

Judgment No. SC 14/08
Civil Appeal No 159/07

CAPS UNITED FOOTBALL CLUB (PRIVATE) LIMITED v (1)
CAPS HOLDINGS (LIMITED) (2) BUYMORE FOOTBALL CLUB

SUPREME COURT OF ZIMBABWE
CHEDA JA, ZIYAMBI JA & MALABA JA
HARARE MARCH 3, & SEPTEMBER 9, 2008

T Biti, for the appellant

J C Andersen SC, for the respondent

ZIYAMBI JA: On 18 June 2007, the High Court dismissed with costs an application made by the appellant for an interdict in the following terms:

- “1. The first Respondent CAPS Holdings Limited be and is hereby barred and interdicted from unlawfully interfering, with the goodwill, brand, colours, regalia and insignia of CAPS United Football Club and CAPS United Football Club (Private) Limited.
2. That the Respondents be and are hereby barred from renaming Buymore Football Club, CAPS Football Club, CAPS Rovers or any other name suffixed or prefixed with the acronym CAPS.
3. CAPS Holdings (Private) Limited be and is hereby interdicted from the use of the colours green and white, together with the acronym CAPS in respect of any football team that it may own or sponsor and register to play with the Premier Soccer League and or with the Zimbabwe Football Association in any division.
4. That the Respondents jointly and severally pay the other to be absolved pay costs of suit.

The learned Judge was of the view that the matter was so replete with grave factual disputes that it was incapable of resolution on the papers.

The dispute between the parties arises from the following facts.

CAPS Holdings Limited (to which I shall refer as “CAPS”) is a company duly registered in Zimbabwe and trades as a pharmaceutical manufacturing company from Manchester Road, Southerton.

It is common cause that in 1973 CAPS (Pvt.) Ltd, a subsidiary of CAPS, founded an association then known as CAPS Rovers Football Club but which later came to be known as CAPS United Football Club (“the Club”). The Club soon rose to be a major sporting force in Zimbabwe producing some of the finest footballers that the country has ever known. It now ranks among the top three football teams in this country, has acquired a considerable fan base and has established unquestionable goodwill over the years.

On 5 September 2006 CAPS registered as a Trade Mark the name “CAPS” “in respect of education; providing of training; entertainment; sporting and cultural”. Also registered as a Trade Mark in favour of CAPS are the colours of the football team which are green and white. Accordingly, the name “CAPS” is not only attached to the pharmaceutical business but also to the football team.

In 1999, CAPS fell on hard financial times from which arose its desire to disinvest from football. In pursuance of this goal, it commenced negotiations with Twin Con Industrial Suppliers (Pty) Ltd (“Twin Con”) represented by its major shareholder Mr

Twine Phiri (“Phiri”). The two agreed to enter into equal partnership of the Club and a joint agreement to that effect was signed on 28 December 1999. From this point the parties differ.

According to Phiri, who deposed to the founding affidavit on behalf of the appellant, pursuant to the joint venture agreement, the parties agreed that a new company CAPS United Football Club (Pvt.) Ltd would be formed to take over the club and that the shareholding of that company would be owned equally by Twin Con and CAPS. That company, the appellant, was indeed incorporated in accordance with the laws of Zimbabwe on 2 December 1999 with a nominal share capital of \$20 000.00 divided into 20 000 shares of \$1.00. Subsequently, the appellant issued 20 000 shares divided equally between Twin Con and CAPS.

However, towards the end of the 2000 soccer season, CAPS lost all interest in the appellant. As a result, on 18 December 2000, Phiri wrote to CAPS suggesting that the latter dispose of its entire shareholding in the appellant to Twin Con. Negotiations commenced between the two parties and in January 2002 CAPS sold its entire interest in the appellant to Twin Con for \$900 000.00 bringing an end to the long association between CAPS and the Club.

In 2006 CAPS acquired the ownership of the second respondent (“Buymore”). Since the acquisition, CAPS has indicated its intention to transform Buymore into another “CAPS United”. Buymore has, deliberately and consciously, unlawfully infringed on the brand of the appellant by allowing its players to wear Tee shirts in the Club’s colours with the CAPS logo inscribed on them. This, Phiri averred, as

well as CAPS' stated intention to rename Buymore "CAPS Football Club", was intended to confuse football fans and the football fraternity at large. It was his further averment that at the time of execution of the agreement of 14 January 2002, it was orally agreed between the parties that CAPS would be restrained from ever owning or sponsoring another football team or doing anything within its power to affect the appellant, the Club and the goodwill and fan base which has been built over the years.

CAPS, on the other hand, averred that the appellant is its wholly owned subsidiary and has no relationship whatsoever with the Club which is owned by Twin Con. Its group human resources manager, Mr. Julius Chifokoyo, deposed to the opposing affidavit. He averred that the appellant was incorporated on 2 December 1999 on instructions of CAPS, the intention being that the appellant would take over the running of the Club. Shortly thereafter, negotiations commenced with a company by the name of Systech with a view to getting a partner to inject funds into the running of the Club. Negotiations with Systech failed. Thereafter Twin Con came onto the scene and negotiations with Twin Con culminated in a joint venture agreement being signed on 28 December 1999.

In terms of the joint venture agreement, Twin Con was to purchase half the franchise value of the Club which franchise value was arrived at by estimating the local market value of the 18 players within the team at an average of \$100 000.00 per player (old currency). The total value was calculated at a total of \$1 800 000.00. Of this, Twin Con was to pay \$900 000.00 which it did. A new company was to be formed to take over the running of the Club and the name "CAPS" was to remain temporarily with the Club until such time as it was revisited by the Board of the new company. Meanwhile, both

CAPS and Twin Con were to enjoy equal rights of advertising their brands on the clothing and kit of the players. No mention was made in the joint venture agreement of the appellant. On the contrary, clause 3 of the joint venture agreement provided:

“ ... that a new joint venture company would have to be set up in whose favour a transfer of the ownership of CAPS United Football franchise would be effected.”

Indeed, the joint venture company was never incorporated as envisaged and there never was an agreement for the sale of shares or equity in the appellant.

The fact that the appellant is a subsidiary of CAPS, he averred, is readily apparent from a perusal of the records of the Registrar of Companies and he deplored what he described as attempts by Phiri to lodge, “in desperation”, certain annual returns in the form of a form CR14 which contained particulars of directors and secretaries, allegedly of the appellant, and which was filed on its behalf with the Registrar of Companies by the legal practitioners of Twin Con on 31 October 2006. This document purports to show that the directors and company officers of the appellant, appointed by CAPS, resigned and were replaced by new appointees of Twin Con, including Phiri, on 17 January 2002. He avers that the CR14 – the only annual return filed on behalf of the appellant since its incorporation - was fraudulently filed by Twin Con without the knowledge or consent of CAPS when it became known that CAPS had bought Buymore and speculation became rife that CAPS would name Buymore after its name.

Mr *Biti* contended that such disputes as there were could have and ought to have been resolved by the court *a quo* taking a robust approach. He referred us to the judgment in *Soffiantini v Mould* 1956(4) SA 150, without directing us to any particular passage. In that judgment at p 154 PRICE J.P. remarked as follows:

“If by a mere denial in general terms a respondent can defeat or delay an applicant who comes to Court on motion (court application), then motion proceedings are worthless, for a respondent can always defeat or delay a petitioner by such a device.

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 Court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits.”

While I respectfully agree with this statement of the law, I am of the view that it is not applicable in the present case. This is not a case where bare denials have been raised in an attempt merely to delay matters. Many relevant disputes have been raised which are, to my mind, incapable of resolution on the papers. For instance, the question whether the appellant is a subsidiary of CAPS and the related questions: If it is, then on what legal basis would it sue its holding company? Who should be the applicant or plaintiff in this dispute? What exactly was sold by CAPS to Twin Con?

Despite Phiri’s averments, CAPS maintains that the name ‘CAPS’ was never sold - an allegation which finds support in the affidavit of Mudiwa Mundawarara which was filed by the appellant in support of its case. It therefore appears on the papers that no agreement was reached in respect of the sale of the name ‘CAPS’. If that is so, then it would seem that no legal basis has been established for the order sought by the appellant to restrain CAPS from using its own name. Clearly, the affidavits do not provide clear and sufficient evidence to justify a robust approach by the Court.

The learned Judge in the court *a quo* set out the disputes as follows:

“Following further negotiations between the parties in 2001 and 2002, the Chief Executive Officer of CAPS (Mudiwa Mundawarara) wrote to Twin Con on the 17th of January 2002. The relevant portion of this letter states as follows:

‘As discussed in our meeting of 17 January 2002, we accept, in principle, your offer for our shareholding in CAPS United, subject to the receipt of the full amount offered.

As agreed, we will now have an agreement drawn up to cover the agreed, terms and conditions of our disengagement and will revert with details once they are available.’

Relying on this letter and Mundawarara’s affidavit, Twin Con claims full ownership of the Club and the Company as well as all the ancillary rights and interests attaching to both entities. As against this, CAPS contends that Mundawarara was not duly authorised to negotiate with Twin Con or to accept its offer and that, in any event, no agreement was ever concluded between the parties for the disposal of CAPS’ remaining 50% shareholding in the Company.

In support of its position, Twin Con adduces an unsigned agreement of sale, dated the 18th of January 2002, as well as two unsigned resolutions from the boards of CAPS and Twin Con authorizing Mundawarara and Phiri, respectively, to sign the requisite sale documents. It is common cause that this 2002 agreement of sale was never signed by any of the parties. Even Mundawarara acknowledges in his affidavit that the agreement was never signed because of “negotiations over the name”.

The terms of the agreement itself, in clause 4, provide that within seven days of the signature of the agreement CAPS should lodge several documents with Twin Con, to wit, share transfer certificates, a resolution of the CAPS board authorizing or ratifying the transfer of shares to Twin Con, and letters from the CAPS appointees on the Company’s board tendering their resignations from their directorships of the Company. CAPS denies that any of these documents was created let alone lodged with Twin Con and, very significantly, the latter was able to produce none of them in these proceedings.

As regards the agreed payment of CAPS’S shareholding in the Company, Twin Con avers that full payment was effected – without however clarifying when or how this was done. CAPS, on the other hand, vehemently disputes having received any payment for its shares in the Company. Again, the papers before the Court do not conclusively substantiate or falsify the position of either party.

In further support of its position, Twin Con has adduced the Company’s CR14 forms (particulars of directors and secretaries) and annual returns for the years 2000 to 2005, inclusive. These documents indicate, *inter alia*, that the CAPS appointees on the Company’s board of directors resigned their posts on the 17th of January 2002 and that the number of shareholders of the Company was reduced from two to one in the year 2002. All of these forms and returns were filed with the Registrar of Companies on the 25th of October 2006 and registered on the 31st of October 2006.

Twin Con contends that while these documents remain lodged with the Companies Registry they are conclusive evidence of their contents. CAPS submits that these documents were filed by a person not duly authorized thereto and that, in any event, they are fictitious and were generated *ex post facto* for the purposes of these proceedings. CAPS therefore disputes their contents as to the number and identity of the Company's directors as well as the number of shares and shareholders of the Company, particularly in the absence of any share transfer certificates. It is further submitted on behalf of CAPS that Twin Con has not produced any minutes of the annual general meetings of the Company referred to in the annual returns and required by section 125 of the Companies Act [*Cap* 24:03].

Having regard to all of the foregoing, it is apparent that there are a number of material disputes of fact relating to the second agreement of sale as well as the shareholding and directorship of the Company. It is also clear to me that these disputes cannot be resolved on the papers before me but require the giving of *viva voce* evidence for their resolution. Having regard to the extant material disputes of fact, I take the view that Twin Con has failed to establish, on a balance of probabilities, that the 2002 agreement was properly concluded and that its terms and conditions were duly fulfilled. Accordingly, having failed to justify its claim to the exclusive use of the goodwill, brand, colours, regalia and insignia in dispute, as well as the CAPS acronym, Twin Con is not entitled to the interdictory relief that it seeks as against CAPS in these proceedings”.

It is clear from the above that the disputes of fact are material and incapable of resolution on the papers placed before the Court. The learned Judge's decision to dismiss the matter on that basis is, in my view, unassailable.

Accordingly the appeal lacks merit and it is hereby dismissed with costs.

CHEIDA JA: I agree

MALABA JA: I agree

Honey & Blanckenberg, appellant's legal practitioners

Mutamangira, Maja & Associates, respondent's legal practitioners