DR. JANE MUTASA
versus
TELECEL INTERNATIONAL
and
TELECEL ZIMBABWE (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 26 June 2014 and 2 July 2014

Opposed application

C Venturas, for the applicant
First respondent in default
R.M Fitches, for the 2nd respondent

MATHONSI J: The bulk of what the applicant relies upon in making out a case for the relief that she seeks is contained in Heads of Argument filed by her counsel. It is not only improper but also wrong, utterly absurd and completely unacceptable to purposely avoid presenting evidence in affidavits which would put the other party on guard and enable that party to respond to such evidence in its opposing affidavit, in the forlon hope of influencing the court by placing it in arguments. It is an undesirable ambush.

In this application the applicant seeks an order declaring all decisions of the board of directors of the second respondent, a company incorporated in Zimbabwe, made from 19 March 2010 to be a nullity and of no legal effect. She also seeks a declaration that all orders given to the second respondent and an entity known as Empowerment Corporation (Pvt) Ltd from 19 march 2010 to be a nullity on the pain of costs on the scale of legal practitioner and client.

In her founding affidavit, the applicant claims to be the chairperson, director and shareholder of the second respondent. Together with other Zimbabwean citizens, whose identities she does not disclose, the applicant claims to have formed Empowerment Cooperation (Pvt) Ltd which went into a joint venture with the first respondent to operate a telecommunications business in Zimbabwe. This arrangement led to the incorporation of

Telecel Zimbabwe (Pvt) Ltd, the second respondent, as a vehicle through which that business was run. There are only 2 shareholders of the second respondent, namely the first respondent and Empowerment Corporation (Pvt) Ltd, she being a shareholder of the latter.

The first respondent and Empowerment Corporation (Pvt) Ltd entered into a shareholders' agreement governing the management of the second respondent. In particular Empowerment Corporation (Pvt) Ltd had the responsibility of chairing all meetings of the board of directors. The applicant states that one James Makamba was the first chairperson of the board of directors but when he was incarcerated, she was appointed the acting chair gravitating towards being the substantive chairperson automatically when Makamba left the country and became a fugitive from justice.

At a meeting of the board of directors of the second respondent held in London on 19 March 2010, a resolution was taken suspending the applicant from the position of chairperson, the position of director and suspending her benefits as a director. In her view that decision is a nullity because there was no quorum in that the meeting was not chaired by a representative of Empowerment Corporation (Pvt) Ltd. She does not state who chaired it. The directors of the first respondent cannot make decisions binding upon her or the second respondent.

It is not clear from the papers whether the application was served upon the first respondent. It has not filed opposition but the second respondent has. In its opposing affidavit deposed to by Aimable Mpore, its Managing director, the second respondent disputes that the applicant ever held the position of chairperson of the second respondent, insisting instead that she was only an acting chairperson until her suspension on 19 March 2010. She has never been a shareholder of the second respondent which has only 2 shareholders, the first respondent and Empowerment Corporation (Pvt) Ltd.

Referring to clause 5.1 of the Shareholders Agreement entered into between the first respondent and Empowerment Corporation (Pvt) Ltd, Mpore maintained that the chairperson of the second respondent proposed by the latter in terms thereof is James Makamba who has always held that position while the Managing Director was proposed by the first respondent in accordance with that provision.

Mpore stated that the applicant was properly notified of the board meeting but chose not to attend. The meeting was properly constituted in terms of clause 6.5 of the Shareholder's Agreement and for that reason the resolution passed was legal. It suspended the applicant from her acting position of chairperson and as director although it did not suspend

her benefits which she continues to enjoy. In order to be valid, resolutions of the board require the presence, in person or by proxy, of half the directors of which at least one director representing each shareholder must be in attendance in terms of Clause 6:5. As the provision does not require the chairperson to be one of the representatives at all times, there was nothing wrong with the constitution of the meeting.

What is clear is that the applicant seeks to impugn the meeting of 19 March 2010 in terms of the Shareholders Agreement between the first respondent and Empowerment Corporation (Pvt) Ltd signed on 11 June 1997. This is the basis of the application in both the founding affidavit and the answering affidavit. The applicant's case then loses track in Heads of Argument filed by her counsel, in which new evidence is improperly introduced.

In those Heads of Argument, it is alleged that Makamba was charged with 11 counts of contravening sections of the Exchange Control Act [*Cap* 22:05]. He was declared a specified person in terms of s 6 of the Prevention of Corruption Act [*Cap* 9:16]. He was removed from the position of chairperson of the second respondent's board. The applicant was given short notice to attend the London meeting and could not do so because she was on bail whose conditions required that she surrenders her passport. It was impossible for her to obtain a visa to the United Kingdom. For these reasons the meeting was designed to prevent the applicant from attending while according a fugitive from justice, Makamba, an opportunity to attend and chair the meeting as he was the only alternative chairperson in the absence of the applicant. The meeting was contrary to public policy and a fundamental violation of Zimbabwean legal order.

None of this is contained in the affidavits and it is amazing that counsel saw it fit to include those allegations in Heads of Argument, when there is no shred of evidence to sustain them. The allegations should have been made in the founding affidavit to accord the respondents an opportunity to respond to them and generally to put the respondents on guard as to what case they faced. Heads of Argument are not evidence and counsel cannot be allowed to lead evidence from the bar as it were: *Angeline Enterprises (Pvt) Ltd* v *Albco (Pvt) Ltd* 1990 (1) ZLR 6 (H) 11 E.

Mr *Venturas* for the applicant could not defend the inclusion of evidence in Heads of Argument. He only maintained that even if it were to be ignored, the applicant's case stands firm by virtue of what is contained in the affidavits.

Where allegations are contained only in Heads of Argument and not in evidence submitted on behalf of a party, in the form of affidavits deposed to by witnesses, the court

will simply ignore such evidence or allegations as I intend to do in this matter: *Kanyanda* v *Muzhawidza* 1992 (1) ZLR 229 (S) 231 C. The logic of that position is pretty obvious. It is that the party against whom such allegations are made is entitled to an opportunity to rebut them.

Coming back to the Shareholders Agreement of the parties, it is the one which governs the conduct of meetings held by the board of directors. It has been argued on behalf of the applicant that she has a right to remain as chairperson and as a director of the second respondent and that the respondents have a binding obligation under the shareholders agreement to reinstate her. As the only legally recognised member of Empowerment Corporation (Pvt) Ltd, the other shareholder of the second respondent after the first respondent, Makamba having absconded, she should be allowed to assume those roles in fulfilment of the Shareholders Agreement.

When this was drawn to Mr *Venturas*' attention, who surprisingly did not address me on the point taken by Mr *Fitches* for the second respondent that the matter should have been referred to arbitration by virtue of Clause 17 of the shareholders agreement, he took the view that the said provision related only to a dispute among shareholders. The dispute that the applicant seeks to have determined by this court is one between directors. I do not agree. In fact that is a classic case of a distinction without a difference which also ignores the reality that a director is merely an employee of a company bringing into play another point taken by Mr *Fitches* that if approached from that perspective, the matter would become a labour matter in which this court would not enjoy jurisdiction.

I do not intend to be bogged down on that at all. To the extent that the applicant seeks to enforce the shareholders agreement, she cannot escape the imperatives of that agreement. She must submit herself to the provisions of the agreement. She cannot pick and choose what provisions she would like to be upheld. Indeed the applicant anchors her application on Art 5 of the Shareholders Agreement which reads:

> "5.1. Unless the shareholders unanimously agree otherwise:
>
> (a) The chairman of Telecel Zimbabwe (Pvt) Ltd shall be proposed by EC;
> (b) The Managing Director of Telecel Zimbabwe (Pvt) Ltd shall be proposed by TIL.
>
> 5.2. TIL shall assist the Managing Director for the daily management of the Company in accordance with the provisions of the Management Agreement attached hereafter as Annex A as previously approved by the parties in the Pre- Bid Protocol."

The same Shareholders Agreement has an arbitration Clause, being Art 17. It reads:-

"- This Agreement shall be governed by and construed in accordance with the laws of Zimbabwe.

- All disputes which could arise among the Shareholders relating to this agreement shall be submitted to arbitration in accordance with the Arbitration Act [*Cap* 7:02].

The arbitration shall be conducted by one sole arbitrator appointed jointly by the shareholders. Such arbitrator shall have an acknowledged experience in the telecommunication field. In case the parties to the dispute could not agree on the choice of arbitrator, either party may, on giving not less than seven (7) days notice to the other, request the Commercial Arbitration Centre in Harare (or any successor to that Centre) to appoint an arbitrator.

Unless the parties to the dispute were to agree otherwise:

1) The arbitration shall take place in Harare;
2) The arbitration shall be conducted in English;
3) The costs of arbitration shall be borne by the losing party.
   The parties hereto irrevocably agree that the decision in those arbitration proceedings:

- shall be final and binding upon them
- shall be carried into effect;
- may be made an order of any court of competent jurisdiction."

Just how the clear provisions of Art 17 could have escaped the attention of the applicant and indeed counsel is difficult to fathom. This court is not in the habit of making contracts for the parties who shall forever remain free to contract as they please. It is a celebrated principle of the concept of sanctity of contract that when the parties have so contracted, the contracts made freely and voluntarily shall be held sacred and enforced by the courts, as I propose to do *in casu*: *Delta Operations (Pvt) Ltd* v *Origen Corp (Pvt) Ltd* 2007 (2) ZLR 81 (S) 86 F-G.

The applicant had no business bringing this matter to this court. It should have been referred to arbitration. No meaningful argument has been advanced to justify the route that the applicant has taken contrary to the dictates of the covenant governing the relationship between the parties. Having taken a wrong turn, the applicant must face the consequences of her actions.

Accordingly, the application is dismissed with costs.

Messrs Venturas & Samukange, applicant's legal practitioners
Messrs Scanlen & Holderness, second respondent's legal practitioners.