MOSES TAPIWA MASWELA
versus
FIRST TRANSFER SECRETARIES (PVT) LTD
and
ABC STOCKBROKERS LIMITED
and
ECONET WIRELESS ZIMBABWE LIMITED
and
ECOCASH HOLDINGS ZIMBABWE LIMITED
and
CAIDIN (PVT) LTD
and
FORETRUST INVESTMENTS (PVT) LTD

HIGH COURT OF ZIMBABWE
CHILIMBE J
HARARE, 4 & 6 July 2022.

Application for rescission of judgment

Applicant in person
Mr.C. *Mucheche* for 1st respondent
No appearance for 2nd - 5th respondents

CHILIMBE J

BACKGROUND

[1] Applicant is a former employee of first respondent. He held the post of "Account Clerk" as at the time of separation. In such capacity, applicant "conducted financial transactions for and on behalf of first respondent". It is in that same capacity too, that applicant misappropriated an amount of USD$244,024,07, so first respondent alleges. Applicant and first respondent parted ways, but not before applicant, according to first respondent, admitted his wrongs, and offered partial compensation on or around 30 January 2017.
[2] The alleged compensation included 50,000 Econet (applicant said 60,000) shares, among other assets, which first respondent claims were surrendered to it by applicant. These recoveries (plus a fidelity risk policy pay-out), reduced first respondent`s exposure down to

USD$161,726,86. First respondent then proceeded to sue for the recovery of this balance under HC 902/18 on 1 February 2018.

[3] Applicant denied the allegations raised against him. He also averred that first respondent extracted 60,000 Econet shares from him by duress. Not only did he proceed to defend the claim against him in HC902/18; he also issued summons in HC 266/19, on 17 January 2019.He sought, in that suit, to reclaim the Econet shares. First to fourth respondents in this present applicant were the defendants in HC 266/19, (fourth respondent is a successor in title, according to applicant). It appears that second to fourth respondents are disinterested parties. Applicant claimed from first respondent, under this cause;

i. 120,133 shares in third respondent Econet,
ii. 54,133 debentures in the same third respondent, and
iii. 92,502 shares in fourth respondent Ecocash.

[4] These claims were centred around the 60,000 Econet shares which applicant maintained had been improperly seized from his by first respondent. The circumstances of such alleged despoliation are not quite relevant to the dispute before me. Nonetheless, according to applicant, first respondent went on to exercise shareholder rights to further share and debenture offerings as well as dividends. There were other suits as between the parties but again, these need not detain us. What matters is that all the legal proceedings were traceable to (a) the alleged misappropriation by applicant, and (b) the alleged confiscation of shares by first respondent. .What also matters is that HC 902/18 and HC 266/19 were consolidated (with the consent of all parties) by an order of my brother ZHOU J on 29 June 2020.What matters even more is that the present application seeks a reversal of ZHOU J`s order in terms of rule 21 (2) of the High Court Rules S1 202/21.

THE OBJECTION IN LIMINE

[5] Applicant raised a point *in limine*. He challenged the validity of first respondent`s purported representative and deponent of the opposing affidavit, Jane Nelly Katsande ("Nelly"). This authority, a resolution issued by first respondent`s board and dated 4 March 2022, appointed Nelly; -

> "...to represent First Transfer Secretaries (Private) Limited as a signatory to any court proceedings and any other related matters in relation to the interdict application by Moses Tapiwa Maswela."

[6] Applicant argued that (a) the resolution predated the present proceedings, (b) related to a different matter altogether, and (c) could not be interpreted to mean that it extended to the present matter. Quite clearly, the resolution could have been worded better so as to leave its continuing authority unequivocal. Mr. *Mucheche* for first respondent, proffered a two-pronged argument in support of validity. Firstly, he suggested that the existence of valid authority could be presumed. After all, Nelly had acted for first respondent in a number of matters with no trouble at all.

[7] Mr. *Mucheche* referred me, in support of that argument, to *Bulawayo City Council v Button Armature Winding (Pvt) Ltd HB 36-15*. Secondly, Mr. *Mucheche* urged me to grant the board resolution`s wording a wider interpretation "for efficacy". The first argument failed but the latter succeeded, (only just). A liberal interpretation of the board resolution does in fact scope in the present proceedings into Nelly`s authority. It is on that basis that I disallowed the point *in limine*.

[8] Because the issue of authority to act for an entity seems to recur rather regularly in matters that come before the court, I may take the opportunity to say a few words on the point. Firstly, legal practitioners and corporate litigants would be well-served to ensure that they draw up appropriately worded approvals for officers appointed to represent companies during legal proceedings. Secondly, whilst a court will not prescribe how parties draft their papers, brevity and simplicity are generally good habits. I also suggest that convoluted instruments brimming with legalese be avoided.

[9] Thirdly, same parties are well-advised take note that the law on this issue is well settled. Where a valid authority is demanded, then such must be produced. So why not simplify matters by presuming that authority shall indeed be demanded and have one in place? The amount of time spent on dealing with points *in limine* raised over validity of authorisations could be more profitably applied by the courts, lawyers and litigants.

[10] As I exit this point, I quote *in extenso*, the remarks of GARWE JA (as he then was) in *Cuthbert Elkana Dube* v *Premier Medical Aid Society and Another SC 73-19* at [35-48]; -

> [35] The reality is that there have been conflicting decisions in the High Court on the question whether a deponent who purports to represent a legal entity is required, in all cases, to prove that he is duly authorised to represent the legal entity. On the one hand a number of cases have relied on the judgment of this Court in Madzivire (*supra*) in determining that proof of such authority is necessary in all cases – see for example *Deputy Sheriff, Chinhoyi v Appointed Enterprises & Ors* HH 450/13; *First Mutual Investment (Private) Limited v Roussaland Enterprises (Private) Limited T/A Third World Bazaars* HH 301/17. On the other

hand, a number of cases from the same court have held that proof of such authority was not necessary in all cases. The latter cases made no mention of the decision of this Court in Madzivire and appear to have been oblivious to its existence as authority on this topic – see for example *African Banking Corporation of Zimbabwe Limited t/a Banc ABC v PWC Motors (Pvt) Ltd & 3 Ors* HH 123/13; *Tianze Tobacco Co (Pvt) Ltd v Muntuyadzwa* HH 626/15; *Mukomba v Unibox Investments t/a Arundel Village Spar* HH 539/15; *Trustees of The Makono E Chimanimani v Minister of Lands & Anor* 2016 (2) ZLR 324 (H).

[36] The conflict in the High Court on this aspect was completely unnecessary. In *Madzivire & Ors v Zvarivadza* HH 74/2006 MAKARAU J (as she then was) stated as follows:

> "The fictional legal persona that is a company still enjoys full recognition by the courts. Thus, for any acts done in the name of a company, a resolution, duly passed by the board of directors of the company, has to be produced to show that the fictional persona has authorised the act. In my view, so trite is this proposition or so settled is this position at law that no authority need be cited. The applicants are well aware of this position at law for in paragraph 17 of the first paragraph, issue is taken that no resolutions were passed by the company authorising the first respondents and others to do certain acts complained of in that paragraph. Due to lack of such authority stemming from the Board of Directors, the applicants argue that the purported act by the first respondent are null and void. Such may be the case, but the irony of it all is that the applicants themselves are guilty of the oversight forming the basis of their complaint to this court. No resolution was produced before me to show that the first to third applicants are authorised to bring this action on behalf of the fourth respondent.
>
> In seeking to lay a foundation for purporting to act on behalf of the fourth applicant, the first applicant had this to say in paragraph 2 of his founding affidavit:
>
> *"I am making this Affidavit on my own behalf and on behalf of the Fourth Applicant who is a Legal persona wherein I am the Managing Director and shareholder respectively and, in that capacity, I am authorised to make the following statements on behalf of the Fourth Applicant*."
>
> Needless to say, this is woefully inadequate to clothe the deponent with authority to make any statement on behalf of the fourth applicant. The paragraph does not even attempt to lay a basis for holding that the bringing of the proceedings in the name of the fourth applicant is authorised …
>
> The first to third applicants have expressly averred in their respective affidavits that they also bring this application on their own behalves as directors and shareholders of the fourth respondent."

[38] The above remarks are clear and unequivocal. 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. <u>This represents the current state of the law in this country.</u>"

[11] I now come to the merits of the matter. Given the simplicity of the issue before me, I intend to be brief. The applicant seeks to have the order of ZHOU J issued on 29 June

2020set aside. He cited rule 21 (2) as the basis of his application. Rule 21 (2) provides as follows; -

> (2) A judgment given by consent under these rules may be set aside by the court and leave may be given to the defendant to defend, or to the plaintiff to prosecute the action and such leave shall only be given on good and sufficient cause and upon such terms as to costs and otherwise as the court considers just.

[12] For what constituted good *and sufficient cause* justifying the upsetting of the order of 29 June 2020, applicant raised the following issues ;-(a) that he had settled first respondent`s claim under case number HC by paying a total of ZWL$72,737,00. According to applicant, this payment extinguished whatever claim first respondent had against him under HC 902/18. In that regard, the payment effectively buried the dispute under that case, rendering it closed. First respondent disagreed with both these contentions. As (b), applicant submitted that the remaining issue was his original claim under HC 266/19. The third point (c) was that first respondent was dragging its feet and appeared quite reluctant to progress matters to trial. Again, first respondent disputed that it had derelicted in prosecuting the matters. For these reasons, applicant prayed for the setting aside of the consent order to enable him to proceed to set the matter HC 266/19 down for trial.

[13] As stated, the issue before me can be resolved with simplicity. I shall therefore not proceed into a discussion of what constitutes "good and sufficient cause" in applications under rule 21 (2) where a party seeks to have a consent order set aside. In the present matter, applicant did not have the benefit of legal representation. The result was this ill-conceived application. His request is simple; -he needs to progress the consolidated matters to trial. The anomaly of behind his application is that the solution to his frustration lies in the very same order that he seeks to upset. ZHOU J`s order prescribed as follows; -

1. Case Nos HC 266/19 and HC 902/18 be consolidated for purposes of a hearing before the same Judge.
2. The record in HC 266/19 be placed before the Judge dealing with the pre-trial conference in HC 902/19 so that a consolidated pre-trial conference minute is prepared in respect of the two matters.
3. The rest of the procedures shall be conducted in terms of the rules of court.
4. This matter, case number HC 266/19 is removed from the roll.
5. The question of today`s wasted costs is reserved for argument at the trial of the two consolidated matters.

DISPOSITION

[14] Nothing else needs to be said apart from dismissing the application and advising applicant to be guided by the order of ZHOU J as well as the rules of court.

Accordingly, it is ordered that; -
The application be and is hereby dismissed with costs.

Caleb Mucheche and Partners-first respondent`s legal practitioners.