

HB 169/18
HC 1747/18
X REF HC 1017/17; 1746/18

WILD GOOSE SAFARIS (PVT) LTD

Versus

SIPHO MPOFU

And

JABULANI MPOFU

And

THE DEPUTY SHERIFF (NO)

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 22 & 28 JUNE 2018

Urgent Chamber Application

Advocate S. Siziba for the applicant
V. Majoko for the 1st and 2nd respondents

MAKONESE J: This is an urgent chamber application brought by Wild Goose Safaris (Pvt) Ltd. The applicant purports to be representing itself. The application is filed under the hand of its Managing Director Phumulani Msipha. The deponent to the founding affidavit is Phumulani Msipha acting in his capacity as the Managing Director of the applicant. A resolution signed by Phumulani Msipha in his capacity as the Managing Director asserts that at a meeting for directors of Wild Goose Safaris (Pvt) Ltd and held at Bulawayo on 18th June 2018 it was resolved that he be authorized and empowered to sign all necessary documents on behalf of the company. The resolution is not certified by any other director of the company and is not signed by the company's secretary.

The respondents are opposed to the relief sought in the draft order whose terms are as follows:-

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“Interim relief sought

Pending the finalisation of this matter, applicant is granted the following interim relief:-

- (a) That 1st and 2nd respondents be and are hereby interdicted from executing any writ of execution issued by the Deputy Registrar of the High Court under case number HC 1017/12 until the return date.”

“Terms of final order sought

- (a) The execution of the default judgment which was granted by this honourable court on the 7th May 2018 under case number HC 1017/12 be and is hereby stayed pending finalisation of the application for rescission of judgment under case number HC 1746/18.
(b) Each party pays its own costs.”

The respondents have raised certain preliminary points, which if sustained would dispose of the matter without going into the merits.

1. The application filed by applicant is not properly before the court as applicant filed the application on its own without the agency of a legal practitioner

It is not disputed that the application was filed by Wild Goose Safaris (Pvt) Ltd under the signature of its Managing Director, Phumulani Msipha. The application was not filed by a legal practitioner, and the applicant purported to act on its own. *Mr Majoko* appearing for the respondents contended that the legal position is settled under our law that a company can only act through a legal practitioner in proceedings in this court. The application was filed by Wild Goose Safaris (Pvt) Ltd in its own capacity and acting as a self actor. *Advocate Siziba*, appearing for the applicant argued that he was appearing on behalf of the applicant on instruction from applicant’s legal practitioners who have since assumed agency. I am not persuaded by the argument that the notice of assumption of agency cures the defect complained of. The applicant is a company registered in terms of the laws of Zimbabwe. The applicant may not institute proceedings in this court without engaging the agency of a legal practitioner. This issue was settled in the case of *Lees Import and Export (Pvt) Ltd v ZIMBANK* 1999 (2) ZLR 36 (S).

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In that matter the Supreme Court held that the rule of practice is that a company could only be represented by a legal practitioner as provided under section 9 (2) of the Legal Practitioners Act (Chapter 27:07), prohibits anyone other than a legal practitioner for performing various forms of legal work, such as issuing out of a summons or carrying on or defending any action or appearing as a legal practitioner on behalf of another in any action. The *proviso* to section 9 (2) provides that nothing in the subsection shall prevent a director or officer in a company from doing these acts. The effect of this *proviso* is simply to allow authority to be given to a director or officer to do these acts. This authority can be provided for in the rules of court. No such authority is given in the High Court Rules for a company to be represented by a director or officer. There is, however provision in the Magistrates' Court Rules authorising a director or officer to these acts in cases covered by the proviso, where such acts are not inconsistent with the prohibition in section 9(2) of the Legal Practitioners Act. It was clear from submissions made by *Advocate Siziba* that he had no meaningful argument to rebut this first preliminary point. On this point alone, the application is not properly before the court and should not be entertained. It is fatally defective.

2. The company resolution signed by the deponent to the founding affidavit is defective

A company being a fictitious person is incapable of appearing in person, and may only appear in the High Court or Supreme Court, represented by a legal practitioner. The company must file a resolution of its directors authorising someone to depose to affidavits on its behalf. The purpose of such resolution is to indicate that the directors have expressly appointed an official of the company to represent and protect its interests. In this matter, the resolution is signed by the Managing Director, authorising himself to act on behalf of the company. There is a blank space, which presumably was to be endorsed and signed by the company secretary. The company secretary, who is the legal officer of the company did not certify the resolution. It is highly irregular for the deponent to the founding affidavit to act on behalf of the company, such authority deriving from a resolution signed by the same person. The resolution is clearly defective and of no force or effect.

3. Urgency

I invited the parties to address me on the aspect of urgency. It became clear that the matter is not in fact urgent for a number of reasons. The deponent to the founding affidavit does not claim that he has been served with any court order. The courts have repeatedly stated that legal practitioners who certify certificates of urgency must apply their minds to the matter at hand. What became clear was that no writ of execution was issued against the applicant. The threat of execution was therefore not real but imagined. This matter has been outstanding and before the courts since 2012. The urgency alleged by the applicant is not the urgency as contemplated by the rules. Nothing has really occurred to lead to the conclusion that this court must drop everything else and attend to this matter. The applicant is open to pursue its application for rescission of judgment. The filing of the application for rescission of judgment cannot be used as the basis of urgency or the need for the applicant to act. The urgency in this matter is therefore contrived.

Disposition

I am satisfied that the application is not properly before the court. The applicant ought to have engaged the services of a legal practitioner to institute proceedings in the High Court. Applicant disregarded the rules of the court. The resolution was not properly executed and is defective. The matter itself is not urgent. In the circumstances of this case, the application ought to be dismissed. See the case of *Agrimac (Pvt) Ltd v Chiwo & Anor* 1991 (2) ZLR 185 (SC).

In the result, and accordingly, the application is dismissed with costs.

Messrs Majoko & Majoko, 1st and 2nd respondents' legal practitioners