

SOUND ELECTRICAL PROPERTY (PVT) LTD
versus
HORNFRISKON INVESTMENTS (PVT) LTD
t/a MAICON RESOURCES

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 20 FEBRUARY 2018 AND 1 MARCH 2018

Opposed Application

N Mazibuko for the applicant
P Lamola for the respondent

MATHONSI J: The applicant sued the respondent, Phil *Lamola* and Priscilla Mangisi by summons action in HC 1958/17 for payment of sums of \$10 353-79, \$4 651,00, eviction from premises known as No 99 Jason Moyo Street, Bulawayo, interest and costs on a legal practitioner and client scale. The respondent, acting on its own, entered appearance to defend and the applicant's protestations by letter written by its legal practitioners on 31 August 2017 entreating the respondent to secure the services of a legal practitioner to file the appearance to defend on its behalf and to represent it before this court fell on deaf ears. Instead the respondent proceeded, as if nothing had happened, to file a request for further particulars.

It is that intransigence on the part of the respondent which has prompted the applicant to make this application for directions in terms of rule 151 of the High Court Rules, 1971 seeking an order directing the respondent to instruct a firm of legal practitioners to assume agency on its behalf and there after file process in HC 1958/17. The applicant would like the respondent barred from filing further process in that matter unrepresented by a legal practitioner and that if it fails to comply leave be granted for the applicant to apply for default judgment.

In its founding affidavit, deposed by Thembinkosi Mhlanga the Commercial Letting Manager of the applicant's estate agent John Pocock and Company, the applicant stated that the appearance to defend is irregular in that the respondent cannot represent itself in a superior court

but has to act through a legal practitioner. As the respondent has simply ignored the request for it to regularize its representation the applicant prayed for an order aforesaid.

The application is opposed by the respondent through Phil Lamola who deposed to an opposing affidavit, remarkable by its brevity. It reads in part;

“I, Phil Lamola do hereby make oath and state as follows:

1. The respondent in the above numbered matter is a private limited company registered in terms of the Companies Act of Zimbabwe.
2. I am a director and shareholder and have been nominated in terms of a company resolution dated 28 July 2017, to represent the respondent and to prepare all documents necessary to defend the legal action instituted by the applicant. It is attached hereto marked A1:
3. ____.
4. ____.
5. AT PARA 8-9
This is disputed. Neither the founding affidavit for this application nor the two letters from applicant’s legal practitioners state on which proposition of the law, they rely on for the argument that a juristic person cannot represent itself in court. In that fact I have represented other companies in the High Court.
6. I refer this Honourable Court to clause 45 (3) of the Constitution of Zimbabwe which extends all rights found in Chapter 4 to juristic persons.”

The respondent goes on to state that section 9 of the Companies Act provides that a company has the capacity and power of a natural person. It is significant that *Lamola* acts by virtue of a company resolution signed by two directors and a shareholder suggesting that the respondent is a fully-fledged company. Indeed *Lamola* does not suggest in his opposing affidavit that the respondent is a one-man company or that he is its *alter ego*.

In advancing the argument that the respondent can only appear in this court through a legal practitioner *Mr Mazibuko* for the applicant cited a series of authorities spanning almost two decades. McNALLY JA set the ball rolling in *Agramac (Pvt) Ltd v Chisvo & Another* 1991 (2) ZLR 185 (S) where at 186 D-F the learned appeal judge pronounced:

“In my view, however a company can only be represented in the High Court or the Supreme Court by a legal practitioner. See *Ramsey v Fuchs Garage (Pty) Ltd* 1959 (3) SA 949 (C); *Dormehl’s Garage (Pty) Ltd v Magagula* 1964 (1) SA 203 (T); and *Stuart Nixon Estate Agency (Pty) Ltd v Brigadoon (Pty) Ltd & Another* 1970 (1) SA 97 (N) at 102 D-E. In *Yates Investments (Pty) Ltd v Commissioner for Inland Revenue* 1956 (1) SA 364 (A) the Appellate Division in South Africa refused to hear an individual who claimed to be the sole beneficial shareholder in the appellate company. I am convinced

there have been similar decisions in this jurisdiction though none seem to have been reported. The simple logic is that we allow a person to appear either in person or through a legal practitioner (the position is different in the Magistrates Court by reason of the provisions of Order 4, Rule 1 of the Rules – Statutory Instrument 290 of 1980). But a fictitious person cannot appear in person. Therefore it must appear through a legal practitioner. Compare the English practice as set out in Order 5 Rule 6 (2) of the Rules of the Supreme Court.”

Two judges sitting at the High Court (SMITH J and GILLESPIE J) in *Pumpkin Construction (Pvt) Ltd v Chikaka* 1997 (2) ZLR 430(H) followed that binding decision of the Supreme Court holding that a company, being an artificial person, cannot appear in person in court and must be represented by a legal practitioner. The court went on to hold that since the signing of a summons or plea is part of the legal process, a summons or plea and indeed a notice of appearance to defend must be signed by a legal practitioner. The court took into account that rule 48 of the High Court Rules provides that entry of appearance to defend shall be effected by the defendant or his legal practitioner and that section 9 (2) of the Legal Practitioners Act [Chapter 27:07] provides that no person other than a registered legal practitioner who is in possession of a valid practicing certificate shall sue out any summons or process, carry on or defend any action, suit or proceedings in any court in the name of any other person or appear, plead or act in the capacity of a legal practitioner for or on behalf of any other person.

Dealing with the proviso to section 9 (2) of the Act which states that nothing there in shall prevent any director or officer in the sole employment of a corporation representing the corporation in court, the learned judges acknowledged that Order 4 rule 1 of the Magistrates Court (Civil) Rules 1980 allows an incorporation to be represented by an officer nominated by it for that purpose. At 434 G they remarked:

“There is no provision in the High Court Rules 1971 equivalent to Order 4 rule 1 of the Magistrates Court (Civil) Rules. Therefore there is no statutory provision authorizing an officer of a company to sue out summons or process or to commence, carry on or defend any action, suit or other proceedings in the High Court in the name of the company.”

I must state though that MUBAKO J was of a different view in *Zimbank Ltd v Pindi Electrical & Hardware (Pvt) Ltd & Others* 1998 (2) ZLR 210 (H) when, ignoring even the earlier case of *Agramac (Pvt) Ltd, supra*, which was binding on him, and the fact that *Pumpkin Construction (Pvt) Ltd, supra*, was a decision of two judges not one, the learned judge declared

that all the earlier cases were wrongly decided. He ruled that a company may act for itself in any court through a director or an officer in its sole employment. Fortunately it is unnecessary to decide whether to follow MUBAKO J's reasoning or not because subsequent to that decision the full bench of the Supreme Court settled the issue in *Lees Import and Export (Pvt) Ltd v Zimbank* 1999 (2) ZLR 36 (S). In that case the constitutional question of whether the rule that companies may only be represented in the superior courts by a legal practitioner offended against the provisions of section 18 of the then Constitution of Zimbabwe that every person is entitled to the protection of the law was referred to the apex court for determination. I must say that the constitutional provision which was the subject of that judgment is the same in content with the current section 69 of the constitution, in particular subsection (3) that every person has a right to access to the courts.

The Supreme Court held that the rule that a company must be represented by a legal practitioner in the superior courts is a long standing one in Zimbabwe and other countries and is too well settled to allow its validity to be impugned on grounds other than constitutional grounds. While recognizing that section 113 of the old constitution (a similar provision to section 45 (3) of the current constitution) provided that a "person" includes individuals and bodies of persons whether corporate or unincorporated, the court maintained that there is no absolute right to appear in person but because a superior court retains a residual right to regulate its proceedings unless fettered by legislation, it can, in the exercise of such discretion and in the interests of justice, permit a person other than a legal practitioner to appear before it on behalf of a company but only in exceptional circumstances.

Applying the *alter ego* doctrine and the organic theory which accepts that in certain instances the acts of certain persons are effectively the acts of the company, the court reasoned that because such persons are the directing mind and will of the company who control what it does, they are not the agents of the company but are the *persona* of the company. Therefore in such small one man companies, where there is no distinction really between the company and the individual, an exception exists for the court to allow the individual to appear before it.

At 48 F-G, 49A GUBBAY CJ writing for the full bench of the Supreme Court pronounced:

“An application of this interpretive approach, with the legal consequences of the organic doctrine in mind, persuades me that the common law rule offends against section 18 (9) of the Constitution, certainly to the extent that it prohibits the duly authorized organ or *alter ego* of a company the right to appear in the person of the company before the High Court and the Supreme Court of this country. In short, the right given to ‘every person’ under this constitutional mandate includes within its reach a corporate body appearing through its *alter ego*. In this sense, it is that body which is exercising the right. This view does not undermine the rule of practice. It merely provides an exception to it. For it does not permit a company to appear before the superior courts through someone who is a mere director, servant or agent. The decision, therefore, in *Law Society of Zimbabwe v Lake* 1988 (1) ZLR 168 (S) still holds. Companies, which cannot be said to be the embodiment of a human body, will not qualify under section 18 (9) because no human being personifies the company ‘in person’. In general, small companies should be able to avail themselves of the exception.”

The position is therefore that a person who can show that he or she is the *alter ego* of the company is allowed to approach the court seeking leave to appear on behalf of such a company in the superior courts. This is because in such situations the person is in effect the heartbeat of the company there being no distinction between the company and the individual. MAKONI J had the occasion to make a pronouncement on that in *Pinelong Investments v Vallance & Another* 2009 (2) ZLR 334 (H) at 339 C-E. She said:

“In terms of s51 of the High Court Act [Chapter 7:06] and s9 of the Legal Practitioners Act [Chapter 27:07], the second respondent has no right of audience before this court except through legal representation. This position has been laid down in a number of cases in this jurisdiction. See *Diana Farm (Pvt) Ltd v Madondo N.O & Another* 1998 (2) ZLR 410 (H); *Pumpkin Construction (Pvt) Ltd v Chikaka* 1997 (2) ZLR 430 (H) and also *Lees Import & Export (Pvt) Ltd v Zimbank* 1999 (2) ZLR 36 (S). In *Lees Import supra* the court recognized exceptions to the rule that a corporate body can appear through its *alter ego*. One has to seek leave of the court to appear on behalf of a corporate body. The same technicality that bedevils the first respondent in the main matter also affects it in the present proceedings. It has no right of audience and is not properly before me.”

I associate myself fully with those sentiments. But then, Mr *Lamola* submitted that all the authorities relied upon in denying audience before this court were decided before the new constitution came into effect. He submitted that because section 45 (3) of the constitution located in Chapter 4 dealing with the Declaration of Rights provides that the definition of a person includes a juristic person, it has now opened the flood gates as it were for directors, officers, employees or agents of companies to appear in the superior courts representing them.

Mr *Mazibuko* on the other hand submitted that the provision has not altered the position at all because it was always in the old constitution at the time the cases referred to were decided. It is not a new invention. Section 45 (3) provides:

“Juristic persons as well as natural persons are entitled to the rights and freedoms set out in this Chapter to the extent that those rights and freedoms can appropriately be extended to them.”

The interpretation section in the Lancaster House Constitution, s 113 (1), defined a person as:

“‘person’ means any individual or anybody of persons whether corporate or unincorporated.”

It therefore included corporations. The fact that s 45 (3) uses the phrase: “juristic person” does not change anything, as it relates to the same issue. So when the Supreme Court determined in *Lees Import & Export supra*, that the entitlement to the protection of the law laid down in section 18 (1) as read with section 18 (9) of the old constitution only extended the right of audience to those companies represented by their *alter ego* it set the tone which has not been altered by the new constitution which only semantically talks of “juristic person.” This is particularly so as the fundamental right to a fair hearing enshrined in section 69 of the current constitution is not new either it having been embodied in section 18 of the old constitution. Therefore I do not agree with Mr *Lamola* that a new lease of life has been given to companies to appear before the superior courts outside the exception set out in *Lees Import & Export, supra*.

It is not without reason that *Lamola* was authorized to represent the respondent by what appears to be a fully-fledged board of directors including a company secretary. It means that the respondent is a fully functional company. It is certainly not a one man band and *Lamola* cannot therefore be the directing mind and will of the company who controls it. In that regard he cannot appear on its behalf. Even if he was, he would have to seek and be granted leave to appear. I would therefore grant the order sought.

In the result, it is ordered that;

1. The respondent be and is hereby directed to instruct a firm of registered legal practitioners to assume agency on its behalf in case number HC 1958/17 and for the said

legal practitioners to thereafter file any further legal process in the matter within 7 days of service of this order on the respondent.

2. The respondent be and is hereby barred from filing any legal process on its own behalf in case No. HC 1958/17.
3. In the event of the respondent's failure to comply with clause 1 of this order, it shall be deemed to be barred and its notice of appearance to defend and subsequent court process filed by it shall be deemed to be struck out at the expiration of the 7 day period aforesaid with the applicant being given leave to apply for default judgment without further notice to the respondent.
4. The respondent shall bear the costs of suit on an ordinary scale.

Calderwood, Bryce Hendrie & Partners, applicant's legal practitioners