

ZHANG BIN
and
ZHANG BIN N.O
versus
JIANG SHIN CIVIL EXPLOSIVE (PRIVATE) LIMITED
and
WU JIANCHUN
and
ZHANG SUYI
and
FAN XINHUA
and
VENGESAYI MHLANGA
and
THE MASTER OF THE HIGH COURT
and
THE REGISTRAR OF COMPANIES AND OTHER BUSINESS ENTITIES N.O

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE 21, 25, 27 January and 1 March 2022

Urgent Chamber application

T W Nyamakura, for the applicants
P Charamba, for the 1st respondent
L Mbereko, for 3rd and 4th respondents

CHITAPI J: This is an opposed urgent application in which the draft provisional order reads as follows.

“INTERIM RELIEF GRANTED

Pending determination of this matter or conclusion of the action in HC166/22, the Applicants are granted the following relief:

1. The interim Directors appointed by the first applicant on the 28th of December 2021 shall conduct the day to day operations of the first Respondent.
2. All Directors and Shareholders shall not alienate, encumber, and dispose any shareholding in the First Respondent pending determination of HC 166/22
3. The factory premises of the First Respondent, stand number 16306 Alaska Mine Road, Chiroradziva Heights, Strachawana Township, Chinhoyi Zimbabwe shall be kept secure at the applicant’s costs and with security company of her choosing.
4. The second to fifth respondents shall prepare and file with the registrar of the High Court a detailed account of the operations and bank account of the first respondent from the date they resumed operations including inventory of all assets expenditure profit or loss to the date of the order. The (sic) herein shall be filed with the Registrar of the High Court within 48hrs of this order being operated, failing which ,the sheriff of the high court shall be authorized to take all steps necessary to give effect to the judgment

5. The respondents personally or through their agents or anyone claiming rights or title through them are interdicted from and restrained from preventing the applicants and directors appointed on the 28th of December 2021 or their duly appointed agents from having access to the premises of the first respondent located at stand number 16303 Alaska Mine road ,Chirorodziva Heights, Stratchcoma Township, Chinhoyi Zimbabwe for purposes of conducting day to day operations of the first respondent, failing which the Sheriff of the High Court with the assistance of the Zimbabwe Republic Police shall take all necessary steps to grant access to the applicants and herein stated directors appointed on the 28th day of December 2021

TERMS OF THE FINAL ORDER SOUGHT

Subject to outcome of the action under HC166/22;

- (1) The Second to Fourth Respondents are interdicted and restrained from conducting operations of the First Respondent.
- (2) Until such a time as the matter under HC. 166/2022 is concluded, the entire issued shares in the First Respondent are owned and/or controlled by the Applicants who are entitled to all the rights flowing therefrom.
- (3) The Second to Fourth respondents are interdicted from making any decisions, calling meetings or otherwise exercising any rights flowing their purported shareholding.
- (4) The Interim Directors appointed on the 28th day of December 2021 shall conduct the day to day running of the business pending the determination of HC. 166/2022.”

The dispute in this application arises from the disputed ownership, control and management of the first respondent company. The first respondent is a duly incorporated and registered company in accordance with the laws of Zimbabwe. The company carries on the business of *inter alia* manufacturing, importation and exportation of explosives. Its principal place of business is stand 16306 Alaska Mine, Road, Chirorodziva Heights, Stratchoma Township Chinhoyi.

The first applicant, second, third and fourth respondents are foreign nationals of Chinese origin. The second respondent is resident in China and is Director of the first respondent. The third and fourth respondents as well as the first applicant are currently residing in Zimbabwe. The fifth respondent is a Zimbabwean national whose connection with the first respondent is that he has acted as its company secretary.

The background to the application is that the first applicant holds an undisputed 26.55% shareholding in the first respondent. She claims that her late husband Lui Dong holds 73.45% of the remaining shareholding to make the first respondent a company owned by her and her husband. The husband Liu Dong died on 23rd of April 2021 in a motor vehicle accident. In terms of the law, the shareholding of the deceased as with other property forming his estate devolved to his estate upon his death. It is common cause that the first applicant was appointed *curator bonis* of the Estate of her husband. It is in such capacity that she sues the respondents in this application.

The dispute around the shareholding of the second respondent revolves on the disputed authenticity involving the purported transfer of shares by the first applicant's deceased husband to the second, third and fourth respondents. There was produced a sale of shares agreement which the second, third and fourth respondents rely upon to evidence the transaction which they claim to have concluded with the deceased prior to his death. The agreement is dated 26th April 2021. It is purportedly initialled and signed by the second, third and fourth respondents with Liu Dong as the seller holding 73.45% of the shares.

The purchasers are listed in the agreement as second respondent who purchased 51% of the 73.45%; the third respondent who purchased 12% and the fourth respondent who purchased 1%. The seller remained with 9.45%. The additional shareholder in the restructured first respondent Company became the first applicant with 26.55%. The Company would in terms of the agreement be constituted of five directors. The purchasers were required to pay a purchase price of \$10.00 for each 1% share and it was acknowledged in paragraph 11.1 of the agreement that:

“11.1. The seller Liu Dong, confirmed that when signing this agreement, he had received cash from the buyers, Wu Jianchun, Zhang Suyi, Fan Xinhua for the purchase as follows:

- (a) Wu Jianchun paid US\$ 510.00
- (b) Zhang Suyi paid US\$ 120.00
- (c) Fan Xinhua paid US\$ 10.00.”

The first applicant impugned the agreement as being fraudulent because it being common cause between the parties that the second respondent was in China as at the date of signature thereof, it could not be possible that the parties signed the agreement on the same date since the Seller, third and fourth respondent were in Zimbabwe. If that argument is accepted, it would logically follow that it would not have been possible that money exchanged hands between the deceased and first respondent at the time of signing of the agreement because the parties were not together contrary to what the date of signature of the agreement would suggest.

The first applicant also contended that assuming but without conceding that the deceased executed the agreement in question, the agreement was still invalid because the shares were not sold in accordance with the articles of association. The articles of association of the First respondent in clause (6b) thereof provides as follows;

“b) The Directors shall in the first place offer any shares compromise (sic) in the transfer notice to the existing members of the company as nearly as possible in proportion to their respective shareholdings and shall give a time limit within which if not accepted any offer may be deemed to be declined. In the event no existing member shall be willing to their offer, the Directors any dispose the shares to any other person as they shall think fit.”

In terms of clause (6c) of the Articles of Association aforesaid, once transfer of shares gives notice to sale and there has been approved sale, the Directors are the ones who give notice to the transferor to transfer to transfer the shares to the purchaser within seven days. The 1st applicant contented that this was not done. Her demands to have sight of the original agreement have been futile. She suggested that the handwriting on the signatures on the copy of the sale of shares agreement appeared to have been constructed by the same person and that it was necessary that a handwriting expert be engaged to make necessary signature comparison investigations.

The first applicant further queried the validity of the changes made in the official returns or documents of the first respondent lodged with the Registrar of Companies or 7th respondent. The CR6 and CR16 dated 21st May 2021 were filed after the death of the deceased. The process did not however involve the estate of the deceased. The 1st applicant produced copies of her share certificate and that of her late husband and persisted that there were only two shareholders of the first respondent, namely the deceased and herself. She averred that the second, third and fourth respondents fraudulently acquired the shareholding which they now laid claim to.

The first applicant averred that she had filed an action under case number HC 166/22 on 12th of January 2022 on her own behalf and on behalf of her late husband's estate wherein she seeks orders to declare invalid the purported sale of shares to the second, third and fourth respondents and consequential relief to have the CR6 and CR16 filed on 21st May 2021 and 26th May 2021 declared invalid. She seeks that the correct position to be restored should be that which obtained prior to the date of the impugned sale agreement. The first applicant averred on this basis that there was a fraudulent acquisition of shares by the second, third and fourth respondent, and that there was need to preserve the subject matter of litigation in case Number HC 166/2022 by seeking the provisional order which she has sought

The first applicant claimed that albeit being barred from accessing the business premises of the first respondent by the third, fourth and fifth respondents. She averred that she failed to access the premises on 14 December 2021 to authenticate information which she had obtained to the effect that the first respondent factory was not operating. She averred she was shocked to discover that on that date the factory had been commissioned and the event had

been headlined on ZBC news. The first applicant deposed that she was denied entry into the factory. She averred that her being denied entry into the factory premises was a violation of an extant order of the Magistrates Court Order obtained against her by the respondents wherein she was allowed entry into the premises but barred from interfering with operations. The 1st applicant averred that the motivation for the application also insure that none of the parties to the disputed shareholding status to the potential prejudice of the other(s). She further averred that because the second to the fifth respondents were untruthful on the issue of resumption of operations on the 14th of December 2021, it meant that they were untrustworthy and were intent on taking advantage of her not knowing the details of the situation on the ground at the factory.

The first applicant also averred that the respondents had reported her to the Police for trespassing at the factory premises. She averred that such report was malicious because the Magistrates Court gave her access to the factory premises of the first respondent to shareholders. The making of the report to the police was according to her thinking, a ploy to get her out of the way so that the respondents would run operations without her knowledge.

The first applicant also averred that the second respondent was out of the country and resident in China whilst the third and fourth respondents were in pre-trial detention on charges of fraudulently acquiring the deceased's shares and contravening immigration laws in that they were working illegally in Zimbabwe without work permits. The fact that the said respondents did not have work permits necessarily meant they could not manage or run the first respondent. She averred that it was therefore necessary that alternative measures be put in place to safeguard the subject matter of litigation in case no HC 166/22 and the operations of the first respondent. It should however be pointed out that as at the date of hearing of this application, the respondents who had been in detention on had been released by High Court on bail.

In response to the application, the first, third and fourth respondents filed opposing affidavits. An issue arose that the second respondent was not served with the application. Counsel for the fourth respondent who according to the certificate of service accepted the application at the business premises of the first respondent submitted that the fourth respondent had denied that he had accepted process on behalf of the second respondent. The dispute on service of the application was in my view a farcical one because the second respondent would have been aware of the case. This is so because if regard is to be had to the respondents' opposing affidavits, there appears a resolution passed by Directors of the first respondent on 24th January 2021 at Chinhoyi authorising the third respondent to represent the first respondent in any court proceedings including the current case since process had been issued and served.

This application would therefore have been discussed at the extra- ordinary meeting aforesaid. It would have been and was therefore clear to every director, the second respondent being a director that he was a respondent herein. In any event in terms of disputed shareholding of the Company the second respondent holds 51% of the shareholding. His majority shareholding would be adversely affected by the litigation. He did not oppose the granting of the provisional order. The fifth respondent did not file any opposing papers either

In their opposing papers the first, third and fourth respondents took a point in *limine* that the matter was not urgent. I was obliged to deal with this preliminary issue first. The first respondent averred that the matter was not urgent because the need to act arose in June 2021 when the first applicant became aware of the change in shareholding and that a number of documents were exchanged in regard thereto. The document referred to were not specifically named. A court cannot relate to any such documents which is not before it.

The third respondent also relied for arguing that the matter was not urgent, upon the same contention as the first respondent. The third respondent averred that the shareholding dispute at play had been raised in the Magistrate Court *Ex-Parte* application which was served on the first respondent on 8 June 2021. It was averred that the CR16 for the first respondent had been attached to the *ex-parte* application and that the first applicant therefore knew about the disputed shareholding which she was now bringing the court on an urgent basis. The third respondent averred that the *Ex-Parte* application was granted in default and that the first applicant did not challenge the allegation that respondent was a shareholder and director of the first respondent. In this respect it appears to me that the third respondent did not appreciate that what matters is the decision which was given in that case. The magistrate court did not make a determination of the shareholding structure of the first respondent and would not have had jurisdiction to do so. The non-challenge could have arisen from fact that the first applicant may not have had a problem with the order sought.

The third respondent also averred that the first respondent's factory had been operating even at the time that the Magistrates Court *ex-parte* application was made. The third respondent argued that since in the *ex-parte* order the first applicant was ordered not to interfere with operations, this meant that the first applicant was aware that the factory was operating and had no justification to use the fact of the first respondent being operational or non-operation as a justification for urgency in bringing the application to court on the urgent matters court roll. The third respondent averred that there was no urgency in the matter because there was no reason for the first applicant to seek an order that the appointed directors should run operations

yet these directors were not appointed in terms of the constitutive documents of the first respondent. There was therefore in the view of the third respondent, no urgency in the application.

The fourth respondent similarly raised the same point as the first and third respondent to the effect that the first applicant did not act when the need to act arose in June 2021 when the first applicant became aware of the shareholding dispute as disclosed by papers filed in the Magistrates Court application filed on 8 June 2021. Submissions were also made that the commissioning of the factory and commencement of operations was also a fact that the first applicant was aware of because the Magistrates Court interdicted the first applicant from interfering with operations and the first respondent's administration. The fourth respondent therefore averred that there was nothing urgent arising out of the fact of that the first respondent was carrying out operations. The fourth respondent averred that the first applicant could not validly appoint directors outside of the procedure set out in the articles of association.

After entertaining further submissions from both the applicants and respondents legal practitioners, I dismissed the objection to the urgency of the matter. The respondents took simplicity view of the concept of urgency. The urgent application procedure is not only to be determined upon the concept of time but of both time and circumstance. See *Mushore v Mbangwa & 2 Ors* HH 381/16 per MAFUSIRE J where the learned judge stated:

“By time was meant the need to act promptly where there has been an apprehension of harm. One cannot wait for the day of reckoning to arrive before one takes action. By consequences was meant the effect of a failure to act promptly when harm is apprehended, it was also meant the effect of, or the consequences that would be suffered if a court declined to hear the matter.”

There was a development which the first applicant related to and became a matter of concern. The first applicant averred that the third and fourth respondents at the time that they filed this application were in pre-trial detention awaiting trial on charges that they fraudulently, transferred the deceased, Liu Dong's shares to themselves. They also faced charges of contravening the immigration laws of the country in that they have and are engaged in work without a permit. By the time of the hearing of the application, the third and fourth respondent had been released on bail. Whilst the criminal charges will be determined in due course by the Criminal Court, the allegations that the third and fourth respondent did not hold work permits could not be left interrogated because it was relevant to the relief sought. If the second, third and fourth respondents did not have work permits, then quite clearly they could not have lawfully managed or run the operations of the first respondent. To my mind the

application had to be dealt with urgently because the court cannot condone or be complicit in the perpetration of crime.

I enquired from counsel for the third and fourth respondent whether or not the serious allegations that the said respondents did not have work permits were correct. The third and fourth respondents in their opposing affidavits were coy on the issue of their being non-holders of work permits. They instead simply commented that the criminal allegations were *subjudice* and they were yet to be tried on the criminal allegations. After much hesitation during which Counsel first stated that they did not have such information to hand, they admitted that there was a development which the applicant averred that the third and fourth respondent at the time that she filed this application were in pre-trial detention awaiting trial on charges that they fraudulently transferred the shares of, Liu Dong to themselves they also faced charges of contravening the immigration laws of the country in that have and are engaged in work without a work permit. By the time of the hearing of the application, the 3rd and fourth respondents had been released on bail whilst the criminal charges with be determined in due course by the criminal court. The allegations that the third and fourth respondents did not hold work permits could not be left uninterrogated because it was relevant to the relief sort. If the second, third and fourth respondents did not have permit, quite clearly they could not manage or run the operations of the first respondent. To my mind, the application had to be dealt with urgently because the court cannot condone or be complicit in the perpetuation of crime.

The admission had to be made because I directed that if the permits were available I would adjourn the hearing to allow the respondents and opportunity to produce the permits. I also referred counsel to the provision of r 60 (8) of the High Court Rules 2021 which gives a discretion to the judge to gather information on a matter which is to be determined as an ordinary or urgent chamber application as the matter may be. The rule provides as follows:

‘(8) A judge to whom papers are submitted in terms of subrules (6) or (7) may require the applicant or deponent to an affidavit or any other person who may in his or her opinion be able to assist in the resolution of the matter to appear before him or her in chambers or in court as the case may to him or her seem convenient and provide on oath or otherwise as the judge may consider unnecessary such further information as the judge may request.

(b) require either party’s legal practitioner to appear before him or her to present such further arguments as the judge may require.”

It was after I had directed Counsel to the above rule and suggested that the confirmation of whether or not the respondents were holder of work permits could easily be resolved by my seeking such confirmation from the office of the Chief Immigration Officer, that counsel made

some submissions that the respondents did not hold work permits. It followed that to the extent that the respondents had made admissions that they were managing operations and running the affairs of the first respondents they were doing it so illegally.

In the light of the admissions on the illegality of allowing a foreigner who does not have a work permit to work in gainful employment, the need to remedy the situation becomes clear and obvious. The facts of the application were common cause. The existence of the disputed shareholding in the first respondent was common cause. The only undisputed shareholding was that of the first applicant. The first applicant's *locus standi* to mount the application on her own behalf was not disputed. The respondents disputed that as *curator bonis*, the first applicant had to sue on behalf of the estate of her late husband. It appears to me that the issue can be left for determination as to a final pronouncement on the return date. I am at this juncture inclined to accept that the *curator bonis* has a real and substantial interest in the matter before the court and as such the *curator bonis* may properly ask the court for an order to protect the affairs of the deceased's estate. Rule 60(9) of the High Court Rules 2021 provide as follows

“60 (a) where in an application for a provisional order, the judge is satisfied that the papers establish a *prima facie* case he or she shall grant a provisional order either in terms of the draft filed or as varied.”

I was satisfied that *prima facie*, the first and second applicants had established a *prima facie* case for the relief sought. In short, with the disqualification of the respondents to manage and oversee the operations of the first respondent by reason of their being non- holders of work permits being a *fait accompli*, the need for the intervention in the affairs of the first respondent because obvious and imperative.

The issue of the first applicant appointing directors of the first respondent had a background which was that she claimed to have been the only available shareholders following the incarceration of the third and fourth respondents. The second respondent was and remains outside the courts' jurisdiction. From the deposition of the first applicant founding affidavit in the Magistrates Court Chinhoyi. Case No. 9/2022 which application was produced and submissions thereto made by Counsel. The applicant stated that on 28 December 2021 she convened an extra ordinary meeting at which she appointed the following additional directors of the company.

- a. Herself
- b. Hao Xin
- c. Victor Raul Stanilaus Da Silver

d. Christopher Maunganidze

These are the directors whom she wants the court to be allowed to run the first respondent in the meantime. The first respondent is in turmoil regarding its shareholding and management of operations. Generally speaking the policy of courts is not to interfere in the domestic affairs of a company where the company ought to be able to adjust its affairs through making appropriate resolutions in terms of its constitutive instruments, see *Levin v Selt and Tweeds Ltd* 1951(2) SA 401 (A); *Professor Zvandasara v Godfrey Saungwewe and Ors* HH 108/18.

In casu, the situation of the first respondents' ownership and directorship is novel. As I have indicated the only undisputed shareholding is that of the first applicant. The shareholding of the second, third and fourth respondents are in dispute and the issue is pending in the Criminal Court and in case no HC 166/22. It is important that I refrain or guard against making decisions which compromise both the Criminal Court proceedings and case No. HC 166/22.

The need for the courts intervention in this application is justified. Since the issue of a company's governance is an internal matter, I suggested to the parties that it was in their interest to try and resolve their dispute and reach common ground. The parties welcomed the suggestion and I postponed judgement under reservation. The parties appear to have failed to reach common ground. There has been an exchange of letters between the parties and letters directed to the Registrar wherein the applicants counsel have stated that parties have failed to settle whilst the respondents hold the position that settlement is possible. I cannot continue to hold over judgement as the applicants have insisted on judgement and declared that the parties have failed to resolve the dispute.

The operations of the first respondent have been run by the third and fourth respondents illegally. They cannot be allowed to continue doing so. They cannot continue to exercise directorship powers on account of the pendency of case No. HC 166/22 and on account of the fact that they face criminal presentation for an alleged fraudulent transfer of their claimed shareholding. Their directorship would have arisen from the fact that they are connected to the first respondent through the disputed shareholding.

The situation on the ground is that the company is operating now without an undisputed board of directors. The respondents would require work permits to effectively control and run the company operations. The first applicant is not a director of the first respondent but is a shareholder. She is the only one whose shareholding is not disputed. The second respondent according to the first respondent is the holder of 51% of the shares and would on the account

of the first respondent, a position which the first and second applicants vehemently oppose, be the majority shareholders. Significantly however, the second respondent did not oppose this application. What this position entails is that when one considers the position of the first, second, third and fourth respondents in the defence of the application, the position is that the respondent with 51% of the shares (through disputed by the applicants) has not opposed the position of the first applicant with 26-55% of the shareholding. This places the third and fourth respondents in the minority where on their account (though disputed) they hold respectively 12% and 1% respectively of the shares.

As I have noted, herein before, r 60(a) requires that the judge in an application for a provisional order must grant the provisional order in terms of the draft filed or varied if the papers establish a *prima facie*. It appears to me that the approach of the court is firstly to be satisfied that the papers establish *prima facie* case. If the *prima facie* case is established, then the provisional order must be granted as prayed for. That is the default position. A variation of the provisional order should be given where the order if not varied would be inappropriate for example for illegality.

The third and fourth respondents objected to the first applicant appointment of director to run the company on the basis *inter-alia* that, the first applicant did not act in terms of the articles of association. It is however not possible to act in terms of the articles of association because of the nature of the dispute as to the authenticity of shareholding of the second, third and fourth respondents. I am not inclined to foster. The first applicants appointed the board of directors of the first respondent. To do so would be to inappropriately interfere in the internal management of a company. I must adopt a position which ensures that the company remains operational under the hands or management of its members.

The only members whose membership or shareholding in the first respondent is not disputed is the first applicant. The only practical stop gap measure which I consider proper to order is that the first respondent's management be placed under the first respondent as an interim measure. The first, third and fourth respondents have not assisted the court. They have adopted a position that the application must be dismissed. They did so in the full knowledge that the third and fourth respondents do not have work permit and are facing criminal charges in that regard. It must have been clear to them that they cannot be allowed to run the affairs of the first respondent. Despite the realisation, they did not suggest an interim measure which they considered to be justiciable. Where a party opposes an application and seeks to dismiss without suggesting a variation to the draft order in the event that the opposition fails, then in

my view, it should not complain when the court grants the relief as prayed for. Under the circumstances, I will grant the provisional order as varied in the interim order as follows:

IT IS ORDERED THAT:

“Pending determination of this matter or the conclusion of the action in HC 166/22, the applicants are granted the following relief:

- (1) The first applicant shall manage and conduct the day-to-day operations of the first respondent and shall keep details of the first respondents operations, a register of assets, income and expenditure.
- (2) The applicants, first, second, third and fourth respondents shall not alienate encumber or dispose of any shareholding in the first respondent pending the determination of HC 166/22.
- (3) The factory premises of the first respondent, stand number 16306 Alaska Mine Road, Chirorodziva Heights, Stratchcona Township, Chinhoyi, Zimbabwe shall be kept secure and the first applicant shall engage a security company for the purpose.
- (4) The fifth respondent shall prepare and file with the Registrar of the High Court, a detailed account of the operation and bank accounts of the first respondent, from the date they resumed operations including, inventory of all assets, expenditure, profit/loss, to date of this order. The account shall be given to the first applicant and a copy filed with the Registrar of the High Court within 96 hours of service of this order, failing which, the Registrar of the High Court shall be authorised to appoint an accountant from the court list of accredited accountants to prepare the account aforesaid at the first respondent’s expense.
- (5) The respondents, personally or through their agents, or anyone claiming rights or title through them are interdicted and restrained from preventing the first applicant or her duly appointed agents from having access to the premises of the first respondent located at Stand Number 16306 Alaska Mine Road, Chirorodziva Heights, Stratchcona Township, Chinhoyi, Zimbabwe for purposes of conducting the day to day operations of the first respondent. In the event that the respondents refuse or fail to do so, the Sheriff of the High Court, with the assistance of the Zimbabwe Republic Police shall take all the necessary steps to grant access to the applicant as aforesaid.”

Devittie, Rudolph & Timba, applicants’ legal practitioners
Charamba & Partners, first respondents’ legal practitioners
Pundu & Company, third & fourth respondents’ legal practitioners