]. (The emphasis is added)

The highlighted or emphasised words are telling. The appellants thereby implicitly recognise that it is the respondent company, and not Gonyora, that is relying on the resolution that they purport to seek to impugn. Their preference to be led by a different person, Ofer Sivan, does not invalidate the company’s actions and or resolutions.

28. Similarly, the averments made that there was no spoliation because the respondent’s employees were not barred from reporting for work and that there were worklogs to prove this are, in the court’s view, of no moment. The company’s business was to be managed and run per the company’s wishes through an authorised director, Gonyora. It was Gonyora, on behalf of the company, who was, in the exercise of his mandated functions, to direct the employees in carrying out their duties. It was not for some employees, in this case the appellants, to assess and decide whether they liked how the company had decided to conduct its business or whether it was being run in accordance with the company’s wishes.

DISPOSITION

29. The court has determined that the board resolution authorising Mr Gonyora to act as Managing Director was valid.

30. The evidence before the court *a quo* clearly established that the company had resolved that its day to day business operations, leadership of employees as well as other administrative functions (see para 2 above), were to be executed by Mr Gonyora, whose authority the appellants (employees) set out to challenge and frustrate. The appellants thus took it upon themselves to unlawfully wrestle with their employer, the respondent company, and despoil it by preventing its authorised agent in the person of its authorised Acting Managing Director, Gonyora, from performing his functions on behalf of and for the benefit of the respondent company. Their preference to receive instructions from Ofer Sivan did not and does not invalidate the respondent company's actions and resolutions. Ofer Sivan is not the company. In the circumstances, it is the court's view that the appellants therefore despoiled the respondent company as correctly found by the court *a quo*.

31. In the circumstances, the appellants cannot escape an order of costs against them. Costs will, as usual, follow the cause.

32. In the result it is ordered as follows:

The appeal be and is hereby dismissed with costs.

BHUNU JA: I agree

CHIWESHE JA: I agree

Samukange Hungwe Attorneys, appellants' legal practitioners.

Rubaya & Chatambudza, respondent's legal practitioners.