

FERNHAVEN INVESTMENTS (PVT) LTD
versus
AFRICOM HOLDINGS (PVT) LTD
and
DR. SIBUSISO B MOYO
and
CHONAKA HLABANGANE-NDLOVU
and
OLD MUTUAL ZIMBABWE LIMITED
and
INTERFIN BANKING CORPORATION LIMITED
and
KWANAYI KASHANGURA
and
FIRST MUTUAL LIMITED
and
NATIONAL SOCIAL SECURITY AUTHORITY
and
CHIVHU TRUST (PRIVATE) LIMITED
and
ALLFACTS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 24 January 2017, 1, 9, 13, 14, 15 21, 23, and
28 February 2017, 6 March 2017

Urgent Chamber Application

F Mahere, for the applicant
A Mugandiwa, for the 1st respondent
T Mpofu for 2nd and 3rd respondent
6th respondent in person
T Magwaliba, for the 9th and 10th respondent

MUNANGATI-MANONGWA J: The matter was allocated to me on 24 January 2017 and I immediately set it down for hearing that very day. It started off with the first eight (8) cited

respondents who increased to ten (10) when I granted an order for intervention by the last 2 (two) respondents.

The facts of the matter are briefly that: Applicant is a shareholder in first respondent. As per the first respondent's Articles of Association the applicant is entitled to appoint three (3) directors who sit on the first respondent's board. The second and third respondents were appointed to sit on the first respondent's board as representatives of applicant. Sometime in April 2016 Applicant withdrew second and third respondent's directorship. However there is a dispute between the applicant and the first, second and third respondents arising out of the purported withdrawal of second and third respondents' mandate to sit on the first respondent's board. There is a pending matter between applicant and the aforementioned respondents under case No HC494/17 wherein applicant seeks *inter alia* a declaration that the second and third respondents be declared to have ceased to be directors from April 2016 when the purported withdrawal of their mandate was communicated. Against this background, the second respondent as Chairman of the first respondent called for an Extra-Ordinary General Meeting to be held on the 25th January 2017 which date was then shifted to the 15th February 2017, wherein proposals to enter into a debt conversion agreement which would result in the dilution of the applicant's shareholding from 41% to 0.41% would be adopted. Due to such a development, the applicant has approached this court on an urgent basis seeking the following relief on a provisional basis:

“TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:-

- 1) The interim relief be and is hereby confirmed.
- 2) The notification from 1st respondent to attend the Extraordinary General Meeting dated 11th January 2017 be and is hereby declared null and void.
- 3) The 2nd and 3rd respondents be and are hereby permanently interdicted from acting as Directors of the 1st respondent.
- 4) All resolutions, decisions or acts made or done by the 1st respondent with the involvement of the 2nd and 3rd respondents from 6th April 2016 to date be and are hereby declared null and void.
- 5) Costs of suit shall be paid jointly and severally by the 1st, 2nd and 3rd respondents

INTERIM RELIEF GRANTED

Pending determination of the matter under case HC 494/17 the applicant is granted the following relief:-

- 1) That the 1st Respondent be and is hereby interdicted from holding the Extra-ordinary General Meeting scheduled for the 25th of January 2017.

- 2) That the 2nd and 3rd Respondent be and are hereby interdicted from acting as Directors of the 1st Respondent with immediate effect.

SERVICE OF PROVISIONAL ORDER

This provisional order shall be served on the respondents by the applicant's legal practitioners or by the Sheriff."

First, second and third respondents filed opposing papers. The fourth, fifth, seventh and eight respondents were in default from the onset. The sixth respondent appeared in person. With the coming on board of other respondents midstream, further opposing papers were filed. In response the applicant filed answering affidavits. A supplementary notice of opposition had to be filed by the second and third respondents.

When the interveners sought to file an answering affidavit to applicant's answering affidavit there was an objection to that act. I upheld the objection and struck out the purported answering affidavit on the basis that leave ought to have been sought in terms of r 235 of the High Court Rules as the same was coming after applicant had filed its answering affidavit.

The first, second, third, ninth and tenth respondents raised several points in *limine*, finding issue with the urgency of the application, lack of authority to institute same, dirty hands among others.

As the matter progressed, I sought clarity from the first respondent's lawyers on 13 February 2017 as to whether the extra ordinary general meeting which the application sought to prevent from being held was to be held on 14 February 2017. Mr. *Mugandiwa* indicated that he was to take instructions. I then set the matter down for the 14th February 2017 and asked the Registrar to notify parties by telephone. Only the applicant and the sixth respondents pitched up. Upon application by the applicant I granted a temporary interdict barring the holding of the extra ordinary general meeting pending finalisation of this application. The matter continued on the 15th February 2017 when arguments on the points in *limine* were wrapped up and I reserved ruling.

On 21 February 2017, I dismissed all the points raised in *limine* and furnished reasons for such decision. Arguments on merits resumed on 22 February 2017.

It emerged at the resumption of the hearing that the extra-ordinary general meeting (EGM) which the order I had given sought to stop had in fact gone on. The representatives of the first, second and third respondents were not forthcoming regarding how that happened until 23

February 2017 at the resumption of the hearing that it was indicated that an appeal had been lodged against my order. Suffice to say no copy of the appeal was made available to me which in itself bordered on unethical behavior. It was just indicated that the appeal was filed under SC 92/17. Whilst it is a litigant's right to appeal, the conduct of proceeding against a specific order of a court on the basis of having lodged an appeal is in my view undesirable and against long established practice of waiting for a determination which in any case can be done on an urgent basis. Such practices can lead to chaos and anarchy where each person simply proceeds to act on the basis that they have challenged the court *a quo*'s decision. Ultimately, the superior court will end up hearing appeals where the appellant has already resorted to self-help before hearing the outcome of their complaint. If everyone who has lodged an appeal were to act as per what they believe should have been the outcome, the superior courts will be reduced to redundancy, considering cases well after the appellant had gotten recourse with the orders becoming *brutum fulmen*. This is undesirable and not good for the legal profession at large.

Nonetheless, due to that development the applicant's counsel Ms *Mahere* sought to amend the draft order seeking further interim relief which would take note of the aforementioned development.

She sought to amend the draft order to read as follows:

“NOTICE OF AMENDMENT

TAKE NOTICE THAT at the hearing of the urgent chamber application, the applicant will seek an amendment to the interim relief to read as follows:

“Pending the final determination of the matter under case HC 494/17, the applicant is hereby granted the following relief:

1. That the operation of the resolutions passed at the AGM of the 1st respondent carried out on 22 February 2017 is hereby suspended.
2. That the 1st respondent be and is hereby interdicted from effecting any changes to its share register.
3. That the 2nd and 3rd respondent be and are hereby interdicted from acting as the directors of the 1st respondent.”

The application was opposed by first, second, ninth and tenth respondents on the basis that the amendment was irregular given that these being application proceedings they could not be amended. Further, Mr. *Magwaliba* argued that an amended draft order ought to have been placed before the court supported by an affidavit placing the justification of the amendment

before the court given that the notice sought to cover events which had occurred subsequent to the filing of the founding and answering affidavit. A fresh application should have been made so it was argued.

Mr. *Mpofu* for the second and third respondents filed heads of arguments dealing with the intended amendments. Therein he submitted that the Kashangura's (intended to refer to complainant) cannot seek to nullify the resolutions of the meeting held on 22 February 2017 as same was held because an appeal had been noted against the interdict issued by the court. Relying on *Airfield Investments (Pvt) Ltd v Minister of Lands & Others* 2004 (1) ZLR 511 (S) Mr. *Mpofu* submitted that a court cannot be asked to nullify that which was lawfully done.

Mr. *Mpofu* is certainly correct as regards the law. However, his argument is in my view misplaced. The issue to be determined is whether an applicant can seek to amend his or her draft order. The answer is in the positive. Relief sought by the applicant is contained in "draft" form. Being a draft it is capable of amendment. In any case the court is not bound by a draft before it. The pertinent issue is whether the papers or evidence at hand speak to the relief sought. It is common cause that the applicant initially sought an order to prevent the holding of an extra ordinary general meeting. Since the extra ordinary general meeting then proceeded to be held when the hearing was on going, the applicant could no longer continue to seek relief which had been overtaken by events but sought in its amendment relevant relief which in my view can be deciphered to flow from the papers without need for extra evidence given that it was not disputed that the meeting took place. The respondents did not show that any prejudice will result from the intended amendment.

The amendment that the applicant seeks does not nullify the results of the extra ordinary general meeting. The amendment sought seeks to have the operation of resolutions passed at the extra ordinary general meeting suspended pending final determination of case Number HC 494/17. In my view "suspend" here means to put on hold, or temporarily stop progression. To that effect the amendment sought is not contrary to what the law provides. Equally the argument that the applicant has to file a new application does not apply as the court still has to assess whether the relief sought can flow from the evidence at hand. After all, it is an amendment that applicant moves for at this stage and not the granting of the substantive relief. That being so I will allow the amendment.

On the merits of the case, the applicant through Ms. *Mahere* submitted that the requirements for an interim interdict are as espoused in *Airfield Investments (Pvt) Ltd v Minister of Lands & Others* 2004 (1) ZLR 511 (S). I note that the same requirements were stated in *Nyambi & Ors v Minister of Local Government & Anor*¹ which are that:

- 1) The right which is sought to be protected is clear; or
- 2) That (a) if it is not clear, it is *prima facie* established though open to some doubt; and, (b) there is a well-grounded apprehension of irreparable harm if interim relief is not granted and the applicant ultimately succeeds in establishing his right
- 3) That the balance of convenience favours the granting of the interim relief
- 4) The absence of any other satisfactory relief.

Ms. *Mahere* submitted that the applicant was entitled to the preservation of proceedings under case Number HC 494/17. There is a challenge to the conduct of the second and third respondents who continue to hold themselves as directors. Basing on Article 22 (2) of the first respondent's Articles of Association, the applicant has a right to remove the directors it would have appointed to the first respondent's board. It was argued that the applicant had exercised that right. Given that the extra ordinary general meeting will impact upon the shareholding of the applicant, the applicant had established a *prima facie* right. The applicant argued that real risk and apprehension of harm existed notwithstanding any subsequent developments. The threat of significant reduction of the applicant's shareholding in the first respondent from 41 % to 0.41% was not denied.

Ms. *Mahere* argued that the balance of convenience favoured the granting of the relief because in the event of the applicant succeeding in HC 494/17 and the court finding that the conduct of the first and second respondents was invalid, it would be near impossible if not impossible to reverse the share structure. It would be less convenient for the first, second and third respondents to wait until the resolution of HC 494/17 given that the debt which is sought to be resolved has been in existence for several years. She further submitted that no satisfactory remedy would be available to the applicant due to the determination by the respondents to proceed; the interests of the applicant will be irreparably damaged.

¹ 2012 (1) ZLR 559 (H)

Mr. *Magwaliba* presented argument on behalf of the first, second, third, ninth and tenth respondents. He submitted that the relief sought was incompetent as it would have the effect of granting the order sought in HC 494/17. Thus the applicant was bringing the same issue before this court. He submitted that the case of *Airfield Investments* is specific that the remedy of an interdict is not available in respect of past invasions. He argued that a CR14 for the first respondent would show that the second and third respondents are directors and the applicant deliberately did not attach the CR14 which would have made that clear. Further, the applicant had not established that the second and third respondents were removed, and the applicant had left the second and third respondents to act for a year as directors without objection.

On the alleged harm, Mr. *Magwaliba* indicated that harm does not arise from the actions of the second and third respondents but from the shareholders who will exercise their right to vote. Mr. *Magwaliba* briefly taking the issue of balance of convenience simply indicated that there is no question of any balance which favours the applicant. As for there being no alternative remedies or relief available to the applicant, he submitted that, the relief lies in HC 494/17 where the applicant seeks nullification of all actions done by the second and third respondents purporting to act as directors representing the applicant on the first respondent's board. It was Mr. *Magwaliba*'s contention that there being insurmountable disputes of facts, which the applicant should have foreseen, punitive costs should be visited upon the applicants. Mr. Kashangura the sixth respondent not being represented did not say much, apparently not privy to the legal requirements for such relief. He only submitted that in terms of Article 22 (2) the company (applicant) has authority to remove directors. A reading of his affidavit shows that he is not opposed to the relief sought

It is not in dispute that the applicant's shareholding in the first respondent consists of 41%. It appears it is the largest shareholder. It is not in dispute that as per the articles of association of the first respondent, the applicant is entitled to appoint (3) directors to the first respondent's board of directors. It is common cause that the applicant appointed the second and third respondents as directors to first respondent's board. The second respondent chairs the first respondent's board. In April 2016 applicants notified the first respondent that the applicant was withdrawing the appointment of second and third respondents to the board with immediate effect. This was not well received by the first, second and third respondents. Neither of them

accepted the withdrawal and the second and third respondents continue to act as representatives of the applicants on the first respondent's board. The second respondent having called for an EGM to put to shareholders a proposal to enter into a debt conversions agreement the applicant sought an interdict to prevent that meeting until the case dealing with the directorship of the first and the second respondent has been decided.

I am satisfied that the applicant has established a prima facie right. The conduct of the second and third respondents is being challenged, and as the applicant's representatives the applicant's interest needs to be protected. They as shareholders of the first respondent have an interest which has not been denied.

The proposal which the EGM seeks to carry through will no doubt result in the dilution of the applicant's shareholding from 41 % to 0.41 %. The harm to applicant is apparent and the fear of the harm being irreparable is well grounded in my view. If the applicant's shareholding in the first respondent is diluted and the applicant finally succeeds in HC 494/17, the reversal of the shareholding in an entity where there are other shareholders is near impossible especially where a debt conversion agreement would have been concluded.

I disagree with Mr. *Magwaliba* that harm does not arise from the second and third respondents' actions but from shareholders who will exercise their right to vote. The second respondent has called for the EGM, and in his letter to shareholders, the second respondent in para 4.6 stated that

"The directors recommend that shareholders attend the EGM and vote in favour of all resolution. The directors confirm that they themselves will vote in favour of resolutions in respect of their own shareholdings, if any."

The applicant's fears became real when first respondent's Managing Director averred in her opposing affidavit that:

"Shareholders will vote on the proposed transactions. It is a foregone conclusion that the proposals shall be approved".

It being a foregone conclusion, the applicant's apprehension gets confirmed. The second and third respondents may not lawfully represent the applicant.

In my view the balance of convenience favours the applicant. The applicant has challenged the continued existence of the second and third respondents on the first respondent's board in HC 494/17. Certainly the ventilation of the parties' dispute viz the applicant's

representation on the first respondent's board will put to rest all the other problems between the parties. The issue of the first respondent's debt for which conversion to equity is sought has been in existence and a source of worry for years such that waiting for the resolution of the applicant's directorship on the first respondent's board will not create a greater hardship. I am further convinced that there is no alternative remedy for the applicants. The remedy which Mr. *Magwaliba* indicated lies in the determination of HC 494/17 is in my view different from what the applicant seeks. Reading in the relief as per the amended draft order, the suspension of the resolutions prevents the dilution of the applicant's shareholding which will be difficult to reverse if not impossible given the first respondent's shareholding structure.

Whilst it is a litigant's right to oppose, one can read throughout the case, a spirit of connivance between the first, second, third, ninth and tenth respondents. The first respondent has categorically refused to accept the purported withdrawal of the first and second respondents, further refused to accept appointment of an alternate director by the applicant. It will be noted that the other shareholders being Old Mutual Zimbabwe Limited, Interfin Banking Corporation Limited, First Mutual Limited, and National Social Security Authority have not found it worthy to oppose the relief sought. If the situation was so dire to the extent that the EGM has to be carried out to save a sinking ship as impressed by the opposing respondents, I have no doubt in my mind these cited respondents would have put up a fight.

I find that it is not necessary to delve into the issue of the legality of the removal of the second and third respondents from the first respondent's board by the applicant as that is what the judge or court seized with the matter in HC494/17 will decide. My decision is informed by the fall out between the parties viz the representation or taking care of the applicant's interests on the first respondent's board.

I am satisfied that the applicant has satisfied the requirements for a temporary interdict. Further, the interim interdict sought is not a remedy for past invasions of rights. The meeting took place whilst this application was still being heard when it had already been instituted. This matter is different from the *Airfield Investments* case cited *supra* where the applicant by virtue of the provisions of the Land Acquisition Act had already lost the right to ownership of land when he filed an urgent chamber application. In *casu*, the meeting took place whilst parties were still in the course of making submissions, after respondents in circumstances smacking of mischief

appealed a very temporary order and decided to proceed with the meeting on a day arguments were continuing to be heard.

In granting the amended order I hasten to state that the founding affidavit can still sustain the order sought. On p 13 of the applicant's founding affidavit at para 23, the effect of the proposed debt conversion is clearly articulated. It then follows when the applicant seeks to have the resolutions suspended that it is to prevent the very harm contemplated in the application. I cannot however grant the relief sought in clause 3 seeking to interdict the second and third respondents from acting as directors of first respondent pending the final determination of HC 494/17, as that has a final effect and it is in my view for the court that will determine the final order to decide on the granting or otherwise of such a relief.

Accordingly the following interim relief is granted.

Pending the final determination of this matter, the applicant is hereby granted the following interim relief.

1. The operation of the resolutions passed at the extra-ordinary general meeting of the 1st respondent carried out on 22 February 2017 be and is hereby suspended.
2. That the first respondent is interdicted from effecting any changes to its share register.

Matsika Legal Practitioners, applicant's legal practitioners
G S Kashangura law Chambers, 1st respondent's legal practitioners
Manase & Manase, 3rd & 4th respondents' legal practitioners
Matsika Legal Practitioners, for the 9th & 10th respondents