

CLEVER MANDIZVIDZA N.O
versus
GREGORY KADZURA
and
I & L BUSINESS CONSULTANTS
and
MASTER OF THE HIGH COURT N.O
and
THE REGISTRAR OF COMPANIES N.O

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 20 & 23 February 2018

Opposed Matter

Miss K Mutezo, for the applicant
First respondent *in person*
Second respondent *in person*

ZHOU J: The applicant instituted the instant court application in his capacity as Executor Dative of the Estate of the late Jonathan Kadzura. The applicant is seeking an order in the following terms.

“IT IS DECLARED AND ORDERED THAT

1. The purported allotment of shares of Goodstorm Services (Pvt) Ltd on 1 January 2016 be and is hereby declared to be in violation of the Companies Act [Chapter 24:03] as well as in violation of the Articles of Association of Goodstorm Services (Pvt) Ltd.
2. The purported allotment of shares to the first respondent in the CR2 Form dated 14 December 2016 be and is hereby declared a nullity.
3. The estate of Jonathan Kumbirai Kadzura be and is hereby declared the lawful holder of all the shares in Goodstorm Services (Pvt) Ltd.
4. The 1st and 2nd respondents jointly and severally be and are hereby ordered to pay the applicant’s costs of suit on the attorney client scale.”

The application is opposed by the first and second respondents who appeared in person to argue the matter.

At the hearing of the matter I raised the issue of the material disputes of fact which are apparent from the papers and whether these could be resolved on the papers. Miss *Mutezo* for the applicant argued that the disputed facts were not material as this case falls to be decided on only one issue which, according to her, is that the first respondent was a minor when the Late Jonathan Kadzura who was his father appointed him as director of the company, Goodstorm Services (Pvt) Ltd on 12 November 2009. The applicant, through his legal practitioner, argued that as at that date the first respondent was 16 years old. Miss Mutezo made no submissions on the other issues raised in the papers, choosing to tie her ship to the single anchor that the minority of the first respondent at the time of his appointment as director invalidated everything that followed from his appointment or was performed by him.

The problem with the approach taken by the applicant is that the alleged minority of the first respondent at the time that he was appointed director is not the cause of action upon which the application is founded. Put in other words, the basis of the application or of seeking the declaratory relief set out in the draft order is not the minority status of the first respondent. It is the settled position that in application proceedings the application stands or falls on the cause of action as set out in the founding affidavit. Reynolds J in *Mobil Oil Zimbabwe (Pvt) Ltd v Travel Forum (Pvt) Ltd* 1990 (1) ZLR 67 (HC) at 70C –D stressed this position of the law as follows:

“It is a well established general rule of practice that new matter should not be raised in an answering affidavit: the cause of action must be fully set out in the founding affidavit. This has been the settled practice of our courts at least since the matter was adverted to in *Coffee, Tea and Chocolate Co Ltd v Cape Trading Co* 1930 CPD 81 at 82.”

See also *Mangwiza v Ziumbe N O & Anor* 2000 (2) ZLR 489 (S) at 492 D – G.

In casu the issue of the invalidity of the appointment of the first respondent as a director of Goodstorm Services (Pvt) Ltd is not raised in the founding affidavit. It is not the basis upon which the application is predicated, which probably explains why even the draft order does not seek a declaration that the appointment of the first respondent as director was invalid. The issue is raised for the first time in the applicant’s answering affidavit. It is also raised in the applicant’s heads of argument. That cannot be permitted to happen because the respondents have not been allowed to

respond to that complaint but, more significantly, because the applicant's cause of action must be contained in the founding affidavit.

There are issues which would call for determination by the court concerning the effect of the minority status of the first respondent at the time that he was appointed a director. Submissions made from the bar by the second respondent who was involved together with the late Jonathan Kadzura and by the first respondent himself might raise the issue of whether the first respondent was an emancipated minor. The question of whether an emancipated minor can be authorised to act as a director of a company was left unanswered in *Ex parte Velkes* 1963 (3) SA 584 (C) at 586H; See also H.S Cilliers et al, Cilliers and Benade *Corporate Law 3rd Ed* p 124.

On the papers filed there are material disputes of fact which cannot be resolved on the papers. The disputes relates to whether the acquisitions of shares by the first respondent and the appointment of the second respondent as a director were done in accordance with the law. The first respondent contends that these were sanctioned by a meeting of the board of directors of the company concerned. The applicant avers otherwise on the basis that he failed to find evidence of how the shareholding and directorship were altered. These are matters that can only be resolved by weighing evidence in a trial.

Thus the issue of the effect of first respondent's minority status and the question of whether the shareholding and directorship of the company involved were done in accordance with the law fall to be determined on the basis of evidence which would require a trial. They cannot be resolved on the affidavits.

This court has a discretion as to the future course of application proceedings where there are material disputes of fact which cannot be resolved on the papers. The court can choose to dismiss the application as a mark of its disapproval of the procedure chosen, or refer the matter to trial or call for oral evidence in terms of the rules of court. The first course is adopted where the applicant should have realised at the time of launching the application that disputes of fact were bound to arise, see *Shereni v Moyo* 1989 (2) ZLR 148 (SC) at 150A-B, *Masukusa v National Foods Ltd & Anor* 1983 () ZLR 232 (HC) at 235 B –C; *Mashingaidze v Mashingaidze* 1995 (1) ZLR 219)) at 222B – G; *Van Niekerk v Van Nierkerk & Ors* 1999 (1) ZLR 421 (S) at 428 D – F; *Adbro Investments Co Ltd v Minister of the Interior* 1956 (3) SA345 (A) at 350A.

In casu the disputes of fact were obvious and the applicant should have realised that they would arise. Even the single ground upon which the applicant through the answering affidavit sought to base his case was one that could not be resolved on the papers, moreso given that it was not raised in the founding affidavit. Also, the papers filed are so bulky that referring the matter to trial on such documents would create problems in the conduct of the trial. It is only appropriate that the present application be dismissed so that the applicant, if he is so minded, can institute proceedings by way of summons. In taking this decision, the court has also considered that an interested party, Goodstorm Services (Pvt) Ltd, which is at the centre of the dispute, has not been cited in this application. While the non-joinder of that company on its own would not defeat the cause, when taken together with the other factors referred to above, it is a relevant consideration in deciding the fate of these proceedings, see *Rose v Arnold & Ors* 1995 (2) ZLR 17.

In the result it is ordered that:

1. The application be and is hereby dismissed.
2. The applicant shall pay the first and second respondents' costs.

Donsa – Nkomo & Mutangi Legal Practice, applicant's legal practitioners