

STALAP INVESTMENTS (PVT) LTD
and
ZIMRE HOLDINGS LTD
and
DOUGLAS MAMVURA
and
RAMSWAY (PVT) LTD
versus
WILLOUGHBY'S INVESTMENTS (PVT) LTD
and
ITAI VALERIE PASI
and
CFI HOLDINGS LTD

HIGH COURT OF ZIMBABWE
MUZOFA J
HARARE, 12 March 2019 & 4 July 2019

Opposed Application

A.B.C Chinake, for the applicants
F Mahere, for the 1st & 2nd respondents
No appearance for the 3rd respondent

MUZOFJA J: In this case, the applicants seek a declaratur in respect of an Extraordinary General Meeting of the third respondent held on 17 November 2017.

The first, second, fourth applicants and the first respondent are shareholders in the third respondent (the company). The second applicant is a shareholder in the first applicant. The third applicant is a non-executive director in the company. The second respondent is a non-executive director in the company at the instance of the first respondent.

This is a dispute pitting shareholders in the third respondent. The genesis of the dispute is a resolution passed in 2015 by the company. According to the applicants, on the 16th of October 2015 at an Extraordinary General Meeting properly called and constituted a resolution to dispose of 81% of the equity of Langford Estates 1962 (Pvt) Ltd for a total consideration of US\$18 million (the Langford transaction) was unanimously passed. Consequently the directors of the company were authorized to give effect to the said resolution. The Langford transaction was subsequently consummated.

In October 2017 the first respondent, by public notice convened an Extraordinary General Meeting of the company (2017 meeting). The second respondent chaired the meeting and a resolution was passed setting aside the Langford transaction on the basis that it was a fraudulent transaction perpetrated by the applicants. The applicants seek a declaratur to set aside the 2017 meeting in the following terms:

IT IS HEREBY ORDER THAT:

1. It be and hereby declared that:
 - 1.1 1st respondent did not comply with the Zimbabwe Stock Exchange Listing Rules Section 11 and 16 in calling and holding the requisitioned meeting and that the failure by 1st respondent to so comply prejudiced the shareholders of the 3rd respondent. Consequently, the requisitioned meeting of 15 November 2017 be and is hereby set aside.
 - 1.2 The 2nd respondent was not lawfully appointed as the Chairperson of 3rd respondent for the purposes of the requisitioned Extraordinary General Meeting of 15 November 2017 and consequently she was not able to lawfully preside over the proceedings and therefore the proceedings are hereby declared a nullity.
 - 1.3 2nd respondent acted improperly and in a gross unreasonable and irregular manner in her conduct of the EGM.
 - 1.4 3rd respondent cannot hold Extraordinary General Meeting without complying with the Zimbabwe Stock Exchange Listing Rules or its own Articles of Association.
2. By extension and in the result, the requisitioned Extraordinary Meeting of 15 November 2017 and/or any and all decisions purported to have been made thereat be and are hereby set aside.

3. 1st and 2nd respondents jointly and severally the one paying the other to be absolved, shall pay the costs associated with this application and the requisitioned Extraordinary General Meeting on a legal practitioner and client scale.
4. A copy of this order shall be served on the Law Society of Zimbabwe by the applicants' legal practitioners for the Law Society of Zimbabwe to take any or such further action as it may wish in respect of the conduct of 2nd respondent in connection with the manner in which she handled the requisitioned Extraordinary General Meeting of 15 November 2017.

The first respondent opposed the application. Mafios Majaira, an officer at the first respondent deposed to the opposing affidavit. Besides pointing out that he was authorized to represent the first respondent, he did not detail the first respondent's basis of opposition but associated fully with the second respondent's averments. The second respondent indeed filed a detailed opposing affidavit and raised a number of preliminary points. The third respondent, the company naturally did not file any opposition since it is the legal *persona* whose constituent members are involved in this legal tussle.

The first and second respondents raised four preliminary points that there are material disputes of fact that cannot be resolved on the papers and non-disclosure of pertinent facts by the applicants. That the applicants are estopped from relying on a breach of the Zimbabwe Stock Exchange (ZSE) Listing Requirements or the Articles of Association of the company as they were the chief architect of such breaches and that the applicants have not exhausted the domestic remedies available in the resolution of this dispute. The applicants also raised two preliminary points in their heads of argument as bolstered in the oral submissions that the second respondent's opposing affidavit is based on hearsay and that the pleadings for the respondent were filed by MushoriwaPasi Corporate Attorneys a conflicted law firm. To that extent the notice of opposition should be struck off and the application be granted. For convenience the court shall address the applicants' preliminary points first as they relate to the question whether or not there is a proper notice of opposition before the court.

It was submitted that the second respondent's averments on the Langford transaction was based on hearsay evidence. When the meeting that deliberated on the Langford transaction was held the second respondent was not a director of the company, she did not participate in the decision making process. All her averments on that transaction were based on inadmissible hearsay

evidence. To that extent her opposing affidavit should be struck off. By extension since the first respondent's opposing affidavit merely associates with the second respondent's affidavit, there was nothing to associate with. The affidavits should be struck off and the application be granted as unopposed.

Counsel for the respondents did not address the issue, both in the heads of argument and in the oral submissions. I note that the applicant's heads of argument were filed on 14 February 2017 and the respondents' heads of argument were filed on 22 February 2017. The respondents should have been aware of the preliminary point, and crucially before the court, no submissions were made on this issue.

A reading of the applicants' preliminary points it is clear that this is an application to strike out. Procedurally the points were not properly taken. No proper application to strike out was made in terms of rule 137 of the High Rules. The remedy sought to strike out the notice of opposition would not be available to the applicants in the absence of a proper. On that basis both preliminary points may not succeed. For the sake of completeness I shall consider the substantive aspects of the preliminary points.

As a general rule, subject to the Civil Evidence Act [*Chapter 8:10*] hearsay evidence is inadmissible in affidavits. The learned authors Herbstein and Van Winsen in *Civil Practice of the High Courts of South Africa* 5 ed, Vol. 1 of p 444 opine that where a deponent to an affidavit includes information that he does not have firsthand knowledge of, a verifying affidavit by a person deposing to the facts should be filed. So important is the issue that in *Bubye Minerals (Pvt) Ltd and Anor v Rani International Limited* SC 60/06 case which the applicants relied on, the court dismissed the appeal on the sole basis that in the court *a quo*, the deponent to the affidavit founding the application had no personal knowledge of transactions alleged in the affidavit, he was not yet in the employ of the applicant. This was despite the fact that the deponent had access to the company records and also consulted the company's employees.

In this case, it is not in dispute that the second respondent was not a director in the company and was not part of the meeting when the Langford transaction was deliberated on. A reading of the second respondent's affidavit shows that the information she sets out on the Langford transaction is based on predominantly documents and inferences. The first respondent, the shareholder whose interests were represented by Willoughby Consolidated which was in

attendance at the 2015 meeting did not set out the facts leading to the making of the Langford transaction. The part relating to the Langford transaction would be hearsay and inadmissible since no one deposed to an affidavit confirming the fraudulent activities by the applicants as set out by the second respondent. However it would seem the Langford transaction is irrelevant in the resolution of this case and that information is of little or no probative value. Even if the information is hearsay, the opposing affidavits cannot be struck off on account of the Langford transaction. The second respondent's opposing affidavit does not constitute of the Langford transaction only, it also addresses other issues relating to the 2017 meeting which she personally attended and has personal knowledge on. It would therefore be improper to strike out the opposing affidavit on account of one issue. On that basis the point taken is dismissed.

In respect of conflict of interest, a brief background would put the preliminary point into its proper perspective. The second respondent is a registered legal practitioner, a partner at MushoriwaPasi Corporate Attorneys. As stated before, she is a non-executive director in the Company at the instance of the first respondent. At the 2017 meeting of the shareholders that the applicants seek to set aside, the second respondent chaired the meeting. When the applicants filed this application, MushoriwaPasi Corporate Attorneys, filed all the pleadings for the first and second respondents. In the course of prosecuting this matter at some point, a default judgment was granted against the respondents on 15 May 2018 by MABHIKWA J. The respondents applied for rescission of judgment. In dealing with the application for rescission of judgment ZHOU J expressed the opinion that Messrs MushoriwaPasi Corporate Attorneys was conflicted and it would be inappropriate for it to represent the respondent in the main matter. The judgment was delivered on 19 December 2018. Taking a cue from that judgment, MushoriwaPasi Corporate Attorneys filed a notice of renunciation on the 4th of January 2019 and NyawoRuzive Legal Practice assumed agency and instructed counsel who appeared before this court.

In response to the issue on conflict of interest counsel for the respondents pointed that she received instructions from Nyawo Ruzive Legal Practice since MushoriwaPasi Corporate Attorneys had renounced agency. She did not address the salient point what happens to the pleadings already filed by the conflicted law firm.

Conflict of interest is a matter of ethics that regulate the practice of legal practitioners. Where conflict of interest arises the court can prevent a legal practitioner from representing a

litigant see *Pertsilis v Calcaterra and Anor* 1999 (1) ZLR 70 (HC), *Base Minerals Zimbabwe (Pvt) Ltd and Another v Chirosva Minerals* 2016 (1) ZLR 78 (H). In a number of cases where the issue on conflict of interest arose the determination was on the representation in court by the legal practitioners, the court was not referred to a case where a determination on the pleadings was made neither did I come across one. However I believe the principles enunciated in *Benmac Manufacturing Co (Pvt) Ltd v Angelique Enterprises (Pvt) Ltd* 1988 (2) ZLR 52 (HC) are applicable in the determination of this issue. In that case the court in addressing the issue of appearance by a legal practitioner in court after analyzing the law on ethical conduct by legal practitioners had this to say at page 58,

‘It is clear, in my view that the onus of establishing this claim lies in the defendant. The position is referred to in *Robinson v van Hulsteyn & Ors* supra at 21 & 22, as follows: C

“... the Court will restrain a solicitor in whom confidences have been reposed by a client from acting against such client where it is made clear to the Court, in the words of COZENS HARDY MR

‘...that real mischief and real prejudice will in all human probability result if the solicitor is allowed to act’.”

Again at p 23, the report of this judgment reads:

“He must show to the Court that the respondents did in fact become acquainted with his secrets and that they used the confidential information reposed in them to his detriment.”

Applying this principle to the present case, it is my view that it was incumbent on the applicants to lay a proper basis by establishing that some confidential information was reposed on the second respondent and refer to the prejudicial information in the pleadings that will result in the real prejudice. This was not done. This would be an uphill task because the second respondent was cited in her personal capacity; it was not shown that the information before this court could not have been furnished to whatever law firm she could have instructed. The applicants failed to lay a proper basis for the striking out of the pleadings based on conflict of interest.

Having found that the notice of opposition is properly before the court, I address the preliminary points raised by the first and second respondents.

I will deal with the issue on non-disclosure and material disputes of facts concurrently. In both instances the respondents relate to the 2015 meeting. Most important to the respondent is that the applicants did not disclose that they were a related party to the Langford transaction and that the resolutions thereto were not properly made. The respondents failed to appreciate that the matter before the court relates to the 2017 meeting and not the 2015 meeting. This is a case where allegations are made against a party and in response that party raises certain improper conduct by

the first party. That would be inappropriate. If the respondents were disgruntled about the 2015 meeting they were at large to seek appropriate recourse if so advised. The court is not seized with the legitimacy of the 2015 meeting. There is no dispute to talk about because this is not the issue before the court. It has no bearing in the resolution of the main matter. It is my considered view that, what transpired or did not transpire at the 2015 meeting is irrelevant in the resolution of this case. The applicants did not have any obligation to disclose any information on the 2015 meeting save to lay a basis that a resolution was made. On that basis the points taken should be dismissed on the basis of irrelevancy. The same reasoning applies to the preliminary point that the applicants also violated the Listing Requirements, that point is not for determination by this court and irrelevant in the determination of this case.

The next preliminary point is that the applicant should have exhausted domestic remedies available to it before approaching this court. It was submitted that in terms of s 65 (1) (a) (1) of the Securities and Exchange Act (*Chapter 24:25*) as read with s 1.14 of the Zimbabwe Stock Exchange Listing Rules, the Committee established therein is the forum where a dispute relating to a contravention of the Listing Requirements should be heard and determined.

Section 1.14 of the Zimbabwe Stock Exchange rules provides:

“If the committee considers that a listed company has contravened the listing requirements in any way, it may (without derogating from the powers of suspension and/or termination of the committee) censure that company by way of a written warning, or by public censure and publication.”

I was urged to construe the provision to give the committee powers to deal with complaints raised by the applicants herein. For the applicants it was submitted that the committee has no jurisdiction to grant orders such as the one sought by the applicants.

The law on exhaustion of domestic remedies is settled and can be summarized as follows. Where there are adequate domestic remedies a party is required to exhaust them before approaching the courts. See *Zikiti v United Bottles 1998 (1) ZLR 389*. Domestic remedies can only be by passed where there are good reasons for approaching the court, for instance where the domestic tribunal undermines the remedy sought or the tribunal lacks jurisdiction or such other special reasons that should be placed before the court. See *Girjac Services (Pvt) Ltd v Mudzingwa 1999 (1) ZLR 243 (S)*. However the rule on exhaustion of domestic remedies is not an absolute rule the Court can exercise its discretion on a proper consideration of the circumstances of the case

and hear a matter despite the existence of domestic remedies see *Mudakureva v Grain Marketing Board* S-15-98 at p 3; *Nhidza v Unifreight Ltd* S-27-99. There is no statutory ouster of the High Court's jurisdiction pending exhaustion of domestic remedies. The court should consider the circumstances of the case and judiciously exercise its discretion whether to determine the matter or not.

In this case a reading of the enabling provision clearly shows that the committee has the power to determine whether a company has contravened the listing requirements. Where it makes a determination that there has been a contravention its powers are limited to censure by way of a written warning or by public censure and publication. Any order beyond that would be *ultra vires* its powers and objectionable. The Committee is a creature of statute and it should therefore exercise its powers within the confines of the enabling provisions. Even this court cannot give the committee powers outside what is provided for in the enabling provision. I was not referred to any authority for the proposition that the committee can be clothed with the power to issue a declaratur as is sought by the applicants. In essence there was no domestic remedy available to the applicants; the committee has no jurisdiction to grant a declaratur. The parties have been to this court and interlocutory applications in HH 826/18 and HH 271/18 made and disposed of pending the determination of this matter. It would be counter-productive to dismiss the matter on that technicality. The interests of justice would require that the matter be heard to its finality before this court. The preliminary point is therefore dismissed.

The last preliminary point relates to the answering affidavit. It was submitted that it introduces new evidence which is disputed. I must hasten to say that the offensive paragraphs 3 to 29 in the first applicant's founding affidavit, that the respondents seek to be struck off relate to the 2015 meeting. As already pointed out the 2015 meeting is not the issue before the court. It is irrelevant in the determination of this case. To that extent the preliminary point remains of no value and it is dismissed.

From the foregoing it is apparent that the preliminary points raised by both parties have no merits. The numerous preliminary points only served to delay the resolution of the main matter which is quiet disheartening. In *casu* the respondents literally lost the cast by relating to the 2015 meeting when the issue is not before the court, those were peripheral issues.

Accordingly the following order is made.

The preliminary points by both the applicants and the respondents be and are hereby dismissed.

Costs be in the cause.

Kantor & Immerman, applicant's legal practitioners
Nyawo Ruzive Attorneys, 1st & 2nd respondents' legal practitioners