ROMEO MKANDLA

Versus

PPC ZIMBABWE LIMITED

And

THE PROVINCIAL MINING DIRECTOR,
MATEBELELAND SOUTH PROVINCE

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 1 AND 31 OCTOBER 2024

Opposed application

B. Mupatsi, for the applicant
G. Nyoni, for the 1st respondent
No appearance for the 2nd respondent

KABASA J: The applicant and the respondents have previously been involved in litigation over mining claims known as Cleveland II, Cleveland 13 and Cleveland. In case number HC 2565/22 the applicant who was the 1st respondent therein had judgment granted against him wherein he was divested of his claim to the mining claims. The order reads:-

> '1. The prospecting licences and certificates of registration issued to the 1st respondent by the 2nd respondent in respect of Cleveland, Cleveland II and Cleveland 13 and registered under No. GA 200, GA 48458 and GA 48490 respectively be and are hereby declared null and void.
>
> 2. Consequently, the prospecting licences and certificates referred to in paragraph 1 above be and are hereby set aside.
>
> 3. The 1st respondent shall pay the applicant's costs of suit."

The judgment was handed down on 28 December 2023. The applicant therein is the 1st respondent herein.

In this current application, the applicant seeks a rescission of the judgment whose order is set out above. The judgment was effectively a default judgment as the applicant was non-suited for failure to comply with r59 (8) of the High Court Rules, 2021.

In seeking rescission of the judgment granted in case No. HC 2565/22 the applicant contends that he was not in wilful default and has a *bona fide* defence on the merits. The failure to comply with r59(8) which requires the filing of the proof of service of notice of opposition on the Registrar not later than forty-eight hours of service of notice of opposition on the applicant, was due to an inadvertent omission by counsel's office messenger.

As regards the merits applicant contends that the mining claims in issue have been registered for more than two years and he has a valid E.I.A certificate issued in terms of the Environmental Management Act [Chapter 20:27] which has been so issued and subsequently renewed more than four times. The mining activities are therefore in compliance with the requirements of the Environmental Management Act ('EMA') and are not in any way hazardous to the environment. Since such claims have been registered for over 2 years title therein cannot be competently challenged per the provisions of s58 of the Mines and Minerals Act, Chapter 21:05]

The applicant therefore seeks the following order:-

"1. Application for the rescission of default judgment granted by this Honourable Court under cover of case number HC 2565/22 (CAPP 393/22) be and is hereby granted.

2. The Default Judgment under cover of case number HC 2565/22 (CAPP 393/22) be and is hereby set aside.

3. Applicant be and is hereby allowed to file a certificate of service within 48 hours of the granting of this order.

4. The Registrar of the High Court be and is hereby directed to set the matter down under HC 2565/22 (CAPP 393/22) for the hearing of the matter on the merits on the earliest available date.

5. No order as to costs if the application is unopposed."

The 1st respondent opposed the application. 1st respondent argues that the reason for the default is not reasonable and honest. The applicant's counsel's office messenger did not forget to file the certificate of service as such had not been prepared. Had the certificate of service been available applicant's counsel would have reacted as soon as he read the answering affidavit and done the needful in order to address that issue. As regards the merits the issue is not that the applicant has an E.I.A certificate but that as at the time he was issued with a prospecting licence he had not first obtained an E.I.A certificate. The certificates of registration

were therefore issued contrary to 'EMA' and s97 of the Act cannot be defeated by the provisions of s58 of the Mines and Minerals Act. This being so by virtue of s3 of the Environmental Management Act which specifically provides that any other law which is in conflict or inconsistent with the Act shall not prevail over its provisions.

To that end therefore, the applicant has no *bona fide* defence and the application for rescission must fail, so argued counsel for the 1st respondent.

At the hearing of the application counsel for the 1st respondent abandoned a point *in limine* which sought to challenge the competency of the application which had sought to argue that the application had not been filed within a month of knowledge of the judgment as contemplated by s27 of the court rules. I will therefore not make any reference to this point.

Counsel for the applicant however raised a point *in limine* which he argued was a point of law which he could raise at any time. It was counsel's contention that the Board resolution authorizing the deponent to the 1st respondent's opposing affidavit to act on behalf of the 1st respondent was not valid. This being so because such resolution gave a blanket authority which speaks to any matter arising at any future date. The application for rescission is a matter which arose at a future date and an entity cannot grant a company official blanket authority as that takes away the duty bestowed on the full Board of Directors.

The authority the deponent to the opposing affidavit utilised is therefore incompetent at law. The net effect is to render the opposing papers a nullity. They must therefore be expunged and the matter proceed as unopposed, so counsel argued. In so arguing counsel referred to several case authorities which I will consider later on in this judgment.

Counsel for the 1st respondent held a different view and argued that the deponent to the opposing affidavit stated at p 63 thereof that he was authorized to act on behalf of the 1st respondent and in what capacity he was so acting. The applicant took no issue with that averment and expressly stated "No issues arise" in reference to the paragraphs which addressed the issue of on whose authority the deponent was acting and deposing to the opposing affidavit. The applicant cannot seek to make it an issue now.

Further, so counsel argued, under case number HC 2565/22 the same resolution was used and no issue was taken. The deponent authorized to so act under HC 2565/22 is the same

person who has deposed to the opposing affidavit *in casu*. This is a rescission of a judgment granted in a previous matter.

Counsel further contended that the 1st respondent's size is such that it cannot be expected to issue resolutions every time it is engaged in litigation as convening such Board meetings can prove cumbersome.

I decided to hear the parties on this issue only as it would dispose of the matter if the point *in limine* proved meritorious. It therefore made no sense to hear the parties on the merits when the issue revolved on whether the matter would be regarded as opposed or unopposed.

Is the Board Resolution valid?

In *Beach Consultancy (Private) Limited* v *Makonya & Anor* HH 696-21 MAKOMO J had occasion to deal with the issue regarding blanket authority. The learned Judge acknowledged that convenience may dictate that a blanket authority be given in some cases as it may be onerous for big corporates to routinely convene board meetings to pass resolutions granting an official to represent it each time such a corporate is engaged in litigation.

Having said that the learned Judge proceeded to say:-

> "Unfortunately, this apparently convenient practice is in my view not supported by law. The current position of the law is that it must be shown that the corporate is aware of the proceedings that it is authorizing. The reason for insistence on the company being aware of the proceedings is to confirm that it is indeed the company that has taken the decision to participate in the court case and that it is not an unauthorized person who is dragging it to court without its knowledge."

Such reasoning cannot be faulted and I associate myself with it as resonates with the position enunciated in *Madzivire* v *Zvarivadza & Anor* 2006 (1) ZLR 514 (S) where CHEDA JA said:-

> "It is clear from the above that a company, being a separate legal persona from its directors, cannot be represented in a legal suit by a person who has not been authorized to do so. This is a well-established legal principle, which the courts cannot ignore. It does not depend on the pleadings by either party."

In *Leechiz Investments (Pvt) Ltd* v *Central Africa Building Society* HH 269-23 MHURI J also cited, with approval, the *Beach Consultancy (Private) Limited* case (*supra*). The learned Judge had this to say:-

> "… I have no hesitation to fully associate myself with the said remarks by the Learned Judge and in particular his summation 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."

It is however important to note that in *Leechiz Investments (Pvt) Ltd* v *CABS* and *Beach Consultancy (Private) Limited* v *Makonya & Anor (supra)* the blanket authority was not relating to a matter that was an offshoot of previous litigation. I am therefore of the respectful view that the circumstances of this particular case justify a departure from the general rule, which legal position is sound and found expression in several cases both in this court and in the Supreme Court.

In case number 2565/22 whose decision is sought to be rescinded, Stephen Nyabadza deposed to the founding affidavit as the Head of Legal and Compliance in the applicant then and now 1st respondent's company.

The Board Resolution which the applicant did not take issue with stated as follows:-

> "Extract of a Minutes (sic) of a Meeting of the Board of Directors of PPC Zimbabwe Limited held at Bulawayo on 9 November 2022.
>
> 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."

In *Valentine & Anor* v *Blooming Lilly Investments (Private) Limited & Ors* S 42-23 UCHENA JA stated that:-

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

The deponent's authority had been challenged on the basis that the board resolution had a future date which meant that it was passed after the proceedings in which Tapiwa Gurupira was authorised to act had already been instituted.

After holding that the date issue must have been an obvious error the learned JA said:-

> "It is also common cause that the first appellant and Tapiwa Gurupira have been involved in various litigation relating to these mining claims and he has always represented the first respondent. I see no basis why his authority to represent the first respondent can be validly challenged at this stage."

I would say the same *in casu*. Stephen Nyabadza deposed to the affidavit under case number HC 2526/22 and he was representing the company as its Legal and Compliance officer over the issue of mining claims pegged on the then applicant's land. Judgment was granted for the 1st respondent. There has therefore been prior litigation between the parties.

The applicant *in casu* now seeks to rescind HC 2565/22 and Stephen Nyabadza has deposed to the opposing affidavit again representing the company as its Legal and Compliance officer over the same mining claims.

In HC 2565/22 as in the current case, the 1st respondent then in HC 2565/22 and the applicant now in HCBC 123/24 took no issue with the deponent's assertion that he was authorised by virtue of the same Board Resolution to act on behalf of the Company.

In *Dube* v *Premier Service Medical Aid Society & Anor* S 73-19 the court had this to say:-

> "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 authority is only necessary in those cases where the authority of the deponent is put in issue. This represents the current status of the law in this country." (underlining my emphasis)

I have already stated that in both the proceedings (HC 2565/22 & HCBC 124/24) the applicant categorically stated – "No issues Arise," with reference to the deponent's averment regarding on whose authority he was acting and the basis of such an assertion with reference being made to the Board Resolution which was attached as an Annexure.

In essence therefore the applicant took no issue with the deponent's authority to act on behalf of the company. An extant judgment of this court rests on the founding affidavit of this same deponent. How can the applicant now seek to challenge that which he took no issue with?

Can he be heard to say now that I know I can take issue with it, I have decided to do so? I think not. The issue is really on whether Nyabadza is on a frolic of his own and if no issue was taken I do not see how it can be taken when the matter is now being argued. You do not start bringing into issue that which you have already stated that you have no issue with.

In *Moonrise Business Transactions (Private) Limited t/a Moonrise Motor Spares* v *Shumayac Agencies (Private) Limited & Ors* HH 376-23 DEME J had this to say:-

> "Further, the third respondent's counsel argued that the present application is an offshoot of the main matter and hence there was no need of obtaining the fresh board resolution authorising the deponent to depose to such affidavit. I do agree with this reasoning. The present application is an interlocutory application and hence expecting the third respondent's deponent to produce a separate board resolution for the purpose would be unnecessary."

I would say the same *in casu*. These proceedings seek the rescission of a judgment under HC 2565/22, same parties, same issue, and the current application being an offshoot of the earlier HC 2565/22 application.

I therefore do not see how Nyabadza"s authority can be successfully challenged in the circumstances. I would agree with Mathonsi J's (as he then was) observation In *Telecel Zimbabwe (Pvt) Ltd v PORTRAZ & Ors* HH446-15 that points in limine ought not to be taken as a matter of fashion but where they are meritable and dispositive of the matter.

I must hasten to add that the applicant's argument would have been persuasive had this been completely different litigation. Put differently I do not see how this board resolution can be used should there be litigation in future involving some other entity or individual. Such a blanket authority may, in my view, be successfully challenged.

That said I hold the view that the point *in limine* was not properly taken and it must therefore fail.

In the result, I make the following order:-

1. The point *in limine* on the validity of the Board Resolution be and is hereby dismissed, with costs.

2. The Registrar shall set the matter down for argument on the merits at the earliest available date.

Moyo and Nyoni, applicant's legal practitioners
Dube Legal Practice, 1st respondent's legal practitioners