ZIMBABWE CANE FARMERS ASSOCIATION
versus
FARAINESU MUTAMBA

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 2 and 8 May 2017

Urgent Chamber Application

O. Matizanadzo with *T. Matonhodze*, for the applicant
G T Ndava with *C T Tinarwo*, for the respondent

CHITAKUNYE J. This is a chamber application for a prohibitory interdict brought on a certificate of urgency. The applicant is a duly constituted Association whose existence and governance is in terms of its constitution. It is a voluntary association of some players in the sugar industry.

The leadership of the applicant is composed of an executive committee constituted in terms of clause 9 of its constitution. The powers and duties of the executive committee are clearly laid out in clause 10 of the constitution.

The applicant's case was basically that the respondent has been portraying himself and his colleagues as the lawful agents of the applicant when that is not so. In that regard the applicant sought an order that the respondent and any persons acting on his behalf or for his interests be interdicted from misrepresenting by conduct or otherwise that they have authority to represent the applicant or act on its behalf in any manner whatsoever.

The respondent opposed the application. In his opposition the respondent raised three preliminary points namely that:

(a) The application is not urgent
(b) The application is none suited for none disclosure of material facts
(c) The authority granted to the deponent of the founding affidavit is not valid.

1. **Whether or not the application is urgent.**

The respondent contended that the application was not urgent because the need to act arose on 20 October 2015 when the executive committee that the deponent of the applicant's founding affidavit is working with was voted out of office. In support of that assertion minutes purportedly of the applicant's annual general meeting (AGM) of 20 October 2015 were attached as Annexure A.

Besides that meeting, the respondent contended that, if the need to act did not arise on 20 October 2015, then it certainly arose on 12 August 2016 when the respondent filed an application for an interdict in HC 8128/16. According to the respondent that application made it clear that the respondent was challenging the legitimacy of Marie Joseph Benoit Lagesse's executive.

The applicant argued that the above point *in limine* had no merit because the need to act arose in March 2017 when it learnt that the respondent was misrepresenting to the whole world, including to this court as in case number HC 9/17 filed at Masvingo High Court, that he was the chairman of the applicant's executive committee and that he was duly authorised by the applicant to act on its behalf. The applicant disputed that the Annual General Meeting of 20 October 2015 had resulted in the election of the respondent as the chairman of the applicant's executive committee. As far as the applicant was concerned that meeting ended abruptly without the election of new executive committee members. The applicant referred to the minutes of the 20 October 2015 it attached to its application as annexure K as the correct minutes of that AGM. It thus disowned the minutes tendered by the respondent.

As regards the respondent's application in HC 8128/16, the applicant's response was simple: that application did not show that the respondent was purporting to be the chairman of the applicant's executive committee but that he had filed the application as a levy paying member. The respondent was also seeking to have respondents 2 to 9 in that application, who were in effect members of the executive committee of the applicant, to be de-registered in the applicant's register. The respondent was not seeking to usurp the authority of the applicant's executive committee or even purporting that he was authorised by the executive to take that action.

In the circumstances the applicant argued that the need to act arose when the respondent now purported to be acting as the chairman of the applicant's executive committee and as authorised by such committee to represent the applicant. This only came to the notice of the applicant in March 2017.

After hearing submissions by counsel for both parties I was reminded of the words of MANTHONSI J in *Telecel Zimbabwe (Pvt) Ltd* v *Postal and Telecommunication Regulatory Authority of Zimbabwe (POTRAZ) and Others* HH 446/15, wherein at p 7 of the cyclostyled judgment the Honourable judge stated that:

> "I agree with *Mr Girach* that raising the issue of urgency by respondents finding themselves faced with an urgent application is now a matter of routine. Invariably when one opens a notice of opposition these days, he is confronted by a point *in limine* challenging the urgency of the application which should not be made at all. We are spending a lot of time determining points *in limine* which do not have the remotest chance of success at the expense of the substance of a dispute.
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> Legal practitioners should be reminded that it is an exercise in futility to raise points *in limine* simply as a matter of fashion. A preliminary point should only be taken where firstly it is meritable and secondly it is likely to dispose the matter. The time has come to discourage such waste of court time by the making of endless points *in limine* by litigants afraid of the merits of the matter or legal practitioners who have no confidence in their client's defence vis-à-vis the substance of the dispute, in the hope that by chance the court may find in their favour. If an opposition has no merit it should not be made at all. As points *in limine* are usually raised on points of law and procedure, they are the product of the ingenuity of legal practitioners. In future, it may be necessary to rein in the legal practitioners who abuse the court in that way, by ordering them to pay costs de *bonis propiis*."

These remarks speak well to the point *in limine* taken by the respondent. In alleging that the need to act arose on 20 October 2015, the respondent was relying on his minutes said to be of that date at p 14 Annexure A of his notice of opposition. Those minutes, as was ably demonstrated by the applicant's counsel, are a testimony of probable fabrication. Had the respondent's legal practitioner cared to compare those minutes with the AGM minutes annexed to the application, she would have noted that the Minutes by her client raised more questions than answers. In terms of the respondent's AGM minutes, he was elected chairman on 20 October 2015 in an elective meeting that started at 15.25 hours. On the other hand the AGM minutes tendered by the applicant show that the AGM in fact started at 2pm and ended at 15.25 hours. It was admitted by the respondent before me that the applicant's minutes were correct in the capture of what took place. An attempt was then made to say that after the closing of the AGM as reflected in the applicant's minutes, the respondent and others continued with the AGM and held elections.

This is, however, contrary to what the last contribution in the AGM states. The statement clearly shows that after a member from the floor had proposed that the meeting be wound up the meeting was declared closed at 15.25 hours. If the AGM that had a clearly set out Agenda was closed at 15.25 hours then whatever may have followed up would not have been in terms of the constitution. At the most it may just have been a meeting of disgruntled

members purporting to be holding another meeting. That is of course if any such meeting was held.

It may also be noted that if, as the respondent contended, he was elected chairman on 20 October 2015 to the knowledge of the applicant's representative; he would have been expected to assume the office of chairman and to refer to himself as such. What we note is that in his application against the applicant and members of the applicant's executive committee, in HC 8128/16, the respondent refers to himself as making the application by virtue of a resolution passed by levy paying members. In paragraph 9 of his founding affidavit he refers to himself as:

> "Applicant is a cane Planter holding a current Grower's licence/quota. He is a current member of the 1st respondent. Applicant has been a member for 18 years."

The resolution he used authorising him to file that application again confirms that he was authorised by levy paying members of the Zimbabwe Cane Farmers Association. It was thus in his capacity as a levy paying member that other levy paying members appointed him to represent them in that court application.

It is pertinent to note that the application in HC 8128/16 was filed on the 12 August 2016, several months after the AGM of 20 October 2015 at which the respondent said he was elected chairman of the applicant's executive committee. If he had indeed been so elected one is left wondering why he did not refer to himself as the chairman of the first respondent's executive committee.

Further why did he not seek authority of his fellow executive committee members if he was a member of such a committee, instead he is authorised by levy paying members in his capacity as a levy paying member and not as Chairman of the Zimbabwe Cane Farmers Association.

As further confirmation that the second to ninth respondents in that application were still in office as executive committee members, the respondent in paragraph 2 of his answering affidavit filed on 3 October 2016 stated, *inter alia*, that:

> "The court application was properly served on all respondents as all respondents are carrying out the executive functions for the 1st respondent at the Zimbabwe Cane Farmers Association offices 344 Lion Drive Chiredzi…"

If, as the respondent's AGM minutes suggest, the executive committee led by Marie Joseph Benoit Lagesse had been voted out on 20 October 2015 and he had been elected as

chairman with a full executive, why was he still referring to that executive as the one carrying on executive functions.

I am of the view that the minutes tendered by the respondent were most probably fabricated. Unfortunately, such fabrication could not undo what the respondent had already filed at court confirming that he was not yet chairman but was fighting to have members of the committee that was carrying out executive functions de-registered to pave way for his possible election.

I am thus of the view that the 20 October 2015 AGM did not give rise to the need for applicant to interdict respondent from purporting to be a lawful representative of the applicant as he was not doing so. At that stage he had not been elected chairman as he now claims.

Equally, in his application of 12 August 2016, the respondent did not purport to be the chairman or lawful representative of the applicant but he clearly presented himself as a levy paying member. There would, therefore, not have been any need for the applicant to seek to interdict or stop him from purporting to be acting for and representing the applicant.

Clearly, in my view, the need to act arose when the applicant learnt that the respondent was now presenting himself as the chairman of the applicant's executive committee with the authority to represent the applicant. I thus find that the matter is urgent.

It is trite that a matter is urgent if, when the need to act arises it cannot wait. It cannot wait because any waiting would result in irreparable harm being occasioned. As aptly noted by MAKARAU JP (as she then was) in *Document Support Centre (Pvt) Ltd* v *Mapuvire* 2006 (2) ZLR 240 (H) at 244A C-D

> "… urgent applications are those where if the courts fail to act, the applicants may well be within their rights to dismissively suggest to the court that it should not bother to act subsequently as the position would have become irreversible and irreversibly so to the prejudice of the applicant."

The applicant must also have treated the matter as urgent by acting when the need to act arose or, where there is some delay, must give good cause for such delay.

In *casu*, when the applicant learnt that the respondent and his colleagues were purporting to be the lawful representatives of the applicant, it swiftly approached court by filing this application. The applicant learnt of the misrepresentation in March and within a few days thereafter filed this application on 17 March 2017. The applicant has clearly treated the matter as urgent.

2. Whether there is material non-disclosure

The next point *in limine* taken was to the effect that the applicant failed to disclose material facts. These material facts pertained to the contention that at the AGM of 20 October 2015 the Executive Committee led by Marie Joseph Benoit Lagesse was voted out of office and a new executive committee led by the respondent was elected.

As already alluded to above, there were no recognised elections on 20 October 2015 and the respondent's minutes of the AGM of that day have been discredited. The applicant could thus not have disclosed something that did not take place to its knowledge. If anything, it is, in fact, the respondent who did not disclose that its purported AGM minutes of 20 October 2015 were done outside the AGM that had been properly convened by applicant's executive committee.

It was also contended that the applicant failed to disclose that members of the executive committee led by Marie Joseph Benoit Lagesse ceased to be cane farmers when their farms were acquired by the State in 2002.

I was at pains to appreciate the respondent's contention in this regard because the executive he was referring to had been in office many years after the acquisition of the farms by the State. Even at the AGM of 20 October 2015 they were recognised as the office bearers yet the farms owned by the companies they represented were alleged to have been acquired in 2002. As argued by the applicant's counsel, these were not members in their individual capacity but the companies in which they were directors were the members. In any case, the fact of loss of farms did not on its own entitle respondent to assume powers that he had not been authorised by the applicant.

3. The authority granted to the deponent to the founding affidavit is not valid.

The respondent challenged the validity of the resolution to appoint Stephen Schwarer to represent the applicant in this application on the ground that the meeting leading to the resolution was held via e-mail. I did not, however, hear the respondent to allude to any particular clause in the applicant's constitution that forbade the use of e-mail to discuss and make resolutions or decisions. This was in my view a desperate bid to scuttle the determination of the application on the merit. It is the sort of point *in limine* that could attract costs on a higher scale.

4. Whether or not the interdict should be granted

Having disposed of the points *in limine* the next issue pertains to whether a case has been made on the merits for a grant of the order sought.

In casu, the applicant seeks an order interdicting the respondent and any persons acting on his behalf or for his interests from misrepresenting that they had authority to represent the applicant or to act on its behalf.

The general requirements for the grant of an interim interdict are:

(a) A *prima facie* right, even though open to some doubt
(b) A well-grounded apprehension of irreparable harm should the interdict not be granted
(c) The absence of other alternative/ordinary remedy.

In *Charuma Blasting and Earthmoving Services (Pvt) Ltd* v *Njainjai and Ors* 2000(1) ZLR 85 (S) at 89 G-90 A SANDURA JA quoted with approval the words of HOLMES JA in *Eriksen Motors (Welkom) Ltd* v *Proten Motors, Warrenton & Another* 1973 (3) SA 685 (A) wherein after outlining the three general requirements for an interim interdict the learned judge proceeded to state, *inter alia*, that:

> "In exercising its discretion the court weighs, inter alia, the prejudice to the applicant, if the interdict is withheld, against the prejudice to the respondent if it is granted. This is sometimes called the balance of convenience.
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> The foregoing considerations are not individually decisive, but are interrelated; for example, the stronger the applicant's prospects of success the less his need to rely on prejudice to himself. Conversely, the more the element of 'some doubt', the greater the need for the other factors to favour him….. Viewed in that light, the reference to a right which, 'though prima facie established is open to some doubt', is apt, flexible and practical, and needs no further elaboration."

In *casu,* the submissions showed clearly that the applicant as a voluntary association is governed by its constitution. For anyone to represent or seek to act on behalf of the applicant they must have authority from the applicant as the applicant has a right to protect its name and assets and to decide on who should represent it in any fora or transaction.

As already alluded to above, the respondent confirmed that he is already presenting himself as the Chairman of the executive committee for the applicant and that he assumed this role on 20 October 2015. In view of my finding on the status of the meeting that is said to have started at 15.25 hours on 20 October 2015, reflected in annexure A to respondent's opposing papers, the purported meeting was not in terms of the applicant's constitution and so could not have resulted in the respondent assuming the position he is now portraying to the world at large.

Further, the respondent seemed to recognise this as well when in his application in HC 8128/16 filed on 12 August 2016, he never referred to himself as chairman of the committee running the affairs of applicant. Had he been the chairman, he would have been glad to indicate so in that application as he seemed glad to do in the court application in HC 9/17.

The applicant's counsel argued that, in any case, the respondent could not have been eligible to vote or to be voted into the applicant's committee as he had ceased paying levies to the applicant in September 2015. In this regard he referred to an instruction by the respondent and his colleagues to Triangle Mill to deduct and withhold their levies due to the applicant from September 2015 until further notice. In that notice the respondent and his colleagues were categorical in stating that: for the avoidance of doubt no association levies normally to the account of ZCFA should be forwarded to this account with effect from the above stipulated date until further notice.

As a consequence of the cessation, on 6 November 2015 the applicant wrote letters to the respondent and his colleagues reminding them to pay their levies in terms of the constitution. They did not pay heed to that reminder.

On 8 December 2015, the applicant wrote another letter to the respondent informing him that he was in breach of clause 16 of ZCFA constitution and that should he not pay within 30 days he would lose the right to vote. The respondent did not comply with this notice.

By virtue of the above breach, applicant argued that, the respondent could not have been voted into the executive committee. It may also be noted that the respondent confirmed none payment to the ZCFA account that was then in operation as he stated in his opposing papers that he and others opened a parallel account purportedly for applicant.

Despite the above breaches and the acknowledgment by the respondent of the creation of a parallel structure outside the provisions of the applicant's constitution, the respondent filed a court application HC 9/17 purporting to be representing the applicant. Clearly the respondent had no such authority to represent the applicant. His authority was to represent this other grouping that purported to elect him chairman in 2016. The respondent's action has the effect of violating the applicant's right to control its own affairs and its assets. Such conduct exposed the applicant and its assets.

In terms of irreparable harm it is my view that the applicant is now exposed as the respondent's action could harm applicant's reputation. The respondent has taken on a court

application in the name of the applicant and any adverse results there from may be visited upon the applicant. Equally the respondent indicated that his grouping opened a second bank account in the name of the applicant. The operations of that account are not in the control of applicant.

I am of the view that the applicant has established that it is likely to suffer irreparable harm if respondent continues to misrepresent to courts, other authorities and the world at large that he is the lawful representative of the applicant, when he knows well that that is not so. He has created his own association and it would only be proper to give it a name or title different from the applicant's.

In terms of alternative remedy, I am of the view that the facts of the case show that there is no alternative remedy to stopping respondent from misrepresenting that he is a lawful representative of the applicant. The respondent and his colleagues must simply be stopped from using applicant's name and from usurping powers of the applicant's lawfully elected executive committee.

In conclusion, it is apparent that the balance of convenience favours the grant of the application. The applicant stands to be prejudiced in the manner alluded to above, including the risk of being sued by third parties who would have entered into transactions or contracts with the respondent believing that he was lawfully entitled to represent the applicant . The respondent has nothing to lose as he and his colleagues are already running a parallel association with its own funds. All he has to do is to assume a different name and not continue operating under applicant's name till such a time what he termed a leadership wrangle is lawfully resolved.

The applicant asked for costs on a legal practitioners scale. As this is only a provisional order I did not find any strong reason for granting costs at this stage. Parties can always argue on the question of cost on the return date.

Accordingly it is hereby ordered that:

Pending the determination of this matter, the Applicant is hereby granted the following relief:

That the Respondent and any persons acting on his behalf or for his interests be and are hereby interdicted from misrepresenting by conduct or otherwise that they have authority to represent the Applicant or act on its behalf in any manner whatsoever.

Matizanadzo & Warhurst, applicant's legal practitioners
Mangwana & Partners, respondent's legal practitioners.