DENISE ROSAMOND BIRKETOFT
versus
NYAHONDO FARM (PRIVATE) LIMITED
and
KIM BIRKETOFT
and
MELISSA BIRKTETOFT
and
VANESSA BIRKETOFT

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 4 April, and 15 May, 2017

Opposed Matter

J Wood, for the applicant
F Chimwamurombe, for the respondent

MANGOTA J: At the close of submissions, I invited counsel to file supplementary heads of argument. The heads aimed at clarifying the issue of whether or not the applicant, as director and shareholder of the first respondent, did have *Locus Standi* to petition the court as she did. The issue arose from my reading of *Tett and Chadwick* who, in their Zimbabwe Company Law, second edition, discussed categories of persons who can apply for the winding up of a company.

The learned authors state at p 140 of their book that:

> "Those who can apply in terms of s 179 for the winding up of the company by the court are set out in s 180, and are as follows:
>
> In subsection (1) of s 180;
> (a) the company
> (b) any creditor or creditors, including any contingent or prospective creditor or creditors,
> (c) any contributory or contributories, any or all of the above parties together or separately
> (d) the Minister in cases falling under s 139 (2) of the Act.

Before drawing up an application on behalf of a contributory the provisions of s 180 (1) (i) must be considered. These are as follows:

"1. a contributory shall not be entitled to present a petition for winding – up a company unless –

(a) the number of members is reduced below two; or

b) the shares in respect of which he is a contributory or some of them either were originally allotted to him or have been held by him and registered in his name, for at least six months during the eighteen months before the commencement of the winding up, or have devolved upon him through the death of a former holder.

The definition of a contributory is set out in s 175 of the Act as follows:

The term contributory means every person liable to contribute to the assets of a company in the event of its being wound up and, for the purposes of all proceedings for determining and all proceedings prior to the final determination of the persons who are to be deemed contributories, includes any person alleged to be a contributory."

An uncrystallised reading of the above conveyed the impression that the applicant, as director and shareholder of the first respondent, fell outside the category of persons who can apply for a winding up order. I am indebted to counsel for the good work which each side of the legal divide submitted on this important matter.

The second respondent, speaking for himself and others, maintained the view which I initially held of the matter. He insisted that the applicant had no *locus standi* to apply as she did. His analysis was, to some extent, incomplete. He said the nearest category into which the applicant fell was that of a contributory. He insisted, however, that the applicant could not be classified as such, because, according to him, she did not satisfy the exception to s 180 (1) (i) (a) of the companies Act [*Chapter 24:03]*. He, for some unexplained reasons, refrained from making any comments in regard to para (b) of s 180 (1) (i). I, therefore, was not able to derive any benefit from him in regard to the meaning and import of the mentioned paragraph.

Counsel for the applicant drew my attention to the case of *Edwards* v *Woodnutt* 1968 (4) SA 184. It was in that case that BEADLE CJ made a thorough analysis of ss 168 and 169 of the then Companies Act [*Chapter 223*]. He compared the word *member* which appeared in s 168 with the word *contributory* which appeared in s 169 and came to the conclusion, reading the Act as a whole, that the two words were synonymous.

Analysing the principles which the learned Chief Justice stated in *Edwards* v *Woodnutt* therefore, the applicant is perfectly within her rights to petition the court as she did. *Tett and*

Chadwick took a clearly defined position on this matter. The learned authors made reference to s 180 of the Companies Act and stated that:

> "Despite this section it has been held that a holder of fully paid up shares has the power to bring an application for liquidation".

The respondents did not ever suggest that the applicant is not a holder of such shares. The presumption is that she is holder of fully paid-up shares. That probability stems from the fact that she is a director and shareholder of the first respondent. She, therefore, falls into the class of persons who can petition the court for a winding up order.

The substance of the application shows that the second respondent and the applicant were husband and wife respectively. They divorced in 2008. The third and fourth respondents are their daughters. Both are shareholders in the first respondent. The record shows further that, during the subsistence of their marriage, the applicant and the second respondent together with their two daughters gave birth to the first respondent. It was or is their family business.

The first respondent was incorporated under the Companies Act on 12 April, 1995. Its directors were the applicant and the second respondent. Its principal asset was Nyahondo Farm ["the Farm"].

At about the time of the divorce of the applicant and the second respondent [i.e in 2008] government compulsory acquired the farm. It did so under its land acquisition laws.

The divorce which coincided with the compulsory acquisition of the first respondent's principal asset precipitated the souring of relations between the applicant and the second respondent. The soured relations became acrimonious, according to the applicant. The professional relationship which the two enjoyed as directors of the first respondent prior to their divorce deteriorated. They no longer could talk or work together as directors of the first respondent. Their divorce posted parting shots for both of them.

It was in the spirit of the above stated matters that the applicant petitioned the court for a winding up order of the first respondent. She anchored her application on s 206 (g) of the Companies Act. She sought no specific relief against her two daughters both of whom, it is common cause, are shareholders in the first respondent. She sought what she termed limited relief against her ex-husband. She alleged that the relief was being sought against him because of the manner in which he, directly or indirectly, handled the affairs of the first respondent and how

his conduct adversely affected their professional relationship as shareholders and directors. She petitioned the court to order the liquidation of the first respondent on the just and equitable ground. She made the following allegations against the second respondent:

(a) unilateral disposal of the first respondent's movable assets;
(b) unlawful removal of her from the position of director of the first respondent;
(c) the second respondent's alleged fraud against the Government of Zimbabwe;
(d) the second respondent's alleged changing of the first respondent's bank account- and
(e) second respondent's alleged failure to keep updated company records.

The respondents opposed the application. They supported each other in denying the allegation that the second respondent made a unilateral decision to, and did actually, dispose of the movable assets of the first respondent. They did not come out clearly on the issue of whether or not the applicant resigned or was removed from her position of director of the first respondent. They denied that the second respondent defrauded the Government of Zimbabwe. They admitted that he changed the first respondent's bank account excluding the applicant as a signatory to the same. They confessed and avoided the last of the applicant's five allegations. They did not, in short, comment on whether or not the second respondent failed to keep updated records of the first respondent.

The applicant stated, and correctly so, that the first respondent is not in court. The first respondent is a private company. Its directors should, therefore, have passed a resolution authorising the second respondent to depose to an affidavit for, and on behalf of, the first respondent. No such resolution was passed let alone produced.

The second respondent, who claimed to be speaking for all the respondents, did not say that he was authorised to depose to the affidavit on behalf of the first respondent. He did not even allege that he was authorised to depose as such by the first respondent. He, indeed, spoke for himself as well as for the third and fourth respondents both of whom deposed to affidavits in support of the founding affidavit.

What was placed before me was essentially a war of words and actions which existed and continues to exist between the applicant and the second respondent. ["the parties"]. The two

daughters who are the third and fourth respondents in *casu* have, unfortunately, involved themselves in the same. They took their father's side for their own undisclosed reasons.

The second, third and fourth respondents placed their reliance on Annexures E and F which are filed of record. These, they submitted, supported the action which the second respondent took to:

(i) appoint a Mr. L Vermaak as director and a replacement of the applicant in the first respondent;

(ii) present the applicant as having resigned from her position of director of the first respondent;

(iii) approach and inform NMB Bank that the applicant was no longer a signatory on the bank account [Annexure E]

(iv) negotiate with the Government of Zimbabwe for compensation which related to the compulsory acquisition of the farm;

(v) have the compensation paid out to the first respondent's shareholders - and

(vi) deduct legal costs in the matter from the compensation pay-out [Annexure F]

The first resolution, Annexure E, was purportedly passed at a members meeting of the first respondent. The meeting was said to have taken place on 3 January, 2008. Those who attended it comprised the second and third respondents. The fourth did not.

The applicant who was a director and shareholder/member of the first respondent was conspicuously absent from the meeting. No evidence was produced to show that she was invited to the same. No evidence was produced to show that she declined to attend. Nothing was said about her involvement or otherwise in that meeting.

That the applicant was still a shareholder and a director of the first respondent as at the date of the purported members meeting is evident from a reading of Annexure B2 which she attached to her answering affidavit. The annexure makes reference to particulars of directors, auditors and secretaries of the first respondent. It is dated 12 October, 2010. It contains the applicant's name as one of the directors. She, for some unexplained reasons, was left out of the purported members meeting of 3 January, 2008.

Annexure F is more interesting than Annexure E. It is yet another purported resolution by the shareholders of the first respondent. It is dated 2 February, 2009. The second, third and fourth respondents are alleged to have attended the shareholders meeting.

The applicant was loud and clear on the point that neither the third nor the fourth respondent was at the meeting. She produced documentary evidence which supported her claims.

The fourth respondent, she said, was attending full time tuition at Whittle College which is in the United Kingdom. The third respondent was in Durban, South Africa, where she was working for a Mrs Fiona Kane, according to her. She, in substantiation of her assertions, attached to her application Annexures G and H. These respectively referred to the fourth and third respondents' whereabouts as at the date of the shareholders meeting of 2 February, 2009.

Annexure G1 which the applicant attached to her answering affidavit refutes the second respondent's claim which was to the effect that the shareholders meeting of 2 February, 2009 was held via Skype Conference. The annexure is an article which one *Verne G. Kopytoff* wrote on 1 March, 2011. Its title reads: SKYPE OPENS A CONFERENCE CALL SERVICE. The article reads, in part, as follows:

> "SKYPE is hoping to play a more important role in business meetings. On Tuesday Skype said that it would introduce a conference call service that will let multiple people talk, see each other through on line video and share documents. The service, which is expected to be available near the end of the year, is part of a broader Skype strategy to create more products for corporate users that it can charge for. Skype is trying to find new ways to make money because the vast majority of its 145 million users pay nothing to make on line calls" [emphasis added].

Three matters emerge from the above cited passage:

These are that:

'(i) the third and fourth respondents did not attend the shareholders' meeting of 2 February, 2009.

(ii) the purported resolution of 2 February, 2009 was not passed by the three respondents – and

(iii) the second respondent passed the resolution alone.

Annexures E and F upon which the second respondent based his actions are both invalid. None of them was properly passed, if it was. The purported resolutions were made in flagrant violation of the Companies Act and its regulations. They were made outside the provisions of the

first respondent's memorandum and articles of association. They, for some unknown reasons, excluded the applicant's participation in their being made. The exclusion was so notwithstanding her position of shareholder and director in the first respondent.

The purported resolutions are a nullity. They have no force or effect. They are nothing and, as such, nothing flows from them.

I mention, in passing, that no resolution was passed let alone produced to show that the second respondent was authorised to sell the first respondent's movable assets. He admitted that he sold the assets to, *inter alia,* pay the terminal benefits to the first respondent's workers. Notwithstanding the alleged noble intentions which he made mention of, his conduct was ultra-vires the first respondent's memorandum and articles of association.

The second, third and fourth respondents submitted that the applicant resigned from her position of director of the first respondent. They, however, produced no evidence in substantiation of their claim. They stated, in the same breath, that she was removed from her position. They referred me to Annexure F which they said was the process by means of which she was relieved of her post. The annexure, as has already been observed, is invalid. At any rate Annexures B 2 which the applicant attached to her answering affidavit shows that she was still a director of the first respondent as at 12 October, 2010.

Nothing of what the second respondent did was sanctioned by law. He did not produce any evidence to show that the compensation which he negotiated with, and part of which he received from, Government was due to the first respondent. He made the whole issue of compensation messy when he passed a purported resolution to pay the compensation to his two daughters and himself as a dividend when it was not such.

The applicant stated, and correctly so, that her ex-husband and her started the first respondent as a family business. They were and are its directors. They are the controlling mind of the same (Hahlo's *South African Company Law*, 6th ed, p 360).

That the first respondent is the parties' family business is evident from the shareholding structure of the same. The business is more akin to a partnership than it is to a large going concern. It is not engaged in any meaningful activities currently. That is so as Government took away from it its principal asset (the farm).

The 2008 divorce of the applicant and the second respondent soured the parties' relationship both socially and professionally. They no longer can sit around the table and discuss anything for the benefit of the first respondent and its shareholders. The air under which they operate is like a poisoned chalice. They have lost trust in each other. Whatever they discuss is more often than not likely to end in a deadlock.

The above observed matters account for the respondents' concerted effort to systematically elbow the applicant out of her position of director of the first respondent. They held meetings and passed purported resolutions without the participation of the applicant. They made every endeavour to deny her right to the exercise of her office. They prevented her from discharging her duties as a director.

It was stated in the *Master* v *Thompson's Executors,* 1961 RFN 43 (FSC) 55 that the duty of all agents, including directors of companies, is to conduct the affairs of their principals in the interests of the principals and not for their own benefit. The second respondent's conduct runs contrary to the above stated principle. He worked for the benefit of his two daughters and himself in all his actions. He sold the movable assets of the first respondent without the latter's approval. He did not give any proper account of what he did with the proceeds of the sale of the assets. He made a lone resolution to remove the applicant from her position of director. He transferred the first respondent's money from one bank to the other and he made himself the sole signatory of the new account. He, in all this, acted *ultra-vires* the first respondent's memorandum and articles of association.

All the above supports the view which the applicant took of the first respondent's unhealthy state of affairs. She submitted, with cogent reasons, that the first respondent should not be allowed to continue to exist. She insisted that it was just and equitable that it be wound-up. She, in support of her position, referred me to *Sulton* v *Fryfern Enterprises (Pvt) Ltd & Anor,* 200 (1) ZLR 188 (H).

Sultan's case is on all fours with the present application. I, therefore, associate myself entirely with the principles which the court laid in that case. The application is, in my view, not without merit.

The first respondent's existence is for no purpose other than to receive the remainder of the compensation from the Government of Zimbabwe. It is not trading at all. It has generated

more hate than good. The second respondent has used his position as director to frustrate the efforts of the applicant. No trust exists any longer between the applicant and him. It is, accordingly, just and equitable that it be wound up.

The respondents' opposition to the application was *mala fide*. *Mala fide* in the sense that they knew that the resolutions which they purportedly relied upon to remove the applicant from the position of director of the first respondent were not valid. They made an effort to mislead the court in the mentioned regard. Their opposition to the application cannot stand. It cannot do so on the strength of the principles which the court enunciated in *Sultan's* case.

The respondents' opposition cannot stand for the further reason that they were heard in error. They had no right of audience before the court as they did not file any heads of argument. I overlooked that matter when I set it down for hearing. The oversight arose from the fact that item 27 of the consolidated index referred to the respondents' heads as having been filed at pp 145 - 158 of the record. The record, as it stands, ends at p 144.

The respondents' heads do not form part of the record. The respondents were, therefore, barred and they should not have been heard. They did not apply for upliftment of the bar or for condonation. There was, in essence, no opposition to the application. The application is, accordingly, granted as prayed.

c/o Matizanadzo & Warhurst, respondent's legal practitioners
Mberi Chimwamurombe, 2nd – 4th respondent's legal practitioners'