THE MINING INDUSTRY PENSION FUND
versus
UNITED REFINERIES LIMITED
and
CHIEF REGISTRAR OF DEEDS
and
ERROL STURT WOLHUTER AND AUSTIN JAMELA SIBANDA
(Trading as Joel Pincus, Konson & Wolhuter)

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 27 May, 17 Sept 2014

Opposed application

Advocate T. Mpofu, for the applicant
T. Magwaliba, for the first respondent
Advocate H. Makusha-Moyo, for the third respondent

DUBE J: This is an application for specific performance. The facts of this matter are summarised in the applicant's founding affidavit as follows.

About October 2006, the applicant purchased from first respondent Stand 13981 Khami Road Extension, Kelvin West Bulawayo Township, (herein after referred to as the property) in terms of an agreement of sale entered into between the applicant and the first respondent. The third respondent, a legal partnership, was nominated to be the conveyancer of the property and was required to transfer the property within a reasonable time. Payment for the property was duly made. Pursuant to the agreement of sale, the parties entered into an agreement of lease wherein the same property was in turn leased to the first respondent in a lease back arrangement. The applicant avers in its founding affidavit that the first respondent has been sporadically paying rentals and is in arrears. That first respondent has failed to effect transfer of the property into its name and is experiencing financial difficulty. The applicant further avers that the third respondent appears to be colluding with the first respondent which has refused to effect transfer of the property or receive any payment in respect of transfer costs. Further that it has delayed in transferring the property into applicant's name. On 25

January 2011, the applicant received a letter from the first respondent in which it purported to cancel the agreement of sale. The applicant maintains that the agreement of sale entered into between the parties remains valid and binding upon the parties and that first respondent is obliged to tender transfer of the property and should not be allowed to resile from the agreement of sale.

The first respondent defends the application. It denies in its notice of opposition that a letter it wrote to the applicant suggests that the first respondent has actually cancelled the sale, but rather asserts that it will proceed to do so unless the transactions can be reviewed on an amicable basis and invites settlement overtures. The first respondent expresses difficulty in meeting the tax payment requirement of the Zimbabwe Revenue Authority (ZIMRA), to secure a capital gains tax certificate. It argues that even if transfer documents are prepared and signed, registration of the title cannot take place unless and until a tax clearance certificate is secured. First respondent further states that the parties were in the process of negotiating the sale of the property back to first respondent and the sticking point was the selling price. The first respondent subsequently filed a supplementary affidavit without leave of the court and the court ruled the affidavit inadmissible. This ruling was confirmed by the Supreme Court.

At the hearing of this application, the parties agreed to the amendment of the order to exclude third respondent from the proceedings. Consequently, the third respondent is no longer part of these proceedings. The first respondent raised the following points *in limine* which it requested the court to determine before resolving the dispute between the parties.

The first point relates to the applicant's *locus standi* to institute these proceedings. The first respondent challenges Kwanele Gatsheni Ndlovu's authority to bring proceedings on applicant's behalf. First respondent challenged her to produce a resolution of the board of directors of the Pension Fund authorising her to bring proceedings on its behalf. The first respondent further takes issue with the fact that she fails to point out in her affidavit that she derives authority from any governing authority of the applicant. The first respondent submitted that whilst she claims to derive authority by virtue of her position as a senior employee of the applicant, she failed to attach her contract of employment which presumably specifies that it is one of her duties to litigate on behalf of her employer. The first respondent takes issue with the fact that the point *in limine* was taken at the time the founding affidavit was filed in February 2011, that it has been 3 years since her authority was challenged and she has neglected to produce the resolution. The first respondent claims that Kwanele .G.

Ndlovu is on a frolic of her own and it urged the court to dismiss the application on that basis alone.

The second point relates to referral of the matter to arbitration. The first respondent submitted that when the lease agreement and agreement of sale are read together it is clear that the dispute between the parties should be referred to arbitration. The respondent's counsel urged the court to refer the matter to arbitration.

Advocate *Mpofu* was opposed to the points *in limine* raised. Counsel submitted that the first respondent is trifling with the court. That first respondent wanted to file a supplementary affidavit in order to set out a defence. Now that it has been unsuccessful, it turns around and alleges that the deponent to the founding affidavit is not authorised. That one wonders what it wanted to respond to and even going all the way to the Supreme Court to challenge this court's decision when it avers that the founding affidavit was improperly before the court. That this speaks to the *mala fides* of the first respondent's defence. *Advocate Mpofu* in addition submitted that there is no law which requires that a resolution be placed before the court and that an application be accompanied by a resolution. He submitted that a party deposing to an affidavit on behalf of a company of association only needs to do two things, thus be authorised to bring proceedings and secondly allege that they are so authorised. He submitted that Kwanele G. Ndlovu does allege in para 3 of her founding affidavit that she is authorised to bring proceedings. That if the first respondent does not agree that she indeed is so authorised, it must place before the court 'a minimum of evidence' showing that she is not so authorised. He referred the court to the case of *Mall (Cape) (Pty) Ltd* v *Merino Ko-opersie* Bpk 1957 (2) SA 347 (C) for this proposition. He further submitted that there is no evidence that the applicant is not the one litigating as no evidence was led to show that the deponent to the applicant's founding affidavit was on a frolic of her own. That she has acted for and on behalf of the applicant before, and that there have been prior dealings between applicant and first respondent. The applicant contended that there is evidence to support the assertion that it is the applicant that it litigating. His support for this assertion is that after this application was filed, the first respondent went to third respondent and stole the title deed of the property in issue. An application was then made by the applicant for the restoration of the title deed. He argued that this shows that the applicant wants to take transfer of the property and is the one litigating.

ARBITRATION

The agreement of sale entered into between the parties makes reference to a lease agreement in its Clause 5. The agreement of lease contains an arbitration clause which reads as follows;

> "Arbitration
>
> Should any dispute arise concerning the construction of this agreement or any part of the conditions contained herein or in any other respect, such dispute shall be referred to arbitration in terms of the Arbitration Act of Zimbabwe."

The law requires a party wishing to rely on an arbitration clause in an agreement to request for referral to arbitration not later than when submitting his first statement on the substance of the dispute in terms of Art 8 (1) of the Model Law to the Arbitration Act [*Cap* 7:02]. The article provides as follows:-

> "Article 8 – A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall if a party so requests not later than when submitting his first statement on the substance of the dispute, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative and incapable of being formed."

My understanding of Article 8 is that it regulates the conduct of cases were referral to arbitration is sought. The import of the article is that a court which has been requested to refer a dispute to arbitration may only accede to that request and stay proceedings after the party so requesting has outlined the dispute to the claim in its pleadings. There must be a dispute in existence between the parties.

This approach was enunciated in *Cargil Zimbabwe* v *Culvernham Trading (Pvt) Ltd* 2006 (1) ZLR 381(H) where the court remarked as follows,

> "For a court to stay its proceedings and refer the matter to arbitration there must be a dispute between the parties apparent *ex-facie* the pleadings."

The court in coming to this conclusion, placed reliance on the cases of *PTA Bank* v *Elanne (Pvt) Ltd and Ors* 2000 (1) ZLR 156 (HC) and *ZBC* v *Flame Lily Broadcasting (Pvt) Ltd t/a Joy TV* 1999 (2) ZLR 448 (H) .

A referral to arbitration is not there simply for the asking. A party wishing to have a dispute referred to arbitration is expected, at the outset and at the time he submits his first statement on the substance of the dispute, to outline his defence in his plea or notice of opposition. The dispute sought to be referred, should be apparent on the face of the pleadings. The rationale

behind this requirement is to ensure that by the time the court is being requested to refer the dispute to arbitration, it is well equipped to determine the existence or otherwise of the dispute between the parties. The respondent does not deny in its notice of proposition that it sold the property to the applicant. It does not allude to any dispute or defence to the applicant's claim. It merely expresses difficulty in meeting its tax obligations. I am unable to conclude that there is a dispute between the parties apparent *ex facie* the pleadings. I accordingly refuse to stay proceedings and refer the matter to arbitration.

LOCUS STANDI

The founding affidavit in this application was deposed to by Kwanele Gatsheni Ndlovu, the applicant's Deputy Principal Officer (Legal and Operations). She has not attached a resolution of the applicant, authorising her to bring the application on its behalf. A party bringing an application on behalf of a company, association or a corporate body is required to be authorised to do so. There is no requirement for the resolution or authority to be placed before the court at the commencement of the proceedings, nonetheless, in any case where the proceedings are challenged on the basis of lack of authority, the deponent to the founding affidavit is required to show that he was duly authorised to bring the application. These sentiments were expressed in *Mall (Cape) (Pty) Ltd* v *Merino Ko-opersie* Bpk 1957 (2) SA 347 (C) as follows;

> "The best evidence that the proceedings have been properly authorised would be to provided by an affidavit made by an official by the company annexing a copy of the resolution but I do not consider that that form of proof is necessary in every case. Each case must be considered on its own merits and the court must decide whether enough has been placed before it to warrant the conclusion that it is the applicant which is litigating and not some unauthorised person on its behalf. Where, as in the present case, the respondent has offered no evidence at all to suggest that the applicant is not properly before the court, then I consider that a minimum of evidence will be required from the applicant (cf *Parsons* v *Barkly East Municipality* 1952 (3) SA 595 (E); *Thelma Court Flats (Pty) Ltd* v *McSwigin* 1954 (3) SA 457 (C))."

The onus is on the applicant to show that the application was authorised by the Pension Fund. See *Griffiths* v *Inglis (Pty) Ltd* v *Southern Cape Basters (Pty) Ltd* p 972 4 SA 249 at 252 where the court relying on the *Mall* case remarked as follows,

> "In the present case, the founding affidavit makes no express mention of authorisation by the company acting through its board of directors .The question of authority has been challenged in the opposing affidavit, and thus the onus is upon the applicant to show that the application has been authorised by the directors of the company .In as much as no contrary evidence has been placed before the court by the

> respondent , "the minimum evidence" ,to use the words of WATERMEYER J ,in *Mall's case* (*supra*) will suffice."

Evidence of prior dealings between the parties is pertinent. In *Air Zimbabwe Corporation & Ors* v *Zimbabwe Revenue Authority* 2003 (2) ZLR 11 (H) the court dealt with the effect of prior dealings on *locus standi* and held that where from prior dealings a party knows that a deponent to the founding affidavit has acted on behalf of the company, the objection regarding authorisation of litigation will not succeed. CHINHENGO J made the following remarks,

> "I may in passing observe that it is often that litigants take objection to the other party's *locus standi* to institute proceedings. I do not think that it is proper for any litigant to do so especially where, from prior dealings ,he should be aware that the challenge to his adversary 's *locus standi* will not succeed"

The deponent to the applicant's founding affidavit has failed to produce the resolution authorising her to bring the proceedings in this application. She alleges that she is authorised to bring the application on behalf of the applicant. There is no contrary evidence showing that the deponent to the founding affidavit lacks authority to institute these proceedings. It is increasingly becoming trendy for litigants to challenge the authority of deponents who depose to founding affidavits on behalf of companies. There is no legal requirement that obliges such deponents to attach board resolutions authorising them to bring proceedings on behalf of such applicants, to founding papers at the commencement of proceedings. An allegation to that effect is sufficient. It is only where authority to bring proceedings on behalf of the applicant has been challenged that it may be essential that the applicant produce such proof of authority. A failure to produce proof of a resolution authorising one to bring proceedings on behalf of another on request, is not on its own, conclusive of the fact that the proceedings are not authorised and is consequently not fatal to the proceedings. The onus is on the deponent to show that the proceedings have been authorised. Only what is required of the applicant to show a 'minimum of evidence' that it is the applicant that is litigating. There is no duty on the part of the respondent to show, a minimum of evidence". In order for the challenge to succeed, there must be contrary evidence that it is not the litigant that is litigating. Evidence of prior dealings between the parties will suffice to show that it is the applicant that is litigating.

The issue requiring to be resolved is whether the applicant has placed before the court, "a minimum of evidence" to show that she is so authorised. In *Chitungwiza*

Municipality v *Gladys Ncube* HH 292\14, I dealt with the same issue and following on the *Mall* case (*supra*), I concluded that in the absence of a resolution from the applicant company, the deponent is required to show a "minimum of evidence" that she is authorised to bring the application. The court should be satisfied that the deponent is not on a frolic of his own, is abusing and that it is the applicant company that is litigating. Each case should be determined on its own merits.

It does not appear to the court that the respondent is genuine in its challenge to the founding affidavit. I am in agreement with the observations of *Advocate Mpofu* regarding the *mala fides* of the respondent. This affidavit challenged is the same founding affidavit that it sought to rely on and respond to when it tried to introduce the supplementary affidavit under HH 313\12. Having failed to do so, the first respondent now seeks to challenge the same founding affidavit. One wonders what it wanted to respond to and challenge when it sought to introduce the supplementary affidavit. Had it been successful, it would have been able to use the supplementary affidavit in this application. This points to the *mala fides* of the respondent's defence.

The deponent to the founding affidavit states that she is authorised to bring these proceedings. There is no evidence to show that the applicant is not in litigation. The first respondent has not laid a basis for the allegation that the deponent to the affidavit has no authority to institute these proceedings. It has actually not been shown that the applicant operates through resolutions. Even assuming that a resolution may have been necessary, I am satisfied that enough has been placed before the court to satisfy it that it is the applicant that is litigating and not some other unauthorised person. There is evidence of prior dealings over the same subject matter of the dispute between the applicant and first respondent in the form of court proceedings. There has been litigation between the parties over the restoration of title deeds of the same property in issue allegedly stolen by the respondent. The deponent to the affidavit has always represented the applicant in this matter. This evidence in my view, suffices as 'minimum evidence' and shows that it is the applicant that is litigating and that the applicant desires to take transfer of the property. I am not satisfied that the deponent to the founding affidavit is abusing the name of the applicant or is on a frolic of her own. It is the applicant that is litigating.

THE MERITS

On the merits, *Advocate Mpofu* submitted that the first respondent admits that it sold the property and agreed to transfer it and that this amounts to an admission of the sale. That the court has already made a finding that the agreement of sale is admitted by the respondent and that it is *functus officio* and cannot change from that position.

The first respondent submitted that it has never been in dispute that the agreements were entered into and signed by the parties but argues that that they were signed for specific purposes. That what the parties differ on is the legal effect of the agreements and not the existence of the agreements. The first respondent requested the court to determine the legality of the agreements and find whether the agreements as read together are lawful. He submitted that at the time the contracts were entered into, they were on the face of them valid and would be binding and effectual. Mr *Magwaliba* urged the court to interpret the contracts to determine what the intention of the parties was. He submitted that the two contracts of sale and lease are clear that the parties entered into an agreement involving payment of 17 billion dollars which was loaned and that there was never an agreement of sale of the property. He urged the court to look at the totality of the agreement of sale and lease and decide whether they do not constitute a *pactum commissorium.*

Advocate Mpofu objected to the raising of the question of legality on the basis that the first respondent's pleadings do not deal with the question of legality of the agreements and that this is a new issue that was being introduced. He submitted that an attempt to introduce the issue of legality was made when first respondent sought to introduce the supplementary affidavit. That the court pronounced itself on that point and made a decision which it cannot reverse .The applicant argued that allowing the respondent to raise to issue of legality of the contracts would amount to allowing the defence raised in the supplementary affidavit. *Advocate Magwaliba* in response contended that legality is a question of law and as such can be introduced at any stage. He cited the case of *Utow Trailers* v *City of Harare and Anor* 2009 (2) ZLR 259 for the proposition that there is no obligation on the parties to plead the law as long as the affidavits and evidence which is on the record sustains the point of law.

A point of law can be raised at any stage of the proceedings even though it was not pleaded. See *Gold Driven Investments (Pvt) Ltd* v *Talane (Pvt) Ltd and Anor* ZLR 2, SC 9/13. See also *Muchakata* v *Netherburn Mine* 1996 (1) ZLR 153 (S) where KORSAH J said at 157 A;

> "Provided it is not one which is required by a definitive law to be specifically pleaded, a point of law, which goes to the root of the matter, may be raised at any time, even for the first time on appeal, if its consideration involves no unfairness to the party against whom it is directed. *Movabane* v *Bateman* 1918 AD 460: *Paddock Motors (Pty) Ltd* v *Igesund* 1976 (3) SA 16 (A) at 23 D-G."

In *Muskwe* v *Nyajina and Ors* (SC) 17-12 the court remarking on the same point stated as follows;

> "Undoubtedly, a point of law can be raised at any time even though not pleaded. However, this is subject to certain considerations, one of which is that the court has to consider whether raising a point of law at this juncture would cause prejudice to the other party against whom it is raised. In our view there is great prejudice to the appellant who, if the matter is decided against him, stands to lose the appeal without argument."

In *Utow Trailers* v *City of Harare* (*supra)* the court held that there is no obligation on the parties to plead the law as long as the affidavits and evidence which is on the record sustain the point of law.

The guiding principle is that a litigant who wishes to raise a point of law which goes to the root of the question and who has not pleaded the law may raise the point of law at any stage of the proceedings provided that his raising of the question does not result in any prejudice being suffered by the other side and causes no unfairness to the other side. It is also vital that the affidavits and evidence on record relied on be competent to sustain the legal point sought to be relied on.

The question of legality of the contracts was not raised in the first respondent's opposing papers. An attempt was made to introduce a supplementary affidavit challenging the legality of the agreement of sale in HH 3I3/12 where the first respondent applied to admit a supplementary affidavit on the basis that the agreement between the parties was a loan disguised as a sale rather than a sale. The court refused to admit this affidavit and it is not part of the record and cannot be relied on by of the first respondent. The supplementary affidavit sought to lay the basis for the defence of legality of the contracts entered into. Acceding to the first respondent's request to consider the legality of the contracts would amount to allowing the raising of the defence and admitting the supplementary affidavit through the back door and would amount to the respondent having a second bite at the cherry. This would in effect amount to allowing the first respondent to raise issues the court ruled out in the supplementary affidavit as this was the import of the supplementary affidavit. This would also be highly prejudicial to the applicant which did not have an opportunity to respond to the

allegations in the supplementary affidavit. In my view the first respondent has just spit into the face of the court by attempting to introduce an issue that the court ruled out in the preliminary application. The point fails. This having been said, the court will not burden itself by going into the merits of the arguments on the question of legality.

The agreement of sale entered into by the parties reveals that the parties entered into an agreement of sale of the property. The essential elements of an agreement of sale were met. These include, the existence of the *merx,* the parties had capacity to enter into the contract and there was an agreement over the purchase price. There was also consensus to sell the *merx.* The first respondent admitted in its notice of opposition that it entered into an agreement of sale of the property with the applicant. It made no effort to advance a defence. The sticking issue was simply the first respondent's commitment to pay capital gains tax which it was struggling to meet. The respondent acknowledged in its arguments that the agreements entered into are binding and effectual but still urged the court to find that the agreements amount to a *pactum commissarium.* Having turned this request down, what remains to be considered is the respondent's admission.

Admissions are provided for in s 36 of The Civil Evidence Act [*Cap* 8:01] which provides as follows;

> "(1) An admission as to any fact in issue in civil proceedings, made by or on behalf of a party to those proceedings, shall be admissible in evidence as proof of that fact, whether the admission was made orally or in writing or otherwise..."

The position was well enunciated in *Mining Industry Pension Fund* v *DAB HH 25\12* where the Supreme Court in dealing with the issue of formal admissions made in pleadings remarked per MAKARAU J remarked as follows;

> "A formal admission made in pleadings cannot be ignored by the Court before whom it is made. Unless withdrawn, it prevents the leading of any further evidence to prove or disprove the admitted facts. It becomes conclusive of the issue or facts admitted. Thus where liability in full, as in *casu*, is admitted, no evidence is permissible to prove or disprove the defendant's admitted liability. The importance of the admission is that it is thus seen as limiting or curtailing the procedures before the Court in that where it is not withdrawn, it is binding on the Court and in its face, the Court cannot allow any party to lead or call for evidence to prove the facts that have been admitted. (See *Rance* v *Union Mercantile Co Ltd* 1922 AD 312 *Gordon* v *Tarnow* 1947 (3) SA 525 (AD; *Van Deventer* v *de Villiers* 1953 (4) SA 72 (C);*Moresby-White* v *Moresby-White*1972 (1) RLR 199 (AD) at 203E-H; 1972 (3) SA 222 (RAD) at 224; *DD Transport (Private) Limited* v *Abbot* 1988 (2) ZLR 98 and *Liquidator of M& C Holdings* (*Pty*) *Ltd* v *Guard Alert* (*Pty*) *Ltd* 1993 (2) ZLR 299 (HC)."

The first respondent has admitted plaintiff's claim. That admission has not been withdrawn. Where a party to litigation makes a formal admission in its pleadings, that admission binds it until that admission is withdrawn. The first respondent made a futile attempt to withdraw this admission by means of an application for leave to admit a supplementary affidavit which was desired to reverse its position in the opposing affidavit. That attempt having failed, the respondent is bound by the admissions it made. The contract of sale entered into by the parties is unassailable. A valid and binding contract was concluded between the parties. The applicant carried out its obligations in terms of the agreement of sale. The respondent received full value for the property at the time. The respondent is not affected by any change in the market value of the property as it has already received the purchase price. Any hardship it may be facing is self created and arises out of its failure to pay transfer fees on time. The obligation to pay taxes arose at the time of sale and it delayed to pay on time resulting in inflation. The responsibility to pay taxes rests on the defendant. It found itself in this position out of its own making. The respondent's difficulties are of no consequence. Parties who enter into contracts and subsequently refuse to honour them only have themselves to blame. They cannot expect the sympathy of the court when their opponents ask for specific performance. The following sentiments expressed by ROBINSON J in *Intercontinental Pvt Ltd v Nestle Zimbabwe* 1993 (1) ZLR 21 (H) at p37 are apt;

> "I would wind up by saying that if the right to specific performance is to be shown to have real meaning to businessmen, then the laid and clear message to go out from the courts is, business beware. If you fail to honour your contracts, then don't start crying if, because of your failure, the other party comes to court and obtains an order compelling you to perform what you undertook to do under your contract. In other words, businessman who wrongfully break their contracts must not think they can count on the courts when the matter eventually come before them, simply to make an award of damages in money, value of which has probably fallen drastically compared to its value at the time of breach. Businessmen at fault will therefore, in the absence of good grounds showing why specific performance should not be decreed, find themselves ordered to perform their side of the bargain, no matter how costly that may turn out to be for them"

The respondent is entitled to specific performance. The subject of the dispute is still there and nothing stands in the way of transfer of the property.

The first respondent has employed tardy tactics in its defence. It is clear that the first respondent had no defence and it caused the applicant to approach the court for recourse. It has unnecessarily put the applicant out of pocket by defending this matter when the odds

were clearly against it .The court must express its displeasure at the conduct of the first respondent. It deserves to be mulcted with costs on a higher scale.

In the result it is ordered as follows;

1. First respondent be and is hereby ordered to sign, within 14 days of this order, all such documents and do all such thing as are necessary to effect transfer of Stand 13981 Khami Road Extension, Kelvin West Bulawayo failing which the Sheriff of High Court or his lawful deputy be and is hereby authorised and required to sign such documents and do all such necessary things on behalf of the first respondent.
2. First respondent shall within 7 days of this order at its sole expense do all such things as are necessary to obtain a Capital Gains Clearance certificate or such other authority or document as may be accepted by second respondent for purposes of transfer of the property set out in para 1 above and shall within 7 days of obtaining such documents furnish third respondent with same failing which it shall irrevocably indemnify applicant of the costs it may incur in obtaining such documents.
3. First respondent shall bear the costs of this application on the scale of a legal practitioner and own client.

Gill, Godlonton & Gerrans, applicant's legal practitioners
Webb, Low & Barry, first respondent's legal practitioners