NU.COM (PRIVATE) LIMITED
and
CHAKANYUKA KARASE
and
MATIPEDZA KARASE
versus
NU AERO (PRIVATE) LIMITED
and
FLYAFRICA LIMITED
and
LOW COST ENTERPRISES (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 16 May 2017 & 9 August, 2017

`

Opposed Application

L Madhuku, for the applicants
T Zhuwarara, for the 1st and 3rd respondents
No appearance for the 2nd respondent

MUREMBA J: The second and third applicants are shareholders of the first applicant, a company duly incorporated in terms of the laws of Zimbabwe. The second applicant is also the Managing Director of the first applicant. The first respondent is a company duly incorporated in terms of the laws of Zimbabwe. The second respondent is a company duly incorporated in Mauritius. The third respondent is a company duly incorporated in terms of the laws of Zimbabwe.

In 2012 the first applicant and the second respondent entered into a joint venture agreement for the provision of low cost air travel in Zimbabwe under the banner of Fly Africa Zimbabwe, which is the first respondent, using the second respondent's business model. Pursuant to the joint venture agreement the two companies entered into a Shareholders' Agreement in respect of the first respondent in 2013 in terms of which the first applicant held

51% shares with the second respondent holding 49% shares. The second applicant was appointed as the first Chief Executive Officer and Accountable Manager of the first respondent. Within a few months of operation, disputes emerged within the first respondent. Pursuant to this, the second applicant as the Chief Executive Officer and Accountable Manager *mero motu* surrendered to the Civil Aviation Authority of Zimbabwe the first respondent's Air Operative Certificate citing financial and operational challenges. The Chief Executive Officer asked that the operations of the first respondent be immediately suspended pending full settlement of financial obligations that were due to various organisations. Some directors of the first respondent reacted by suing the second applicant in this court under case number HC10476/15. They got a provisional order interdicting the second applicant from making unilateral decisions or taking unilateral actions in relation to the first respondent's business. From that time relations between the first applicant and the second respondent went sour.

In October 2015, the second respondent served the first applicant with a Default Call Option Notice in terms of clause 21 of the Shareholders Agreement. The notice was notifying the first applicant that it was being required to sell to the second respondent all its shares within the time frame stipulated in clause 21. Although the first applicant received the notice, it did not act on it. Resultantly, the second respondent acquired the first applicant's shares as per the provisions of the Shareholders' Agreement without notice to the first applicant. The second respondent thereafter sold the all the shares (100%), including its own shareholding to the third respondent. This development prompted the applicants to make the present application for a *declaratur*. They want a declaratory order to the effect that the first applicant is still the 51% shareholder in the first respondent. They aver that the first applicant never sold its shares. They aver that the suggestion that it sold its shares is untrue, unlawful and mischievous. They challenge the sale and transfer of the first applicant's shares that happened on the grounds that:

(i) The shareholding structures of companies are strictly regulated by the Companies Act [*Chapter* 24:03] and the common law. It is legally impossible for shares to be bought and sold in the manner the first applicant's shares are said to have been bought and sold.

(ii) Clause 21 of the Shareholders Agreement is not a basis for the compulsory acquisition of property as what happened. The parties never intended the innocent clause to have such a drastic import. If the clause was to be given the meaning being suggested, it would be void for being contrary to the Companies Act.

(iii) The meaning being given to clause 21 offends firstly, s 71 of the Constitution of Zimbabwe (the right to property) and secondly, the public policy of Zimbabwe.

(iv) Assuming that the sale was permissible in terms of the Shareholders' Agreement, the provisions of clause 21 which were invoked were not properly followed.

The order the applicants seek is as follows;

"It is ordered:

1. That the first applicant be and is hereby declared to be still holding 51% shares in the first respondent.
2. That the purported sale of the first applicant's shares in the first respondent to the third respondent be and is hereby declared null and void and of no force or effect.
3. That for the avoidance of doubt, the default call option purportedly exercised by the second respondent pursuant to clause 21 of the Shareholders' Agreement between the first applicant and the second respondent, be and is hereby declared null and void and of no force or effect.
4. That all transactions, decisions and or proceedings carried out by first, second and third respondents, individually or collectively pursuant to their belief that the first applicant was no longer a shareholder in the first respondent be and are hereby declared null and void and of no force or effect.
5. That the first, second and third respondents pay the costs of this application on a legal practitioner and client scale jointly and severally, one paying the others to be absolved."

The first and third respondents filed opposing papers to the application, but the second respondent did not.

At the hearing of this matter on 16 May 2017 Mr. *Zhuwarara* for the first and third respondents raised a point *in limine* with regards to service of the application on the second respondent, Fly Africa Limited, a company incorporated in Mauritius and having its registered office at Suite 510, 5th Floor, Barkly Wharf, Le Caudan Water-front, Port – Louis, Mauritius.

Mr *Zhuwarara* submitted that initially the matter was set down for hearing on 31 January 2017 before FOROMA J who postponed the matter *sine die* to enable the applicants to properly serve the second respondent who is a peregrine, with no offices in Zimbabwe. He said that FOROMA J had ruled that the service that had been effected on the second respondent was improper. Mr. *Zhuwarara* submitted that the matter cannot be heard as the applicants have not addressed the issue of service of the application on the second respondent that was raised before FOROMA J. He said that the applicants had not obtained leave to bring the second respondent who is a peregrine before the court.

Mr. *Madhuku* disputed the account that was given by Mr. *Zhuwarara*. He submitted that FOROMA J did not make a ruling that the service that had been effected on the second respondent was improper. He said that the issue was that FOROMA J had recognized that the second respondent had been served with the application but had not answered. There was email correspondence between the applicants' legal practitioner and the director of the second respondent showing that service had been effected. He said that the judge directed that all the papers be served on the second respondent and the second respondent be required to indicate whether or not it was opposing the application.

Mr. *Madhuku* went on to submit that after the hearing of 31 January 2017 there was service of process afresh on the second respondent on 3 February 2017. A certificate of service to this effect which was filed with this court on 10 March 2017 was produced. It states that the court application, first and third respondents' notice of opposition, applicants' answering affidavit, applicants' heads of argument, first and third respondents' heads of argument were served upon Mr. Ntlhane Makena, the legal practitioner for the second respondent by Fedex Courier and the said Ntlhane Makena confirmed service by email on 20 February 2017. The address where service was effected was given as Edward Nathan Sonnenbergs, 150 West Street, Sandton, Johannesburg, Republic of South Africa. The shipment document by Fedex containing this information was also attached to the certificate of service. The email correspondences that

happened between Dickson Mundia, the legal practitioner for the applicants and Mr. Ntlhane Makena were also attached. The email correspondences show that the first email was written by Dickson Mundia on 1 February 2017 to Ntlhane Makena confirming that he acts for the applicants and indicating that the matter had not been heard on 31 January 2017, because the judge was of the view that the matter should be postponed to allow the second respondent to indicate whether or not it would like to oppose the application. Dickson Mundia asked Ntlhane Makena if his client wished to oppose the application. On 2 February 2017 Ntlhane Makena responded asking for a full set of pleadings in this matter as his client, second respondent was only having the founding affidavit and answering affidavit deposed to by the applicants. Ntlhane Makena indicated that he wanted a full set of pleadings to enable him to advice if they were opposing the application or not. Then on 20 February 2017 after being served with a full set of process by Fedex Courier services, Ntlhane Makena wrote another email saying "our client will not be opposing this application."

With these developments in the matter, the question now turns on whether or not this service was proper. Mr. *Zhuwarara* who claimed to be seeing the documents for the first time as they had not been brought to the attention of his instructing legal practitioners, Kantor and Immerman submitted that the documents do not constitute proof of proper service for the following reasons.

i) The documents purport to be service of a Mauritius based company to legal practitioners based in South Africa who have not filed any documents to show that they represent the second respondent and can receive service on its behalf.

ii) Emails and text messages are not sufficient proof of service in this jurisdiction. A certificate of service cannot have attached to it emails, text messages and WhatsApp messages. So what is before the court is not a certificate of service in terms of the rules of this court.

iii) Service was not effected by an agent of the applicants' legal practitioners but by a courier service, Fedex outside the jurisdiction of Zimbabwe without the leave of the court

iv) This is not in compliance with Order 5 r 39 (2)(d) of the High Court Rules, 1971 which states that:

"(2) Subject to this Order, process other than process referred to in sub rule (1) may be served upon a person in any of the following ways—
(*a*) …….
(*b*) ……..
(*c*……
(*d*) in the case of process to be served on a body corporate—
(i) by delivery to a responsible person at the body corporate's place of business or registered office; or
(ii) if it is not possible to serve the process in terms of subparagraph (i), by delivery to a director or to the secretary or public officer of the body corporate."

Mr. *Zhuwarara* submitted that there is no way of verifying the link between the South African legal firm and the second respondent for no court process has been filed explaining the link. Further there has been no submission to the jurisdiction of this court by the second respondent. He submitted that in the absence of submission to jurisdiction this court cannot exercise any decision with regards to the second respondent. He said that in terms of s 15 of the High Court Act [*Chapter 7:06*] this court cannot exercise jurisdiction over a peregrine who has not been properly brought before it and who has not been properly served. The provision reads as follows.

"S. 15 Exercise of jurisdiction founded on or confirmed by arrest or attachment
In any case in which the High Court may exercise jurisdiction founded on or confirmed by the arrest of any person or the attachment of any property, the High Court may permit or direct the issue of process, within such period as the court may specify, for service either in or outside Zimbabwe without ordering such arrest or attachment, if the High Court is satisfied that the person or property concerned is within Zimbabwe and is capable of being arrested or attached, and the jurisdiction of the High Court in the matter shall be founded or confirmed, as the case may be, by the issue of such process."

Mr. *Zhuwarara* asked that the matter be struck off the role and the applicants be ordered to pay costs on a higher scale because service was not properly done and the certificate of service that was produced that was filed with this court on 10 March 2017 was not even served on the first and second respondents, them being the parties who had raised the issue of service on the second respondent on 31 January 2017. He submitted that these respondents should be indemnified for having to come to court to state or argue the obvious.

In response Mr. *Madhuku* made the following three arguments. The first argument was that this application being an application for a declaratory order in terms of s 14 of the High Court Act gives this court jurisdiction to enquire into the rights of the first applicant. He said that no leave of the court or a judge is required to serve such process outside Zimbabwe. He

submitted that this is different from an action where the plaintiff will be seeking a claim against the defendant and the defendant has to perform. He said that it is under such circumstances that leave under the provisions of edictal citation is required. Mr. *Madhuku* submitted that s 15 of the High Court Act which Mr. *Zhuwarara* cited is not relevant in this case. He said that the provision does not apply to every situation where the person is outside Zimbabwe. He said that although the order that is being sought has some consequential relief being sought, that does not take away the fact that this is an application for a declaratory order.

Mr. *Madhuku's* second argument was that in the event that the court makes a finding that no leave of the court is required to serve the application on the second respondent, it should go ahead and make a finding that service was properly and validly effected. He submitted that the certificate of service before the court was prepared by a legal practitioner who is an officer of the court. Mr. *Madhuku* submitted that there were several correspondences which were exchanged between the applicants' legal practitioners and a representative of the second respondent leading to the applicants' legal practitioners being told that the second respondent is represented by lawyers in South Africa. He referred to emails attached to the certificate of service filed on 25 January 2017 which was produced before FOROMA J on 31 January 2017. The certificate of service shows that Dickson Mundia, the applicants' legal practitioner on 18 January 2017 served the court application, the applicant's heads of argument and notice set down on the opposed roll for 25 January 2017 upon Georges Chung Ming Kan, a representative of the second respondent by DHL Courier in Mauritius and he confirmed service by email on 23 January 2017. In that same email Georges Chung Ming Kan indicated that the second respondent needed to advise its lawyers in South Africa. The matter was not heard on 25 January 2017. It was postponed to 31 January 2017. Another notice of set down for 31 January 2017 was sent by email to Georges Chung Ming Kan in Mauritius. There was confirmation of that email having been seen by Geroges Chung Ming Kan on 25 January 2017.

Mr. *Madhuku* submitted that in the absence of allegations that the legal practitioner who filed the certificate of service has an intention to mislead the court there is no reason why the certificate of service which was filed on 10 March 2017 should be disregarded by the court. He said that in terms of r 39 of the High Court Rules an application unlike the summons may be served by the parties which is what happened in the present matter. Mr. *Madhuku* submitted that

service by courier and email is proper service. He said that the rules of this court were enacted in 1971 and have not been amended to suit modern methods of communication. He said that communication by courier and email should be accepted on the basis of r 4C which says,

> "4C ***Departures from rules and directions as to procedure***
> The court or a judge may, in relation to any particular case before it or him, as the case may be—
> (*a*) direct, authorize or condone a departure from any provision of these rules, including an extension of any period specified therein, where it or he, as the case may be, is satisfied that the departure is required in the interests of justice;
> (*b*) give such directions as to procedure in respect of any matter not expressly provided for in these rules as appear to it or him, as the case may be, to be just and expedient."

Mr. *Madhuku*'s third argument was that the first and third respondents have filed opposing papers and have given facts relevant for the determination of the matter, it is therefore not proper for them to say the matter should not be heard until the second respondent is brought before the court. He said that the court is being called to determine whether or not shares can be transferred outside the Companies Act and this does not require the attendance of the second respondent. He said that the first applicant is simply saying that it is a shareholder in the second respondent and merely wants that right declared. He said that the court can alter the draft order for it not to affect the second respondent. He said that even then that issue does not even arise because the second respondent has indicated that it does not oppose the application.

In his response Mr. *Zhuwarara* said that it is a fallacy that this matter can proceed without the second respondent which is the party which sold the shares that are now being held by the third respondent. He said that the second respondent has a material interest in the matter. He said that the second respondent's legal practitioners should have filed process consenting to the granting of the application instead of sending an email because that communication being attached to a certificate of service is not on record and it is in violation of the rules of this court. He said that certificates of service have no provision for the attachment of evidence. Mr. *Zhuwarara* said that r 4C cannot be used to condone or create a procedure that does not exist. He said that the interests of justice are not served by condoning a wanton disregard of the rules. He further said that s 15 of the High Court Act prohibits the manner employed by the applicants. It guards against orders that cannot be effected.

The result slip of 31 January 2017 by FOROMA J which is in the file reads as follows.

"Matter postponed *sine die*. The applicant to bear today's wasted costs".

The reasons why the matter was postponed *sine die* are not on record. I therefore have no way of knowing who to believe between Mr. *Zhuwarara* and Mr. *Madhuku*. Be that as it may, with service having been effected afresh on the second respondent on 3 February 2017, I now have to decide firstly, whether leave of the court or a judge was required for process to be served. Secondly, if leave was not required, I have to decide whether service by courier and confirmation by email is valid and proper.

Order 5 r 39 (2) (d) which both counsels referred to in their submissions is not applicable in the present matter because the issue at hand is about service of process to the second respondent a company based in Mauritius, outside the jurisdiction of this court. Order 5 rule 36 states that Order 5 applies to service of process within Zimbabwe. It does not apply to service of process outside Zimbabwe. It reads:

> "36. ***Application of Order 5***
> This Order shall apply to the service of all process within Zimbabwe except to the extent that it is inconsistent with—
> (*a*) any other provision of these rules relating to the service of any particular process; or
> (*b*) any order or direction which a court or judge may give in relation to the service of any particular process."

Service of process outside the jurisdiction of Zimbabwe is catered for under Order 6. It reads:

> "**ORDER 6**
> SERVICE OUTSIDE THE JURISDICTION AND SUBSTITUTED SERVICE."

Order 6 r 44 deals with Edictal Citation. Rule 44 (1) reads:

> ***"44. Edictal Citation***
> (1) Save as is provided in rule 45 or in any Act relating to the service of process on a reciprocal basis in any territory, no process or document whereby proceedings are instituted shall be served outside Zimbabwe without the leave of the court or a judge.(My underlining for emphasis)

The phrase 'no process or document' means that every court process and every court document has to be served outside the jurisdiction of this court with the leave of the court or a judge. The word 'shall' means that the requirement is peremptory. An application for a declaratory order is a court process. With the rule giving no exception, it means that an

application for a *declaratur* cannot be served outside Zimbabwe without first obtaining leave. If such an application was meant to be an exception or exempted then the rule would have provided so. This therefore means that in *casu* the applicants ought to have first obtained the leave of this court or a judge before serving the second respondent with the application. I do not believe that the non-compliance with the rules on this aspect is something that the court can condone as Mr. *Madhuku* argued and requested. My reason for saying this is that in the application for leave to serve process or documents outside Zimbabwe, in terms of rule 44 (3) (c) the applicant asks the court or judge to authorise the manner of service on the respondent(s). In terms of r 44 (4) the court or judge gives an order as to the manner of service it or he seems proper and necessary. The court or judge further orders the time frame within which a response should be filed by the respondent(s). In the same edictal citation application and in terms of r 44 (3) (b), the applicants would have stated the grounds upon which this court has jurisdiction to entertain the application against the second respondent. This would have addressed the issue of submission to this jurisdiction by the second respondent which Mr. *Zhuwarara* raised.

Rule 44(3) and (4) read as follows.

> "44(3) Application for leave of the court or of a judge shall be made by application in terms of Order 32 setting out concisely—
> (*a*) the facts upon which the cause of action is based;
> (*b*) the grounds upon which the court has jurisdiction to entertain the claim;
> (*c*) the manner of service which the court or judge is asked to authorize, and if personal service cannot be effected the last-known whereabouts of the person to be served and the inquiries made to ascertain his present whereabouts.
> (4) On such application the court or judge may make such order as to the manner of service as to it or him seems proper and necessary, and shall further order the time within which notice of intention to defend or any other step is to be taken by the person to be served."

If the applicants in the present matter had made an edictal citation application in terms of Order 6 r 44 for service of the second respondent, the court or judge would have prescribed or directed the manner of service. So the issue of whether or not service was properly effected on the second respondent would not even arise. Having made a finding that leave of this court or a judge is required for service of process and documents in this matter the matter ends here. The second issue which is the issue of whether or not service was properly effected via courier and email does not arise for determination.

Mr. *Madhuku's* third argument was that this matter should be heard in the absence of the second respondent since the first and third respondents filed opposing papers and have given facts relevant for the determination of the matter. He said that in any case the second respondent has indicated that it is not opposed to the application. To begin with, this court having made a finding that leave of the court or a judge was required before service of process could be effected, it means that the service that was effected by the applicants is improper and invalid. Therefore, the certificate of service filed by the applicants on 10 March 2017 and all attachments attached to it including the email consenting to the application which the second respondent purportedly gave is invalid. It is therefore not on record that the second respondent is not opposing the application. Secondly, it should be noted that the second respondent is very critical and central to this case. It is the one that sold shares to the third respondent and the consequential reliefs being sought by the applicants nullifying all transactions it entered into with the third respondent have an effect on it. The case cannot therefore proceed without proper service having been effected on it in terms of the rules. In the absence of proper service on the second respondent this matter cannot be heard. I will thus strike it off the roll. However, I am not inclined to grant costs on a higher scale against the first and third respondents for the simple reason that I do not really know why the matter was postponed *sine die* by FOROMA J on 31 January 2017. I do not know if the arguments that were made before me are the same arguments that were made before FOROMA J and what his ruling was before postponing the matter *sine die*. I will thus give the applicants the benefit of the doubt.

In the result, it be and is hereby ordered that:

1. The matter is struck off the roll.
2. The applicants pay the first and third respondent's costs.

Mundia & Mudhara, applicants' legal practitioners
Kantor & Immerman, 1st and 3rd respondents' legal practitioners