NATIONAL FOODS LIMITED
versus
GODFREY NGWARU
and
LINOS CHINGONGA
and
CLOUD ZINGUNDE
and
DEPUTY SHERIFF HARARE

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 10, 11 and 15 March 2015

Urgent Chamber Application

A K Maguchu, for the applicant
M Hungwe, for the respondents

MAKONI J: The applicant approached this court on a certificate of urgency seeking the following relief:-

> "TERMS OF THE FINAL ORDER SOUGHT
>
> That you show cause to this Honourable Court why a final order should not be made in the following terms:
>
> 1. The writ of execution granted by the High Court on February 2015 be and is hereby set aside permanently.
>
> 2. The First, Second and Third Respondents be and are hereby ordered to pay costs of this Application.
>
> INTERIM RELIEF GRANTED
>
> Pending the confirmation or discharge of the order, Applicant is granted the following interim relief:-
>
> 1. The First, Second and Third Respondents be and are hereby interdicted from uplifting Applicant's attached property on the basis of the Writ issued by the High Court on

February 2015."

The background to the matter is that on 3 February 2011 the first to third respondents obtained an arbitral award against the applicant in default.

The first to third respondents had the award registered with this court on 25 March 2011. On the same date they had a writ (the writ) issued by the Registrar. The writ and notice of removal were served on 27 April 2011.

In the meantime, and on 15 April 2011, the applicant successfully applied before the arbitrator, to have the award set aside. After service of the writ, the applicant filed an urgent chamber application before this court seeking stay of the writ. The application was opposed by the respondents and was dismissed on 17 May 2011 on the basis that the matter was not urgent. The applicant was advised to proceed on the basis of an ordinary application if it so wished.

On 19 April 2011 the applicant filed an appeal with the Supreme Court against the decision of MTSHIYA J. It also applied, on a certificate of urgency, for an order staying execution which was granted on 20 June 2011, in the following terms:-

"1. The 1st respondent is hereby interdicted from removing applicant's goods in pursuit of a writ of execution issued by the Registrar of the High Court on 25 March 2011.

2. The costs of the application are costs in the cause."

On 30 January 2015 the Registrar of the Supreme Court wrote to the applicant's legal practitioners advising them that the applicant did not comply with rule 34 (1) of the Supreme Court rules 1964 and that in terms of sub rule (5), the appeal was deemed to have lapsed. Pursuant to that letter and on 17 February 2015, the respondents obtained another writ and it was served on the applicant on 31 March 2015. The applicant then instituted the present proceedings. The basis for the applicant to seek the relief to the present proceedings is that the first to third respondents issued a fresh writ when it ought not to have been issued one on the basis that:-

(i) There is no award entitling them to claim the amounts they are claiming as the award was set aside.

(ii) The execution of the writ was permanently stayed by the Supreme Court.

(iii) In terms of the Arbitration Act, one can resist the enforcement of an award that has been set aside. Such resistance can be initiated in the court that issued the

writ by way of application.

(iv) The amount claimed by the first to third respondents is excessive.

The first to third respondent opposed the application and took three points *in limine* viz 1) The deponent to the founding affidavit has not been authorised to depose to the affidavit on behalf of the applicant.

2) That the matter is *res judicata.*

3) That the matter is not urgent.

I will deal with the points *in limine in seriatim.*

1) <u>Authority to represent the applicant</u>

Mr *Hungwe* contended that the applicant being a legal person acts on resolutions. There is no resolution attached to the application that Leigh Blatheway, has been authorised to depose to the affidavit for and on behalf of the applicant. He concluded by saying that there is no application before the court.

Mr *Maguchu* on the other hand contended that the respondents must lay a basis for saying that the deponent is lying that he has authority. In urgent matters involving large corporations it might be difficult to gather all board members to get a signal resolution.

There is a plethora of authorities on this point that a company does not function on its own but through an agent authorised to do so. Where court proceedings are instituted and there is no proof of the artificial person has authorised the proceedings then the respondent may take objection to the agent's authority. The point was succinctly made in *Mall (Cape)* (*Pty) Ltd* v *Merino Co-operative Bpk* 1957 (2) SA 347C which was quoted with approval by CHINHENGO J (as he then was) in *Air Zimbabwe & Ors* v *Zimra* HH 96/2003 where WATERMEYERJ had this to say at 351 G – 352 B:-

"There is a considerable amount of authority for the proposition that, where a company commences proceedings by way of petition, it must appear that the person who makes the petition on behalf of the company is duly authorised by the Company to do so (see for example *Lurie Brothers Ltd v Arcache,* 1927 NPD 139, and other cases mentioned in Herbstein and van Winsen*, Civil Practice of the Superior Courts of South Africa* at pp 37, 38). This seems to me to be a salutary rule and one which should apply also to notice of motion proceedings where the applicant is an artificial person. In such cases some evidence must be placed before the court to show that the applicant has duly resolved to institute the proceedings and that the proceedings are instituted at its instance. Unlike the case of an individual, the mere signature of the notice of motion by an attorney and the fact that the proceedings purport to be brought in the name of the applicant are in my view insufficient. The best evidence that the proceedings have been properly authorised would be provided by an affidavit made by an official of 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 €; *Thelma Court Flats (Pty) Ltd v McSwigin* [1954 (3) SA 457 (C)]. "

CHINHENGO J at p 6 of the cyclostyled judgment made the following observation:-

> "In all cases referred in the respondents' heads of argument the emphasis is placed on the quantum of evidence placed before the court to show that the applicant has resolved and authorised to institute the proceedings. The emphasis is not of the fact to be proved."

I want to add that the quantum of evidence to be placed before the court is dependent on the challenge mounted by the respondent. Where the respondent makes bold averments not supported by evidence as against an averment under oath by a deponent then the respondent cannot successfully challenge the authority of the deponent. In *casu*, the respondents make a bold averment which is not supported by any facts i.e. they have not laid a factual basis for their position. The challenge becomes more problematic when one takes into account that there has been running battles between the applicant and the respondents before the arbitrator, the Labour Court, this court and the Supreme Court. This is the sort of case that CHINHENGO J had in *Air Zimbabwe & Ors* (*supra*) when he observed;

> "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 it is proper for any litigant to do so especially where, from prior dealings, he should be aware that the challenge to his advisory's *locus standi* will not succeed."

I will therefore dismiss the point in *limine.*

Res Judicta

Mr *Hungwe* submitted that the applicant filed a similar urgent chamber application in HC 4410/11 which was dismissed. He further submitted that the only differences is that there is an appeal in the Labour Court and in the Supreme Court.

Mr *Maguchu* contended that the respondents were proceeding in terms of a fresh writ. It is litigation in respect of the 25 March writ which was determined. He contended that the sane principle operates against the respondents as a higher court has ruled that the writ issued where an ward had been set aside should be stayed. The same problems afflicting the first writ still subside.

This point should not detain the court. As was submitted by Mr *Hungwe*, when HC 4410/11was determined the issue of the application to the Supreme Court and the Labour Court were not before the court. In that matter the court was dealing with the 25 March writ whereas in this matter I am dealing with the February 2015 writ. It is clear that the matter is not *res judicata*.

Urgency

Mr *Hungwe* submitted that the applicant was advised that its appeal had lapsed more than a month ago by the Supreme Court. It did not do anything until after its goods had been attached. It could have regularised the appeal with the Supreme Court.

He further submitted that 4 years ago the applicant was given an option to proceed by way of ordinary application. It has not done so to date.

He contended that there is no basis for the matter to be heard o urgent basis. Rather the circumstances of the case establish self-created urgency.

Mr *Maguchu* contended that the matter is urgent. When HC 4410/11was dismissed, the applicant applied to the Supreme Court where it obtained an order permanently staying the writ. The order that it sought as final relief in HC 4410/11 was granted by the Supreme Court. There was no need to approach this court to seek the same relief. The need to act only arose when the first and third respondents caused a fresh writ to be issued. He further submitted that they were not served with the letter from the Registrar of the Supreme Court. They only saw it for the first time in the opposing papers.

What the applicant seeks in the interim, in this matter, is the stay of execution of the February 2015 writ. In the final order he seeks permanent stay of the writ. In its certificate of urgency and the founding affidavit, the applicant does not make reference to the appeal that it filed in the Supreme Court. This is despite the fact that the applicant was not aware, as was submitted by Mr *Magichu*, that its appeal had lapsed. The founding papers only talk about the order granted by the Supreme Court. Mr *Maguchu* sought to convince the court that that order was granted on the basis that the award had been set aside and that it was not granted pending the appeal. He could however not explain what "cause" was being referred to in para 2 of the order which states that costs will be in the cause. The Supreme Court could not have granted the order, on a certificate of urgency, if there was no appeal pending before it. I agree with submissions made by Mr *Hungwe* that in the urgent chamber application before the Supreme

Court what the applicant sought was stay of execution pending an appeal against the decision of MTSHIYA J. That appeal has lapsed. What remains extant is the order by MTSHIYA J which dismissed the application for stay of execution for lack of urgency. There is therefore no impediment for the first to third respondents to proceed with execution. The appeal that was holding the execution of the writ has lapsed. If the applicant intended to have, as it is doing now, the writ set aside, it should have done so 4 years ago as has rightly submitted by Mr *Hungwe*. It chose not to do so but pursue the appeal. It cannot ask this court to drop everything and give it audience. I agree with the remarks by MTSHIYA J in HC 4410/11, HH 104-11 on p 6-7 where he stated:

> "In General Transport & Engineering Private Limited & Ors v Zimbank Corporation Private Limited 1988 (2) ZLR 301 (H) GILLESPIE J said:
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> > 'A party who brings proceedings urgently gains a considerable advantage over persons whose disputes are being dealt with in the normal course of events. This preferential treatment is only extended where good cause can be shown for treating one litigant differently from most litigants, for instance where, if it is not afforded, the eventual relief will be hollow because of the delay in obtaining it.'
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> I associate myself with the above remark because, given what transpired, I am unable to find good cause for giving the applicant preferential treatment. A litigant seeking assistance through the urgent window of this court must demonstrate having taken immediate action (i.e. timeous action) when the danger to be averted first arose."

In view of the above the applicant has not established a basis for the matter to be heard on an urgent basis. In view of the finding, it will not be necessary for me to proceed to determine the merits.

The first to third respondents sought for an order of costs on a higher scale. I see no basis for denying them that relief. My view is that they have unnecessarily put out pocket by the applicant's motion which dragged to court.

I will therefore make the following order:

1) The application is struck off the roll.
2) The applicant is to pay the first to the third respondents' costs on a higher scale.

Dube Manikai and Hwacha, Applicant's Legal Practitioners
Hungwe and Partners, 1st, 2nd & 3rd Respondents' Legal Practitioners