SINIKIWE MPARUTSA
versus
ALVIN NYARADZAI MPARUTSA
and
CLASSIC SUPER FOODS (PRIVATE) LIMITED
and
THE REGISTRAR OF COMPANIES

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 24 October 2016 & 9 November 2016

Opposed Application

T Mpofu, for the applicant
S Zhuwarara, for the 1st & 2nd respondent

DUBE J: This application is brought in terms of s118 of the Companies Act, Chapter 24; 03, [hereinafter referred to as the Act]. The applicant seeks an order declaring her to be a 50 % shareholder in the second respondent, an order directing the second respondent to rectify its share register to reflect that position and an order declaring that a notice issued by the first respondent convening an extra ordinary general meeting be declared *null and void* and of no legal effect.

The applicant and the first defendant are married to each other and are in the process of divorcing. The second respondent is a company at the centre of this dispute. The third respondent is the Registrar of Companies and is cited as a nominal respondent. The third defendant is not defending the application.

The applicant's case is based on the following synopsis. The second respondent is Classic Super Foods [Pvt] Ltd, [hereinafter referred to as the company]. The shareholders of the company are applicant and the first respondent and both own 50 % shareholding in the company. The couple are the directors of the company which is run as a family business. Both the first respondent and applicant do not hold share certificates nor is there a share register as is required by the law. The applicant contends that the first respondent has no share certificate reflecting that he holds the entire shareholding in the company. She has filed a resolution signed by both herself and the first respondent authorising the company to borrow money. The resolution records that she and the first

respondent each own a 50% stake in the company. She maintains that the resolution is proof that she owns 50% of the shares.

The applicant avers that she has successfully been solely running the affairs of the business since 2013 whilst the first respondent was involved in various failed ventures. The first respondent has returned to the company and is trying to oust her. Squabbles between the parties have put a strain on the marriage resulting in her filing for divorce. She submitted that the first respondent has in his capacity as company secretary used a wrong procedure by unilaterally convening an extraordinary general meeting without calling a board meeting or consulting her as the other director in an attempt to deprive her of her shareholding. She prays for an order declaring her a 50% shareholder in the company, the third respondent compelled to rectify the share register so that it reflects that she is a 50% holder of shares in the company and an order declaring the extra ordinary meeting held a nullity and of no legal effect.

The first and second respondents defend the application. The respondents maintain that the first respondent is a 100% shareholder in the company. They deny that the first respondent ever sold, donated or transferred any shares to the applicant. They challenged the resolution that the applicant relies on as proof that she is a shareholder as fictitious. The first respondent disputes that he orally conceded that the applicant is a 50% shareholder. The respondents challenged her to produce her shareholding certificate as proof of her ownership of the shares. The respondents maintain that the applicant had no entitlement to be invited to the extraordinary meeting as the notice was addressed to shareholders, which she is not. Having challenged the applicant's assertion that she is a holder of a 50% stake in the company, the respondents urged the court to dismiss the application on the premise that there are material disputes of fact that existing on the papers which the court cannot resolve without a trial.

The approach of the courts to factual disputes that appear in motion proceedings was succinctly put in *Tamarillo (Pvt) Ltd v B.N. Aitken (Pvt) LTD* 1982 (1) SA 398. In that case CORBETT J said the following,

> "A litigant is entitled to seek relief by way of notice of motion. If he has reason to believe that facts essential to the success of his claim will probably be disputed he chooses that procedure at his peril, for the court in the exercise of its discretion might decide neither to refer the matter for trial nor to direct that oral evidence on the disputed facts be placed before it, but to dismiss the application. But if, notwithstanding that there are facts in dispute on the papers before it, the court is satisfied that on the facts stated by respondent, together with the admitted facts in the applicant's affidavits, the applicant is entitled to the relief, it will make an order giving effect to such finding, with an appropriate order as to costs".
> *See also Masukusa* v *National Foods Ltd and Anor* 1983 (1) ZLR 232 (H).

In Herbstein &Van Winsen, *The Civil Practice of the Superior Courts of South Africa 3rd ED* at the foot of p61 the learned authors state as follows,

> "Courts will only order that a matter brought by way of motion proceedings be dealt with by way of rial proceedings or be dismissed if there is a real dispute of fact between the parties".

Courts will decline to deal with a matter on application where a dispute of fact arises from the papers filed. However, courts are encouraged to endeavour to resolve the disputes without the hearing of evidence if the court is satisfied that there is no genuine dispute of fact on the papers. In deciding what approach to take, the court must, consider whether in reality there is a dispute of fact and if so, if it is material and if the application can proceed without doing an injustice to either party, *see Jose and as* v *Shah 1972 (1) RLR 137: Zimbabwe Bonded Fibreglass (Pvt) Ltd* v *Peech* 1987 (2) ZLR 338. *CCSU* v *Minister of the Civil Service 951. See Bercorp (Pvt) Ltd Nyoni 1992* (1) ZLR 352. In *Room Hire* v *Jeppe Street Mansions* 1949(3) SA 115 said the following:

> "A bare denial of applicant's material averments cannot be regarded as sufficient to defeat applicant's right to secure relief by motion proceedings in appropriate cases. Enough must be stated by respondent to enable the court to conduce a preliminary investigation ..... and to ascertain whether the denials are not fictitious, intended merely to delay the hearing (or for some other purpose.) The respondent's affidavits must at least disclose that there are material issues in which there is a *bona fide* dispute of fact capable of being decided only after *viva voce* evidence has been heard, see also *Prisloo* v *Shaw* 1938 AD 570. It is necessary to make a robust common sense approach to a dispute on motion as otherwise the effective functioning of the court can be hamstrung and circumvented by the most simple and blatant stratagem."

The approach is that the court must not hesitate to decide an issue of fact on an affidavit merely because it may be difficult to do so. The court is required to consider whether in reality there is a dispute of fact and if so, if it is material. A robust approach is encouraged with courts being encouraged to "endeavour to resolve the disputes without the hearing of evidence if the court is satisfied that this can be done without doing an injustice to either party" per Lord Diplocks in *CCSU* v *Minister of the Civil Service 951.*Where there is no genuine dispute of fact on the papers, the courts are encouraged to adopt a robust approach and consider the dispute on the papers before it.

In determining whether there is a real or material dispute of fact between the parties in this case, it is important to understand the nature of a share, how it is acquired and transferred from one person to another. The court will then examine the evidence before it and decide if it is capable of resolving the dispute over ownership. The authors of *Hahlo's South African Company Law through the cases* at p148 define a 'share' as a share in the capital of a company. They state that it constitutes property which is capable of being bought, sold, mortgaged or bequeathed. Further, that

it is movable property which is transferable in the manner provided for by the Companies Act and the articles of the company.

Our Companies Act provides for registration and transfer of shares. Section 98 provides that shares are movable and are transferable in a manner provided by the articles of the company. In order for a person to show that he holds shares in a company he should do so by way of documentary proof. Every company is required at law to keep a register of allotment of shares . Proof of registration of the shares is by way of entries in the Register of Deeds. Since shares are property, they are both registrable and transferable. Once shares have changed hands and have been transferred, a share certificate is issued. In practice, evidence of ownership of shares is reflected in the following documents, the memorandum of association, articles of association, CR2 returns showing the shareholders of a company, a share certificate showing the shareholding and a share register.

Where a share register does not reflect correct information regarding the ownership of shares an aggrieved party is entitled to make an application for rectification of the register. The court derives the power to rectify a share register from s118 of the Act. The section118 reads as follows,

> "**118 Power of court to rectify register**
> (1) If—
> (*a*) the name of any person is, without sufficient cause, entered in or omitted from the register of members of a company; or
> (*b*) default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member; the person aggrieved or any member of the company or the company may apply to the court for rectification of the register.
> (2) Where an application is made under this section, the court may either refuse the application or may order rectification of the register and payment by the company of any damages sustained by any party aggrieved.
> (3) On an application under this section the court may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members or between members or alleged members on the one hand and the company on the other hand, and generally may decide any question necessary or expedient to be decided for rectification of the register."

A number of South African cases have defined the word ''rectification'' in the context of s115 of the South African Companies Act 1973 . In *Orr* v *Hill 1929 TPD 885,* the court in reference to s115 of the South African Companies Act which is worded in similar fashion to our s118, defined the word 'rectification' as meaning,

> "putting right something which, at the present time, is wrong on the register…But in my opinion, we should not place that narrow construction on the word. I think the word 'rectification' covers an alteration of the register so as to make it reflect the state of affairs which the applicant is entitled to claim that it ought to reflect".

The approach of the South African courts to disputes of fact in matters involving rectification of the share register where there is a dispute over ownership of shares was discussed in *Botha* v *Fick 1995(2) SA 750 (A).*In that case, the court drew a distinction between title to disputed shares and title to be on the register. See also *Jeffrey* v *Pollack and Freemantle* [1938] AD 1 where the court suggests that a court dealing with an application for rectification of the register of members should confine itself to dealing with title to be on the register and leave the question of title to shares to be dealt with in a separate trial. The case of *Verrin Trust & Finance Corporation (Pty) Ltd* v *Zeeland House (Pvt) Ltd* 1973 (4) SA 1 (C), is another case where the court was faced with a challenge to title to shares and title to be on the register. The court remarked as follows,

> "In so far as the difficulty and complexity in this matter relates to the question of title to the shares(as distinct from title to be on the register),I consider that , upon the peculiar circumstances of this case , this is a relevant factor in exercising a discretion against the grant of an order on motion."

The court held that the issue of title is a matter of considerable difficulty and complexity and is not one that is amenable to a decision on motion. The approach taken is that it is undesirable where title to shares is challenged in an application for rectification, to deal with such a challenge on motion. The courts have tended to shy away from deciding the issue of title to shares in an application. As a result most matters involving rectification of the register involve a challenge to title to shares and are dealt with by way of trial.

Section 118 of the Companies Act permits rectification of the record where the name of a particular person is entered or omitted to be mentioned in the register of persons without sufficient cause. Secondly, where there is default or delays in recording the fact of any person ceasing to be a member. The section also allows a court to make a determination regarding the title of any person to have his name or title entered in the register or any other question necessary for rectification of the register. The court's power to rectify the register of in terms of s 118 is discretionary. The court has a discretion to deal with the question of title to shares in 118 (3).The court is also empowered to exercise its discretion in other situations not specified under the section. This course is evident from the language used in section 118(3) which permits the court to deal with "any question necessary or expedient to be decided for the rectification of the record."

The term 'rectification' as used in section 118 has a broad meaning. It entails much more than just putting right something which is wrongly recorded on the register. Rectification of the register in this section includes altering the register to make it reflect the correct and prevailing

situation. Section 118 empowers a court dealing with an application for rectification of the register to decide in its discretion any question relating to the title of any person to have his name entered or omitted from the register. The section entitles the court to deal with both the questions of title to the shares and that regarding rectification of the share register. The objective of the section is to ensure that the register reflects the correct entries. A court dealing with an application for rectification may be required to deal with issues regarding title to be on the register. The question of ownership of the shares and rectification of the share register are interrelated and cannot be separated. Title to shares is a question necessary to be decided before the rectification of the register where there is a challenge related to it. Rectification of the register does not only involve putting something correct which is incorrectly reflected in the register. In any case where title to shares sought to be registered is put in issue, the court is required to dispose of the question of title to shares first before it considers rectification of the register. Clearly, a court faced with an application for rectification of the record is not confined to correcting errors on the register.

The fact that the court is clothed with wide discretionary powers in terms of s118 to entertain an application for rectification, does not mean that the court should do so in the face of glaring disputes of facts appearing on the papers. The question of ownership of shares is a question of fact. The difficulties associated with determining an issue related to title to shares on motion where a dispute of fact has been raised cannot be underestimated. A court faced with a challenge to title to shares in an application to rectify a register is entitled, where material disputes of fact arise which it is incapable of resolving on the papers, to refuse to deal with the application and dismiss it. An applicant is not entitled to rectification of a register where there is a dispute of fact regarding his title to the shares.

The applicant placed reliance on a resolution made by the parties when the company obtained a loan for the proposition that she owns 50 % of the shares in the company. The applicant argued that the resolution signed by both the applicant and the second respondent reflects that the two each hold 50% shares in the second respondent. Nothing else was produced in support of the applicant's case. The applicant's case is compounded by the fact that there are no sufficient statutory documents in support of the share structure of the company. It was submitted that the applicant is holding onto company documents which she is refusing to release and failed to attach to her application. The applicant has decided to be elusive and hide information from the court. It is unfeasible for the applicant to prove the acquisition, ownership and transfer of the shares in the absence of the share register, articles and memorandum of association of the company and other related documents. A resolution by a company to obtain a loan where it records out of the blue

that a patty owns shares does not suffice as proof of acquisition of such shares. This document is the basis of the dispute. More needs to be shown to prove ownership of the shares. The details given in this application are very scanty making it difficult to resolve the dispute between the parties. Had the court been provided with all the documents related to the company, it would have been easy for the court to adopt a robust approach and resolve the matter on the papers. That course isn't possible in the circumstances of this case.

The applicant submitted that the resolution is a public document and constitutes an announcement to the whole world of the applicant's ownership of the shares. A resolution of company directors to obtain a loan with a mere statement that the directors listed own shares in the company does not at law suffice as proof of acquisition, ownership and transfer of shares. Such a resolution cannot be a proper basis for the assertion that the applicant owns the shares. The resolution does not transfer shares nor does it translate to a registration of real rights which are registrable in the Deeds Registries Act. Being that the resolution does not confer real rights, it cannot be a public document that constitutes an announcement to the whole world of the applicant's ownership of the shares. The applicant is required to show more than the resolution to prove her ownership of the shares. This approach is well enunciated in the case of *Takafuma* v *Takafuma* 1994 (2) ZLR 103 (S).

Rectification of a register can only be carried out where an applicant has shown an entitlement to the shares. There clearly exists a real dispute of fact on the papers especially in the face of a contention that the resolution is fictitious. The dispute is genuine and material and the court has difficulties in trying to resolve the dispute on the basis of the papers filed. This application raises intricate questions regarding title to shares. I must conclude that the resolution produced is not on its own sufficient to equip the court to resolve the question before it. The dispute requires to be further explored in a full trial. The court is ill-equipped to resolve the dispute regarding the ownership of shares on the basis of the papers filed before it.

The court has in its discretion decided to decline to entertain the dispute considering the manner in which the dispute was presented. The justice of this case will not be met by dealing with this matter on the papers.

In the result it is ordered as follows:

a) The application is dismissed with costs.

Kantor & Immerman, applicant's legal practitioners
Puwayi Chiutsi, 1st & 2nd respondent's legal practitioners