

DISTRIBUTABLE (3)

(1) HAROLD CROWN (2) PORTRIVER INVESTMENTS (PRIVATE)
LIMITED

v

(1) ENERGY RESOURCES AFRICA CONSORTIUM (PRIVATE)
LIMITED (2) ENERGY RESOURCES AFRICA (PRIVATE)
LIMITED

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GWAUNZA JA & PATEL JA
HARARE, JUNE 14, 2016 & JANUARY 30, 2017

T. Mpfu, for the appellants

T. Magwaliba, for the respondents

ZIYAMBI JA:

[1] This is an appeal against an interdict granted by the High Court in favour of the respondents. The appellants contend that the interdict was improperly granted and seek that it be set aside.

[2] Briefly, the background to the appeal is as follows:

The first appellant (“Crown”) is a director and the *alter ego* of the second appellant, PORTRIVER INVESTMENTS (PRIVATE) LIMITED (“PORTRIVER”), a limited liability company incorporated according to the laws of Zimbabwe.

[3] The second respondent (“ERA”) is also a limited liability company incorporated according to the laws of Zimbabwe. It appears from the record that its directors are DAVID MASHAYAMOMBE (“Mashayamombe”) and one T P NTAISI (“Ntaisi”). Mashayamombe is the *alter ego* of ERA.

[4] Crown and Mashayamombe came together in 2011 for the purpose of two tenders floated by the City of Harare. The first tender was for the rehabilitation of the Firle Sewage works. The second was for generation of power from the waste. The two agreed to form a consortium of which they would be directors and ERA and PORTRIVER would be shareholders. The consortium formed in consequence of this agreement is the first respondent (“ERAC”). It was incorporated according to the laws of Zimbabwe on 17 February 2011. Crown is resident in South Africa.

[5] ERAC tendered for, and won, both projects. The value of the contracts was USD13 000 000.00. In terms of the payment plan agreed with the City of Harare, monthly payments of US\$300 000.00 were made to ERAC by the City of Harare into the account of PORTRIVER.

[6] Cracks in the relationship between Crown and Mashayamombe became apparent in or about May 2015. Correspondence between the parties’ legal practitioners shows that their differences became irreconcilable so that in its letter dated 19 May 2015, ERA through its legal practitioners declared:

“... ERA hereby terminates the arrangements between the parties”

and PORTRIVER, also through its legal practitioners, by letter dated 22 June 2015, “formally” accepted “the termination of the parties’ relationship” warning that:

“Such acceptance, however, makes the **US\$423 428.66** and **ZAR 24 000.00** immediately due and payable to Portriver Investments (Proprietary) (sic) Limited (PTR)”.

[7] On 30 September 2015, Mashayamombe, purporting to act on behalf of ERAC, took certain unilateral actions. He approached the Zimbabwe Revenue Authority (“Zimra”) on the last day of a tax amnesty extended to erring companies. Having done so, he secured an undertaking from Zimra to allow ERAC to benefit from the amnesty if certain conditions were observed. Two of the conditions were that a new Zimra registration form be completed by the directors and a bank account be opened in the name of ERAC into which account all monies from the contract would be deposited. It is not clear on the record whether there was a time limit within which these conditions were to be fulfilled. However, he then, unsuccessfully, sought the cooperation of Crown to sign the registration form and furnish his personal details for the opening of the new bank account.

He took the view, in the face of this lack of cooperation, that an urgent situation had arisen. He did not obtain a resolution from ERAC authorising his conduct. Instead he turned to ERA, his *alter ego*. The Board of ERA passed a resolution which was signed by himself and Ntaisi. Armed with this resolution by ERA, he approached the High Court, on an urgent basis, in the names of both ERAC and ERA, seeking to compel compliance by Crown with his wishes. The order, sought and granted, was as follows:

“Terms of the Final Order Sought

1. Respondents be and are hereby interdicted from performing any action under the Contract between City of Harare and First Applicant which in any way violates the Income Tax Act [Chapter 23:06], the Value Added Tax [Chapter 23:12] and the Companies Act [Chapter 24:03].
2. Respondents shall take all steps necessary to comply with First Applicant’s statutory returns as and when they fall due.
3. The Respondents be and are hereby ordered to pay costs of suit.

INTERIM RELIEF SOUGHT

That pending the determination of this matter, the Applicant is granted the following relief:-

1. The First Respondent (*Crown*) as the director representing the interest of the Second Respondent (*Portriver*) in the First Applicant (*ERAC*) be and is hereby ordered, upon service of this order:
 - (a) To complete and sign the FBC Bank account application form which is required to open a bank account for the First Applicant at FBC Bank; and
 - (b) To complete and sign a Rev 1 ZIMRA form which is required by the First Applicant for purposes of its tax amnesty application.
2. Pending the determination by Zimra in First Applicant's application for tax amnesty, First Respondent be and is hereby interdicted from receiving any income due to First Applicant under the contracts with the City of Harare for the rehabilitation of Firlle Sewage Works or for power generation.
3. First Respondent shall direct City of Harare to make payments due to First Applicant in terms of the Contracts, into the FBC Bank account to be opened by First Applicant.”

[8] The grounds of appeal are, briefly, as follows:

1. The application was not urgent.
2. The application was not authorised.
3. Second Respondent ERA had no legal interest in the matter.
4. No justification was shown for the grant of an interdict against receipt by PORTRIVER of payments due from City of Harare.
5. ERAC and ERA had no rights to secure by way of interdict.
6. The essence of the judgment is to stop PORTRIVER from rendering service to City of Harare which was not cited by respondents or heard by the court.
7. The court erred in not determining who had a contract with City of Harare because no relief could be afforded without a prior determination of this question.

[9] I proceed to consider the first three grounds of appeal as, in the Court's view, they raise preliminary issues a determination of which would dispose of this appeal.

GROUND 1: Urgency

[10] The question of urgency is generally a matter for the discretion of the court. It is only in certain limited circumstances that a superior court will be persuaded to interfere with a decision arrived at pursuant to a discretion exercised by a lower court. Accordingly, while this court may entertain different views as to the urgency of the application, I do not consider that the reasoning of the learned judge is so unreasonable as to justify interference by this court¹.

GROUND 2: Whether the application was authorised.

[11] The application was purportedly brought by ERAC whose directors are Mashayamombe and Crown. Mashayamombe, who deposed to the founding affidavit, averred that he is a director of ERAC and ERA:

“I am a director of the First and Second Applicant companies. I aver that I have authority to depose to this affidavit on behalf of both Applicants. I attach hereto the resolution of the board for the Second Applicant as Annexure “A”.

The resolution was signed by Mashayamombe and Ntaisi. It read:

“ENERGY RESOURCES AFRICA (PRIVATE) LIMITED
EXTRACT FROM THE MINUTES OF THE BOARD OF DIRECTORS
Held on 30 September 2015

It was resolved:

1. That the company shall institute court proceedings as advised by the company's legal advisors to protect the interests of the company as a Shareholder in Energy Resources Africa Consortium (Private) Limited.”

¹ See *Barros & Anor v Chimponda* 1999 (1) ZLR 58 (S); *Lindsay v Lindsay* 1993 (1) ZLR195 (S) at 201D-E.

[12] No resolution from ERAC was produced. The appellants argued in the High Court, as well as before this Court, that ERAC did not authorise the application purportedly filed on its behalf by Mashayamombe. The learned judge rejected that argument. He found that Mashayamombe and Crown “are directors in ERAC and ERA” and that Mashayamombe could depose to the affidavit on behalf of the two companies.

[13] In so finding, the learned judge misdirected himself. Crown is not a director of ERA. Although the papers show clearly, in particulars filed with the Companies Registry, that both Crown and Mashayamombe are directors of ERAC, there is no evidence showing that both are directors of ERA. The learned judge’s finding that Crown was a co-director of both ERAC and ERA is therefore not supported by the evidence. What the evidence discloses is that whereas Mashayamombe is a director of both companies, Crown is a director only of ERAC.

[14] Mashayamombe admits that he unilaterally took the decisions, on behalf of ERAC: to approach Zimra with a view to obtaining the benefit of the tax amnesty; to institute the present proceedings; and, to order the City of Harare to halt all payments to PORTRIVER until details of a new bank account to be opened by ERAC were availed to it for the purpose of depositing those payments therein. The court *a quo* was of the view that Mashayamombe had acted properly. It said:²

“In our view, the first applicant (ERAC) did nothing wrong in signing the resolution in the absence of the first respondent (Harold Crown) who is elusive. So whatever Mr Mashayamombe did was above board and valid in terms of the duties of a director under the Companies Act for the benefit of the companies and the other directors. Even if he had not signed the resolution as he did we would still have accepted his founding affidavit on the basis that as a director he had personal knowledge of what was happening in the companies and could positively [swear] to an affidavit touching on the affairs of the company. He has sufficient authority to depose to any affidavit.”

² At p9 of the cyclostyled judgment

[15] This finding calls for comment. Firstly, ERAC did not pass or sign a resolution. The only resolution on record was made by ERA, a different entity from ERAC and an entity of which Crown is not a director. ERA could not legally authorise the institution of proceedings in the name of ERAC. Thus the resolution signed by ERA could not, and did not, constitute authority to Mashayamombe to make the application on behalf of ERAC.

Further, while it is correct that Mashayamombe, as a director of both ERA and ERAC, could depose to an affidavit “touching on the affairs of the company” it has not been established that he was authorised by ERAC to institute proceedings on its behalf. This issue of authorisation to represent a company was clearly dealt with by this Court in *Madzivire & Ors v Zvarivadza & Ors* 2006 (1) ZLR 514 (S) where it was held that a company, being a separate legal *persona* from its directors, cannot be represented in a legal suit by a person who has not been authorised to do so. At page 516 B-E CHEDA JA, delivering the judgment of the Court, said:

“It is clear from the above that a company, being a separate legal *persona* from its directors, cannot be represented in a legal suit by a person who has not been authorised to do so. This is a well-established legal principle, which the courts cannot ignore. It does not depend on the pleadings by either party. The fact that the first appellant is the managing director of the fourth appellant does not clothe him with the authority to sue on behalf of the company in the absence of any resolution authorising him to do so. In *Burstein v Yale* 1958 (1) SA 768(W), it was held that the general rule is that directors of a company can only act validly when assembled at a board meeting.

There is no evidence that there was any service of a notice of a meeting to pass the required resolution authorising the first appellant to represent the fourth appellant. Even if the first, second and third appellants had agreed on the action, there is no indication that the first respondent, who is one of the directors, was served with a notice of a meeting of directors to pass the resolution of authority. Both the fourth appellant and the first respondent are entitled to be served with a notice of meeting so that a resolution be passed authorising the first appellant to represent the fourth appellant. This was not done. Failure to do so renders the decision to represent the fourth appellant invalid.”

[16] In his answering affidavit, Mashayamombe sought to justify the unilateral decisions taken by him purportedly on behalf of ERAC by relying on ss 169 (1) and 170 of the companies Act [*Chapter 24:03*] (“the Act”), set out below.

“169 Directors and secretary

(1) Every company shall have not less than two directors, other than alternate directors, at least one of whom shall be ordinarily resident in Zimbabwe.

(2) Every company shall have at least one secretary ordinarily resident in Zimbabwe.

(3) Every person signing the memorandum of a company shall, until other directors are appointed, be deemed to be a director of the company and be liable for all the duties and obligations of a director:

Provided that where a person signs the memorandum, whether as agent or otherwise, on behalf of some other person who is not qualified to be a director of the company, the first-mentioned person shall be deemed to be a director.

(4) Where subsection (1) or (2) are not complied with in relation to any company, each director of that company shall, unless he satisfies the court that he took all reasonable steps that were available to him to secure compliance with the relevant provisions, be guilty of an offence and liable to a fine not exceeding level three.

[Section as amended by Act No. 22 of 2001]

170 Validity of acts of directors

The acts of a director or manager shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification.”

The above passages were quoted by the court *a quo* without explaining their relevance to the matter in issue. It was not explained what “duties of Directors in terms of the Companies Act” had the effect of validating Mashayamombe’s actions nor which “other directors” would benefit from his actions.

[17] Mr *Magwaliba* submitted that the requirement that at least one of the directors be ordinarily resident in Zimbabwe is to be interpreted as meaning that the resident director could act unilaterally on behalf of the company. I do not agree. The provision clearly envisages a situation where alternate directors would be appointed to act in place of the absentee directors and would, together with the resident director, transact the business of the company. It seems to me that s 169 was meant to ensure that not all the directors of a company are absentee

directors and that the management of companies is not left solely to alternate directors. In other words, the resident director would act with the alternate director in making valid decisions on behalf of the company. The submission to the contrary, urged by Mr *Magwaliba*, would not accord with a proper interpretation of s 169 of the Act.

I conclude that the application brought in the court *a quo* was not authorised by ERAC and was therefore invalid. It ought to have been dismissed by the court *a quo* for this reason. This conclusion on its own is dispositive of the appeal. However, I turn to consider the third preliminary matter.

Ground 3: *Locus standi* of ERA to make the application

[18] The mandate given to Mashayamombe by ERA was to institute proceedings to protect the shareholding of ERA in ERAC. It is not explained in the affidavits how such a shareholding was to be protected by the proceedings instituted by the respondents. For this reason, the appellants allege that ERA had no *locus standi* in relation to the tax issue which was the subject of the application.

[19] I have found that the proceedings filed on behalf of ERAC against the appellant were unauthorised and invalid. It follows that the only applicant before the court *a quo* was ERA.

[20] As submitted by Mr *Mpofu*, the order sought or granted does not speak to ERA nor was it established on the papers that ERA had any legal interest in the tax issue which was the subject of the application.³ Further, ERA, being a separate legal

³ Zimbabwe Teachers Association & Ors v Minister of Education and Culture 1990 (2) ZLR48 (HC)

entity from ERAC, has not established a legal basis on which it sought the order granted by the court *a quo*. I therefore agree with the submission advanced on behalf of the appellants that ERA lacked *locus standi* to bring the application in the High Court.

[21] In the result, not only did the respondents fail to establish *locus standi* on the part of ERA to make the application, but they did not establish that the application was authorized by ERAC. Since ERAC was the entity allegedly seeking the remedy, the lack of authorisation was fatal to the application.

It follows that the appeal must be allowed.

It is, therefore, ordered as follows:

1. The appeal is allowed with costs.
2. The judgment of the court *a quo* is set aside and substituted as follows:

“The application is dismissed with costs”.

GWAUNZA JA:

PATEL JA:

Venturas & Samukange, appellants’ legal practitioners

Dube, Manikai & Hwacha, respondents’ legal practitioners