LUNA ESTATES (PVT) LTD
versus
DIVINE AID TRUST COMPANY t/a DATCO
and
THE REGISTRAR OF DEEDS N.O

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 23 May 2017 & 14 June 2017

Opposed application

E Samukange, for the applicant
M D Hungwe, for the 1st respondent

MUREMBA J: This is an application for rescission of a default judgment that was granted in favour of the first respondent under Case No. HC 6802/16.

The applicant's founding affidavit was deposed to by its Managing Director, Mirriam Rehwai Kangai. The first respondent raised a point *in limine* to the effect that the deponent to the applicant's founding affidavit, Mirriam Rehwai Kangai lacked authority to depose to the affidavit as she did not attach any proof to that effect. In the answering affidavit Mirriam Rehwai Kangai attached the board resolution giving her the authority. The board resolution was signed or dated 11 October 2016 and it showed that the meeting giving rise to that resolution had been held on that day. The resolution stated that the deponent had been authorised to represent the company in any legal proceedings against the first respondent.

Mr. *Hungwe* was persistent with this point *in limine* at the hearing. He argued that the resolution that the applicant's deponent had attached was dated 11 October 2016 yet the founding affidavit had been deposed to on 29 September 2016. He said that the resolution in question did not and could not retrospectively give authority to the deponent. He argued that for

this reason the written authority that was then given to Mirriam Rehwai Kangai on 11 October 2016 was irrelevant, inconsequential and should be disregarded.

Mr. *Hungwe's* second issue was that in deposing to the founding affidavit, Mirriam Rehwai Kangai simply said "I am the Managing Director of the applicant and I am competent to depose to this affidavit on behalf of the applicant." Mr. *Hungwe* argued that this makes the application fatal because Mirriam Rehwai Kangai did not aver authorisation to depose to the affidavit. He argued that the mere fact that one is a Managing Director does not automatically clothe them with authority to represent the company since legal persons act through their board of directors. Mr. Hungwe's argument was centred on the distinction between the word 'competent' and 'authority'. For this averment Mr. *Hungwe* referred to the cases of *United Associates (Pvt) Ltd v Estate Late Leornard Dabulamanzi Ncube* HB 29/03 and *Tapson Madzivire & Ors v Misheck Brian Zvarivadza & Others* SC 10/2006.

Mr. *Samukange* argued that the mere fact that one avers that they have authority means that they would have been authorised to represent the company as what the deponent did in this matter. He submitted that the board resolution that Mirriam Rehwai Kangai then attached to the answering affidavit was just proof that she was still authorised to represent the applicant as she had said in her founding affidavit. What Mr. *Samukange* overlooked is the fact that in the founding affidavit the applicant did not say she was authorised to represent the company. She said "I am the Managing Director of the applicant and I am competent to depose to this affidavit on behalf of the applicant." She did not say that she was authorized but she said that she was competent to depose to the affidavit.

In the case of *Tapson Madzivire & Ors v Misheck Brian Zvarivadza & Others* SC 10/2006 it was held that a company being a separate legal person from its directors cannot be represented in a legal suit by a person who has not been authorised to do so. It was further held that the fact that one is a managing director of the company does not clothe him with the authority to sue on behalf of the company in the absence of any resolution authorising him to do so. In view of this case I am inclined to agree with the submission made by Mr. *Hungwe* that being a managing director does not automatically clothe one with an automatic right to depose to an affidavit on behalf of the company which is a separate legal *persona*. Being competent simply means having the necessary ability or being able to do something successfully, but having

authority means having been given the power to do something. This means that whist a managing director might be competent to depose to an affidavit, he or she will still need authority from the company to depose to it.

In *casu* although Mirriam Rehwai Kangai had said that she was competent to depose to the affidavit without saying that she was authorised to depose to it, she later furnished a resolution authorising her to, "represent the company in any legal proceedings against Divine Aid Trust Company and is entitled to do all things necessary in this regard including giving evidence in court, signing affidavits and representing the company." So she later got the authority to represent the applicant. It is my considered view that it is immaterial that the resolution did not specifically ratify the founding affidavit she had deposed to earlier on, on 29 September 2016. I say this for two reasons, firstly, that if the applicant was opposed to Mirriam Rehwai Kangai representing it, the subsequent resolution would not have been passed. Secondly, the purpose of requiring authority is for the court to be satisfied that it is indeed the applicant which is litigating and not the unauthorised person. See *Mall (Cape) (Pvt) Ltd v Merino Ko-Opraisie BPK* 1957 (2) SA 345 (C) and *Steelmakers Zimbabwe (Pvt) Ltd v Mandiveyi* HH 479/15. In light of this I would therefore hold that the resolution gave retrospective authority to Mirriam Rehwai Kangai to depose to the founding affidavit on 29 September 2016. I therefore dismiss the point in *limine*.

The merits

The application for rescission is being made in terms of r 449 (1) (a) of the High Court Rules, 1971 which provides that:

> "***449. Correction, variation and rescission of judgments and orders***
> (1) The court or a judge may, in addition to any other power it or he may have, *mero motu* or upon the application of any party affected, correct, rescind, or vary any judgment or order—
> (*a*) that was erroneously sought or erroneously granted in the absence of any party affected thereby"

In HC 6802/16 the first respondent filed an application to register a caveat on the applicant's property. The certificate of service shows that the application was served at 1 Wynne Street, CFX Building, Harare which is the applicant's chosen *domicillium citandi* as appears in clause 19.3 of the agreement that the applicant and the first respondent entered into.

In applying for rescission the applicant stated that the default judgment was erroneously sought and granted on the basis of 3 grounds which it said if the court had been aware of, it

would not have granted the default judgment. The applicant averred that, firstly, it was never served with the application as it no longer operates from the chosen *domicillium citandi* but from Plot 25 Glen Forest Road, Glen Forest, Borrowdale, Harare, since 2013 when one of its directors, Kumbirai Kangai passed on. The applicant averred that the first respondent was aware of this although it chose to serve at 1 Wynne Street, CFX Building, Harare. The applicant said that if the court had been aware that the application had not been served on it, it would not have granted the default judgment.

In response to this issue, the first respondent denied that it was aware of the changes in the address of the applicant and averred that in terms of clause 19.5 of the agreement the parties entered into, any change of address should have been communicated to it by way of a notice which was never done. It said that consequently, it served the application on the applicant's chosen *domicillium citandi* as appears in the agreement and the application was received by a receptionist who is in the employ of the applicant who however withheld her name.

Since the first respondent was not served with a notice of the change in the address of the applicant as is required in terms of clause 19.5 of the agreement, it did not make an error by serving the applicant at its chosen *domicilium citandi.* That the applicant no longer operates from the said premises is neither here nor there as long as it did not adhere to the terms of the agreement in notifying the first respondent about its change of address. The averment that the first respondent knew that it had changed premises does not assist the applicant as clause 20 of the agreement says that any alteration, variation, cancellation of or addition to the agreement shall be of no force or effect unless reduced to writing and signed by both parties.

Secondly, the applicant averred that the first respondent erred by approaching this court without first referring the matter to arbitration as is stipulated in clause 18 of the agreement. Thirdly, the applicant averred that if it was in breach of the agreement, the first respondent being the aggrieved party should have given it a written notice to remedy the breach within 14 days as is stipulated in terms of clause 17 of the agreement. The applicant averred that all this was not done by the first respondent. The applicant said that for these reasons the application for a default judgment was erroneously sought by the first respondent. It further submitted that the court also erroneously granted the default judgment because if these issues had been brought to its attention, it would not have granted the default judgment.

In response to the second ground of arbitration, the first respondent averred that the application for the placement of a caveat on the applicant's immovable property is an issue which falls outside the purview of matters or disputes envisaged by the arbitration clause. It averred that the arbitration clause only arises if there is a dispute between the parties and in this case there was not. The first respondent further averred that the issue of applying to place a caveat on the applicant's property has nothing to do with the breach of any portion of the agreement between the parties hence there was no need for it to give the applicant notice to remedy any breach. The first respondent averred that it simply applied to register a caveat on the applicant's property in order to protect its interests in terms of the huge financial investment it had made by entering into the agreement with the applicant.

It is my considered view that these two grounds that the applicants raised are issues to do with the merits of the main application in HC 6802/16. They are irrelevant to this application which was made in terms of r 449. In terms of r 449 the court is not worried about whether or not the applicant has a *bona fide* defence to the respondent's case as is required if the application for rescission is being made in terms of r 63. Even if the court was unaware of these two issues, I do not see how it can be said that it granted the default judgment erroneously. It can neither be said that the first respondent erroneously sought the default judgment when the applicant had been served at its *domicillium citandi,* but did not file any opposing papers to the application.

In view of the foregoing, the application is dismissed with costs.

Venturas & Samukange, applicant's legal practitioners
Kadzere, Hungwe & Mandevere, 1st respondent's legal practitioners