DYNAMOS FOOTBALL CLUB (PRIVATE) LIMITED

and

DYNAMOS FOOTBALL CLUB

versus

RICHARD CHIMINYA

and

SUNDAY CHIDZAMBWA

and

CHARLES GWATIDZO

and

JAIROS BANDA

and

GEORGE SHAYA

and

SIMON SACHIDI

and

BRIAN KASHANGURA

and

ERIC MVUDUDU

and

PREMIER SOCCER LEAGUE

HIGH COURT OF ZIMBABWE

CHATUKUTA J

HARARE, 2 April 2008 & February 2009

Opposed Matter

Mr Uriri, for the applicant,

Mr Mutasa, for the respondents,

CHATUKUTA J: This is an opposed application in which the applicant sought the following relief, that:

"1. The affairs of the Second Applicant shall be run by the Board of Directors of the First Applicant.
2. The Ninth Respondent shall forthwith recognize any person appointed by the First Applicant and the two representative (*sic*) of the Second Applicant.
3. The First, Second, Third, Fourth, Fifth, Sixth Seventh and Eighth Respondents shall cease to run the affairs of Dynamos otherwise than through the structures set by the First Applicant.
4. First to Eighth Respondent (*sic*) shall pay the costs of this application."

The 2nd applicant is a football club (herein referred to as the Club). It is an unincorporated voluntary organization. It was established in 1963 under the Constitution of the Dynamos Football Club of Salisbury Rhodesia (the Constitution). A Board of Trustees was established in terms of clause 5 of the Constitution. The Board of Trustees was constituted of the founder members and former players who joined the Club within the first year of its existence. The Board of Trustees was mandated to be the policy organ of the Club (Clause 5.1.3). It was further empowered to appoint the executive committee, managers, head coach and other committees of the club. The executive committee was mandated to administer and manage the affairs of the Club.

Clause 16 of the Constitution provided for the registration of a company, Dynamos Football Club (Pvt) Ltd (the Company). Upon registration of the Company, the Board of Trustees was to constitute the Board of Directors of the Company.

The 1st applicant is the company that was formed pursuant to clause 16 of the Constitution.

The applicants averred that the 1st respondent in connivance with the 2nd to the 8th respondents formed an association which they termed the "Board of Trustees". They proceeded to appoint an executive committee which is now illegally running the affairs of the Company. It was contended that the Board of Trustees and the executive committee

are illegally running the affairs of the club as it has usurped the powers of the Board of Directors of the Company.

The application was opposed by the 1st to the 8th respondents whom I shall refer to as "the respondents". The respondents raised two points *in limine*. The first point is that Morris Longstaff Sifelani (Sifelani), who deposed to the founding affidavit, did not have the authority to represent both applicants. It was contended that Sifelani purported to act for two separate entities and was required to satisfy the court in the founding affidavit that he had the authority to represent the applicants.

The applicants filed minutes of a meeting of Board of Directors of the Company, held on 22 May 2007, which purported to authorise Sifelani to institute the proceedings in the Answering Affidavit. I say "purported" because the legality of the Board of Directors is challenged by the respondents. The respondents contended that the proof of authority only arose in the Answering Affidavit instead of the Founding Affidavit. This amounted to introducing new evidence. The applicants should therefore have applied for leave of the court to introduce the new evidence. It was contended that an application must stand or fall by its founding affidavit.

The applicants contended that the minutes were adequate to cure the irregularity raised by the respondents. It was further contended that s12 of the Companies Act [*Chapter 24:03*] raises a presumption that the acts of the company are regular. Outsiders should therefore not inquire if the rules of the company have been complied with.

The second point *in limine* is that there is a material dispute of fact that cannot be resolved on the papers. It was contended that Sifelani does not have the authority to represent the applicants. It was further contended that Sifelani was not a Director of the 1st applicant. He was not a member of the Board of Trustees of the 2nd applicant at the time the 1st applicant was incorporated. He therefore could not have been a director of the 1st applicant. It was further contended that the 1st respondent has disputed Sifelani's authority and membership of the 2nd applicant in other cases. The applicants therefore ought to have known that a material dispute of fact would arise and should therefore have proceeded by way of motion.

The applicants contended that the court should adopt a robust approach and resolve the dispute on the papers. It was contended that the production of Form CR14 on the appointment of directors was adequate proof that Sifelani is a Director of the company. It was submitted that the Form was, *prima facie* proof of Sifelani's directorship.

It is my view that the two issues are entwined and the first issue is subsumed by the second issue, whether or not there is a material dispute of fact. I shall therefore deal with first issue in that context. It is clear that the court has a discretion as to whether or not to dismiss an application where there are material disputes of fact which cannot be resolved on the papers. In exercising its discretion, the Court must take into account when the applicants became aware that there were disputes of fact in the matter. (See *Masukusa* v *National Foods Ltd & Anor* 1983 (1) ZLR 232).

I will deal first with the applicant's contention that the decision that Sifelani represents the 1st applicant in these proceedings is covered by section 12 of the Companies Act. It appears to me that the presumption of regularity of the acts of a company does not apply in this case and the applicants' reliance on the rule is misplaced. As stated by MALABA JA in *Ngatibataneyi (Private)Limited v Tobias Venganayi Moyo and Anor* SC 13/07, s 12 of the Companies Act embodies the common law principles of estoppel enunciated in the case of *Royal British Bank v Turquand* 1856) 119 E.R. 886 (generally known as the Turquand Rule). The Turquand Rule is intended to protect the rights of third parties dealing with companies. It is therefore a rule that a third party would rely on when a company or office bearer of a company seeks to avoid liability. It is my view that s 12 was red herring.

The question of the Sifelani's *locus standi* or authority to institute legal proceedings on behalf of the applicants is not new to this Court. The present application is a sequel to other applications brought on behalf of the applicants. On 2 August 2005, the Club filed an Urgent Chamber Application in case No HC 3803/05 against the 1st and 9th respondents in the present matter and another. The applicants were challenging the dissolution of the then incumbent executive committee on 25 July 2005 by the 1st respondent. It appears from the Consolidated Index to the application that Sifelani deposed to a supporting affidavit. However, the affidavit is not in the record. The

application was opposed. The 1st respondent, in paragraph 12(ii) of the Opposing Affidavit, listed the original members of the Board of Trustee. The list does not include Sifelani. The application was dismissed on the basis that it was not urgent and that the deponent to the Founding Affidavit, one Phillip Mugadza, did not have the authority to represent the Club.

On 12 September 2005, the present applicants, Sifelani and three others filed an Urgent Chamber Application in case No HC 4530/05, against the 1st respondent in the present matter. Sifelani deposed to the applicants' founding affidavit on behalf of all the applicants. The applicants were again challenging the 25 July 2005 dissolution of the Club's executive committee by the 1st respondent. Sifelani averred that he was the executive director and executive chairman of the company. He further averred that he was a founder member and a trustee of the Club. The application was almost a replica of HC 3803/05. It appears that the respondents had not filed any opposing papers. Letters filed of record indicate that the respondents were going to oppose the application. The application was withdrawn and the applicants, except for the Company and the Club, were ordered to pay costs on a legal practitioner and client scale.

On 23 February 2006, the same applicants as in case no HC 4530/05, filed yet another court application against the 1st respondent in case no HC 1065/05. The cause of action was the same as in the other two applications. Sifelani deposed to the founding affidavit again averring that he was a founding member and Trustee of the Club and that he was the chairman and chief executive officer of the Company. The application was again opposed. Sifelani status was again put into issue in paragraph 8 of the opposing affidavit.

On 29 May 2007, the applicants filed the present application. At the core of the application is again the question as to who should run the Club. The application was again opposed and Sifelani's directorship and trusteeship put into issue. In issue is also his status as the chairman and chief executive officer of the company.

It is clear that when the applicants brought the application it must have been in their contemplation from the previous applications that a dispute of fact would arise. The Form CR 14 produced by the applicants does not seem to resolve the issue. The Form is

merely *prima facie* proof of the directorship of Sifelani. The proof has been put into issue with the production of what the respondents purport to be the first Trustees of the Club who subscribed to the formation of the Company. It is these Trustees who were mandated under the Club's Constitution to form the Company and constitute the Board of Directors. The document therefore questions Sifelani's assertion that he is one of the founding members and a trustee of the Club when his name does not appear on its face. It further raises the question how Sifelani became a director of applicant as at 10 October 2002 as appears on the Form CR 14.

The minutes of the Board of Directors that purportedly authorized Sifelani to institute these proceedings were challenged by the respondents. The 1st respondent challenges the holding of the meeting and the passing of the resolution. It is not in issue that the 1st respondent is a director of the company. It appears from the minutes of the meeting that he did not attend the meeting. There is no indication from the applicants whether or not notice of the meeting was given as is required under the Companies Act. Despite previous challenges of Sifelani's authority to represent the company, the minutes were only annexed to the answering affidavit.

It is my view that these disputes of fact cannot be resolved on the basis of the affidavits filed of record. As already alluded to, these are disputes of fact that the applicants should have anticipated and adopted the proper procedure for their resolution. What is left, I believe, is for me to decide whether or not, in view of the apparent material dispute of fact, I should dismiss the application as prayed for by the respondents. As stated in *Adbro Investments Co Ltd v Minister of Interior* 1956(3) SA 345AD;

> "Where the facts are in dispute the court has a discretion as to the future course of the proceedings. It may dismiss the application with costs or order the parties to go to trial or order oral evidence.....
>
> The first course may be adopted when the applicant should have realised when landing his application that a serious dispute of fact was bound to develop."

Ordinarily, because of the apparent material dispute of fact, this is a case where the respondents would have been entitled to their prayer. However, I consider this case not an ordinary one. It appears that there is a tug of war between individuals who purport to be representing the applicants, particularly the Club. In almost all the applications,

there are two people who are featuring prominently, challenging each other's status within the Club, that is Sifelani and the 1st respondent. When the elephants fight, the grass suffers. In this case it is the Company and the Club which appear to be suffering. This, in my view, is not healthy for the two applicants.

It should be noted that the dispute as to who should control the Club has spilt into the Supreme Court following an appeal against a decision of this court. The issue before the Supreme Court in *Dynamos Football Club (Private) Ltd and Anor v Zimbabwe Football Association and Ors* SC93/06, was the independence of the Club to run its own affairs following a dissolution of the executive committee by Zimbabwe Football Association (ZIFA). The second issue was whether or not a 1994 amendment of the Club's constitution was valid. The court ruled that the Club was to manage its own affairs without any interference from the respondents. It was also declared that the ownership and management of the club was in terms of the 1963 Constitution until such time as it was lawfully amended or repealed. Although the case did not deal with Sifelani's *locust standi*, it brings to the fore the unending fight for the control of the Club. The multiplicity of court applications has not resolved the issue. It is my view that the fight should be brought to an end in the interest of the applicants.

This is one of the cases where it is therefore necessary to adopt a robust approach and refer the matter to trial so that all the issues are properly ventilated.

On the question of costs, the court can order costs against the applicant even where it has not dismissed the application as a sign of its displeasure. (See Herbstein and Van Winsen *supra* at 392). However, in *Van Answegen and Another* v *Drotkskie and Anor* 1964(2) SA 391 at 395 SMUT AJ stated-

> "It does of cause not follow that because a dispute of fact is reasonably foreseeable that an application on notice of motion will always be dismissed with costs. There may still be circumstances present which will persuade a court not to dismiss an application but to order the parties to go to trial together with an order that the costs of the application be costs in the cause or else that the costs stand over for determination at the trial."

This is a case where authorization of the institution of the proceedings is in issue. I do not believe that an order for costs at this stage would be in the interest of justice where the decision to institute the proceedings may later be found not to have been authorized by the two applicants. In the result, it appears only just that the question of costs be deferred for determination at trial.

In the result, it is ordered that:

1. The matter be and is hereby referred to trial with the court application standing as the summons.
2. The applicants be and are hereby ordered to file a declaration within 10 days of the date of this order.
3. The respondents' notice of opposition shall stand as the appearance to defend.
4. All further pleadings shall be in accordance with the rules of this Court.
5. The costs of this application shall stand over for determination at the trial.

Atherstone & Cook, applicants' legal practitioners

Gill, Godlonton & Gerrans, 1st -8th respondents' legal practitioners