CECILIA RUTENDO MAKONYA (1)
and
JORDAN HAULIERS (PRIVATE) LIMITED (2)
versus
GODKNOWS ZIVAINASHE MAKONYA

HIGH COURT OF ZIMBABWE
DEMBURE J
HARARE; 19 & 27 September 2024

Opposed Application

A Mutima, for the applicants
A Mugiya, for the respondent

DEMBURE J: This is a court application for a final interdict. The first and second applicants seek the following relief against the respondent:

1. The application be and is hereby granted.
2. The respondent be and is hereby ordered to deliver one MAN TGX truck, white in colour bearing registration number AFJ 5157; one MAN Horse truck, red in colour, registration number AFJ 5157; forklift, white in colour AFJ 4080 and a link trailer AFG 9594 to the applicants within three (3) days from the date of service of this order to Aspindale Truckshop, Harare or any place chosen by the applicants.
3. Should the respondent fail to do *(sic)*, the Sheriff of this Court shall be authorised to proceed in terms of the rules.
4. Respondent to pay the costs of this application on an attorney and client scale.

THE FACTS

The first applicant is a director and shareholder in the second applicant, a registered company operating a trucking business. The first applicant is married to the respondent. However,

on 2 November 2023, the respondent filed summons for divorce and other ancillary relief before this court in case number HCH 7124/23 and the said matter is still pending.

The first applicant avers that she holds 33% shareholding in the second applicant and that the other shares were held by one Newman Ishe Chinofunga who has since relinquished his shareholding and directorship duties in the company. These averments were not disputed by the respondent except that he claimed that he was the one who donated the shares to the first applicant and Newman Ishe Chinofunga. He claimed that the donation to the first applicant was for what he termed "convenience". It was not clear though what he meant by such "convenience". It is common cause, however, that the respondent is neither a director nor a shareholder of the second applicant.

The first applicant also averred that she remained the only shareholder after this court nullified the registration of the Jordan Family Trust. On 2 April 2024, this court before WAMAMBO J issued an order *inter alia*, declaring the registration of the Jordan Family Trust Deed a nullity and ordered that it be cancelled by the Registrar of Deeds. The court also declared a nullity the donations of an immovable property known as stand 2219 Kambuzuma Township measuring 260 square metres, stand 12124 Glen View measuring 200 square metres and the motor vehicles being Man TGX, white in colour registration number AFJ 7347 and a Man Horse red in colour registration number AFJ 5157 to the Trust. The said motor vehicles are the subject of this application. This final order followed a provisional order issued by this court on 23 February 2024 before TSANGA J where the respondent was interdicted from selling or transferring any of the above property pending the finalisation of the matters case numbers HCH 856/24 and HCH 7124/23.

It is also common cause that the movable property namely one MAN TGX truck, registration number AFJ 5157; one MAN Horse truck, registration number AFJ 5157; a forklift registration number AFJ 4080 and a link trailer AFG 9594 are owned by the company, the second applicant. The first applicant avers that she was in charge of the day-to-day business operations of the company until March 2022 when she took a temporary sabbatical from work after she fell pregnant and requested the respondent to oversee the day-to-day operations of the company. The respondent, she alleged, took over the operations but has not been providing any financial reports on the operations including reports of the state of the trucks and the income realised from the trucking business. The applicants seek a mandatory interdict to recover the company property

from the respondent who has refused to return the company assets despite demand. The application is opposed by the respondent who denies being in possession of the company property and disputes that the company makes any monthly income of about US$4 000.00 as alleged by the applicant. While the respondent did not raise a preliminary objection to the proceedings in his notice of opposition, counsel for the respondent, Mr *Mugiya* raised the following points in *limine* at the hearing of the application:

1. That the application is invalid on account of lack of authority for the first applicant to institute the proceedings on behalf of the company. In other words, it was submitted that the board resolution attached to the application was fatally defective.
2. The first applicant has no *locus standi* to sue for the company's property.

POINTS *IN LIMINE*

1. **WHETHER THERE IS A VALID BOARD RESOLUTION AND CONSEQUENTLY WHETHER THE APPLICATION IS VALID.**

Mr *Mugiya*, counsel for the respondent, submitted that the application must fail as the purported board resolution by the company at p 10 of the record which is the basis upon which the first applicant acted for the second defendant is fatally defective. The resolution was done by one director, the first applicant and was not signed by the other director and shareholder Newman Ishe Chinofunga. The second director did not authorise the first applicant to act for the second applicant. He argued that it was clear that there is no valid resolution authorising the deponent to institute these proceedings. He further submitted that the first applicant was not involved in the day-to-day running of the company and that she was a nominal director. The principle of ostensible authority does not arise. For such ostensible authority to apply she must have been involved in the running of the company.

Counsel further submitted that there is a plethora of case law that for a director to act on behalf of the company there has to be authority and such authority must not be questionable. It must be shown that a board meeting was validly constituted to pass a valid resolution. I noted that in his address Mr *Mugiya* muddled up his submissions on the two points *in limine* that the resolution is invalid and the lack of *locus standi* by the first applicant. I had to separate the submissions which deal with the first point *in limine* here as that is what I will decide on first. He

further argued that a company ought to operate with at least two directors. The first applicant who claims that the other director resigned cannot operate with one director by virtue of the provisions of s 195(1) of the Companies and Other Business Entities Act [Chapter 24:31] *("the COBE Act")*. He argued that s 195(1) requires a private company to have at least two directors. The applicant holds 33% shareholding while Newman is the other silent shareholder. It is clear from the provisions of s 201 of the same Act that a private company at its inception ought to have at least two directors. There is no doubt, however, that at its inception the company had more than one director. That is not the issue before me.

Counsel further argued that the section that authorises the passing of resolutions is s 204 which requires directors to vote. It requires a *quorum* of directors for them to sit and make decisions that bind the company. From the CR 6, it is clear that one Liberty Mupandaguta resigned on 31 March 2022 upon which Newman was appointed as director. There is no need to place an *onus* on the respondent when the applicant herself said she sat alone. The law is clear on how directors should sit. She cannot blow hot and cold. He also argued that the application stands or falls on the founding affidavit. There is questionable authority and the other director should have at most placed a supporting affidavit to the application.

On the other hand, Mr *Mutima*, counsel for the applicant, relying on the decision in *Beach Consultancy (Pvt) Ltd* v *Makaya & Anor* HH 696/21 submitted that there is a valid application by the company. The evidence is clear that the first applicant is properly representing the company. The respondent has not shown any contrary evidence to disprove the first applicant's authority to act for the company. He argued that the court must look at the evidence and find if the proceedings are being instituted by the company and not some an unauthorised person and that each case depends on its own circumstances. Even the omission to attach a resolution may not be fatal in some instances. The case addresses the fiduciary duties of the first applicant as a director and the order sought is meant to protect the interests of the company. The other director is no longer involved in the affairs of the company. While at some point he was a director, he resigned from the board and relinquished his shareholding. A board of directors of a private company owned by one shareholder can be validly constituted by one director and that is permissible under s 195(1) of the COBE Act. That section is worded differently from the old s 169(1) of the Companies Act [*Chapter 24:03*]. The court in *Beach Consultancy, supra* also confirmed that at law a private

company can have one director and it would be an exception on the requirement of a board resolution. The fact that the CR. 6 has not been updated is insignificant as the undisputed fact is that Newman Ishe Chinofunga relinquished his position and is no longer interested in the affairs of the second applicant. He finally submitted that the first applicant as the sole director has the authority to act for the company and the proceedings are accordingly valid. The respondent is not a shareholder or director of the company. He submitted that the point *in limine* must be dismissed.

It is trite law that a company being an artificial or legal person must be represented in any legal proceedings by a person who has been authorized by the company to do so. The person must be authorized by a valid company resolution to institute proceedings on its behalf. The leading authority on this legal position is the Supreme Court decision in *Madzivire & Ors* v *Zvarivadza & Ors* 2006 (1) ZLR 514 (S) at 516 B-E 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 authorised 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. The fact that the first appellant is the managing director of the fourth appellant 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 *Burstein v Yale* 1958 (1) SA 768(W), it was held that the general rule is that directors of a company can only act validly when assembled at a board meeting.
>
> There is no evidence that there was any service of a notice of a meeting to pass the required resolution authorising the first appellant to represent the fourth appellant. Even if the first, second and third appellants had agreed on the action, there is no indication that the first respondent, who is one of the directors, was served with a notice of a meeting of directors to pass the resolution of authority. Both the fourth appellant and the first respondent are entitled to be served with a notice of meeting so that a resolution be passed authorising the first appellant to represent the fourth appellant. This was not done. Failure to do so renders the decision to represent the fourth appellant invalid."

This legal position was confirmed in *Dube* v *Premier Service Medical Aid and Another* SC73/19 where on para 38 of the cyclostyled judgment the court held that:

> "[38] The above remarks are clear and unequivocal. A person who represents a legal entity, when challenged, must show that he is duly authorized to represent the entity. His mere claim that by virtue of his position he holds in such an entity he is duly authorized 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." [My emphasis]

See also *Crown & Anor v Energy Resources Africa Consortium & Anor* SC 3/17.

In *Beach Consultancy, supra,* MATHONSI J (as then was) recognizing the binding nature of the *Madzivire, supra* referred to *African Banking Corporation of Zimbabwe Limited t/a Banc ABC* v *PWC Motors (Pvt) Ltd & 3 Ors* HH123/13 which further outlines the position as follows:

> "However, it occurs to me that that form of proof is not necessary in every case as each case must be considered on its own merits. *Mall (Cape) (Pvt) Ltd v Merino KO-Oprasie Bpk* 1957 (2) SA 345 (C). All the court is required to do is satisfy itself that enough evidence has been placed before it to show that it is indeed the applicant which is litigating and not an unauthorised person.
> To my mind the attachment of a resolution has been blown out of proportion and taken to ridiculous levels. Where the deponent of an affidavit states that he has the authority of the company to represent it, there is no reason for the court to disbelieve him unless it is shown evidence to the contrary. Where no such contrary evidence is produced the omission of a company resolution cannot be fatal to the application. I therefore reject the point *in limine*."
>
> With respect, the requirement for the production of a company board resolution, as opposed to authority to represent a natural person, may not be replaced by a claim by the deponent in the affidavit that he is authorized to represent the company. Pleadings may not supplant a company resolution as proof of authority. The rule is strict and admits of only one exception, that is, where the company has only one director. This is the import of *Madzivire* case."

In *casu*, the dispute is centered on the validity of the board resolution filed together with the founding affidavit at p 10 of the record. It is common cause that it was signed by the first applicant in her capacity as the director of the second applicant. It purports to authorize these proceedings and that the first applicant has the authority to act for the company. The issue that arises is whether or not the said resolution is valid. In para 4.2 of the applicant's founding affidavit, she stated:

> "4.2 As a shareholder I hold a 33% share in the company and serve as one of its directors. The remaining shares are held by Newman Ishe Chinofunga, who is a silent shareholder and has relinquished his duties and shareholding [in] Jordan Hauliers a company which is engaged in the trucking business, providing services in truck hiring, transportation and forklifting. I attach a copy of the shares allocation marked as Annexure "C". [My emphasis]

In his response to this, the respondent in para 5 of his opposing affidavit did not dispute the above facts but could only claim to have donated the 33% shareholding and directorship to the

first applicant for "convenience" and also donated the remaining shares to Newman Ishe Chinofunga.

It is, therefore, common cause that the first applicant remains the only active director and shareholder of the second applicant. The respondent also did not dispute that the Jordan Family Trust was nullified and that its shareholding no longer exists as well following the order of this court in case number HCH 856/24. See para 6 of the respondent's opposing affidavit. The law is clear that what is not denied in affidavits is taken to have been admitted. See *Fawcett Security Organisation* v *Director of Customs & Excise* 1993 (2) ZLR 121 (S). It is, therefore, factual that the first applicant is the only active director of the second applicant despite the formal CR 6 filed in 2022. That CR 6 being a public document in any event, is *prima facie* proof of the facts stated therein in terms of s 12(2) of the Civil Evidence Act [*Chapter 8:01*]. Where there is evidence that it has not been updated which is not in dispute the court cannot ignore that evidence of recent developments. The evidence clearly establishes that the first applicant remains the only active director and shareholder of the second applicant. She is the only person who can act to protect the company's interests.

This brings me to the question of whether our law permits a private limited company to have one director. Mr *Mugiya* argued that s 195(1) of the COBE Act only allows a private company to have at least two directors. The relevant provisions of s 195(1) of the said Act reads:

"195 Directors and their functions and responsibilities

(1) A private company with more than one and fewer than ten shareholders shall have two or more directors, a private company with ten or more shareholders shall have not fewer than three directors, and a public company shall have not fewer than seven nor more than fifteen directors.

(2) At least one director shall be ordinarily resident in Zimbabwe." [My emphasis]

The current provisions must be read with the provisions of the old s 169 of the Companies Act which reads thus:

"169 Directors and secretary

(1) Every company shall have not less than two directors, other than alternate directors, at least one of whom shall be ordinarily resident in Zimbabwe.

(2) Every company shall have at least one secretary ordinarily resident in Zimbabwe." [My emphasis]

It is trite law that words in any document, contract or statute must be interpreted in their context and must be given their ordinary grammatical meaning unless to do so would lead to some absurdity. See *Lungu & Ors* v *Reserve Bank of Zimbabwe* SC 04-24 at p 12. As I have found above that it was not disputed that the first applicant is the only remaining shareholder and director of the second applicant, the new s 195(1) which is worded differently from the old s 169(1) shows that a private company with one shareholder is not required to have at least two directors. The provisions clearly state: "a private company with more than one…" This is different from saying "one or more shareholders". The ordinary meaning is that where there is one shareholder there is no mandatory requirement for a private company to have at least two directors. The new provision now links the number of directors to the number of shareholders. This was not the case in the old s 169(1) which stated that "Every company shall have not less than two directors". Mr *Mugiya*'s submission that the second applicant as a private company must have at least two directors is clearly erroneous. It is based on the repealed law.

Once it is accepted that she was the only director of the company at the time the proceedings were launched, it cannot then be said that the board resolution was invalid for want of the signature of Newman Ishe Chinofunga who had resigned. That act of resignation is a unilateral act and the fact that the company records have not yet been updated at the Registrar of Companies does not take away that undisputed fact. The first applicant was clearly authorized to act for the second applicant and the resolution attached to the application is valid. As held in *Madzivire, supra*, the person acting on behalf of the company must be authorized by a company resolution. That company resolution is there. In any event, where there is one director, the law provides that it is an exception to the rule requiring that a board resolution be produced as proof of authority. This was confirmed by MATHONSI J (as he then was) in *Beach Consultancy, supra,* where he said:

> "With respect, the requirement for the production of a company board resolution, as opposed to authority to represent a natural person, may not be replaced by a claim by the deponent in the affidavit that he is authorized to represent the company. Pleadings may not supplant a company resolution as proof of authority. The rule is strict and admits of only one exception, that is, where the company has only one director. This is the import of *Madzivire* case." [My emphasis]

The first applicant as a director had to act to protect the interests of the company. It is also trite that as a director she has the fiduciary duty to act in the best interests of the company. Thus,

in *Beach Consultancy*, *supra,* the court commenting on this position which is now codified under s 54 of the COBE Act quoted *Howard* v *Herrigel* 1991 (2) SA 660 (A) at 678 where the court succinctly states the principle as follows:

> "...at common law, once a person accepts an appointment as a director, he becomes a fiduciary in relation to the company and is obliged to display the utmost good faith towards the company and in his dealings on its behalf.*"*
> Authors Cassim *et al* in their seminal work *Contemporary Company Law* 2nd ed, 2012 (Juta) at p514 state that:
> "The fundamental and paramount or overarching duty of company directors is to act *bona fide* in what they consider – and not what the court may consider – to be in the best interests of the company as a whole, and not for a collateral purpose."

I observed that the company has not been operating professionally and that in the absence of the first applicant taking this bold step the interests of the company might not have been protected by anyone. The respondent besides not disputing the factual position that the first applicant is currently the sole shareholder and director in his opposing affidavit did not place any evidence to show any contrary position that she has no authority to act or that the present proceedings were not authorized by the second applicant. The proceedings have been authorized by the company. The application by the second applicant is accordingly valid. The point *in limine* on the validity of the resolution was only taken at the hearing and it is my view that it was raised as an afterthought to avoid dealing with the merits. The point *in limine* has no merit. I accordingly dismiss the point *in limine* that the application is invalid for want of a valid board resolution.

2. WHETHER THE FIRST APPLICANT HAS *LOCUS STANDI*

Mr *Mugiya* submitted that the first applicant has no *locus standi* to bring this application seeking to vindicate company property. She is a shareholder and the appropriate remedy was for her to bring a derivative action. What she owns are the shares in the company, not the property of the company. She is not entitled to vindicate the property of the company in circumstances where she is not the owner.

In contrast, the applicants contended that the first applicant as a major shareholder of the company has a right to access and control the assets belonging to the company. It was argued that on that basis she has *locus standi*.

It is a settled principle of the law that for a litigant to sue or be sued he or she must have *locus standi*. The principle of *locus standi* was highlighted in *Sibanda & Ors v The Apostolic Faith Mission of Portland Oregon (Southern African Headquarters) Inc* SC 49/18, where HLATSHWAYO JA stated as follows:

> "It is trite that *locus standi* is the capacity of a party to bring a matter before a court of law. The law is clear on the point that to establish *locus standi*, a party must show a direct and substantial interest in the matter. See *United Watch & Diamond Company (Pty) Ltd & Ors v Disa Hotels Ltd & Anor* 1972 (4) SA 409 (c) at 415 A-C and *Matambanadzo v Goven* SC 23-04."

The question that arises is whether the first applicant has *locus standi* to seek a mandatory interdict meant to recover the property owned by the second applicant, a company. It is common cause that the property in question is owned by the second applicant, a registered company. The principle of separate legal personality of a company is a fundamental principle of our law as propounded in *Salomon v Salomon and Co Ltd* (1897) AC 22. In that leading case on the doctrine of corporate personality it was held that:

> "It is a fundamental principle of our law that a company is a separate person, with its own corporate identity, separate and distinct from the directors or shareholders and with its own property rights and interests to which alone it is entitled. If it is defrauded by a wrongdoer, the company itself is the one person to sue for the damage." [My emphasis]

This principle extends even to a "one-person" company notwithstanding that it is controlled in every respect by that individual.

The law is very clear that the company owns its property alone and not jointly with shareholders or its officers. A shareholder does not have rights to property owned by the company. See *Borland's Trustees* v *Steel Bros & Co. (Pvt) Ltd* [1901] 1 Ch 279. This position was also confirmed as part of our law in *Philippa Ann Coumbis* v *Theright Investments (Pvt) Ltd* HH 740/22. The first applicant as a shareholder and director has no ownership rights in respect of the property owned by the second applicant. I agree with Mr *Mugiya* that she cannot vindicate company property. She has no *locus standi* to do so or seek the mandatory interdict for such property. I accordingly uphold the point *in limine* raised by the respondent that the first applicant has no *locus standi* to bring the present application.

However, since the second applicant, the owner of the property in question, is properly before me I must proceed to determine the merits of the application by the company now as the sole applicant before me.

THE MERITS

The issue for determination is whether the applicant company has established the requirements for an interdict.

APPLICANT'S SUBMISSIONS

Mr *Mutima* submitted that this is an application for a mandatory interdict. There is an application that was granted by this court for an interdict before WAMAMBO J to the effect that the respondent was in possession of certain movable property belonging to the applicant. The order prohibited the respondent from selling the assets of the company. The application requires that the applicant has a clear right. The company is the owner of the property as shown by the registration books, annexures E, F and G. Even if the respondent donated the shares he was divested of any interest in the company. It is not in dispute that the respondent is neither a director nor a shareholder in the company. He does not hold any possessory rights to the property of the company. On the issue of irreparable harm, Counsel argued that there is irreparable prejudice arising from the continued possession of the company assets by the respondent. There is a risk of disposal and the applicant seeks delivery of the assets. The benefits of the court order issued before WAMAMBO J will not be realized and that order cannot be a *brutum fulmen*. He argued that the court guard's ownership rights jealously. Counsel referred the court to the cases cited in the applicant's heads of argument. It was further argued that the applicant does not have any alternative remedy rather than the court giving effect to its previous order. The respondent did not deny that the property is owned by the applicant and has not shown any interest in giving back the property of the applicant. The relief sought must be granted.

RESPONDENT'S SUBMISSIONS

Mr *Mugiya* made very brief submissions on the merits. He simply stated that he stood with the respondent's opposing affidavit and the respondent's heads of argument filed of record.

THE LAW

The requirements for a final interdict are a matter of settled law. For the court to grant a final interdict a party must satisfy the court that their particular case favors such an order with regards to the requirements for the granting of the interdict. See *MDC-T & Ors* v *Timveos & Ors* SC 9/22. At p. 9 CHITAKUNJE JA went on to state that:

> "An interdict is a summary court order, usually issued upon application, by which a person is ordered either to do something, stop doing something or refrain from doing something in order to stop or prevent an infringement of a certain right… The requirements for a final interdict on the other hand are:
> i. A clear right;
> ii. Irreparable harm actually committed or reasonably apprehended; and
> iii. The absence of an alternative remedy."

See also *Setlogelo v Setlogelo* 1914 AD 221 at 227; *Flame Lily Investment Company (Pvt) Ltd v Zimbabwe Salvage (Pvt) Ltd & Anor* 1980 ZLR 378.

APPLICATION OF THE LAW TO THE FACTS

CLEAR RIGHT

The applicant is required to allege and prove a clear right which he seeks to protect. The existence of a clear right is a matter of substantive law. The legal right which is sought to be protected must be proved on a balance of probabilities. See *Mujokeri & Anor v Apostolic Faith Mission in Zimbabwe & Ors* HH 372/18. In *casu*, the applicant company is undoubtedly the owner of the property namely the two trucks, a trailer and forklift. The evidence placed on record established this. That fact is common cause. As the owner of the property, the company is entitled to vindicate the property from whosoever is in possession of it without its consent. The nature of the mandatory interdict sought is in effect a vindicatory action. The right of ownership is a real right enforceable against the whole world. The company, as the owner, remains entitled to its property. MAKARAU JP (as she then was) made this clear in *Alspite Investments (Pvt) Ltd v Westerhoff* 2009 (2) ZLR 236 where she said:

> "There are no equities in the application of the *rei vindicatio*. Thus in applying the principle, the court may not accept and grant pleas of mercy or for extension of possession of the property by the defendant against an owner for the convenience or comfort of the possessor once it is accepted that the plaintiff is the owner of the property and does not consent to the defendant holding it. It is a rule or principle of law that admits no discretion on the part of the court. It is a legal principle heavily weighted in favour of property owners against the world at large and is used to ruthlessly protect ownership. The application of the principle conjures up in my mind the most uncomfortable image of a stern mother standing over two children fighting over a lollipop. If the child holding and licking the lollipop is not the rightful owner of the prized possession and the rightful owner cries to the mother for intervention, the mother must pluck the lollipop from the holder and restore it forthwith to the other child notwithstanding the age and size of the owner-child or the number of lollipops that the owner child may be clutching at the time. It matters not that the possessor child may not have had a lollipop in a long time or is unlikely to have one in the foreseeable future. If the lollipop is not his or hers, he or she cannot have it." [My emphasis]

See also *Nzara & Ors v Kashumba & Ors* SC 18/18; *Eastlea Hospital (Pvt) Ltd v Ndoro & Ors* SC 116/23.

The respondent did not dispute that he is neither a shareholder or a director of the company. His position was that he was the one who donated the shares and directorship to the first applicant and the other shares to Newman Ishe Chinofunga. But even assuming he donated those shares, once the donation is concluded and effected the donor retains no title to the same property donated. He is, in other words, divested of ownership of the same. The donor impoverishes himself without receiving or stipulating anything in return while the estate of the donee is enriched. See *Goto* v *Tsuro N.O. & Ors* SC40/24. The respondent clearly has no direct interest in the property of the company, a separate legal person.

It is my finding that the respondent is in possession of the company property in question. While he denied that he is in possession of the trucks, I found his denial to be simply a bare denial. It is trite that a mere denial is insufficient to constitute a good defence to a claim. He did not dispute that there was an order issued by this court barring him from disposing of the same company assets. It defies any logic for the court to have done so if he had no control of the assets. Further, in para 8.iii of his opposing affidavit to the maintenance claim in the lower court in case number M915/24 (which was attached to the applicant's answering affidavit) the respondent clearly admitted that he had possession of the company assets. In that para 8.iii he stated:

> "I also wish to point out that the applicant bears the onus to prove additional income. All she was able to show is that I am in possession of the company assets…" [My emphasis]

This affidavit was commissioned on 6 May 2024 while the respondent's opposing affidavit in this case was deposed to about ten days later on 17 May 2024. He even confirmed that the trucks were in Zambia on 4 March 2024 in para 13. All this evidence shows that the respondent is in possession of the company assets sought to be recovered by the company. That continued possession is clearly without the consent of the applicant. He did not set out facts or evidence to establish any defence to the vindicatory claim of the applicant. The company has clearly established that it has a clear right in terms of the law to the relief sought.

IRREPARABLE HARM

The applicant company has established that irreparable harm has actually occurred and or is reasonably apprehended. The irreparable harm contemplated is that the applicant will suffer permanent, irreversible harm or harm that is beyond repair. In *casu*, it is common cause that the applicant is engaged in the trucking business, in particular, it is into truck hiring, transportation and forklifting. The property it seeks to recover is essentially its only property for its operations. The continued control of those assets and the income realized from those trucks in the hands of the respondent, who is neither a shareholder nor a director, deprives the company of all income from its property. The harm cannot be remedied otherwise by an order for an immediate delivery of those assets into the custody of the company. The movable goods also wear and tear due to their use and such depreciation will mean further reasonable irreparable prejudice to the applicant. The respondent has not been accounting to the company for the income realized. The conclusion can only be that he is realizing that income for his own selfish benefit as he confirmed in para 13 of his opposing affidavit that the trucks were in Zambia on 4 March 2024 meaning they are being used to generate revenue for the respondent. The court must intervene to stop further prejudice to the applicant. The second requirement was accordingly established on a balance of probabilities.

ABSENCE OF A SATISFACTORY REMEDY

The applicant managed to allege and prove on a balance of probabilities that the remedy being sought in the draft order is the only satisfactory and effective remedy to stop the continued infringement of its rights. As noted above, in *Alspite Investments (Pvt) Ltd, supra* the court has to protect the right of ownership where a party holds another person's property without its consent

or does not have any lawful right to retain possession. There are no equities applicable. To enable the company to operate and generate income it would require the property in question. The property is in the hands of the respondent who is holding on to them unlawfully as his possession is not with the company's consent. He has refused to surrender the assets. There is no other remedy with satisfactory results that can enable the company to recover its business assets from the respondent. I accordingly find in favour of the applicant company that it has established the third requirement for an interdict.

All the requirements are satisfied and the applicant is entitled to a final interdict.

COSTS

The applicant prayed for costs on a punitive scale. I found the conduct of the respondent to be malicious. His grounds of opposition do not show that there was any basis to oppose this application by the company in the first place. He did not dispute most of the critical facts necessary for the application of this nature. He did not dispute that the company owns the property in question and that the company at law is entitled to vindicate its property. His focus was largely on the first applicant, who is no longer before me and Mr *Mugiya* had to spend most of his time arguing on the issue of the validity of the board resolution. He realised that he completely did not have a *bona fide* defence on the merits. The respondent's opposition was clearly frivolous and vexatious and amounted to abuse of court process. I find this case to be one of the exceptional cases where costs on a higher scale can be awarded. Litigants must take court proceedings seriously and avoid wasting the court's time.

DISPOSITION

In the result, it is accordingly ordered that:

1. The respondent shall deliver one MAN TGX truck, white in colour bearing registration number AFJ 5157; one MAN Horse truck, red in colour, registration number AFJ 5157; forklift, white in colour AFJ 4080 and a link trailer AFG 9594 to the applicant, Jordan Hauliers within three (3) days from the date of service of this order at Aspindale Truckshop, Harare or any place chosen by the applicant.

2. Should the respondent fail to comply with para (1) above the Sheriff of the High Court be and is hereby authorized to seize the said movable goods from wherever they can be found and deliver them to the applicant.
3. The respondent shall pay the costs of this application on an attorney and client scale.

DEMBURE J: …….

Jiti Law Chambers, applicant's legal practitioners.
Mugiya Law Chambers, respondent's legal practitioners.