AGM MINING AND ENGINEERING (PTY) LIMITED
versus
MOHAMED YUSUF MATHER
and
RUNGS INVESTMENTS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 24 February 2020, 17 March 2020 and 15 September 2021

Urgent Chamber Application for an Interim Interdict

K Kadzere, for applicant
K Kachambwa with I A Ahmed, for the respondents.

CHITAPI J: The applicant is a company registered in terms of the laws of South Africa. It is a peregrine. The applicant filed this urgent application for a provisional order whose terms were couched as follows –

"TERMS OF FINAL ORDER SOUGHT

1. The applicant be and is hereby declared the sole and rightful owner of a certain movable property being a Gold Recovery Plant presently situated at 2nd respondent's mining location in Hwedza as well as the 8 tone crusher unit presently situated at Number 35 Paisley Road, Corner Stirling Road, Workington, Harare.
2. The respondents be and is hereby barred, stopped and interdicted from using, removing, damaging or in any way exposing to damage applicant's Gold Recovery Plant presently situated at 2nd respondent's Hwedza mining location and the 8 tone crusher presently situated at Number 35 Paisley Road, corner Stirling Road, Workington, Harare.
3. The respondents to pay costs of suit on an Attorney and client scale.

INTERIM RELIEF GRANTED

4. The Respondent be and is hereby stopped, barred and interdicted from using, removing damaging or in any way exposing to damage applicant's Gold Recovery Plant presently situated at 2nd respondent's Hwedza mining location and the 8 tone crusher presently situated at Number 35 Paisley Road, corner Stirling Road, Workington, Harare respectively pending finalization of the matter under HC 1220/2020.
5. Applicant be and is hereby allowed, authorized and empowered to second security personnel at its expense at the two sites where the Gold Recovery Plant and the 8 tone crusher unit are presently located to ensure their safe keeping until the matter under HC 1220/2020 is finalized."

The application was set down for hearing on 24 February, 2020. At the hearing the parties agreed that para 1 of the terms of the interim order sought, being a declaratur on the ownership of the subject matter of the dispute, being a gold recovery plant, was part of the relief sought in case HC 1220/20. Case HC 1220/20 is a claim for vindication of the gold

recovery plant and was field by the applicant herein against the respondents. This urgent application was premised upon the existence of case HC 1220/20 in that the temporary or interim interdict sought is intended to regulate the protection of the gold recovery plant pending the determination of its vindication. The applicant's counsel accepted that para1 of the terms of the final order could not properly be sustained. Counsel abandoned it.

The abandonment aforesaid meant that para 2 of the main relief was the relief which the applicant intended to pray for on the return date. The said relief was similar to the interim relief sought in paragraph in the interim order. Paragraph 5 of the interim relief was consequential in that the order to allow the applicant to second its own security personnel to protect the subject matter of the dispute would be predicated upon the grant of the relief set out in para 4.

An application in which the interim and final relief sought are similar does not fit into the realms of a provisional order. A provisional order by name and nature means exactly that: It is a temporary or interim order. It is intended to regulate the subject matter of the dispute and conduct of the parties to the dispute pending the final determination of their dispute. In the case *Kuvarega* v *Registrar General & Anor* 1998(1) ZLR 188(H), it is stated by CHATIKOBO J as follows-

> **"**The practice of seeking interim which is exactly the same as the substantive relief sued for, and, which has the effect, defeats the whole object of interim protection. In effect, a litigant who seeks relief in this manner obtains final relief without proving his case. That is so because interim relief is normally granted on a mere showing of a *prima facie* case. If the interim relief is identical to the main relief and has the same substantive effect, it means that the applicant is granted the main relief on proof merely of a *prima facie* case. If the interim relief is identical to the main relief and has the same substantive effect, it means that the applicant is granted main relief on proof merely of a *prima facie* case. This, to my mind is undesirable where, as here, the applicant will have no interest in the outcome of the case on the return date."

In the case of *Amalgamated Rural Teachers Union of Zimbabwe (ARTUZ*) v *Zanu PF* HMA 36/18, MAFUSIRE J, took the view that the principle that the final order should not be similar to the provisional order was not cast in stone and that every case depended upon its own facts. The learned judge stated as follows at para 29 of the judgment:

> "[29] *In casu*, it is true that the interim relief sought in the original draft order was almost identical to the final order sought on the return day. In essence this relief was the interdict to restrain the respondents from continuing with the activities complained of. But my view is that the principle or requirement that the interim relief in an urgent chamber application should not be the same as the final relief to be sought on the return day is not cast in stone. Every case depends on its own facts. In appropriate situations it may be that the relief sought in the interim may be all that an applicant was concerned with yesterday, today and tomorrow. He may want it today on an urgent basis. That does not stop him from wanting it again on a permanent basis

> on the return day. It is granted today on an interim basis, all he may want on the return day is its confirmation. All he shows in the interim, among other things, is an actual or perceived infringement of a *prima facie* right, even if that right be open to some doubt. On the return day he must prove, on a balance of probabilities, an actual or perceived infringement of a clear right. It is not altogether uncommon for the court to grant interim relief, only to discharge it on the return day. Thus, I found the first respondent's objection a moot point and lacking merit."

I easily appreciate the *dict* by MAFUSIRE J. I however note that in the case of *Cawood* v *Madzingira & Anor* HMA 12/17 the learned judge recognized that principle that the main and interim relief should not be similar. The issue remains subject of debate with the court taking varied positions. My position as already stated is that a provisional order is intended to be a regulatory order. It cannot be the same as the final order. Simply put, the issue can be couched as, "what is the final relief or order that the applicant desires", and secondly "how does the applicant desire to have the subject matter of the dispute regulated until the court determines the final relief?" The applicant cannot tell the court that the interim order which he seeks now is the order that he intends to come back and seek that it is confirmed. The applicant who desires a final order in an urgent application should simply make the application and seek its urgent hearing under r 223A which provides as follows|-

> "223A – Where a legal practitioner has certified in writing that a matter is urgent, giving reasons for its urgency, the court or a judge may direct that the matter should be set down for hearing at any time and additionally; or alternatively, may hear the matter at any time or place and in such event r 223 shall not apply or shall apply with such modifications as the court or judge directs."

It follows in my view that the rules adequately provide for hearing of urgent applications which are not for a provisional order. Where the provisional and final relief sought are similar then there is nothing provisional about the order. Such application should, in my view be struck off the roll for procedural incompetency.

In this application the problem was cured by the parties agreeing that the application be determined on the basis of the final relief. The question or issue to be determined was whether or not the temporary interdict sought should be granted to regulate the subject matter dispute pending the determination of the vindication case HC 1220/20. There would be no need for a return date for confirmation of the interim order. The parties were given time lines for the filing of the answering affidavit by the applicant if it so desired and heads of argument. I also issued an interim order that the *status quo* prevailing in regard to the subject matter of the dispute and the parties conduct in relation thereto should be maintained until the final determination of this application.

The facts of the matter are not seriously in dispute. The applicant claimed that it was the lawful owner of a gold recovery plant which it manufactured in South Africa. The manufacturing took place at the applicant's business premises at Plot 7; farm Rietfontein, Nirvana Arme Extension 9, Lenasia, Johannesburg. The manufacturing was said to have been a big project which took over a year, that is, from April, 2018 to June, 2019 to complete. The applicant averred that it bought assorted raw material for use in the manufacture of the plant. The applicant attached documents which it described in para 4 of its founding affidavit, as –

> "(4) ….. in manufacturing the Gold Recovery Plant, applicant bought various assorted raw materials from its own suppliers for use in manufacturing. See Annexure B1 – B45 being samples of receipts and invoices from applicant's suppliers of raw material which were employed in manufacturing the gold recovery plant."

It is not clear why the applicant referred to the attached documents as samples. I, however do not wish to be detained on issues of authenticity of the documents because the decision on whether or not to grant the interdict sought does not solely depend on the invoices as it shall become apparent in the judgement.

In para 5 of the founding affidavit the applicant averred that –

> **"**5. Once the Gold Recovery Plant manufacturing was complete, and without the applicant's consent and/or knowledge, the 1st respondent removed the Gold Recovery Plant aforesaid from applicant's Johannesburg engineering plant and clandestinely exported it out of South Africa and into Zimbabwe sometime around May to August, 2019."

The impression created by the above averment is that the 1st respondent removed the completed plant and exported it to Zimbabwe. The applicant did not plead the details of the relationship between it and the first respondent except to allege scantily in para 6 that the first respondent had been engaged to oversee the production of the plant. On a "risk share basis" (whatever this implies or means). The applicant alleged that the first respondent having taken the plant to an unknown place could not be found as he had cut off all communications with the applicant's Managing Director, being the deponent to the founding affidavit. To use the words of the deponent to the founding affidavit in reference to the first respondent , it is stated in para 6 –

> **"6**…. He had literally vanished together with the plant and as such applicant was at a loss as to where to locate either the equipment or the 1st respondent."

I shall pause here and remark that I asked the applicant's legal practitioner Mr *Kadzere* as to whether or not the applicant had filed a police report with the police since the alleged facts had all the ingredients of the crime of theft. Mr *Kadzere* responded that no report was

made because under the Muslim faith to which both the applicant's managing director and the first respondent subscribed to did not allow for members to report each other for faith. I do not wish to debate the veracity of the statement. What I did take into account was that the applicant was literally claiming a theft of the whole manufactured plant but did not report the theft as would have been expected of it in the normal run of things.

The applicant averred in para 8 of the founding affidavit that it commenced investigations to establish the whereabouts of the plant and only discovered on/or about 14 February, 2019 (*sic*) that the plant had been exported into Zimbabwe in bits and pieces and; "falsely declared as having been bought from the applicant and other South African entities by the first respondent with the import documents showing the second respondent as the consignee of the equipment which constitutes the Gold Recovery Plant. See Annexure C1 – C9 being various customs Declaration Forms and fake invoices used to import the various components of the Gold Recovery Plant from South Africa by the first and second respondents".

The applicant further averred that on 15 February 2019 it traced the gold recovery plant to Hwedza at a mining site where the plant had been assembled and was in use. The applicant averred that major components of the plant had been located at the site, except for an 8 tonne stone crusher which was located at 35 Paisley Road, Workington Harare in safe keeping at the instance of the first respondent. The applicant averred that it did not authorize the removal of the plant by the respondents and did not consent to the applicant's possession of the same.

The applicant averred further that it had issued out summons in case HC 1220/20 claiming an order for the "return of the Gold Recovery Plant and the 8 tonne (*sic*) crusher to the Plaintiff in Johannesburg South Africa against the Defendants and all those claiming possession and the right to use the property through them".

The applicant in this application averred that the gold recovery plant is susceptible to depreciation and requires extensive maintenance. It averred that the continued use of the plant by the respondents would result in its loss of value and possible vandalism beyond repair, thereby rendering the judgement in case HC 1220/20 nugatory if the court grants the claim. The applicant also averred that the respondents could alienate the plant and remove it from the courts' jurisdiction as they had done when removing it from South Africa using forged documentation.

The applicant averred that it had suffered irreparable harm of ZAR15 000 000.00 which was the value of the plant. It averred that the respondents had no property of value in Zimbabwe and that the applicant would therefore suffer irreparable harm as the respondents had no security to be able to use to pay damages. It averred that so far as the balance of convenience is concerned, the respondents had no legal claim or entitlement to the plant. Consequently, it

was averred that as the respondents had stolen the plant and clandestinely relocated it from South Africa to Zimbabwe, they could not a claim of convenience.

The respondents opposed the application. They objected to the urgency of the application. This aspect fell away upon the adoption of the course that the court determines the interdict application to its finality. On the merits, the first respondent averred that the applicant, the deponent to the applicant's founding affidavit and the first respondent himself were all residents of South Africa. He averred that him and the deponent to the founding affidavit invested in the second respondent and were incorporated as directors of the second respondent as evidenced by the CR 14 of the second respondent wherein they are both listed as directors since 3 August, 2018. The first respondent averred that he and the deponent to the applicant's affidavit were therefore investors in the second respondent.

The first respondent averred that him and the deponent to the applicant's affidavit visited the Hwedza mining site. He averred that the deponent to the founding affidavit was the sole director of the applicant and its alter-ego. He averred that the applicant operated its plant manufacturing business at the first respondent's premises. The applicant was leasing part of the property before it faced financial difficulties which resulted in its failure to pay rentals to the first respondent nor to contribute towards the Hwedza Mining project. First respondent averred that the deponent to the founding affidavit had accrued unpaid rental of 25 months totalling ZAR 2 200 000.00 as at May 2019. The first respondent averred that he agreed with the deponent to the founding affidavit that the first respondent could take components of the gold recovery plant as set off for the rentals. He averred that the components in question were released to him and were valued at ZAR2 133 722.03 and that the deponent to the founding affidavit actually prepared invoices for the goods. Reference was made to several annexures which comprise invoices and receipts purportedly generated by the applicant in favour of the 2nd respondent. The documents are referred to on pp 93 to 127, p 152 and 170 of the applicant's affidavit. It was not explained by the applicant, how if export documents used by the first respondent were contrived, the applicant is the one who had the documents and produced them as annexures to the founding affidavit.

The first respondent also listed documents from the annexures attached to the founding affidavit showing components thereon which had nothing to do with the applicant as they pertained to supplies by different companies from the applicant. The applicant described the documents annexures C1 to C9 as fake. However, it must be noted that the documents were

accepted by Customs and duly used for clearance of the importation of goods stated thereon. And as I indicated the applicant did not lay a basis for alleging that the annexures were fraudulent. It for this reason that I indicated herein before that I did not consider that the issue of authenticity of the documents would be determinant of the application. I took this position after considering that export documents of the plant components into Zimbabwe had been accepted by the authorities and I was not in a position to hold otherwise especially upon a bare allegation by the applicant that the documents were fraudulent .

The first respondent averred that the exportation of the plant components was done with the knowledge of the applicant and that the applicant was aware of the export of the components to Zimbabwe and the purpose thereof which was to set up the plant at the Hwedza mining site owned as a mining business by the second respondent, wherein both the deponent to the founding affidavit and the first respondent had financial interests as investors and were directors. The applicant attached copies of downloaded whatsapp communications between the deponent to the applicant's affidavit which pertained to the transportation of the equipment or components in the period February, 2019; May 2019 and August 2019. The first respondent averred that the denial by the applicant of any knowledge of the movement of the plant components was a falsity. The first respondent also averred that the deponent to the founding affidavit had resigned his directorship in the second respondent by letter of resignation dated 17 May 2019. A copy of the resignation letter was attached to the opposing affidavit.

In the answering affidavit, the deponent to the founding affidavit admitted that he was a director of the second respondent and had injected capital into the second respondent. He denied that he ever made a decision to invest in the second respondent which was a contradiction because in the same vein, he stated that he injected capital in the second respondent. He averred that he was supposed to have been a 40% shareholder in the second respondent. He however discovered that he had not been allocated any shareholding. The deponent to the founding affidavit also admitted that he visited the second respondent's mining site. He also averred that the first respondent did not have capital and averred that the arrangement was that the first respondent would contribute his time as his contribution. He denied that he agreed to contribute plant components as part of his investment in the mine. It must be noted that it was in the answering affidavit that for the first time the deponent to the applicant's affidavit confessed his connection with the second respondent and prior knowledge of the mining venture being run by the second respondent in Hwedza. The founding affidavit

gave the impression that the second respondent was alien to the deponent to the applicant's affidavit yet the truth of the matter was that the deponent to the applicant's affidavit and both respondents were connected in business at one time or another.

In para 13 of the answering affidavit the deponent to the founding affidavit having accepted in para 8 that he is the sole director of the applicant and therefore its alter ego admitted that the gold recovery plant was to be exported to Zimbabwe eventually. Significantly, he stated as follows:

> "… In as much as I was aware that the plant would eventually be exported to Zimbabwe, I was kept in the dark by the 1st Respondent as to when this was going to be done. The truth of the matter is that all this was done without my knowledge or that of the Applicant."

The deponent averred in the same para 13 that the first respondent acted clandestinely during the ten (10) consecutive days when the deponent to the applicant's affidavit was in seclusion at the mosque fasting. He averred that the first respondent took advantage of the absence of the deponent to the founding affidavit on the ten day fasting to "spirit away the Gold Recovery Plant".

It is noted as well that the deponent to the founding affidavit in para 8 of the answering affidavit averred that the applicant was managed by the first respondent who exercised *carte blanche* control over the applicant with the deponent to the founding affidavit being the financier of all raw material purchases and running and related costs. Again the founding affidavit painted a different picture of the relationship between the deponent to the founding affidavit, the applicant and first respondent. The impression created upon a reading of the founding affidavit was that the first respondent's involvement with the applicant was that the first respondent was an overseer of the production of the engineering plant. The deponent to the founding affidavit had averred that he had no knowledge of the alleged removal and export of the plant until sometime in September 2019, yet in the answering affidavit he referred to undesignated ten (10) days of his absence on fasting as having afforded the first respondent the opportunity to clandestinely relocate and export the plant.

It is clear that the deponent to the founding affidavit did not tell or depose to the whole truth on the background to the application and the relationship between the parties. The applicant used the answering affidavit to open up to what he then stated to be the truth. It is trite that in application proceedings the applicant's case is established by the founding affidavit. The trite position has been expressed as that in application proceedings the applicant stands or

falls on the founding affidavit. Not so far back, the principle was reiterated by the Supreme Court, per BHUNU JA in the case *Yunus Ahmed* v *Docking Station Safaris (Pvt) Ltd t/a CC Sales* SC 70/18. At p 3 of the cyclostyled judgment, the learned judge stated –

> **"**It is trite that an application stands or falls on its founding affidavit. (See *Fuyana* v *Moyo* SC 54/06; *Muchini* v *Adams & Ors* SC 47/13 and *Austerlands (Pvt) Ltd* v *Trade Investment Bank Ltd & Ors* SC 80/06…"

The principle is also found expressed in authoritative texts where Herbsten & Van Winson state in the text, *The Civil Practice of Superior Courts in South Africa* – 3rd ed at p 8 as follows-

> "The general rule, however, which has been laid down repeatedly is that an applicant must stand or fall by his founding affidavit and the facts alleged herein, because these are the facts which the respondent is called upon to either affirm or deny. If the applicant merely set out a skeleton case in his supporting affidavits any fortifying paragraphs in his replying affidavit will be struck out."

The applicant *in casu* sought to build its case whose foundation was not solid by reinforcing the same in the replying affidavit. It is not permitted to do so and its case must be determined on the skeleton facts alleged in the founding affidavit.

The case of *Director of Hospital Services* v *Ministry* 1979 (1) SA 626 (A) is instructive and the *dicta* by DIEMONT JA at p 635 in fin-636 reads as follows:

> "When, as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a judge will look to determine what the complaint is…As was pointed out by KRAUSE J in *Pounta's Trustees* v *Lahanas* 1924 WLD 67 at 68 and has been said in many other cases
>
> "an applicant must stand or fall by his petition and the facts alleged therein and that, although it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because there are the facts which the respondent is called upon to either affirm or deny."
>
> Since it is clear that the applicant stands or falls by his petition and facts therein alleged:
>
> "it is not permissible to make out new grounds for the application in the replying affidavit."

What should be set out in the founding affidavit and the particularity required has been dealt with in a number of cases; see, for example, *Joseph and Jeans* v *Spitz and Others* 1931 WLD; *Victor* v *Victor* 1938 WLD 16 at 17 and *Titty's Ben and Bottle Store (Pvt) Ltd* v *ABC Garage (Pvt) Ltd and Others* 1974 (4) SA 362 (T) at 369 B. Each case will depend on its own facts. The correct approach is set out in the *Titty's Ben case* supra as follows:

> "It has, of course in the discretion of the Court in each particular case to decide whether the applicant's founding affidavit contains sufficient allegations for the establishment of his case.

> Courts do not normally countenance a mere skeleton of a case in the founding affidavit, which skeleton is then sought to be covered in flash in the replying affidavit.
>
> This type of objection must be considered on the basis of an exception to a declaration or combined summons.
>
> The relevant considerations are
> (a) The founding affidavit alone is to be taken into account;
> (b) The allegations in the founding affidavit must be accepted as established facts;
> (c) Are these allegations, if proved, sufficient to warrant a finding in favour of the applicant?"

There is a further consideration which arises in this application and impacts on whether relief should be granted to the applicant. It is trite in urgent applications as I think should apply to all applications that the application is *bona fide*. In this respect the applicant should disclose all material facts relevant to the relief sought and must take the court into his or her confidence. The applicant must not mislead the court or lie in the founding affidavit. It is important that the applicant should not seek to gain advantage that because an urgent application for a provisional order is determined on a *prima facie* standard, the applicant can be coy with the truth or withhold pertinent facts that impact on the application. The applicant herein was coy with information of the deponent's involvement with the respondents and gave the court an impression that the respondents were fraudsters who hatched a plan to steal the applicant's gold recovery plant. The respondents demonstrated that the parties had a business relationship and were intricately connected. The applicant then sought to open up in the answering affidavit. On the basis of the authorities I have cited, the answering affidavit will not aid the applicant. The applicant therefore lied about the background to the application and its foundational basis.

In the case of *Leader Tread Zimbabwe (Pvt) Ltd* v *Smith* HH 131-2003 at p 7 of the cyclostyled judgment, a case aptly referred to by the applicant's counsel in his heads of argument, it is stated –

> "The defendant deliberately lied and changed his story. It is trite that if a litigant gives false evidence, his story will be discarded and the same adverse inferences may be dranon as if he had not given evidence at all – see *Tumachole Beseng* v *R* 1949 AC 253 and *South African Law of Evidence* by LH Hoffiman and DT Zeffertt (3rd ed) at p 472. If a litigant lies about a particular incident, the court may infu that there is something about it which he wishes to hide…"

In *casu*, I was satisfied that the applicant deliberately withheld material disclosures on the nature of his relationship with the respondents. He deliberately did not disclose that it was

always the plan that the gold recovery plant in question was destined for export to Zimbabwe. He did not disclose his connection with the mine at which the plant was set up, the truth being that the applicant was an investor who contributed capital to the development of the mine but resigned when a promised 40% shareholding in the second respondent did not materialise. The applicant's non-disclosure resulted in him creating a false story that the respondent stealthily stole the gold recovery plant behind his back. The applicant attached export documents used to import the plant components some generated by the applicant. The applicant did not demonstrate the alleged falsity of the export documents for the importation of the machinery into Zimbabwe.

In the case of *Graspeak Investments (Pvt) Ltd* v *Delta Corporation (Pvt|) Ltd & Anor* 2001 (2) ZLR 557 () at p 554 D – stated:

> **"**The utmost good faith must be observed by litigants making *ex-parte* applications in placing material facts before the court; so much so that if an order has been made upon an *ex-parte* application and it appears that material facts have been kept back whether wilfully or *mala fide* or negligently, which might have influenced the decision of the court whether to make an order or not, the court has a discretion to set the order aside with costs on the ground of non-disclosure."

The learned judge continued on p 555 C to state:

> "The courts should, in my view, discourage urgent applications, whether *ex-parte* or not, which are characterized by material non-disclosures; *mala fid*es or dishonesty. Depending on the circumstances of the case, the court may make an adverse or punitive orders as a seal of disapproval of *mala fides* or dishonesty on the part of litigants."

Although the *dicta* in the above judgement was made in the context of the confirmation/discharge of a provisional order, the *dicta* applies with equal force to the determination of an urgent application at first instance. All urgent applications must be *bona fide* and the applicant must be candid with the court and make all material disclosures of the facts that ground the application. Where the applicant is coy with the truth and deliberately conceals the truth, the court will be justified not to come to the applicant's aid and a dismissal of the application will be an appropriate order coupled with, if considered appropriate, an order to pay costs on a punitive scale.

The deponent to the applicant's affidavit did not only mislead the court in the several ways that I have noted, he also filed a fraudulent and/or invalid power of attorney purporting that he deposed to the founding affidavit under authority of a board resolution passed by directors of the applicant in a meeting of directors of the applicant company held on 17 February 2020 at Harare. When the respondents took objection to the validity of the power of

attorney on the basis that the deponent to the founding affidavit was the sole director of the applicant, a fact accepted by the deponent to the founding affidavit, the deponent aforesaid did not dispute the allegation that the purported board resolution was invalid nor to explain in the answering affidavit. The resolution purported to have been signed by a director whose name or details of his or her identification were not endorsed on the resolution. The deponent to the founding affidavit was clearly cornered and failed to establish the validity of the resolution. In answer to all objections raised by the respondents on the validity of the purported resolution, the deponent to the applicant's founding affidavit stated in para 22 of the answering affidavit –

> "22 Ad para 34
> The resolution was signed by my personal assistant who doubles as my board secretary."

Clearly the above statement does not explain the anomalies noted in the resolution nor does the deponent to the answering affidavit attempt to motivate the validity of the purported resolution. It is curious that the deponent states that the signature on the resolution is that of his unnamed personal assistant yet the portion signed should have been signed by a director. The resolution tells lies about itself and is invalid. In the absence of a valid resolution appointing the deponent as agent for the applicant company to institute the current application, the application is therefore a nullity. The deponent to the founding affidavit did not have *locas standi* to represent the applicant company. That being the case application must be dismissed.

The last issue pertains to costs. It is trite that the award of costs lies within the discretion of the court. This rule is considered against the general rule that costs follow the event, which means that the successful party may recover his or her costs. See *Mariyapera* v *Eddies Pfugari (Pvt) Ltd & 26 Ors* SC 247/13; *Chimunda* v *Zimuto* SC 76/14. The third aspect on costs is the level of costs which can either be granted on the ordinary scale or on a punitive scale of legal practitioner and client. The respondents in their opposing affidavit did not motivate the award of costs on a punitive scale and only made the claim in the heads of argument. An award of costs on the punitive scale is an exception to the general rule that a party recovers costs on the court tariff which is the ordinary scale. Where costs are sought on the exceptional scale, the party seeking such award must specifically plead the claim for costs on such scale and motivate the justiciability of such award by setting out facts which persuade the court to grant punitive costs. In *casu*, I am hamstrung to grant costs on the punitive scale as the respondents did not specially plead their justiciability. Costs will therefore follow the event and will be awarded on the court or ordinary scale.

Disposition

It is my finding that the deponent to the founding affidavit failed to demonstrate his *locus standi* to represent the applicant company. He then proceeded to mislead the court by making false depositions in his affidavit in the ways that I have set out hereinabove. The court does not countenance applications which are not *bona fide* or where the applicant misrepresents or deliberately withholds material facts or evidence. The court in such a case is justified to dismiss the application.

The following order is consequently made.

It be and is hereby ordered that the application be and it is hereby dismissed with costs.

Kadzere, Hungwe & Mandevere, applicant's legal practitioners
Ahmed & Ziyambi, 1st and 2nd respondents' legal practitioners