PRODIGY CHINANGA
versus
STANBIC BANK ZIMBABWE LIMITED

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 28 May, 20 June 2024 & 4 July 2024

Opposed Court application – point *in limine*

Mafusire, for the applicant
Chagonda, for the respondent

CHITAPI J: The applicant is Prodigy Chinanga a male adult of Harare. The respondent is Stanbic Bank Ltd a registered commercial bank operating in Zimbabwe. The brief background to the application is that the applicant and the respondent were employee and employer. The applicant was employed as a reconciliation officer for nine (9) years from 2023 to 1 November, 2022. In the course of the employment relationship, the applicant was charged with an act of misconduct, the gravamen of which the applicant was accused of downloading and installing an unauthorized software on his laptop. The applicant was found guilty and dismissed from employment on 19 September, 2022.

Following the dismissal of the applicant, he appealed to the next authority in terms of the applicable code of conduct. The matter escalated to the Employment Council for the Banking Undertaking, to an Arbitrator and to the Labour Court. I do not propose to go into detail on the issues which were at play before the administration bodies which dealt with the matter as well as the Labour Court. I retrain from doing to because the applicant raised a point *in limine* which is the subject matter of this judgment. The point *in limine* which I shall advert to shortly does not require that I should deal with the substance of the application.

It suffices that there is an extant arbitral award which inter alia reinstated the applicant to his employment on full pay and benefits from the date of the applicants' dismissal. In the alternative, the applicant was awarded damages *in lieu* of reinstatement if reinstatement was no longer possible or practical. The respondent has not complied with the award nor appealed against it. The applicant, appealed to the Supreme Court against the award in part. The appeal

is yet to be disposed of. The applicant contended that since his appeal does not relate to the order of reinstatement and restoration of his *status aquo* the respondent should comply with that and other parts of the award which were not appealed against and remain extant

The Applicant headed his application as follows:

"Court application for *mandamus* to compel the respondent to comply with para 2 of the arbitral award of 28 November 2023 issued by Honourable Arbetrtor Biegriton Mudiwa."

The draft order was coined as follows:

"IT IS HEREBY ORDERED THAT:

1. The instant application be and is hereby granted
2. The respondent be and is hereby ordered to comply with para 2 of the arbitral award by restoring the employment status of the applicant on suspension pending the outcome of the disciplinary hearing matter before designated agent in terms of s 101(6) of the Labour Act [*Chapter 28:01*].
3. The respondent be and is hereby ordered to pay costs on attorney and own client seale."

The respondent opposed the application. It filed notice of opposition and an opposing affidavit deposed to by one Simba Mawere Jr. He styled himself as a manager in the legal department of the respondent. The applicant took the point *in limine* that the opposing affidavit was fatally defective on account of the fact that the deponent did not depose to his authority to represent the respondent in this litigation.

The deponent to the opposing affidavit stated as follows:

> " I Simba Mawere Jr a Manager Legal Department in the employ of Stanbic Bank Zimbabwe Limited, the above named respondent by whom I am authorized to depose to this affidavit hereby take oath and state as follows: …."

The applicant averred that it was not necessary for a deponent to have authority to depose to an affidavit since the deposition in essence constitutes evidence which the deponent is competent and compellable to give unless excepted. The applicant however averred that it was the authority of the respondent company to represent the respondent in the litigation which was central or the applicant to allege. The applicant averred that it was necessary for a person who represents a juristic entity and in the case of a company to attach the company resolution which authorizes the person to do so. It was averred that as the deponent to the opposing affidavit did not attach the resolution, the notice of opposition was not valid.

The respondent took issue with the applicants' preliminary objection. It was submitted in the respondents' heads of argument and before the court orally by the respondent's counsel that the applicants' objection was hairsplitting because he did not take issue with the authority of the deponent to the opposing affidavit to depose to the affidavit but with the authority of the

deponent to represent the company. The position of the respondent was expressed as follows in para 21 of the respondents heads of argument.

> "21. In his Heads of Argument the applicant does not take issue with the authority to depose to an affidavit but takes issue with authority to represent the respondent. Clearly the applicant is splitting hairs. The authority to depose to an affidavit given to Mr Mawere by the respondent in connection with the applicant's court application is clear authority to represent the respondent. How would the respondent have authorized the deposition to an affidavit and at the same time denying Mr Mawere the right to represent the respondent"

The respondent also submitted that the applicant should not blow hot and cold because it did not raise the issue of the authority to represent the respondent in prior proceedings presumably the arbitration proceedings and in the Labour Court.

The subject of representation of companies in application proceedings not infrequently arise in this court. The problem generally arises because of imprecision by counsel in settling pleadings. It is an issue touching on the ability of the drafter of the founding and /or opposing affidavit as the case may be to prepare a clear affidavit which makes necessary allegations of fact concerning the relationship of the company representative with the company and with either the institution of proceedings by the company or the defence of proceedings brought against the company.

It is an elementary principle of law not requiring the citing of authority that a company is a juristic entity which can only act through a natural persone. The company decisions are taken by its director through resolutions which the directors make at properly constituted directors meetings. In cases of litigation contemplated or to be defended as the case may be two decisions are generally made. Firstly the decision must be made whether or not the company should institute the contemplated proceedings. If the answer is yes a person is then nominated who should represent the company. The elementary nature of this position was said to be "TRITE" by MAKARAU J (as she then was in the case of *Madzivire & Ors* v *Zvavaridza & Ors 2005 (2) ZLR 148 at 150.*

In relation to the law on the issue in this jurisdiction, counsel for both parties quoted the dicta in the decision of the Supreme Court per GARWE JA (as he then was) in the case *Cuthbert Elkama Dube* v *Premier Service Medical Aid Society & Anor* 2019 (3) ZLR 589(s) para 37 to 38. The learned judge stated:

"[37] The High Court decision was appealed against. In a decision reported as *Madzivire* v *Zvavaridza* & Ors (supra) at 515, this court (per CHEDA JA) remarked as follows:-

> "A company being a separate legal person 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. The fact that the person is the managing director of the company does not clothe him with the authority to sue on behalf of the company in the absence of any resolution authorizing him to do so. The general rule is that directors of a company can only act validly when assembled at a board meeting. An exception to this rule is where a company has only one director who can perform all judicial acts without holding a full meeting"
>
> [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 the position he holds in such 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 proof is necessary only in these cases where the authority of the deponent is put in issue. This represents the current state of the law in this country."

The respondent argued that in the Labour Court the deponent did not take issue with the affidavit of Mr Mawere when he stated that "he was authorized to depose to the affidavit" as done herein without him stating that he was authorized to represent the company. I am not persuaded that an implied estoppel on the applicants to now take issue with the authority of the deponent to represent the company is a sound argument. The issue involved is one of law. The dicta in para 38 in the *Dube* case (supra) is clear. It says that if authority to represent the company is challenged them the person who purports to represent the company "must show that he is authorized to represent the entity."

It seems to me that the respondent was not properly advised not to simply provide the authority. The authority would then have spoken for itself on what it entails and the nature of the mandate granted to the deponent to the company representative. In accordance with the dicta in the *Dube* case (supra) which permits that the authority may be produced after challenge, the person whose authority is challenged may be allowed to file a supplementary affidavit to deal only with the production of the authority or resolution of the company on the issue. The resolution or authority may be produced over the bar by consent of the other party. Where however the produced authority is further challenged, the applicant as in this case must be heard on the challenge and would have to file an affidavit dealing with the challenge to that produced authority. The court then makes a ruling on the challenged authority. Where there is no challenge, to the produced authority, the question of the authority of the deponent to the challenged affidavit to represent the company is resolved.

In the case *of T N Gold-Acturus Mine* (Pvt) Ltd v *Zvanyadza* and *Environmental Management Agency* HH 612/21 this court noted that it was insufficient for a deponent to an affidavit to make a bare statement that he is authorized to represent a company or other juristic

person without more ado. The deponent must give details of the nature of the authority and where and when it was granted. For example the deponent must allege that he is authorized to represent the company by virtue of a board resolution to that effect dated and given a particular place. It is for the deponent to establish the existence of the authority which he alleges to have. It is not for the person who challenges the authority to disprove it. If however the authority is produced but the other party challenges it, the onus shifts to that party who challenges the actual produced authority to prove its falsity or invalidity.

The respondent then filed on 27 May, 2024 under a notice of filing, what it referred to as

"Its round robin resolution." The document reads as follows in material particulars.

> "STABIC BANK ZIMBABWE LIMITED
> ROUND ROBIN RESOLTION
> By means of a Round Robin Meeting of the Directors of Stanbic Bank Zimbabwe Limited. ("the company") this resolution was passed; the effective date shall be the date upon which the last signature was appended hereto (my underlining)
> BORD RESOLUTION
> In consideration of the ongoing labour matter between the Bank and its former employee, Prodigy Chinanga it was resolved that;
>
> 1. Simba Mawere (Jr) ID number 28-2000341J66 in his capacity as a legal advisor is hereby authorized to act on behalf of the Bank in the matter between *Prodigy Chimanga* and *Stanbic Bank Zimbabwe* Limited HCH 1285/24, and any other matter which may arise out of the above-mentioned matter;
> 2. This authority shall be for the signing of any documents in the matters and the appearing as a representative of the Bank.
>
> Confirmation of Resolution
> Mr Gregory Sebborn
> Chairman 24/05/2024

Ten other directors signed the resolution between the 24 May 2024 and 27 May 2024 when the last director to sign Betty Musambinda appended her signature."

It is clear that the resolution filed was made following a meeting that was held after the current application had been filed, opposed and partly heard. The question is by what authority then could the deponent to the opposing affidavit Mr Mawere have acted prior to the meeting of the directors and their resolving to grant him power to represent the company. The resolution did not refer to any earlier meeting of the board or a resolution to defend the current application when it was served on the company. Even though the deponent Mr Mawere stated in his affidavit that he was authorized to depose to the affidavit, he cannot rely on the board resolution filed on 28 May 2024 which was made after Mr Mawere had already deposed to the opposing affidavit. Sadly, for Mr Mawere the resolution did not ratify the prior authority in question

which he deposed to have had. The filed resolution is also clear that it would be effective on the date that the last director signed it which was 27 May 2024. Therefore, Mr Mawere failed to show that he was duly authorized to represent the respondent in this application. The arguments on whether the authority was to depose to the affidavit or to represent the company does not require resolution. The matter ends with the enquiry whether or not there was evidence produced by the respondent to establish that at the time that Mr Mawere deposed to the opposing affidavit, he had the authority of the respondent company to represent it or indeed to even defend the proceedings. He failed to show that he had such authority.

In the premises the preliminary objection taken by the applicant succeeds. There is no valid opposing affidavit before the court. The application shall be treated as unopposed. The respondent should bear wasted costs as there is no reason advanced as it why costs should not follow the event

IT IS ORDERED THAT:

1. The respondent's opposing affidavit and all subsequent documents filed in its defence are struck out.
2. The application shall be dealt with as an unopposed application.
3. The applicant may set down the application to be dealt with on the unopposed roll.
4. The respondent shall pay the costs of this application.

Muhonde Attoneys, applicant's legal practitioners
Atherstone & Cook, respondent's legal practitioners