MING CHANG SINO AFRICA INVESTMENTS (PRIVATE) LIMITED

Versus

GDL NUMBER FIVE (PRIVATE) LIMITED

And

DGL NUMBER TWENTY (PRIVATE) LIMITED

And

EAGLE ITALIAN SHOES (PRIVATE) LIMITED

And

WANG KE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 8 NOVEMBER 2021 & 18 NOVEMBER 2021

Urgent application

V. Majoko, for the applicant
S. Chamunorwa, for the 1st, 2nd and 3rd respondents

DUBE-BANDA J: This is an urgent chamber application. This application was filed in this court on 20 October 2021, and was placed before me on the same day. I directed that it be served on the respondents together with a notice of set down for the 25th October 2021. On the set-down date Mr *Chamunorwa* counsel for the respondents sought a postponement of the matter for the purposes of preparing and filing opposing papers. Mr *Majoko* counsel for the respondent, consented to the postponement sought, and I postponed the matter to the 8th November 2021 for a hearing. The application is opposed by the 1st, 2nd and 3rd respondents. The order sought is couched in the following terms:

> Terms of the final order sought
> It be and is hereby ordered that:
> 1. The parties are directed and ordered to enter into negotiations for the purpose of drawing a shareholder agreement as contemplated by the agreement entered into among them in April 2017, by which they became associated and, failing agreement on a

shareholder agreement, agreement by which they will in terms of the Companies and other Business Act they will dissociate.

2. The respondents jointly and severally pay costs of this application.

Interim relief granted

Pending the finalisation of this application all mining, milling and processing gold ore at DGL Number Five (Private) Limited and associated mining locations be and hereby ordered to, on service of this provisional order, cease.

Service of application and provisional order

Service of this provisional order be effected by the deputy sheriff on the respondents and on the Minerals and Border Control Unit the Zimbabwe Republic Police, Matabeleland North Province.

Background facts

This application will be better understood against the background that follows. On the 11 April 2017, an agreement was signed amongst Ming Chang Sino Africa Mining Investment (Private) Limited (applicant); DGL Twenty (Private) Limited (2nd respondent); Eagle Italian Shoes (Private) Limited (3rd respondent) and Fuel Africa (Private) Limited. In terms of the agreement, applicant; Eagle Italian Shoes and Fuel Africa became investors in DGL Twenty (Private) Limited, which owns a controlling interests in DGL Number Five (Private) Limited (1st respondent). Fuel Africa is not interested in this matter as it did not take up any rights or assume obligations under the agreement. The ten percent shares reserved for it were eventually allocated to the Wang Ke (4th respondent). In summary, a dispute has arisen amongst the investors, applicant contending that there has been no accountability for the business and income earned by 1st respondent. Further applicant avers that there has been a lack of transparency in the manner in which the business of the 1st respondent has been carried out. Applicant's position is that there be a cessation of all mining activities of the 1st respondent so that there is no party that benefits from the resources of the 1st respondent, to the exclusion of other parties. It is against this background that applicant has launched this application seeking the relief mentioned above.

Preliminary objections

In their opposing papers 1st, 2nd and 3rd respondents took preliminary points, *viz*; that this application is not urgent, and allied to the attack on urgency it is contended that the certificate of urgency is defective; and that this is not a case where a shareholder may sue in respect of wrongs allegedly done to it or the company. Respondents urged this court to strike off this application from the roll of urgent matters with costs at an attorney and client scale without a consideration of the merits.

Urgency

Respondents contends that this application is not urgent. The entitlement of litigants to approach a court on an urgent basis is provided for in the High Court Rules, 2021, and is now trite. This court enjoys a discretion in urgent applications to authorize a departure from the ordinary procedures that are prescribed by its rules. It is usually hesitant to dispense with its ordinary procedures, and when it does, the matter must be so urgent that ordinary procedures would not suffice. See: *Kuvarega* v *Registrar General and Another* 1998 (1) ZLR 188; *Triple C Pigs and Another v Commissioner-General* 2007 ZLR (1) 27. *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* [2019] ZACC 27.

In the ordinary run of things, court cases must be heard strictly on a first come first serve basis. It is only in exceptional circumstances that a party should be allowed to jump the queue on the roll and have its matter heard on an urgent basis. The *onus* of showing that the matter is indeed urgent rests with the applicant. An urgent application amounts to an extraordinary remedy where a party seeks to gain an advantage over other litigants by jumping the queue and have its matter given preference over other pending matters. This indulgence can only be granted by a judge after considering all the relevant factors and concluding that the matter is urgent and cannot wait. See: *Kuvarega* v *Registrar General and Another*1998 (1) ZLR 188; *Triple C Pigs and Another v Commissioner-General* 2007ZLR (1) 27.

In assessing whether an application is urgent, the courts have in the past considered various factors, including, among others: the consequence of the relief not being granted; whether the relief would become irrelevant if it is not immediately granted; and whether the urgency was self-created. See: *New Nation Movement NPC and Others v President of the*

Republic of South Africa and Others [2019] ZACC 27. Further to pass the urgency test, applicant must show that there is an imminent danger to existing rights and the possibility of irreparable harm. See: *General Transport & Engineering (Pvt) Ltd & Ors* v *Zimbank* 1998 (2) ZLR 301; *Document support Centre (Pvt) Ltd* v *Mapuvire* 2006 (1) ZLR 240 (H); *Dextiprint Investments (Pvt) Ltd* v *Ace Property Investment company* HH 120/2002; *Madzivanzira & Ors* v *Dexprint Investments (Pvt) Ltd & Anor* 2002 (2) ZLR 316 (H).

The jurisprudence in this jurisdiction is that in considering whether a matter is urgent this court looks at the certificate of urgency to establish whether the application is indeed urgent. In *Chidawu & Others v Sha & Others* SC 12/13 the Supreme Court held that the certificate of urgency is the *sine qua non* for the placement of an urgent chamber application before a judge. In making a decision as to the urgency of the application a judge is guided by the averments in the certificate of urgency. Without a valid certificate of urgency a matter has to just join the queue of other matters awaiting set-date on the ordinary roll.

BHUNU J (as he then was) in *Condurago Investments (Private) Limited T/A Mbada Diamonds Versus Mutual Finance (Private) Limited* HH 630/15 noted that the need for the certificate of urgency is therefore meant for the benefit of the generality of the hapless litigants who are about to be jumped in the queue but cannot speak for themselves because they are never consulted or given an opportunity to object. For that reason there is need for a judge to proceed with caution and due diligence so that justice may be done and be seen to be done.

The urgency of this matter is based on the certificate of urgency signed by a legal practitioner. For the sake completeness, I reproduce the certificate in its entirety. It says:

1. The applicant is a 45% shareholder in the 1st respondent company. Directly and indirectly the 1st respondent holds and has interests in over 500 mining locations.
2. Sharp differences have arisen among the shareholders in the 1st respondent which have rendered the 1st respondent's board of directors dysfunctional. All pretense at co-operation and mutual trust has all but gone.
3. The parties have acknowledged they cannot work together and several attempts have been made to resolve the disputes, including that the parties share 1st respondent's claims amongst them but these have not resulted in any agreement. The parties disagree on virtually everything.

4. The party in charge of 1st respondent's operations has conducted the business of the 1st respondent as if it was the sole shareholder, and has failed to report to the other shareholders, despite repeated requests for transparency.
5. The party in charge and in control of the 1st respondent's business has gone as far as to purchase on its own a CIP plant from which it mills and processes gold it does not account for to the other shareholders, but milling and processing ore mined from 1st respondent's many mining locations, depleting ore resources for its sole benefit.
6. Applicant has called for cessation of all mining and milling process at all 1st respondent's mining locations and related mining locations until the parties agree on how best to resolve the disagreements there are among them, including agreement on how to split the claims among them, but this has been ignored.
7. The matter is made urgent by the fact that in the absence of transparency in how the business of the 1st respondent is being carried out there could be liabilities to tax authorities as it is not clear that statutory dues are being met as the fall due, which could result in huge penalties applicant would have to bear. It is also not clear if the mining and processing activities are being carried out in an environmentally sustainable manner. Importantly, gold ore resources are being depleted and revenue is being earned for the benefit of only one party.
8. A cessation of all mining and gold processing activities would allow the parties to all take stock of the activities of the 1st respondent and out an end the lack of transparency and oppressive conduct.

The certificate of urgency passes out in silence on the dates the events which are said to have triggered the urgency are alleged to have occurred. Looking at the certificate the court is left in the dark about the time-line of the events that are said to have triggered the urgency. The dates are very important, so that the court would know upfront whether applicant did not sit and relax and wait for the arrival of the date of reckoning to act. This is so because the urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated rules. See: *Kuvarega* v *Registrar General and Another* 1998 (1) ZLR 188. This certificate of urgency is deficient to the extent that it does not give the court the time line of events.

It is only *paragraph* 7 of the certificate that somehow speaks to urgency. The rest of the *paragraphs* speak to the history of the dispute amongst the parties. *Paragraph* 7 says the matter is made urgent by the fact that in the absence of transparency in how the business of the 1st respondent is being carried out there could be liabilities to tax authorities as it is not clear that statutory dues are being met as they fall due, which could result in huge penalties applicant would have to bear. It is averred that it is not clear if the mining and processing activities are being carried out in an environmentally sustainable manner.

Mr *Chamunorwa*, counsel for the 1st, 2nd and 3rd respondents contends that the averments in *paragraph* 7 do not arise in the founding affidavit filed in support of this application. It is argued that the averments in the certificate of urgency must arise from the founding affidavit. I agree. It remains a mystery where the author of the certificate of urgency acquired facts which are not in the founding affidavit. This court cannot adjudge a matter as urgent based on factual averments in the certificate of urgency which do not arise from the founding affidavit.

Again, Mr *Chamunorwa* contends that the averment that applicant could be liable to tax authorities arising from 1st respondent's failure to meet such obligations is incorrect at law. It is argued that 1st respondent is a company and has a separate and distinct legal existence apart from its shareholders. It is liable for its own obligations. Its tax obligations would not be obligations of its shareholders. I agree. See: *TBIC (Private) Limited & Another v Mangenje & 5 Others* SC 13/18. Even if 1st respondent is not carrying its mining and processing activities in an environmentally sustainable manner, should there be consequences arising from such conduct, it would be 1st respondent to contend with such consequences. Further in *paragraph* 7 of the certificate of urgency it is averred that gold ore resources are being depleted and revenue is being earned for the benefit of only one party. On the facts of this case, this averment cannot be a cause of urgency. This is all what other litigants involved in disputes relating to mining claims etc. have to contend with. It cannot standing alone, permit applicant to jump the queue in court roll and have its matter given preference over all other matters on the roll.

The certificate of urgency is deficient in that it does not make a case for the urgency of the matter. This should really mark the end of this inquiry, but for the sake of completeness, there is need to look at the argument on urgency from a different perspective. In its founding affidavit, applicants avers that it is a significant and largest investor in 1st respondent. It has

been excluded from participating in the affairs of 1st respondent yet it is entitled to assets and has heavily invested in such assets. The papers show that since the signing of the agreement on the 11 April 2017, the investors have not known peace. If applicant is excluded from the affairs of the 1st respondent, this cannot be a new occurrence, it is as old as the agreement itself. Such a fact cannot be on the 20 October 2021, be a trigger of an emergency.

Further in the founding affidavit applicant avers that "while this application could have been filed earlier applicant had hoped, until the last meeting of the 30 September 2021 that the disputes among the parties could be amicably resolved but it has since become clear that the respondents have no such intention." In his submissions Mr *Majoko* argued that the trigger for urgency is the meeting of the 30 September 2021. This is the meeting which is said to have caused an emergency, for this matter to jump the queue on the roll, the court to put aside everything and attend to it, and the respondents to drop everything and attend to this matter.

This meeting is not specifically averred to in the certificate of urgency. If it is indeed the trigger of the urgency it must have been averred and highlighted in the certificate, to alert the court and the respondents upfront that the urgency is anchored on such a factual occurrence. On the facts of this case, if the spark is this meeting of the 30 September 2021, no explanation is given in the certificate of urgency and the founding affidavit why this application was only filed on the 20 October 2021. This is important because applicant must show that it treated the matter as urgent, a litigant cannot be permitted to ask the court to jump and put aside everything, ask the respondents to jump and put aside everything and attend to this matter, when it did not act when the time to act arose.

In its founding affidavit applicant anticipates that a question would arise whether it treated this matter as urgent. In anticipation of this question, it provides an answer, and it is this: "I must point out that applicant always urged the other parties that we agree on a shareholder's agreement and in this regard applicant has drafted several draft shareholders' agreements which respondent have rejected although they have not themselves put forward their counter proposals in this regard." I note that absence of a shareholders' agreement is not a new fact. Again, by applicant's own version, other shareholders purchased and erected a mill plant from 2018, and started operating it in June 2020, this cannot now be a new occurrence necessitating an urgent application. Further a letter from Calderwood, Bryce Hendrie and Partners dated 18 march 2020, shows that the issues applicant is complaining about were

known to it more than a year and six months before filing of this application. Further what applicant did after the meeting of the 30 September 2021 is also telling. After the meeting, on the 4th October 2021, applicant sent to the other parties a drat shareholders' agreement for their consideration. This negates the contention that the meeting of the 30 September 2021, is the trigger of the urgency contended in this application.

What applicant seeks to achieve is to resolve the long time ranging disputes amongst the shareholders of 1st respondent *via* this application. This is unattainable. The urgent roll was created specifically for matters of litigants who seek urgent relief, not matters based on self-created urgency. There is no reason why this matter should be heard in the urgent roll and not in the ordinary roll. There is no emergency in this case. This matter is not urgent and it cannot be afforded a hearing in the roll of urgent matters. It falls to be struck off the roll of urgent matters with an appropriate order of costs.

Having found that this matter is not urgent, it is not necessary for me to consider the remaining points *in limine* taken by the 1st, 2nd and 3rd respondents, *vis;* that the order in this application is incompetent.

What remains to be considered is the question of costs. Respondents seek costs on the scale of legal practitioner and client. I take the view that this is not a case where applicant should be penalized with costs on a legal practitioner and client scale.

Disposition

In the result, I make the following order:

1. The point *in limine* on urgency is upheld.
2. This application is not urgent and is struck off the roll of urgent matters with costs of suit.

Majoko and Majoko, applicant's legal practitioners
Calderwood, Bryce Hendrie and Partners, 1st, 2nd and 3rd respondents' legal practitioners