

LEO KHOZA

And

CALVIN MAPIYE

And

SECAM PRODUCTIONS PRIVATE LIMITED

Versus

JOSHUA MPOFU

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 17 JULY 2023 AND 4 JANUARY 2024

Opposed Application

G. Jakosi, for the applicants
L. Mpofu, for the respondent

TAKUVA J: This is a court application for a declaratory order and derivative action for a claim for damages in terms of section 61 of the Companies and other Business Entities Act Chapter 24:31.

BACKGROUND

In 2006, respondent registered a company called Secam Productions (Pvt) Ltd which specialized in video sales. The directors were the respondent, holding 70% of the shares, Nobuhle Mpofu with 20% shares and Sikhanyiso Dube with 10% shares. Respondent and 1st and 2nd applicants are former employees of a company called Zambezi Helicopter Company, a company providing helicopter rides in Victoria Falls. Respondent and 1st applicant entered into an agreement for mutual termination of employment with their employer, in which they were given an opportunity to run their own video business and were immediately to resign as

employees of Zambezi Helicopter Company. This was on 25th February 2009 and 2nd applicant followed suit on 2nd March 2009.

It was agreed that the 1st and 2nd applicants would join the 3rd applicant as directors in 2010. Respondent's family members resigned as directors but did not dispose of their shares leaving the 3rd applicant's shareholding structure unchanged.

In March 2021, differences started emerging with allegations and counter allegations of illicit deals. An audit was conducted between 15th December 2020 and 5 November 2021 which revealed the prejudice as US\$23 511.25. The 1st and 2nd applicants were suspended from 5th November 2021 up to 5th March 2022. This suspension was uplifted and the 1st and 2nd applicants resumed work but allegations of misappropriation continued until respondent reported the 1st and 2nd applicants to the police. Relations continued to sour and respondent obtained a peace order against 1st and 2nd applicants under P.O 56/22.

On 22nd September 2022 the applicants herein proceeded to file this court application seeking the following relief;

- “1. The application be and is hereby granted.
2. The purported suspension of 1st applicant and 2nd applicant as Directors be and is hereby declared a nullity and the 1st and 2nd applicants be declared to be Directors of Secam Productions (Pvt) Ltd.
3. The 3rd applicant be and is hereby awarded damages in the sum of USD 6 067.18 or the equivalent RTGS calculated at auction rate applicable on the day of this order.
4. The respondent be and is hereby ordered to pay 3rd applicant the sum of US\$ 6 067.18 or the equivalent RTGS calculated at auction rate applicable on the day of this order, within seven days from the date of this order.
5. The 1st and 2nd applicant (sic) be and hereby (sic) US\$3000-00 or equivalent RTGS calculated at the prevailing auction rate on the day of this order, as reasonable expenses and legal costs incurred in bringing this motion.

6. The respondent be and is hereby ordered to pay cost (sic) of suit on a higher scale.”

APPLICANTS’ CASE

LOCUS STANDI

Both applicants contended that they established their legal standing in this application as shareholders bringing a derivative action on behalf of the 3rd applicant. They argued that the standing originates from section 61(1) and (2) of the Companies and other Entities Act. As proof, applicants relied on an affidavit by one Daniel Machaka Ngavi who claimed to have allotted two hundred (200) shares to 1st and 2nd applicants. See Annexure E1 on page 67 of the record.

Applicants also relied on the fact that as directors, they are entitled to seek a declaratory order to the effect that their suspension was a nullity. This is the case because the procedure adopted to remove the 1st and 2nd applicants is irregular.

MATERIAL DISPUTES OF FACTS

Applicants submitted that there is no material dispute of facts in the application as alleged by the respondent. The averment by respondent that 1st and 2nd applicants are not shareholders does not amount to a material dispute of facts that warrants the matter to be referred to trial –See *Supa Plant Investments (Pvt) Ltd v Chidavaenzi* 2009 (2) ZLR 132.

According to the applicants, if the issue is whether or not the evidence is sufficient, that should be an issue to be determined on the merits. Otherwise the issue is capable of being resolved on the papers without adducing *viva voce* evidence. It was also contended that the fact that the order sought is for damages does not mean that the matter cannot be resolved on the papers.

Riozim (Pvt) Ltd v Falcon Resources (Pvt) Ltd and Anor SC 28-22

Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623.

To that extend, applicants submitted that the court can grant relief on the papers as respondent raises fictitious disputes of facts.

RESPONDENT'S CASE

The 1st point *in limine* raised by the respondent is whether or not the 1st and 2nd applicants have the *locus standi* to bring a derivative action on behalf of the 3rd applicant. The argument here is that in terms of section 61(1) (2) (3) of the Companies and other Business Entities Act (Chapter 24:31) this application can only be brought by a “member” or a “shareholder” as the case may be with a minority shares and such member or shareholder should have at least 10% voting power.

The shareholders of 3rd applicant are the respondent with 70% shares, Nobuhle Mpofo with 20% shares and Sikhanyiso Dube with 10% shares. Therefore, the averment by 1st and 2nd applicants that they are instituting legal action through a derivative action is misplaced as they do not have the capacity to bring same. The 1st and 2nd applicants failed to provide any proof justifying their claim of being shareholders in that their mere averment in the absence of share certificates or memorandum of association shall not be sufficient to permit them to bring a derivative action on behalf of the 3rd applicant.

Further, if the court is to believe that applicants are shareholders and that the share structure of the company is 33.33% to 1st applicant, 33.33% to 2nd applicant and 33.33% to respondent, this means 1st and 2nd applicants have a combined share of 66.66% making them the majority shareholders thus not eligible to benefit under a derivative action. A majority shareholder is not qualified to bring a derivative action. Also, a company cannot sue under a derivative action to protect its own interest. It is only a member or a shareholder that can do so on its behalf using rights derived from the company. Reliance was placed on *Piras & Sons (Pvt) Ltd v Piras* 1993(3) ZLR 245 (S).

From the above, it is clear that there are no applicants in this case as 1st and 2nd applicants do not have the capacity to bring a derivative action and also the 3rd applicant cannot sue under a derivative action to protect its own interests. By virtue of there being no applicants before the court, the matter should be dismissed with costs on a higher scale.

Respondent submitted that 3rd applicant is not before the court in that it did not file a supporting affidavit to that filed by 1st applicant in compliance with Rule 58(4)(a) of the High Court Rules, 2021. The result is that there is no application from the 3rd applicant. Third applicant as a company should itself enforce its rights when it is wronged.

See *Foss v Harbothe* (1843)2 HARE 461,67ER189

Minister of Mines & Mining Development & Ors v Grandwell Holdings Pvt Ltd & Ors
S.C 34-18.

Since 3rd applicant has been cited as an applicant, it means it is able to act on its own. Therefore, there should be duly authorized agents acting on behalf of the company coupled with a company resolution to that effect. The 1st and 2nd applicants have no automatic authority as directors to represent the company since a company being a separate legal persona cannot have legal proceedings through 1st and 2nd applicants.

The 3rd point *in limine* is that applicants approached this court on the wrong platform and ought to have instituted action proceedings instead of application proceedings because there is a material dispute of facts.

See *Dube v Dube & Ors* [2014] ZWBHC 107

Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T)

Masukusa v National Foods Ltd & Anor 1983 ZLR (1) at p 232.

The contention by the respondent is that the material dispute of fact is whether or not applicants are shareholders and remains unsettled and in the absence of formal documents to support the allegation it remains unresolvable on affidavits without *viva voce* evidence. Further, the alleged size of the applicants' shares is in dispute. Applicants have not attached any documentary proof of their shareholding. They did not attach the share certificates themselves, the sale of share agreement or proof of payment of taxes upon transfer of such shares.

The Law and Application

In application proceedings, where a material fact arises which cannot be resolved without the aid of *viva-voce* evidence, the court may either direct the parties to trial or dismiss the application with costs. *Room Hire C. (Pty) Ltd supra*.

In *Masukusa's* case *supra*, the court per MCNALLY J (as he then was) stated as follows;

“Where the facts are in dispute, the court has a discretion as to whether to dismiss the application or allow the matter to go on evidence. The first course is appropriate where an applicant should when launching his application, have realised that a serious dispute was inevitable.”

MAKARAU J (as she then was) echoed the same sentiments in *Supa Plant Investments (Pty) Ltd v Chidavaenzi* 2009 (2) ZLR 132 (H) in the following terms:

“A material dispute of fact arises when material facts alleged by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence.”

MALABA CJ dealt with the same issue in *Riozim (Pvt) Ltd v Falcon Resources (Pvt) Ltd and Anor* SC 28-22 where at page 7 of the cyclostyled judgment, the learned CJ stated that:-

“... the mere allegation of a possible dispute of fact is not conclusive of its existence. From decided cases, it is evident that a dispute of fact arises where the court is left in a state of reasonable doubt as to which course to take in resolving the disputed matter without further evidence being led.”

In *Plascon-Evans Paints* case *supra*, it was noted that;

“where it appears to the court that the respondent’s defence is a bare denial or raises fictitious disputes of facts or is palpably implausible or farfetched or untenable it can grant relief on the papers.”

In casu, apart from the contentious issue of shareholding, material disputes of fact arise in instances whereby the applicants throw allegations of misappropriation of funds against the respondent, allegations of theft and abuse of company vehicle which by their very nature would require *viva voce* evidence to be led to support and establish same. Further the issue of *locus standi* is entwined with that of shareholding. The provisions of section 61 (1)(2) and (3) of the Companies and Other Business Entities Act are clear and common cause. What is in dispute and contested is whether or not 1st and 2nd applicants are members or shareholders of the 3rd applicant. In my view no matter how robust the court approaches this question, it is ultimately left in a state of reasonable doubt as to which course to take in resolving this dispute. The dispute is not fictitious. It is real.

In my view, this dispute has been known to the applicants before they filed their application in that respondent has always regarded them as non share-holders. The respondent has traversed the issue of shareholding in such a manner as to leave this court with no ready answer to this dispute. There is a need to lead further evidence in this case. Further or, on the

undisputed facts of this case, the applicants were full aware of the existence of the multiple disputes of fact before embarking on the application procedure.

I accordingly find the points *in limine* to be meritorious.

In the result, the application is dismissed with costs.

Mvhiringi & Associates c/o TJ Mabhikwa and Partners, applicants' legal practitioners
Dube Nkala and Company, respondent's legal practitioners