

KUDAKWASHE SHANA

And

SMOLLY SHANA

And

SHANANA DISTRIBUTORS

Versus

MANALA LOVENESS MOTSI N.O.

And

NICHOLAS MASHIRI

And

REGISTRAR OF COMPANIES

And

REGISTRAR OF DEEDS

And

**DEPUTY MASTER, HIGH COURT OF ZIMBABWE
BULAWAYO N.O.**

IN THE HIGH COURT OF ZIMBABWE

TAKUVA J

BULAWAYO 10 NOVEMBER 2016 & 13 APRIL 2017

Opposed application

S. Chamunorwa for the applicants

L. Chikwakwa for the 1st and 2nd respondents

TAKUVA J: The applicants obtained a provisional order on 4 February 2016 in the following terms:

Interim Relief

“Pending the determination of this matter, the applicant is granted the following relief:

1. The 1st and 2nd respondent be and are hereby interdicted from acting for and on behalf of the 3rd applicant, and interfering with the 1st applicant’s duties at 3rd applicant.”

Terms of the final order sought are as follows:

“That you show cause to this Honourable Court why a final order should not be made on the following terms:

1. The appointment of the 1st and 2nd respondent as directors of the 3rd applicant be and is hereby declared to be null and void.
2. It be and is hereby confirmed that the directors of the 3rd applicant are 1st and 2nd applicants until such time that they resign their office or are otherwise removed in terms of the law.
3. The 3rd respondent be and is hereby ordered to expunge from her records the names of the 1st and 2nd respondents with regards to their directorship in the 3rd applicant and to reinstate the CR14 dated 24 March 2014.
4. The 1st and 2nd respondents be and are hereby interdicted from interfering in the affairs of the 3rd applicant.
5. All actions carried out by the 1st and 2nd respondents purportedly on behalf of the 3rd applicant be and are hereby declared to be null and void.
6. The 1st and 2nd respondents be and are hereby ordered to pay the costs of this application on an attorney and client scale.”

The 1st and 2nd respondents opposed the confirmation of this order, hence this application. The background to this matter is that the late Samson Shana and his wife Smolly Shana incorporated themselves into a company called Shanana Distributors (Pvt) Ltd, the 3rd applicant herein. The 1st applicant is their son who was appointed a director in the company on 1 January 1006. Mr Shana held 50% shareholding in the company while his wife held the other 50%. It appears that Mr Shana divorced his wife and married the 1st respondent. Upon Mr Shana’s death, the 1st respondent was appointed the executrix dative of the estate of the late Samson Shana on 2 September 2014.

On 12 November 2014, the 1st and 2nd respondents altered the 3rd applicant’s CR14 by removing 1st applicant’s name and inserting their names as 3rd applicant’s directors. The applicants contended that the 1st and 2nd respondents’ actions are wrongful and fraudulent. They

also argued that there is no other remedy available which is as effective as an interdict and that the balance of convenience favours the granting of the relief sought than its refusal.

First and second respondents who were self actors opposed the confirmation of the final order. However on the date for the hearing they were represented by Mr *Chikwakwa* who filed heads of argument conceding that the 1st and 2nd respondents cannot lawfully assume directorship of the 3rd applicant. He agreed that the final order be granted as prayed in paragraph 1, 2 and 3. As regards the 4th and 5th paragraphs, he argued that they were too wide and loosely worded. Finally, he argued that there is no justification at all for the 1st and 2nd respondents to pay punitive costs.

Mr *Chamunorwa* conceded that paragraph 4 was widely worded. He submitted that it be amended by the insertion of the word “unlawfully” to accommodate the lawful activities of 1st respondent as the executrix dative of late Samson Shana’s estate. At the same time, that will ensure that 1st and 2nd respondents do not interfere with the lawful duties of the 1st and 2nd applicants as 3rd respondent’s directors. He submitted further that paragraph 5 is not superfluous and should remain as prayed the final order.

As regards costs, Mr *Chamunorwa* insisted that the 1st and 2nd respondents be ordered to pay costs of this application on an attorney and client scale because in his view they fraudulently altered the CR14 for their own personal benefits. It was further argued that the respondents’ concession is not sufficient to disentitle the applicants from an award of costs at a punitive scale. He relied on *Kenias Mutyasira v Barbra Gonyora NO & Ors* HH-180-14 and *Jicama 194 (Pty) Ltd and Karen Lotter NO & Anor* 6094/2007.

On the other hand Mr *Chikwakwa* argued that there is no need for the 1st and 2nd respondents who were self actors to be ordered to pay punitive costs because 1st respondent had been lawfully appointed and erroneously believed that she could run 3rd applicant without 1st applicant’s interference. Also, the fact that the final order had been widely drafted necessitating argument disentitled applicants to any order of costs as they are equally culpable.

Costs are in the discretion of the court and an award of attorney and client costs will not be granted lightly as the court looks upon such orders with disfavor and is loathe to penalize a person who has exercised a right to obtain a judicial decision on any complaint such party may have – see *Mudzimu v Chinhoyi Municipality* 1986 (3) SA 140 (ZH).

It is trite that the grounds upon which the court may order payment of attorney-client costs include, where a party has been guilty of dishonesty or fraud or had vexatious, reckless and malicious or frivolous motives or committed grave misconduct in the conduct of the case.

In casu, although the alteration of the CR14 could be some evidence from which fraud or recklessness may be inferred, there is a real possibility that the 1st respondent acted *bona fide*. The amendment or alteration was done after 1st respondent had been properly and lawfully appointed executrix. Quite clearly she overstepped her jurisdiction but her intention, if the background of the case is anything to go by was to protect the interests of the rest of the beneficiaries. Also, the fact that as soon as 1st and 2nd respondents got legal advice they consented to the granting of the final order in respect of those clauses not widely drafted, should weigh heavily in 1st and 2nd respondents' favour.

For these reasons, I will grant the final order in the following terms:

1. The appointment of the 1st and 2nd respondents as directors of the 3rd applicant be and is hereby declared to be null and void.
2. It be and is hereby confirmed that the directors of the 3rd applicant are 1st and 2nd applicants until such time that they resign their office or are otherwise removed in terms of the law.
3. The 3rd respondent be and is hereby ordered to expunge from her records the names of the 1st and 2nd respondents with regards to their directorship in the 3rd applicant and to reinstate the CR14 dated 24 march 2014.
4. The 1st and 2nd respondents be and are hereby interdicted from unlawfully interfering in the affairs of the 3rd applicant.

5. All actions carried out by the 1st and 2nd respondents purportedly on behalf of the 3rd applicant be and are hereby declared to be null and void.
6. The 1st and 2nd respondents be and are hereby ordered to pay the costs of this application on the ordinary scale.

Messrs Calderwood, Bryce Hendrie & Partners, applicant's legal practitioners
Sansole & Senda, 1st and 2nd respondents' legal practitioners