

DOUGLAS MAMVURA
and
HEDGEHOLD TRADING (PVT) LIMITED T/A MANA BRAND
and
GROSMA INVESTMENTS (PVT) LIMITED
versus
ISRAEL TANGWENA
and
TONDERAI MUOCHA
and
GLADYS TUSO
and
OPEN TRIBE FOUNDATION
and
NEVER CHIPENZI
and
PETER SEPE
and
INNOCENT GURUPIRA

IN THE HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 16 July 2014 and 23 July 2014

Urgent chamber application

O. Matizanadzo, for the applicants'
I. Mataka, for the respondents'

MATANDA-MOYO J: This is an urgent application for a spoliation order, and an interim order in the following:

- 1) That respondents and any persons acting on their behalf immediately restore to applicants possession of second applicant's food processing factory situated at food processing factory situated at number 121 Citroen Road, Cnr Martin Drive Msasa pending the hearing and final determination of this matter,
- 2) That respondents and any persons acting on their behalf be temporarily restrained from:
 - 2.1. unlawfully interfering with the second applicant's possession, operation and management of its food processing factory and business

- 2.2. communicating in any manner whatsoever with second applicant's bakers, employees, customers and business and/or trading partners;
 - 2.3. communicating any prejudicial information concerning first and second applicants
 - 2.4. unlawfully interfering with the first applicant's rights as a shareholder, director and chairman of second applicant.
 - 2.5. holding themselves as the representatives or agents of the second applicant
 - 2.6. entering the second applicant's premises.
3. That in the event that the respondents or any other people acting on their behalf fail to comply with 1 and 2 above, the Sheriff or his lawful Deputy with the assistance of the Police should be so require be and are hereby ordered to take all necessary steps to ensure that the provisions of paragraphs 1 and 2 are complied with.

The first applicant alleged that he is the major shareholder and director in both the second applicant and third applicant. He claims that in that capacity he has authority to represent the second and third applicants.

In *Mall (Cape Pty) Ltd v Merino* BPK 1957 (2) SA 347 (c) @ 351G-352B WATERMEYER J said;

“There is a considerable amount of authority for the proposition that where a company commences proceedings by way of petition, it must appear that the person who makes the petition on behalf of the company's duly authorized by the company to do so (see for example *Lurie Brothers Ltd v Arcaches* 1927 NPD 139, and other cases mentioned in Herbestein and Van Winsen, *Civil Practice of the Superior Courts of South Africa* at pp37, 38). This seems to be a salutary rule and one which should apply, also to notice of motion proceedings where the applicant is an artificial person. In such cases some evidence must be placed before the court to show that the applicant has duly resolved to constitute the proceedings, and that the proceedings are instituted at its instance---. The best evidence that the proceedings have been properly authorize would be provided by an affidavit made by an official of the company annexing a copy of the resolution but I do not consider that that form of proof is necessary in every case. Each case must be considered on its own merits and the court must decide whether enough has been placed before it to warrant the conclusion that it is the applicant which is litigating and not same unauthorized person on its behalf.---.”

The deponent of the affidavit has not bothered to provide proof that he was authorized to represent the second applicant and third applicant. He purports to be the majority shareholder of the second applicant, a fact hotly disputed by the respondents. There is no proof before me that the first applicant is the alter ego of the second and third applicants and there is therefore no

proof that the first applicant is authorized to bring any action on behalf of second and third applicants. What also became apparent during the hearing was that some of the respondents are directors, and shareholders of second applicant. The first respondent for instance is infact the Managing Director of the second applicant under whose control and possession is the business of the second applicant. The applicant's counsel conceded that indeed it would be in appropriate to grant an order of spoliation or non-interference against the second applicant as regard the first two respondents and the other respondents who are employed by the second applicant.

I am not impressed in the manner in which the first applicant has presented this application. He omitted to place before the court such pertinent facts that some of the respondents are indeed directors of the second applicant. The first applicant has not been candid with this court. As reiterated in many cases a person who intends to get assistance from the courts has an obligation to be candid with the courts. The first applicant has failed to do so and the courts are reluctant to come to the rescue of persons who acts in that manner. I am not convinced that the first applicant is authorized to represent the second applicant and third applicant as there is no resolution to that effect. The only applicant who is properly before me is therefore the first applicant.

In any case the fight here is amongst the directors of the second applicant who are fighting for the control of second applicant. None of the directors can in a matter as this purport to act on behalf of the second applicant.

The first applicant is abusing this court by trying to gain control of second applicant by way of this application. The first applicant must approach the court by way of action to determine the shareholding of the second applicant, which is the real issue for determination. Granting the order sought is tantamount to granting the control of the second applicant to first applicant who was not in control of the company.

There is no proof before me that first applicant was in possession of second applicant and that he was unlawfully ousted. See *Yeko v Quang* 1973 (4) SA 735 AD@739. It is not appropriate therefore for first applicant to seek the order he seeks.

Accordingly the application fails and is dismissed with costs.

Matizanadzo & Walhurst, applicants' legal practitioners
Chambati Mataka & Makonese, respondents' legal practitioners