HH 634-23
HCHC389/23

MUYENGWA E MOTSI

Versus

RYAN ALEXANDER GARIZIO

And

M GARIZIO PROPERTIES (PVT) LTD

And

ZIMBABWE SPRING STEEL (PVT) LTD

And

THE SHERIFF OF ZIMBABWE N. O

HIGH COURT OF ZIMBABWE
COMMERCIAL DIVISION
CHILIMBE J
HARARE 6 & 28 November 2023

Application for leave to appeal an interlocutory ruling

S.M. Hashiti for applicant
H. Mutasa for first to third respondents
No appearance by fourth respondent.

CHILIMBE J

BACKGROUND

[1] On 8 May 2023, applicant obtained a default judgment against first to third respondents in case number HCHC 88-23. I will refer to this matter as "the main dispute". I will also address the first, second and third respondents jointly as "the respondents". The respondents filed an application seeking the rescission of this judgment on 3 October 2023 under case number HCHC 389/23.

[2] I will cite this second matter as "the rescission application". Second and third respondents were represented in that regard, by first respondent Mr. Ryan Alexander Garizio. He claimed such authority from two board resolutions filed of record. These resolutions were contentious. They found the core of this dispute.

[3] At the commencement of argument of the rescission application, Mr. *Hashiti* (for the applicant herein), raised two points in limine. I disallowed both points after hearing arguments on them. Mr. *Hashiti*, immediately indicated applicant`s wish to appeal the court`s ruling. To that end, this present application for leave to appeal was then immediately mounted. I will term it the "application for leave".

[4] By necessity of r 43 (3) of the Commercial Court Rules, the application for leave had to be made "immediately" and orally. This means that this present application for leave was therefore not a pitched motivation. It was moved and resisted from the bar. The arguments were naturally not preceded by a codified notice and grounds of appeal. I had to rely in that regard, on the indicative grounds issuing from the submissions by Mr. *Hashiti*.

[5] I may comment briefly that r 43 (2) prohibits appeals on interlocutory matters. But r 43 (3) defers, inevitably, to section 43 (2) (d) of the High Court Act [Chapter 7:06]. This section secures the right of parties seeking to appeal an interlocutory point. But it requires them to first obtain the court`s leave. (See the general remarks of this court on the procedure and timing of applications for leave to appeal in *Gappah v Mahere* HH 633-22.)

[6] That aside, I delivered ex tempore, the reasons for dismissal of the two objections. I will therefore summarise (i) the points in limine and arguments thereto, (ii) the court`s ruling on those points, and (iii) the present application for leave.

THE POINTS IN LIMINE

[7] *The first point in limine*; - applicant challenged Mr. Garizio` s authority to institute the rescission application on behalf of second and third respondents. This challenge was first made in the notice of opposition in the rescission application by the now applicant (who was the respondent then). He argued that the resolutions issued by second and third respondents dated 29 May 2023, cited an incorrect case reference HCHC 351/23 instead of HCHC 88/23.That mis-citation rendered the resolutions incurably defective. Second and third respondents were therefore non-suited.

[8] The present respondents did not concede this point raised in the notice of opposition. But they filed amended resolutions, dated 2 June 2023, together with their answering affidavit.

Apart from the new date and corrected case number, the resolutions were identical in wording to the 29 May 2023 set. I will refer to both sets of resolutions simply as the Garizio resolutions. The new Garizio resolutions read as follows; -

1. The Company shall file an application for the rescission of the rescission of the default judgment granted against it under case number CC 88/23.

2. Mr. Ryan Alexander Garizio be authorised to represent the Company and sign all necessary affidavits and documents in relation to the aforesaid litigation.

[9] According to Mr. *Hashiti*, the second set of resolutions were afflicted by yet another defect. They purported to authorise Mr. Ryan Garizio to proceed and institute legal proceedings which had in fact, already been launched. This anomaly, according to counsel, again blighted both resolutions beyond salvage. Mr. *Hashiti* urged the court to follow its decision in *Dupont Agricole de Portugal v Lexrac Investments (Pvt) Ltd & 2 Ors* HH 227-23. In that matter, the court had rejected a resolution on the basis of patent ex facie defects.

[10] Counsel further cited the two leading authorities on the need for body corporates to furnish proof of authorisation; - *Madzivire & Ors v Zvarivadza* 2005 (2) ZLR 148, (H); and *Cuthbert Elkana Dube v PSMAS & Anor* SC 73-19. Mr. *Mutasa* for the respondents defended the resolutions. They represented, he argued, valid authorisation for Mr. *Garizio* to institute the rescission application. Read together with the papers before the court, the resolutions formed sufficient proof on a balance of probabilities according to Mr. *Mutasa*.

[11] *The second point in limine*; - Mr. *Hashiti* argued that the application for rescission of judgment was again incurably defective for want of correct form. It had been filed as an application for rescission in terms of r 15 of the Commercial Court Rules Statutory Instrument 123/2020. Counsel submitted that r 15 however, only applied to applications filed to set aside judgments obtained in default of filing of a plea. Herein, judgment had not been so procured. The present respondents had, in the man application, derelicted to enter appearance to defend.

[12] In that regard, counsel contended that the present respondents ought to have (i) had recourse to rule 4 of the Commercial Court Rules, then (ii) filed their application for rescission in terms of rule 27 of the High Court Rules SI 202-21. In support of that submission, Mr.

Hashiti argued that he drew support from the Constitutional Court decision of *Minister of Mines and Mining Development & Another v Fidelity Printers and Refiners (Pvt) Ltd & Another* CCZ 9-22; He also referred the court to *Bushu v Grain Marketing Board* HH 326/17 and *Muhlwa v Alpha Media Holdings (Pvt) Ltd* HB 117-22;

[13] In response, Mr. *Mutasa* for the respondents, accepted that the respondents ought indeed to have referred to rule 27 of the High Court Rules in the heading to their rescission application. There was no rule in the Commercial Court Rules that dealt specifically with an application for rescission of judgment granted in default of entry of appearance. Mr. *Mutasa* however pleaded substantial compliance. The requirements set by the two rules 15 and 27 were, according to counsel, substantially the same.

[14] He further argued that a party seeking to offset a default judgment had to show good cause and the applicants had done just that. In any event, the authorities cited in *Muhlwa* v *Alpha Media Holdings* (supra) also recognized that failure to cite the correct rule was not always fatal. Further, no prejudice had been occasioned to the applicant. Mr. *Mutasa* concluded by seeking the court`s indulgence. He stressed that the values and ethos borne out in the Commercial Court Rules favoured the granting of indulgence to the respondents.

THE COURT`S RULING

[15] In summary, the reasons for my ruling went thus; - the law regarding proof of authority to represent an entity was clear. Where such authority was required, it had to be furnished. *Cuthbert Dube v PSMAS* (supra) reconciled the various conflicting authorities on the matter. Given that established position on the law, it was inexcusable for a party required to furnish proof of authority to struggle in that regard.

[16] Apart from argument on validity, it had also been accepted on behalf of the respondents that the two sets of resolutions were indeed problematic. There was no need to cite a wrong case number in the first set of resolutions. And similarly, the second set could have been better framed to put their import beyond argument. For that reason, I deprecated the respondents for inattention in crafting of the resolutions and levied cists against them.

[17] Nonetheless, my conclusions were that the defects did not necessarily render the resolutions fatal. The Garizio resolutions could be clearly distinguished from the power of attorney presented in *Dupont Agricole de Portugal v Lexrac Investments (Pvt) Ltd & 2 Ors* (supra). In that matter, serious questions about the authenticity of the power of attorney were raised. There were doubts regarding the exact identity of the entity on whose behalf they were issued.

[18] In addition, the authority of the signatories could not be ascertained. Thirdly, there were alarming misrepresentations of geographical location by the signatories. Finally, the court in Dupont Agricole was persuaded by the treatment of a similar matter by the Supreme Court in *Stand Five Four Nought (Pvt) Ltd v Salzman ET SIE SA*, SC 30-16.

[19] The Garizio resolutions had merely mis-stated a date of commencement. Mr. *Mutasa*`s argued (correctly) that besides the attacks by Mr. *Hashiti*, the resolutions remained immune from any other defect. Further, in my ruling, I concluded that one could also read the resolutions` two paragraphs disjunctively. The result being that even if the first paragraph were to be expunged, the second paragraph could sustain the validity of Mr. Garizio` s right to represent the second and third respondents. On a balance of probabilities, the resolutions were accepted as adequate proof of authority.

[20] On the issue of citation of the application, the following observations were noted; -firstly rule 10 (1) of the Commercial Court Rules granted a defendant a period of 10 (ten) days within which to note their appearance to defend a matter. Secondly, the same rule directed such defendant to apply Form No. CC 9 in that regard. As a third point, this Form No. CC9 granted the same defendant a period of 7 (seven) days within which to note its appearance to defend. There is therefore a discrepancy between the period set out in rule 10 (1) and that marked on Form No CC 9.

[21] Fourthly, rule 12 (1) of the same Commercial Court Rules requires a defendant to file its plea within 7 (seven) days from the date of service of summons commencing action. These provisions in the rules mean that effectively, the period within which a defendant may enter appearance or flea a plea are coincident. For practical purposes therefore, a party who fails to enter appearance also automatically defaults in its plea.

[22] Accordingly, given the anomalies in the rules, the court could resort to rule 7 and pardon the respondents` failure to explicitly title their application. Further, the provisions of rule 15 of the Commercial Court Rules and rule 27 of the High Court Rules were materially aligned. The defaulting party was required to show good cause and prospects of its case. Lastly, the authorities cited by Mr. *Hashiti* (see paragraph [12] above), dealt with substantial violation of the rules. That was not quite so herein. For these reasons, the points in limine were dismissed but with the respondents bearing the wasted costs.

THE APPLICATION FOR LEAVE TO APPEAL

[23] In his application for leave to appeal the court`s ruling Mr. *Hashiti* made the following submissions. By mounting an application for rescission of judgment under rule 15 (1) of the Commercial Court rules, the respondents had deliberately selected their causa. As such, they could not be permitted to abandon that cause mid-stream and elect for a fresh one. By using the facility of rule 7 of the Commercial Court rules to pardon them, the court had aided the respondents in this improper switch of causa.

[24] This approach was, according to Mr. *Hashiti,* inconsistent with the position taken by the Supreme Court in *Mukambirwa & 7 Ors v The Gospel of God Church International 1932* SC 8-14 and *Rogerio Barbosa de Sa v Herlander Barbosa de Sa* SC 34-16. In addition, Mr. *Hashiti* submitted that in his view, the High Court had recently replicated the error in *Gospel of God International v Masedza & 6 Ors* HH 556-23. It was therefore appropriate that leave be granted to take the present matter on appeal for a definitive position to be set by the Supreme Court.

[25] With respect, both arguments by counsel were unsustainable and below are the reasons. The respondents did not at all amend their cause of action. At least not insofar as that principle was laid out by this court per MALABA J (as he then was) in *Peebles v Dairiboard (Pvt)* Ltd 1999 (1) ZLR 41 (H). The respondents` quest in the rescission application remains one to offset a judgment entered against them in default. The fact that they may not have accurately titled their application changes not alter the essence of their prayer.

[26] Curiously, this court in *Gospel of God International v Masedza & 6 Ors* (supra) observed as follows at page 6; -

> "I also observe that in *Barbarossa de Sa v Barbarossa de Sa*[1] *supra,* Guvava JA made the point that a judge dealing with a Rule 63 (now Rule 27) may set aside a judgment granted in error if the facts show that. The Supreme Court did not confirm the argument by Adv *Hashiti*. On the contrary, the following passage from the *Barbarossa de Sa case supra* seals the fate of the applicant's argument:
>
> "The question which remains to be determined is whether the considerations for r 63 are similar to the consideration to be made in an application for rescission in terms of r 449 (1) (a). This point was discussed in *Munyimi v Tauro* SC 41/2013 where the court stated that: "Further it is also established that once a court holds that a judgment or order was erroneously granted in the absence of a party affected, it may correct, rescind or vary such without further inquiry. There is no requirement that an applicant seeking relief under r 449 must show "good cause" – *Grantually (Pvt) Ltd & Anor* v *UDC Ltd* 2001(1) ZLR 361at p 365, *Banda v Pitluk* 1993 (2) ZLR 60 (H), 64 F-H; *Mutebwa* v *Mutebwa & Anor* 2001 (2) SA, 193, 199 I-J and 200 A-B."

[27] With respect, I similarly could not identify the connection between Mr. *Hashiti's* argument on migrating causa and the two Supreme Court authorities of *Mukambirwa v Gospel of God* and *de Sa v de Sa*. If anything, the two authorities recognised the court`s discretion to act mero motu in terms of [the present] rule 29, where the facts demonstrated that a judgment was entered in error.

[28] Even though an application for the rescission of such may have been launched under [the present] rule 27. Counsel also argued that the position raised a conflict between the High Court and Supreme Court. The answer to this last point is self-evident. Judicial precedent must hold sway.

[29] On the impugned resolution, counsel contended that the High Court had handed down conflicting positions. In *Zimind Publishers (Pvt) Ltd & Anor v Minister of Local Government, Public and National Housing & 3 Ors* HH 464-22 and *Dupont Agricole*, the High Court had rejected resolutions on the basis of defects apparent on the face thereof. But by disallowing the

[1] Also cited as *Rogerio Barbosa de Sa v Herlander Barbosa de Sa* SC 34-16

points in limine which were premised on the ruling in *Dupont*, the court under the present proceedings had departed from its own authority. Further, the High Court had taken the strict approach in *Hallmax Engineering (Pvt) Ltd v ZIMRA* HH 832-22.

THE LAW ON APPLICATIONS FOR LEAVE TO APPEAL INTERLOCUTORY RULINGS

[30] In *Golden Reef Mining Private Limited & Anor v Mnjiya Consulting Engineers Pty Ltd & Anor* HH 631-15 this court per MAFUSIRE J, recognised that the right to appeal was guaranteed by section 14 of the Constitution of Zimbabwe. But inasmuch as the facility of appeal served a critical purpose, it had, for practical purposes, to be curtailed. The court referred with approval, to the remarks of SCHREINER JA in the *Pretoria Garrison Institutes v Danish Products* 1948 (1) SA 839 (A), where the learned judge of appeal held at 867 that; -

> "A wholly unrestricted right of appeal from every judicial pronouncement might well lead to serious injustices. For, apart from the increased power which it would probably give the wealthier litigant to wear out his opponent, it might put a premium on delaying and obstructionist tactics. This latter consideration has, I imagine, been the predominant one in leading legislators to try to restrain the bringing of appeals from orders of a preparatory or procedural character arising in the course of a legal battle. The chief object has naturally been to bring about a just and expeditious decision of a major substantive dispute between the parties. …But desirable as it would be to ensure that all such orders are properly made, it has been widely felt, in different ages and countries, that a line between appealable and non-appealable orders of this preparatory or procedural character ought to be drawn somewhere, for if they were all appealable, the delay and expense might be excessive, while if they were none of them appealable the injustice resulting from wrong orders might be intolerable."

[31] In *Gappah v Mahere* HH 633-22, this court[2] held that leave to appeal could be granted where the following requirements were met proved:

[2] Citing with approval; - *Pichanick NO v Paterson* 1993 (2) ZLR 163 (H) and *Chikafu v Dodhill* (Pvt) Ltd & Ors 2009 (1) ZLR 293 (S).

i. that there are reasonable prospects of success;
ii. that the balance of convenience favours the grant of such leave;
iii. that the matter is of substantial importance to one or both parties;
iv. that there is a point of law, or divergence of authorities on it that will be settled by the appeal court;
v. that for a judgment sounding in money, that the amount in dispute is not trifling.

PROOF OF AUTHORITY IS BUT A MATTER OF EVIDENCE

[32] Mr *Hashiti* emphasised points (i) and (iv) on the above list. He argued that applicant enjoyed great prospects of success on appeal on the two points raised in limine. Secondly, counsel submitted that it was necessary that the Supreme Court addresses the divergent points on the law that he believed characterised the High Court`s approach.

[33] I will deal with the two grounds[3] in one swipe, commencing with the impugned resolutions. The law is laid, fixed, certain and established on the requirement to furnish proof of authority to institute or represent an entity in legal proceedings. In that regard, one therefore expects little argument or confusion whenever this subject arises in the courts. What the courts generally concern themselves with, is the sufficiency of proof of such authority.

[34] Proof is a matter of evidence. And evidence is split into two parts; - (i) the facts to be proven, and (ii) the facts to prove the facts to be proven. This takes the matter largely into the realm of adjectival law-where evidence mainly resides. And evidential-adjectival law generally entails the exercise of judicial discretion within circumscription. The discretion to receive, consider and place a value and effect, on evidence presented before that court.

[35] Flowing from that general observation, I note that in simple terms, but for the wrong case number, the first set of Garizio resolutions would have been valid. And that but for the date, the second set of Garizio resolutions would also have been valid. This deduction is critical. It is a conclusion that must also, be considered against the already-stated and indisputable purpose behind the need for authority in legal proceedings.

[3] (namely (i) and (iv)) and their two arguments (on the resolution and form of application)

[36] The superior courts-(High Court[4], Supreme Court[5] as well as the Constitutional Court[6])have all spoken on the point. The need to furnish proof of authority to institute legal proceedings on behalf of a body corporate is not a mere libation to assuage an idle procedural whim. It is based on a solid, practical purpose. And the authorities have consistently stated that purpose over the years; - from *Madzivire* to *Cuthbert Dube*. Recently the Supreme Court refreshed that self-same purpose at paragraph [30] in *Peter Valentine & Anor v Blooming Lily Investments (Pvt) Ltd & 2 Ors* SC 42-23 where UCHENA JA held that; -

> *[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.

RESOLUTIONS AS EVIDENCE BEFORE THE COURTS

[37] A good starting point would be *Stand Five Four Nought (Pvt) Ltd v Salzman ET SIE SA*, (supra). Therein, UCHENA JA observed that where specific formalities were prescribed for documents submitted as proof of authority, then such formalities had to be fulfilled. Herein, neither in the points in limine nor the application for leave were the essentials of a valid company resolution articulated.

[38] What counsel for the applicant did was to merely point out to patent shortcomings on the face of documents. His observations amounted to standard checks which anyone can make on a document. Check on matters such as date, signature, language or grammar and sense. Without a doubt such matters are quite important. But they are also the very same matters that place a court at large in assessing the overall validity of the document concerned.

[39] In that regard, courts have taken various approaches when assessing the validity of resolutions (See *Cossam Chiangwa & 7 Ors v Apostolic Faith Mission in Zimbabwe & 7 Ors* SC 67-21; *Peter Valentine & Anor v Blooming Lily Investments (Pvt) Ltd & 2 Ors* SC 42-23).

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[4] *Madzivire & Ors v Zvarivadza* 2005 (2) ZLR 148
[5] *Cuthbert Elkana Dube v PSMAS & Anor* SC 73-19
[6] See *Bere v JSC & 6 Ors* CCZ 10-22

[40] Counsel, with respect, and based on the facts before the court, reduced his observations to a rather perfunctory attack. The resolution could not be equated to the impugned power of attorney in *Stand Five Four Nought.* Our law is clear on the fundamental requirements of most instruments; - from documents evincing title or possession, to affidavits or even court orders. What is the position on resolutions?

[41] One may also have regard to section 65 of the Companies and other Business Entities Act [Chapter 24:31] which sets outs instances that can render a resolution void, voidable and prohibited. Herein, applicant did not attack the Garizio resolutions from such a dimension. Nor did he do so from as solid a perspective, for example as occurred in *Lancaster 101 (RF)(Pty) Limited v Steinhoff International Holding N. V& 2 Ors* [2021] 4 All SA 810 (WCC). This approach by applicant left the court at large to weigh the resolutions based on considerations behind the purpose of such resolutions.

[42] Further, I have not, again with respect, identified any pronounced divergences in the law as to require the Supreme Court`s intervention. The decisions cited by counsel for applicant relate to different factual scenarios where the respective courts made findings of fact on the evidence presented thereto. As regards the title of the application and argument around change of causa, the reasons offered in dismissing the points in limine should suffice.

DISPOSITION

[43] In this jurisdiction, the right to appeal derives from the Constitution of Zimbabwe. The Supreme Court, per MATHONSI JA, in *Al Shams Global BVI Limited v Deposit Protection Corporation & 3 Ors* SC 52-22, emphasised the importance of that right of appeal. Even in the face of legislative restrictions such as section 43 (2) (d) of the High Court Act. This means that the facility of appeal must not be trifled with. Neither by those pursuing it, those resisting it, nor by the courts confronted with it.

[44] Such is my reading of MATHONSI JA`s commentary on *Pretoria Garrison Institutes v Danish Products* in the said Supreme Court decision of *Al Shams Global BVI Limited v Deposit Protection Corporation & 3 Ors.* Accordingly, the present application must be addressed with those considerations in mind.

[45] Those considerations exhort the court to recognise that the application for leave to appeal derives from two points in limine. These being points in limine which were, in turn, anchored in (i) established principles of law and (ii) an area falling firmly within the court`s discretion. On the first aspect (i), I refer to the Supreme Court`s guidance in *Rainbow Tourism Group v Kabasa & Anor* SC 52-14.

[46] It was therein held that leave to appeal ought not be refused in matters involving unsettled areas of the law. Especially where the resolution of such questions of law was pending before the Supreme Court. This matter is quite clearly, far removed from the scenario envisaged in *Rainbow Tourism Group v Kabasa & Anor*.

[47] And secondly on (ii), I do not believe that applicant has demonstrated prospects of success on appeal. The Garizio resolutions were, apart from inelegance born of inattention, reliable proof of authority to institute and represent second and third respondents in legal proceedings. Mr. *Hashiti* observed that the court`s conclusion on divisibility of the resolution was incorrect. That conclusion did not have the effect of tainting the resolution. It retained its character as reliable evidence of authority.

[48] It is my conclusion that the application for leave has not sufficiently discharged the requirements set out in *Gappah v Mahere* (supra). Accordingly, leave to appeal will be refused.

It is therefore hereby ordered; -

That the application for leave to appeal the dismissal of the two preliminary points be and is hereby dismissed with costs.

E. Motsi & Associates -applicant`s legal practitioners
Gill, Godlonton & Gerrans-respondents legal practitioners

CHILIMBE J___28/11/23

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