MAZOWE RURAL DISTRICT COUNCIL

Versus

EQUITY PROPERTIES (PVT) LIMITED

HIGH COURT OF ZIMBABWE
COMMERCIAL DIVISION
CHILIMBE J
HARARE 13 May and 25 June 2025

Opposed application

M. Mavhiringidze- for applicant
G.R.J Sithole with *D. Chiburi* -for respondent

CHILIMBE J

BACKGROUND

[1] This court held many years ago per MAKARAU J (as she then was) that *"…so trite is this proposition or so settled is this position at law that no authority need be cited"*[1]. The proposition in question being the requirement that a party purporting to represent a company in legal proceedings must proffer as authority to so act, a valid resolution passed by the company`s directors.

[2] A preliminary point arose over this trite position. The respondent challenged the validity of the authority to institute and represent applicant in the present application for summary judgment.

[3] In the main matter, applicant, as plaintiff, issued summons seeking to enforce the terms of a contract regarding payment by respondent of endowment fees as well as delivery of nominated partitioned pieces of land (stands) in developed and undeveloped status. The

[1] *Madzivire & Ors v Zvariwadzwa & Ors* 2005 (2) ZLR 148 at 150 B-C. Note the spelling difference between **Zvariwadzwa** in the High Court citation, and **Zvarivadza** in the Supreme Court appeal reported as *Madzivire & Ors v Zvarivadza* & Ors 2006 (1) ZLR 514.

monetary claims, including those in the alternative, totaled US$2,827,681.00 (Two million eight hundred and twenty-seven thousand six hundred and eighty-one dollars).

THE DISPUTE BETWEEN THE PARTIES

[4] Applicant is a statutory body and local authority incorporated in terms of the Rural District Councils Act [*Chapter* 29:13] ("the RDC Act"). Respondent is commonly known as a land developer[2]. Respondent holds a subdivision permit Number MASH/C/2/2007 ("the subdivision permit") to develop certain tracts of land situate in the district of Salisbury, being unimproved land being subdivisions of a piece of land called Lot 3 of Bannockburn held under DT 9068/2008 (hereinafter called "Bannockburn").

[5] A dispute arose over payment by applicant of endowment levies due to applicant to the value of US$2,827, 681.00. Applicant instituted proceedings in this court as noted above. Respondent defended the suit and filed a counter claim. This defence and counter claim triggered the present application for summary judgment and its resultant point *in limine*.

THE RESOLUTION AUTHORISING INSTITUTION OF LEGAL PROCEEDINGS

[6] The founding affidavit in support of the summary judgment application was deposed to by Mr. Liberty Mufandaedza, the Chief Executive Officer (CEO) of applicant. Mr. Mufandaedza based his authority to institute proceedings on a letter dated 9 August 2024, referenced "To whom it may concern" and signed by Alderman Councillor (sic) John Mudzonga, Council Chairman in the following terms: -

> "This is to confirm that Mr Liberty Mufandaedza is authorized in his capacity as Chief Executive Officer of Mazowe Rural District Council to represent Council, sign and execute all documents in relation to all legal matters involving Council at the courts of law and specifically the matter involving Zimbabwe Rural District Councils` Workers Union and Mazowe Rural District Council concerning non-payment of salaries and benefits. This is in terms of Section 66 of the Rural District Councils Act *Chapter* 29:13 as read with section 69 of the same. This is also confirmed by Resolution 530C469 of 2015 attached hereto"

[2] See *Vevhu Resources (Pvt) Ltd v Operation Nehemiah Cooperative* HH 628-23

[7] The resolution 530C469 of 2015 ("resolution 530C469") referred to in Alderman Mudzonga' s letter was passed by applicant council on 25 June 2015 and read as follows; -

> "Delegation of Powers to the Chief Executive Officer to Make Appeals
>
> Council resolved that powers be delegated to the Chief Executive Officer to instigate appeals against cases awarded unfavourably to Council."

THE POINT *IN LIMINE*.

[8] Respondent, challenged the validity of this resolution as authority for the CEO of applicant to institute present proceedings. In the opposing affidavit sworn to by its Operations Manager, Mr Richard Chakweya averred [3];-

> "That it was common cause that the Council which made this resolution would have been dissolved and new councillors appointed and new resolutions made. Therefore, this court cannot be made to rely on a council resolution made 10 years ago, as situations and circumstances change and appointees change. The resolution is therefore unreliable to establish authority of the deponent."

[9] Further, Mr Chakweya insisted that resolution 530C469 pertained to a specific set of litigation whose ambit excluded present proceedings. The resolution 530C469 read; - "Council resolved that powers be delegated to the Chief executive Officer to instigate appeals against cases awarded unfavourably (sic) to council".

[10] It being an application for summary judgment with no facility for an answering affidavit, applicant did not answer these factual averments. That aside, the point *in limine* was sustained on essentially the same basis in the respondent`s heads of arguments. Mr *Sithole,* for respondent reiterated the position taken in the opposing affidavit and heads of argument that there was no valid application before the court.

[11] There was no valid resolution by applicant to have present proceedings instituted on its behalf. The resolution 530C469 attached to the founding papers was nearly 10 years old. In that regard, argued counsel, it was clear that on 25 June 2015 when applicant council passed resolution 530C469, the present suit was not at all within its contemplation. In addition, the

[3] Paragraph 1 A 1 of the opposing affidavit.

passage of time since 2015 had ushered in so much change as to render the resolution 530C469 virtually otiose.

[12] Membership of council had changed with an entirely different set of councillors now presiding over applicant`s affairs. Further, resolution 530C469 authorised the CEO to institute a completely different type of legal proceedings. These being appeals and matters granted unfavourably against council. It was neither specifically crafted nor passed to authorise the institution of present summary judgment proceedings. Even then, the resolution 530C469 carried yet another incurable defect in that generic in nature and thus blanket in application.

[13] The issue was compounded by Alderman Mudzonga` s "resolution" dated 9 August 2024 which purported to extend the CEO`s authority to litigate on labour appeals. Again, the present matter-being an application for summary judgment-did not fit the definition of a labour appeal.

[14] Mr *Sithole* referred in that regard, to this court`s decision in *Lugania Investments (Pvt) Ltd v Rose Natalie Heuer & Anor* HH 453-21. His reading of the authority was that the court reasoned that an aged resolution generated validity questions. It held that "blanket and aged" resolutions, such as the one before the court, passed to authorise the institution of legal proceedings on behalf of corporates as incompetent.

[15] As such, the court per Mr. *Sithole*, opined that it was necessary for the party relying on an aged resolution to place verifiable evidence to confirm the relevance and validity of such resolution. The court in *Lugania Investments* eventually ruled the outdated resolution 530C469 as invalid, submitted Mr *Sithole*[4].

[16] On inquiry from the court as to whether the doctrine of perpetual succession did not address the change in membership, Mr. *Sithole* partly conceded but drew attention to the reference in resolution 530C469 to appeals and other matters granted unfavourably against council which rendered it inapplicable.

[17] Counsel reverted to the guidance in *Madzivire & Ors v Zvarivadza & Ors* 2006 (1) ZLR 514 (S) on the need for specificity in the wording of resolutions authorising legal proceedings. A resolution had to specify the terms of reference circumscribing the authority of the herein

[4] Counsel`s interpretation of this authority was not entirely correct. The court disallowed the authority as it was, in the finding of the court, tainted by a number of defects other than the longevity adverted to by counsel.

CEO deponent. Resolution 530C469, being broad in application, did not delineate the CEO`s mandate and scope, was resultantly inappropriate. Similarly, submitted Mr. *Sithole,* a resolution which granted authorisation of future acts was irreconcilable with the requirement of specificity. A resolution had to relate to the particular litigation at hand.

[18] This requirement of specificity in resolutions, submitted counsel, had been asserted beyond contest by the courts in decisions cited in *Arosume Property Development (Private) Limited v Farai Olivia Mashonganyika & Minister of Local Government and Public Works* HH 143-25.

[19] Counsel argued that despite all these glaring anomalies having been raised in notice of opposition as well as heads of argument, no attempt to file an updated authority was made by applicant. Right unto cusp of the hearing. Mr *Sithole* asked for a punitive order of costs given the applicant`s obdurate response to extended attempts to persuade it to see the light.

AUTHORITY TO REPRESENT AN ENTITY: STATUTORY BODIES

[20] Mr *Mavhiringidze* for the applicant distinguished *Arosume Property Development (Pvt) Ltd v Farai Olivia Mashonganyika & Ors* (supra) and related authorities. In that regard, counsel argued that these decisions` findings exempted resolutions passed by statutory bodies such as applicant. The authorities like *Arosume Property Development (Pvt) Ltd v Mashonganyika* dealt with resolutions passed by private limited companies.

[21] Continuing, counsel urged the court to pay regard to the distinction between public corporations, constitutional bodies like the JSC, and statutory bodies like the applicant. He expressed the difficulties likely to befall these organisations, especially applicant, if the courts were to insist on specific resolutions rather than generic ones. The applicant, as a local authority carried diverse statutory responsibilities many of which inevitably generated litigation.

[22] To then remove the facility of generic resolutions and demand instead that such institutions convene council to pass resolutions each time there was need to litigate would be impracticable. In any event, statutory authorities such as the applicant being creature of statute were restricted to a certain number and cycles of meetings. In that regard, he implied in his argument that those

authorities which held as invalid, blanket resolutions to institute legal proceedings, had been incorrectly decided.

[23] Counsel urged the court to recognise the salient distinction between private and statutory bodies in considering the argument regarding invalidity of anticipatory resolutions. Further, the RDC Act by s 52 dealing with rescission and alteration of council resolutions provided that all resolutions remained valid and extant unless rescinded or altered by council. Accordingly, Mr. *Mavhiringidze* submitted that the longevity of resolution 530C469 was inconsequential.

[24] Further and in any event, resolution 530C469 was, per Mr *Mavhiringidze*, backed by another executed on 9 August 2024, by the council chairman Alderman Mudzonga. The latter authority also empowered Mr Mufandaedza the applicant`s CEO to represent council in all legal matters. The issue was not about specificity but about evidence of authority to act on behalf of council.

[25] Mr. *Mavhiringidze* added that the respondent`s disputation of the CEO`s authority was not only insincere but unsustainable. The parties had executed an agreement consenting to the jurisdiction of the High Court in the event of a dispute. Mr. *Mavhiringidze* then cited *Tianze Tobacco Co. (Pvt) Limited v Muntuyadzwa* HH 626-15 where this court criticized frivolous challenges to authority to institute proceedings.

[26] In any event, a further updated resolution had been passed and could be produced. Unfortunately, a copy of same had been left at counsel`s office due to inadvertence. A further undertaking was made by Mr. *Mavhiringidze* that applicant council could still convene an extraordinary session in order to issue yet another resolution meeting the specificity demanded by respondent. The inconsistency between these two positions, was apparently lost to counsel.

[27] Counsel urged the court not to be distracted by what he termed differences in form over substance in interpreting resolution 530C469. On the strength of *Gold Fields Limited v Harmony Gold Mining Company Limited and Another* [2005] ZACAC 1; [2005] 1 CPLR 74 (CAC) cited with approval in *Ariston Holdings Limited v The Competition and Tariff Commission of Zimbabwe* SC 83-20, he contended that materially, the authority on record constituted a valid sanction for the CEO to act as he did.

[28] It mattered not that the resolution referred to the institution of legal proceedings related to appeals rather than the present application for summary judgment. On the same point, Mr. *Mavhiringidze* reverted to s 149 of the RDC Act contenting that the provision empowered the applicant`s chairperson or CEO to execute or authenticate documents on behalf of council. This power or functionality extended to the issuance of authority to institute legal proceedings on behalf of applicant.

[29] On his point regarding the uniqueness of a statutory body and automatic authority, I drew counsel`s attention to *Judicial Service Commission v Erica Fungai Ndewere* HH 792-22 where the issue of statutory accounting officers was discussed. Mr. *Mavhiringidze` s* response was that the court in *JSC v Ndewere* endorsed applicant`s position in that the court in that matter upheld the validity of the statutory body`s authority to institute proceedings.

[30] On costs, counsel urged the court to take cognisant of the novel legal issue arising from the effect of s 149 of the RDC Act on authority. Additionally, that the question of perpetuity of a council resolution as prescribed by s 52 became an untested issue for the court to determine. Finally, Mr. *Mavhiringidze* drew attention to the fact that summary judgment did not accord the respondent an opportunity to file an answering affidavit. Which excluded the opportunity to cure the complaint over the resolution.

[31] In response, Mr *Sithole* asserted the argument that the courts had spoken on the point. Generic or blanket resolutions such as the one before the court were invalid. He further submitted that the opportunity to present a fresh resolution was no longer available to the applicant. An objection had been raised and contested and the matter now awaited the court`s determination. On *JSC v Ndewere*, counsel`s view was that the court had ruled that authorisation to institute proceedings was required in the case of all artificial persons.

ANALYSIS OF THE ARGUMENTS

Issues before the court

[32] The conclusion to reach in disposing of the point *in limine* is whether resolution 530C469 constitutes valid authority to institute legal proceedings. And in addressing the question, it will be necessary to deal with the points on its longevity, wording as well as the implication of ss 52 and 149 of the RDC Act raised in defence of its validity. I will also turn to argument raised by applicant that statutory entities are *sui generis* institutions whose named officers were permitted by legislation, to institute proceedings under delegated authority of the statutory bodies concerned.

[33] I must also advert to the pivotal argument buttressing the objection; -namely that the High Court has firmly pronounced itself on the invalidity of generic/anticipatory, pre-emptive or blanket resolutions, such as the one before me now, to institute proceedings on behalf of an entity. I must point out that Mr Sithole argued to his strengths the question of invalidity of blanket authority constituting respondent`s point *in limine*. He referred to a string of authorities endorsing this position at law.

[34] The same cannot be said of the applicant`s response to this argument. With respect, applicant charged obliquely at the flanks instead of confronting the arguments on blanket authority head on. Counsel for applicant merely submitted that such authorities were distinguishable before implying that the court could even depart from its own position as set out in *Arosume Property Development (Pvt) Ltd v Mashonganyika.*

[35] In the result, the positions argued before me did not crystallise the question of validity of a blanket or anticipatory resolution into a specific point which required the court`s ruling. Additionally, I recognise that whilst the applicant`s argument sought to draw the court into a revision of its position on blanket resolutions, it was not backed by the sort of focus, depth and analysis in legal argument required to sway the court from its established position.

[36] Nonetheless, given the importance of the question of authority to institute legal proceedings on behalf of body corporates, I will linger beyond the usual in my attention to the question of blanket or anticipatory resolutions *en passant*. The daunting prospect of *status legis infelix*[5] must be avoided at all costs.

[5] Meaning "the unhappy/sad state of the law". An expression used in, among other decisions, *TN Harlequin Luxaire Limited v Mberikunashe Matsvimbo & 14 Ors* SC 84-22, to denote a state of conflicting positions on the law.

The recurrent challenges on authority to institute legal proceedings.

[37] The facility of one party empowering another to act in the former`s stead is a concept intrinsic to our legal system. Agency manifests in a diversity of situations and represents an indispensable arrangement in the identification, defence and exercise of legal rights. As an example, the humble power of attorney -in its general and special format as variously crafted to suit purpose-is a familiar record of a principal`s assent.

[38] Similarly, *Cuthbert Elkana Dube v PSMAS & Anor* SC 73-19 restated the same principle[6] that the body corporate-being unable to represent itself, relied on the agency of its associates to institute or represent the body corporate concerned in legal proceedings. But the validity of authority is an absolute pre-requisite to the propriety of such proceedings.

[39] In that respect and on the latter point, there have been a number of concerns and complexities with regard to resolutions passed by entities authorising the institution of legal proceedings. As an example, the concerns raised by MATHONSI J in *Tian-ze Tobacco Co. (Pvt) Limited v Muntuyadzwa* HH 626-15 ten years ago still abound. Protestations over the validity of authority framed in the following manner are commonplace in the courts; -

> "The applicant raised some points *in limine* against the respondents. It is the applicant's case that the first respondent's deponent to the opposing affidavit had no lawful authority from the first respondent as there was no resolution authorising the deponent to make such averments. The applicant also affirmed that the deponent for the second respondent's opposing affidavit had no authority from the Sheriff to depose to the opposing affidavit. Alternatively, the applicant also argued that the deponent to the second respondent's opposing affidavit did not state necessary averments which may clothe her with the authority to depose to the opposing affidavit. With respect to the third respondent, the applicant submitted that the deponent to the third respondent's opposing affidavit had no authority to depose to the affidavit as the resolution attached

[6] See footnote 1 above.

does not give the deponent specific powers to prosecute the third respondent's defence in this matter."[7]

***The rule in Beach Consultancy (Pvt) Ltd v Makonya & Anor* HH 696-21**

[40] In seeking to resolve or narrow down such procedural flashpoints on resolutions authorising legal proceedings, this court has taken a position. It has ruled that resolutions passed by body corporates granting their officers blanket/anticipatory or pre-emptive authority to represent or institute legal proceedings are invariably fatal.

[41] See *Beach Consultancy (Pvt) Ltd* v *Makonya & Anor* HH 696-21, *Leechiz Investments (Pvt) Ltd* v *Central Africa Building Society* HH 269-23, *Latifa Sidat & Ors v Nazirf Lambat & Ors* HH 50-24, *Romeo Mkandla v PPC Zimbabwe Ltd & Anor* HB 151-24, and *Arosume Property Development (Pvt) Ltd* v *Mashonganyika & Anor*.

[42] As noted above, these are the decision relied upon by Mr *Sithole* on one hand, and deemed distinguishable by Mr. *Mavhiringidze* on the other. I believe the starting point in a discussion on the matter should be seminal decision of *Cuthbert Elkana Dube v Premier Service Medical Aid Society & Anor* (supra) where the Supreme Court held, per GARWE JA (as he then was) as follows at [38]; -

> "A person who represents a legal entity, when challenged, must show that he is duly authorised to represent the entity. His mere claim that by virtue of the position he holds in such an entity he is duly authorised to represent the entity is not sufficient. He must produce a resolution of the board of that entity which confirms that the board is indeed aware of the proceedings and that it has given such a person the authority to act in the stead of the entity. I stress that the need to produce such proof is necessary only in those cases where the authority of the deponent is put in issue. This represents the current state of the law in this country." [underlined for emphasis]

[43] The Supreme Court clarified the position beyond issue in as far as the question of authority to institute proceedings is concerned. All that remains is for the courts and litigants to correctly follow the simple guidance in that authority. Equally critical is the fact that the Supreme Court,

[7] *Moonrise Business Transactions (Private) Limited t/a Moonrise Motor Spares* v *Shumayac Agencies (Private) Limited & Ors* HH 376-23 at page 2 per DEME J

in its judicial heavy lifting, carried out a survey of conflicting decisions and reconciled the position.

[44] With the dissipation of the confusing pall of *status legis infelix*, all decision handed down prior to *Cuthbert Dube v PSMAS* must be read against the guidance of this latter Supreme Court authority. This leading or controlling authority has been consistently followed, but variously interpreted.

[45] Yet the Supreme Court has remained clear. In *Valentine & Anor* v *Blooming Lilly Investments (Private) Limited & Ors* S 42-23, the following meaning was given to the above passage in *Cuthbert Dube v PSMAS;* -

> *"[30]* Therefore, a company resolution is required for two reasons***, first***, to prove that the entity is aware of the legal proceedings and has authorised them and, ***secondly***, that the person representing it has been clothed with the requisite authority to represent it in the proceedings."

[46] These considerations in my view, should guide a court in its treatment of the evidence placed before it to confirm the existence or otherwise of a valid authority to institute proceedings. Further, in *Peter Valentine*, the court traversed a number of other aspects- including the facts constituting the dispute, the authenticity of the resolution itself as a document, court as well as the existence of an order of court -in addressing the validity of a resolution passed to grant authority.

[47] My view, in passing, being that the validity of an empowering resolution is an evidentiary inquiry ahead of all else. The Supreme Court did not pronounce itself on the nature or format of a resolution as a pre-condition to its validity. Nor did the Supreme Court, more specifically, declare all anticipatory/pre-emptive or blanket resolutions setting out generic authority as invalid as a matter of law. A resolution, when demanded, must meet the requirements set in *Cuthbert Dube v PSMAS* as elaborated in *Peter Valentine*. How a company will seek to do so is a matter entirely within its power.

[48] Given that position one must approach the following decisions properly informed by *Cuthbert Dube v PSMAS.*These being *Beach Consultancy (Pvt) Ltd* v *Makonya & Anor, Leechiz Investments (Pvt) Ltd* v *Central Africa Building Society, Latifa Sidat & Ors v Nazirf*

Lambat & Ors, and *Arosume Property Development (Pvt) Ltd* v *Mashonganyika & Anor* (supra) which declared blanket resolutions as invalid.

[49] I note that in *Latifa Sidat*, this court per CHITAPI J, whilst disapproving blanket authority, appeared circumspect and observed as follows; -

> "A blanket authority to represent the juristic entity and litigate is not valid **unless** it relates to a specific cause or matter that must be instituted or defended as the case maybe. Thus, whilst the authority to represent the company may be generalized, when it comes to litigation, the entity must specially authorize the institution of litigation or the defence of a litigation." [underlined for emphasis].

[50] Similarly, in *Romeo Mkandla v PPC Zimbabwe Ltd & Anor* HB 151-24, this court, per my sister KABASA J, upheld as valid a resolution in the following terms; -

> "It was resolved that: -The Head of Legal and Compliance in the Company, Stephen Nyabadza, will sign all affidavits that may need to be signed in any court of law in Zimbabwe in matters that involve the company and any miner or holder of a mining claim pegged on any of applicant's lands in Zimbabwe. Such matters will involve among other issues, challenging the pegging of such mining claims on applicant's claims and seeking any such order as the company may deem fit to challenge such pegging or issuance of certificate of registration on any licences including seeking declaratory orders where necessary. He will do everything he will deem necessary to lawfully protect the interests of the company in this regard."

[51] I may also draw attention to the fact that this court actually approved a blanket resolution prior to *Beach Consultancy (Pvt) Ltd* v *Makonya & Anor* in *Esau Gwatipedza Dube v The Minister of Local Government, Public Works & National Housing N.O. & 4 Ors* HMA 54-17 where MAFUSIRE J upheld a blanket authority in the following terms; -

> *"[3]* ……...It was spurious. It was just meant to waste time. Among other things, there was a council resolution attached to the notice of opposition by council authorising the town secretary to represent it in ***any legal proceedings***." [underlined, italicised and bolded for emphasis]

The rationale in Beach Consultancy (Pvt) Ltd v Makonya & Anor

[52] The decisions in paragraph [48] above all followed this court`s authority of *Beach Consultancy v Makonya & Anor.* It is therefore necessary in my view to follow the court`s reasoning in *Beach Consultancy* v *Makonya & Anor* in order to identify and understand the *ratio decidendi* behind the rejection of anticipatory authority, as well as establish its alignment to *Cuthbert Dube v PSMAS*.

[53] Briefly, in *Beach Consultancy (Pvt) Ltd v Makonya & Anor* the court had before it, an urgent chamber application for stay of execution. The underlying dispute traced its origins to a labour causa. Secondly, one may note out of curiosity that the legal point which subsequently gave birth to the significant prouncement by the court issued from the pen (or lips) of a self-actor.

[54] From the court`s summary of the issues placed before it, there is no suggestion that telling legal arguments flowed from the self-actor-nor for that matter-the applicant itself. Except that the self-represented respondent relied on the authority of *Cuthbert Dube v PSMAS* and *Madzivire v Zvarivadza*. That aside, in that decision of *Beach Consultancy (Pvt) Ltd v Makonya*, MAKOMO J, after some commendably diligent analysis of the law held as follows at page 9; -

> "From the foregoing, I venture to state that a company may not grant general authority to a director or employee to represent it in future court cases that have not yet arisen at the time when the authority is granted."

[55] This proposition of law is singularly attractive due to its definitiveness. The conclusion was preceded by a survey of authorities within and without the jurisdiction on authority to represent a body corporate in legal proceedings. The inquiry also drew the court into the realms of company law and especially, the fiduciary duties of directors. The divergent state of the law (which GARWE JA described in *Cuthbert Dube v PSMAS* as having been "completely unnecessary") was also retraced, with a considerable attention by the court.

[56] I must draw particular emphasis though, to the fact that the court in *Beach Consultancy v Makonya & Anor* started its analysis, not from the position stated in *Cuthbert Dube v PSMAS*, - but the following premise [at page 5]; -

> "Despite the clear exposition of the law in the above authoritative and persuasive texts, the **question that still confronts me** in the instant case **is whether an entity may give**

> **a general authority to a deponent for whatever litigation, that may not be known now but which may arise in future?** The cases of ***Madzivire* (*supra*) and *Cuthbert Elkana Dube*** (*supra*) cited by the first Respondent for his objection to the founding affidavit by Applicant's deponent **do not answer this question**." [Underlined and bolded for emphasis]

[57] The consideration issuing from the wording in bold triggered the whole discussion in *Beach Consultancy (Pvt) Ltd* v *Makonya & Anor*. It imperative that one acknowledges, in that regard (with the greatest reverence to the late MAKOMO J), that in search for answers, the court may have unwittingly drawn itself further away from *Cuthbert Dube v PSMAS*. The very authority where the self-same answers lay.

[58] As a result, the court in *Beach Consultancy (Pvt) Ltd* v *Makonya & Anor* then settled on the below view on the duties of directors [at page 8]; -

> "For that reason, therefore, directors of an entity may not authorize, on behalf of the company, participation in litigation whose existence and facts thereof they are not aware of at the time of the authorization, and whether the company will have any material interests in that litigation. To do so would be to act without due diligence and constitutes a breach of their duty to act in the best interests of the company for purposes of expediency. The purpose of the board properly sitting to authorize a particular litigation or to be involved in such litigation is to consider whether there are any interests of the entity that may be served by instituting or defending the litigation. It is also to carefully consider the consequences of the litigation. Such an exercise is a fiduciary duty of the directors to which they may not divest themselves of by giving a *carte blanche* authority to the individual director or officer. The duty is inextricably tied to the office of a director who may delegate the duty only in very strict and exceptional circumstances but not totally abdicate on it.[8] Thus, to grant a particular director or officer blanket authority to exercise discretion on whether to institute or defend litigation whenever it arises in future is to delegate the function which must be that of a properly constituted board to such individual director or officer. That, the board cannot do. The decision to participate in litigation must be carefully considered, in the best interest of the entity, only when the cause has arisen and the facts thereof

[8] McLennan J S "No Contracting Out of Fiduciary Duty" 1991 *South African Mercantile Law Journal* 86-88.

> known to the board for its proper exercise of discretion. The directors can only discharge this paramount duty to take decisions on behalf of the company and in its best interests when they are properly informed of all the facts relating to the case."

[59] This passage captures the basis for that definitive articulation of the law quoted in paragraph [54] above. Without a doubt, pertinent issues were raised on the road to the said conclusion. But the court may have been persuaded more by considerations on fiduciary duties of directors than the primary assessment of evidence of a board`s knowledge, consent and approval as stated in *Cuthbert Dube v PSMAS*.

[60] It is not immediately apparent too, if the principle that courts should be reluctant to interfere in the affairs of a company formed part of the inquiry on fiduciary duties of directors (See the court`s examination of the point in *Meikles Consolidated Holdings (Pvt) Ltd v Meikles* HH 601-24). In that regard, the question arises as to whether; by trammelling the latitude of entities to regulate their own affairs including the passing of resolutions, the court is not clashing with its own principle?

[61] It is also necessary, in reflecting further on *Beach Consultancy v Makonya*, to once more revert- to *Madzivire & Ors v Zvariwadzwa & Ors* (supra). In that case, three co-director-shareholders in instituted proceedings in the High Court following a dispute with a fellow director-shareholder whom they cited as first respondent.

[62] The three directors joined to their suit, the company as the fourth applicant. The first applicant-director, who also functioned as managing director purported to represent the company in such capacity. On appeal in *Madzivire & Ors v Zvarivadza & Ors*, the Supreme Court the upheld a challenge to the first appellant`s authority to represent the company. The Supreme Court per CHEDA JA ruled that first appellant`s assumed authority was invalid and held as follows at 516 D-E: -

> "There is no evidence that there was any service of a notice of a meeting to pass the required resolution authorising the first appellant to represent the fourth appellant. Even if the first, second and third appellants had agreed on the action, there is no indication that the first respondent, who is one of the directors, was served with a notice of a meeting of directors to pass the resolution of authority. Both the fourth appellant and the first respondent are entitled to be served with a notice of meeting so that a resolution

be passed authorising the first appellant to represent the fourth appellant. This was not done. Failure to do so renders the decision to represent the fourth appellant invalid."

[63] Clearly, *Madzivire* restated the established company law position that a board of directors can only act validly as an assembly of members (*Burstein* v *Yale* 1958 (1) SA 768 (W). As such, all members whose tenure is valid and extant, including those deemed intransigent, hostile or even rogue, must still be served with the notice of meetings called to pass particular resolutions. *Madzivire v Zvarivadza* was decided on the principle that no single director-not even one imbued with executive authority-could purport to act singlehandedly on behalf of a company.

[64] The Supreme Court in *Madzivire* and subsequently- *Cuthbert Dube v PSMAS*- was focussed on the validity of resolutions issued by a panel, college or board of directors. The Supreme Court did not, as a matter of primacy in considering the issue before it, delve into the format of resolution nor directors` fiduciary obligations.

[65] Having opined thus on *Beach Consultancy v Makonya & Anor*, I return to conclude the point *in limine*.

Are statutory bodies exempted from the High Court`s position on blanket resolutions? And does the RDC Act empower the council chair and CEO to institute proceedings?

[66] These questions reflect the thrust of Mr *Mavhiringidze* and I address them in three comments. Firstly, *Beach Consultancy v Makonya & Anor* laid no exemption as regards application of the rule against blanket resolutions. That invalidation extends to all body corporates. But in any event, the Supreme Court in *Cuthbert Dube v PSMAS* put issues beyond argument. All body corporates must furnish a valid board (or equivalent) resolution confirming authority to re-present the entity in legal proceedings.

[67] Secondly, the suggestion that ss 52 and 149 should be read as investing the council chairperson and CEO with authority to act on applicant`s behalf is clearly misplaced. It is an argument that need not detain the court as the relevant provisions are far removed from the purpose which counsel for applicant attempted to extend.

[68] The third comment relates generally to how the courts have interpreted attempts to resort to the Public Finance Management Act [*Chapter 2:19*] ("the PFMA"), Public Entity Corporate Governance Act [*Chapter 10:33*] ("the PECGA") as well as other parent statutes governing particular entities on the question of authority.

[69] In *Tichahleyi Mpofu v Zimbabwe Manpower Development Fund* SC 33-24, the CEO of respondent, a statutory body, claimed authority to represent the entity based on s 41 of the PFMA. Following *Cuthbert Duve v PSMAS* and *Madzivire v Zvarivadza*, the Supreme Court held that the CEO required board approval to institute proceedings on behalf of respondent.

[70] I must state that in *Tichahleyi Mpofu v ZIMDEF* (supra), consideration was given as to whether a CEO could act in the stead of a board whilst awaiting constitution of the board concerned. It was held as follows per MWAYERA JA; -

> *"[26]* Again the legislative intention can be deduced from the use of the peremptory language. Where the enabling Act provides for a board and one has not been appointed by the relevant authority a direct obligation is imposed on the chief executive officer to notify the Minister immediately. The law does not spell out that the chief executive officer is the Board or can act on behalf of the Board."

[71] In addition, the power of a statutory corporate CEO`s automatic authority to institute proceedings was dismissed in *JSC v Ndewere* where this court, in a matter that I decided, held as follows; -

> *[56]* There are five responses to this third point and its resultant arguments from both counsel. Firstly, if Mr. *Mugandiwa*` s position is to be assumed as correct, then by necessary implication, there is no reason why others entity representatives such as "*head officers*"[9], or even "*principal officers*"[10],should not enjoy the same privileges extended to "*accounting officers*"[11].All such officers ,whose roles are also provided by their governing statutes, should be able to validly institute proceedings in courts without proof of approval from the bodies running the affairs of their entities. Such an approach would clearly be inconsistent, not only with *Cuthbert Elkana Dube* and all the other authorities cited therein, but ironically- with *SC 1-22* itself.

[9](Effectively chief executive officers or managing directors) as defined by sections 221 (4) and (5) of COBA
[10] As per sections 20 and 20A of the Banking Act *[Chapter 24:20] as an example.*
[11] As defined in section 10 of the Public Finance Management Act

[57] Secondly and more substantively, I did not read the *Bere v JSC* decisions in the High Court, Supreme Court *[SC1-22]*, and Constitutional Court to have specifically or unequivocally held that the status of statutory accounting officer obviated prior corporate authority to institute proceedings. The relevance of "accounting officer" to the matter at hand in those decisions was secondary to the validity of authority empowering the accounting officer to act on behalf on the entity. In that regard, I do not believe that those decisions should be taken as having departed from the position laid by GARWE JA (as he then was) in *Cuthbert Elkana Dube* where the Learned Judge of Appeal held as follows [at 38] ……..."

DISPOSITION

[72] Returning to the arguments presented, resolution 530C469 cannot be impugned purely because it was aged. A reading of the resolution reveals however, that it pertained to an entirely different mandate. On that very simple basis it cannot avail the applicant. The CEO was authorised by Resolution 530C469 to institute "appeals granted unfavourably to council". This matter as argued by Mr. *Sithole* does qualify as such. In stating this, I also discount Alderman Mudzonga` s letter dated as it did not amount to a resolution passed by applicant`s council.

[73] Mr. *Mavhiringidze* in last desperate last-ditch attempts, albeit demure, at securing another opportunity to furnish the authority concerned cannot prevail. The point *in limine* must succeed with costs following the successful party. I see no cause to depart from the established position. Nor is there any basis to punish applicant harshly despite its pertinacity in the face of several warnings that its authority was defective.

[74] I do agree with Mr. *Sithole* that applicant could have resolved the matter by procuring an updated authority free from controversy. I must express the court`s displeasure at the obdurate approach adopted by applicant in that regard. I do believe that the court`s censure should suffice for purposes of discouraging such conduct in future.

Accordingly, it is ordered that; -

1. The point *in limine* moved by applicant challenging the validity of applicant`s authority to prosecute the present proceedings be and is hereby upheld.

2. The application for summary judgment be and is hereby struck off the roll.

3. Applicant to bear the costs of suit.

Mavhiringidze and Mashanyare – applicant`s legal practitioners
Chambati Mataka and Makonese -respondent's legal practitioners

[CHILIMBE J___25/6/25]