**REPORTABLE (33)**

**TICHAHLEYI MPOFU**

**v**

**ZIMBABWE MANPOWER DEVELOPMENT FUND**

**SUPREME COURT OF ZIMBABWE**

**UCHENA JA, CHATUKUTA JA & MWAYERA JA**

**HARARE: 18 SEPTEMBER 2023**

*T. Chagudumba*, for the appellant

*M. Moyo*, for the respondent

**MWAYERA JA:**

1. On 18 September 2023, after hearing counsel and having considered documents filed of record, we delivered an *ex tempore* judgment, and issued the following order:

Accordingly, it is ordered as follows:

“1. The appeal be and is hereby allowed with costs.

1. The judgment of the court *a quo* be and is hereby set aside and is substituted as follows:
2. The preliminary point be and is hereby upheld.
3. The matter be and is hereby struck off the roll with costs.”

The respondent has requested for written reasons for the judgment. These are they.

1. This is an appeal in which the appellant appealed against parts of the High Court’s (“the court *a quo*”) judgment handed down on 30 April 2023. The court *a quo* ordered the appellant to surrender a motor vehicle, cellphone, iPad and laptop to the respondent. The appellant was dissatisfied by the court *a quo*’s finding that the Chief Executive Officer (“CEO”) had *locus standi* to sue the appellant without a board resolution to that effect.

**FACTUAL BACKGROUND**

1. The brief facts of the matter can be summarized as follows. The appellant was formerly employed by the respondent as the Information Communication Manager. The respondent is a fund established under the Manpower Planning Development Act [*Chapter 28:02*] (“the Act”) with the principal mandate of developing skilled manpower in Zimbabwe. As part of his conditions of service, the appellant was issued with an Isuzu double cab and DMAX, an HPZ Book Laptop, a Samsung Galaxy Tablet and Samsung Galaxy Note 10 Plus mobile phone (“the assets”).
2. On 5 July 2021, the appellant was suspended from employment with full pay and benefits pending investigations into allegations of contravening s 4 (a) of the Labour (National Employment Code of Conduct) Regulation 2006. The appellant was found guilty of the alleged misconduct following a full disciplinary hearing leading to his dismissal from employment. The appellant was requested by the respondent to surrender the assets. He failed to comply with the request. Resultantly, the respondent filed an application for *rei vindicatio* beforethe court *a quo*. The court *a quo* granted the application for *rei vindicatio* with costs in favor of the respondent.

**SUBMISSIONS *A QUO***

1. The respondent submitted that the assets were availed to the appellant as tools of trade in terms of the contract of employment as read with the Management Policy. It was argued that upon termination, the appellant had no basis and reason to remain holding on to the assets. The respondent’s founding papers in the application for *rei* *vindicatio* were deposed to by one Sebastion Marume in his capacity as the CEO of the respondent. In terms of the Act, the CEO is an *ex officio* member of the respondent’s board.
2. In the founding papers, the CEO averred that at the time of deposing to the affidavit, members of the Board had not yet been appointed, so there was no Board to administer the respondent’s affairs. He further averred that by virtue of him being the only Board member available he had the requisite authority to depose to the founding affidavit and sue the appellant on behalf of the respondent.
3. In response to the preliminary points raised by the appellant, it was submitted that the deponent to the respondent’s founding papers was the accounting authority of the respondent, for purposes of section 41 of the Public Finance Management Act [*Chapter 2:19*] (PFMA). It was contended that in that capacity, the CEO could exercise the powers of an accounting authority.
4. The appellant, on the other hand raised two preliminary points in the court *a quo*. The first was that the application was invalid as the deponent to the respondent’s founding affidavit did not have authority to depose to the affidavit on behalf of the respondent neither did he have authority to institute proceedings on its behalf.
5. The second point was that the application was a nullity as the applicant had not complied with the provisions of s 124 (1) of the Labour Act [*Chapter 28:01*] which provides as follows:

“**124 Protection against multiple proceedings**

1. Where any proceedings in respect of any matter have been instituted, completed or determined in terms of this Act, no person who is aware thereof shall institute or cause to be instituted or shall continue any other proceedings, in respect of the same or any related matter, without first advising the authority, court or tribunal which is responsible for or concerned with the second mentioned proceedings of the fact of the earlier proceedings.”

**FINDINGS *A QUO***

1. The court *a quo* determined the preliminary points first before delving into the merits. It held that there is no inconsistence between the provisions of the PFMA and the Act because the provisions of the PFMA seek to fill any gaps in the law that may cause operational challenges in the management of public entities in the absence of a Board. The court further held that in terms of s 41 (2) (b) and s 44 of the PFMA, the CEO of the respondent can institute or defend proceedings on behalf of the respondent without the need to produce a resolution, as would be the position with a company. The court *a quo* thus dismissed the first preliminary point for lack of merit.
2. Regarding the second preliminary point, the court again dismissed it on the basis that the matter before the Labour Court and the application before it were premised on different causes of action. The court *a quo* heldthat the application before it was based on *rei vindicatio* while the pending case in the Labour Court was centered on the issue of the lawfulness or otherwise of the termination of the appellant’s contract of employment.
3. Having dismissed both preliminary points, the court *a quo* determined the matter on the merits. It held that the respondent’s claim was unassailable as it is a settled position of the law that once the contract of employment has been terminated, the former employee has no legal basis to hold on to assets issued to him/her when the contract of employment subsisted. The court *a quo* dismissed the appellant’s claim which it held was based on speculation. The court *a quo* dismissed the application with costs on a higher scale as it held that by defending an application for *rei vindicatio* in the circumstances of this case the appellant was abusing court process.
4. Disgruntled by the decision of the court *a quo* the appellant approached this Court with the present appeal. The appellant lodged the appeal on the following grounds of appeal.

**GROUNDS OF APPEAL**

1. The court erred on a point of law in holding that the respondent’s CEO could institute proceedings on behalf of the respondent without the need to produce a resolution as proof of Authority in circumstances where the court had found that there was non-compliance with both the Manpower Planning and Development Act [*Chapter 28:02*] and the Public Entity Corporate Governance Act [*Chapter* *10:33*] which statutes bind the respondent.

2. *A fortiori*, the court *a quo* erred in placing reliance upon the Public Finance Management Act [*Chapter* *22:19*] as clothing the respondent`s Chief Executive Officer with authority to institute proceedings in circumstances where there were violations of statutes considering that the same Act mandates the respondent`s Chief Executive Officer to ensure compliance with the provisions of the Act or any other enactment applicable to the respondent as a public entity. The dirty hands doctrine militated against the finding by the court *a quo*.

3. The court *a quo* erred in the exercise of its discretion and ordering the appellant to pay costs on the punitive scale when the same court had accepted that the matter raised an important corporate governance issue.

**SUBMISSIONS BEFORE THIS COURT**

1. Mr *Chagudumba*, counsel for the appellant submitted that the CEO of the respondent did not have the authority to institute proceedings against the appellant because the Act stipulates that the entity shall be headed by a board. He argued that where the law provides for a board s 41 (2) (b) of the PFMA does not apply.
2. He further contended that the court *a quo* erred in finding that the CEO had authority to represent the respondent in the proceeding *a quo*. He further submitted that the CEO had no authority and he had failed to comply with the law by failing to initiate the appointment of a board. Counsel argued that the two statutes, that is, the Act and PFMA were not inconsistent but complemented each other. The respondent as a CEO simply had no authority as he was not the board and he also did not have authority to institute proceedings *a quo*. He urged the court to allow the appeal.
3. *Per contra,* Mr *Moyo* for the respondent submitted that s 41 (2) (b) of the PFMA applies even in situations where the board is provided for but has not been appointed. He further submitted that the law allowed the CEO to institute proceedings where there is no board in place. Further, he averred that the PFMA and the Act were inconsistent on the issue of the Board and as such they ought to be read to mean that the CEO had the authority to institute proceedings. He urged the court to dismiss the appeal as the court *a quo* had correctly dismissed the points *in limine* and granted the application on the merits.

**ISSUES FOR DETERMINATION**

1. Issues that fall for determination in this matter are as follows-:
2. Whether or not the respondent`s Chief Executive Officer could institute proceedings on behalf of the respondents without need to produce a resolution of the board for this authority.
3. Whether or not an order for costs on a legal practitioner and client scale against the appellant was justified.

**THE LAW**

1. The respondent is a creature of statute. Section 47 (4) of the Act stipulates that the fund shall be administrated by the Board subject to this Act. The Board is established by s 48 which provides as follows:

“**48 (B) Zimbabwe Manpower Development Board**

1. There is hereby established a board to be known as the Zimbabwe Manpower Development Board.
2. The Board referred to in subsection (1) shall consist of-
3. the Chief Executive who shall be an *ex officio* member; and
4. one member appointed by the Minister from a list of three nominations from each of the following bodies –
5. the Zimbabwe Institution of Engineers established in terms of the Zimbabwe Institution of Engineers (Private) Act [*Chapter 27:16*].
6. the Law Society of Zimbabwe established in terms of the Legal Practitioners Act [*Chapter 27:07*].
7. Public Accountants and Auditors Board established in terms of the Public Accountants and Auditors Act [*Chapter* *27:12*].
8. organisations representing industry and commerce;
9. an organisation representing the churches;
10. the National Council of the Disabled Persons;
11. Two more persons from persons with knowledge and experience in any other business- related fields;
12. One former Vice Chancellor of a University or former Principal of a Tertiary Institution” (Underlining my emphasis).
13. It is worth noting that the language used in both provisions is peremptory. The use of the word “shall” denotes the intention of the legislature to make the provision peremptory. See *Doctor Daniel Shumba & Anor v The Zimbabwe Electoral Commission & Anor* SC 11/08 and also *Moyo & Ors v Austin Zvoma N.O Clerk of Parliament & Anor* 2011 (1) ZLR 345 (S).
14. As regards the institution of proceedings it is trite that a person who represents a legal entity in court ought to have the authority required to represent the said entity. This Court made pertinent remarks in *Cuthbert Elkona Dube v Premier Service Medical Aid Society & Anor* 2019 (3) ZLR 589 (S), it stated the following:

“The above remarks are clear and unequivocal. A person who represents a legal entity, when challenged, must show that he is duly authorised to represent the entity. His mere claim that by virtue of the position he holds in such an entity he is duly authorised 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 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).

1. See also *Madzivire v Zvarivadza & Anor* 2006 (1) ZLR 514. It is settled in this jurisdiction that a person representing a legal entity has to be clothed with the requisite authority and that the entity is aware of the proceedings undertaken on its behalf.
2. Section 41 of the Public Finance Management Act provides as follows: -

“**41. Accounting Authorities**

1. Every public entity shall have an authority which shall be accountable for the purposes of this Act.
2. If the public entity –
3. has a board or controlling body, that board or body shall be the accounting authority for that entity; or
4. does not have a board or other controlling body, the chief executive officer or the person in charge of that public entity shall be the accounting authority for that public entity unless the enactment or memorandum and articles of association or foundational document relating to that public entity designates another person as the accounting authority”.
5. Further, s 44 of the same PFMA provides as follows:

“**44 General responsibilities of accounting authorities**.

1. An accounting authority for a public entity –
2. shall ensure that the public entity establishes and maintains-
3. effective, efficient and transparent systems of financial and risk management and internal controls;
4. …
5. …..
6. is responsible for the management, including the safeguarding of the assets and revenue and expenditure and liabilities of the public entity;
7. …..
8. shall take effective and appropriate disciplinary steps against any employee of the public entity who-
9. contravenes or fails to comply with provision of this Act applicable to such entity;
10. commits an act which undermines the financial management and internal control system of the public entity; or
11. Incurs or permits irregular expenditure or fruitless and wasteful expenditure.
12. ……
13. shall comply, and ensure compliance by the public entity, with provisions of this Act and any other enactment applicable to the public entity. (my emphasis)
14. If an accounting authority is unable to comply with any of the responsibilities of an accounting authority under this Part, the accounting authority shall promptly report the inability, together with the reasons therefor, to the appropriate Minister and Treasury.”
15. Further, s 57 of the Act provides that:

“(1) Subject to this Act, the Chief Executive shall perform such of the Minister’s functions specified in subsection (2) of section forty-eight as the Board may delegate to him.”

1. The significance of corporate governance of public entities is also fortified by s 11(11) of the Public Entities Corporate Governance Act [*Chapter 10:33*] (“PECG Act”), which stipulates that:

“11 (11) If the number of members of the board falls below the number fixed by any law as a quorum of the board –

1. the chief executive officer concerned shall immediately notify the Minister in writing of that fact and; (my emphasis)
2. the line Minister shall take steps to fill the vacancies on the board within 90 days from the date on which the board’s membership fell below a quorum, and if within that period he or she is unable to appoint sufficient members to reach the quorum of the board, he or she shall cause the Unit to be notified immediately of that fact.”
3. Again the legislative intention can be deduced from the use of the peremptory language. Where the enabling Act provides for a board and one has not been appointed by the relevant authority a direct obligation is imposed on the chief executive officer to notify the Minister immediately. The law does not spell out that the chief executive officer is the Board or can act on behalf of the Board.
4. It can be deduced from reading s 41 of the PFMA that every public entity shall be accountable and where the public entity has a Board, the board shall be the accounting authority. Where the public entity does not have a Board, then the chief executive officer shall be the accounting authority provided that is in conformity with the statute creating the public entity. The responsibilities of the accounting authority are also outlined in peremptory language in s 44 of the same Act. The emphasis in s 44 (g) that the accounting authority shall comply and ensure compliance by the public entity with provisions of the PFMA and any enactment applicable to the public entity clearly shows that the Public Finance Act is complimentary to other enactments relevant to the public entity. In this case, the PFMA is complimentary to the Act. The accounting authority is mandated to administer the public entity transparently and in compliance with the law.

**APPLICATION OF THE LAW TO THE FACTS**

1. In *casu*, the appellant challenged the *rei vindicatio* proceedings initiated by the respondent in the court *a quo*. The challenge was based on the fact that the deponent to the founding papers, the chief executive officer, had no authority to institute legal action on behalf of the respondent. Upon challenge the deponent ought to have produced the Board resolution authorising him to represent the entity in terms of the settled legal position. See the Dube case *supra*. The enabling Act which established the Zimbabwe Manpower Board and ss 47 and 48 B (2) are unambiguous as they spell out that the Board is the responsible administrative authority. The Act further provides for the composition of the 10-member board and outlines the responsibilities of the Board. The CEO is provided for as an *ex officio* member of the board. There is clearly a demarcation between the Board and CEO even though he becomes an *ex officio* member of the Board upon assuming office. The fact that the CEO sits on the Board by virtue of his position, does not make him the Board in the absence of other Board members.

1. In terms of s 57 (1) of the Act, the CEO can only perform the functions of the Board upon delegation from the Board and not unilaterally assume the role of the Board. In fact, as it stands in this case, it is common cause that the Board was not constituted, such that no delegation of authority as envisaged in s 48 (2) of the Act was done. A reading of the relevant provisions of the Act, the PFMA and PECG Act does not create any discord as the law is crafted in such a manner as to inculcate a culture of good corporate governance within public institutions.
2. The Public Entities Corporate Governance Act weighs in to buttress the significance of good corporate governance of public entities by placing a direct obligation on the Chief Executive Officer to notify the Minister immediately in writing of the vacuum created by lack of a quorum of the Board. Section 11 (ii) (a) of the PECG Act is apposite.
3. In the present case, the deponent to the respondent’s founding papers acknowledges that the Board was not constituted as envisaged by the law. He, in contravention of the Act, PFMA and PECG Act did not notify the relevant Minister of the anomaly. He assumed the position of the Board contrary to the legal provisions. In the absence of the Board which could have delegated to the CEO the requisite powers, his actions on behalf of the respondent are a nullity. There is no legal basis for the CEO, who did not have any authority from the board to institute legal proceedings for and on behalf of the respondent.
4. The remarks of this Court in *ANZ (Pvt) Ltd v The Minister of State for Information and Ors* 2004 (1) ZLR 538 (S) at 548B resonate well with the facts of the present case. This Court remarked:

“This Court is a court of law and as such cannot connive to condone the applicant’s open defiance of the law. Citizens are obliged to obey the law of the land and argue afterwards.”

1. The CEO, as an ex officio member of the board could only derive authority from the board to run the affairs of the public entity. In terms of the Act the board is the responsible authority to run the respondent`s affairs. The statutory imperative imposed by law on the CEO to notify the Minister of the absence of the Board, did not clothe the deponent with authority to depose to the impugned founding papers.
2. The preliminary point that the deponent to the founding papers, that is the CEO, did not have the relevant authority as there was no resolution by the Board, ought to have been sustained. In the absence of a Board resolution the actions of the CEO are a nullity. This conclusion is dispositive of the appeal. It is therefore, not necessary to allude to the other issues that were raised in this appeal.

1. Costs follow the result. We find no basis to depart from this standard. It was for these reasons that we allowed the appeal with costs and issued the order appearing in the first paragraph of this judgment.

**UCHENA JA** : I agree

**CHATUKUTA JA** : I agree

*Atherstone & Cook*, appellant’s legal practitioners

*Dube-Banda Nzarayapenga & Partners*, respondents’ legal practitioners