

TZH HOLDING LIMITED  
versus  
ZIMRE HOLDINGS LIMITED  
and  
REGINALD SARUCHERA N.O.

HIGH COURT OF ZIMBABWE  
PATEL J  
HARARE, 27 January 2005

*Adv. S. Morris*, for the Applicant  
*Mr A. Chinake*, for the 1<sup>st</sup> Respondent

### **Urgent Application**

PATEL J: This matter was heard in chambers as an urgent application on the afternoon of the 27<sup>th</sup> of January 2005.

The applicant sought a provisional order interdicting the first respondent from issuing any further shares, whether as a rights issue or otherwise, until the occurrence of certain events. The applicant also sought authority to appoint one or more representatives to participate and vote at any extraordinary general meeting ("EGM") of the first respondent without interference from the second respondent. Pending finalisation of the matter, the applicant sought interim relief postponing the first respondent's EGM which was scheduled for 9.00 a.m. on the following day and at which the members present were to decide on a proposed rights offer of Z\$60 billion.

The application was dismissed with costs and my reasons therefore were pronounced at the hearing. The applicant now urgently seeks brief reasons for the judgement in writing. My reasons are set out below.

### The Facts

The applicant is a company registered in the United Kingdom. It holds 100% of the shares in Endurite Properties (Pvt) Ltd. ("Endurite"), while Endurite owns 75% of the shares in Ukubambana-Kubatana Investments (Pvt) Ltd. ("UKI"). Both Endurite and UKI are registered in Zimbabwe.

On the 26<sup>th</sup> of August 2004, both Endurite and UKI were declared to be specified persons in terms of section 6 of the Prevention of Corruption Act [*Chapter 9:16*]. At the same time, the second respondent was appointed as the investigator of both entities for the purposes of the Act.

The first respondent is a company listed on the Zimbabwe Stock Exchange. Endurite and UKI respectively hold 24.32% and 22.23%, making a total of 46.55%, of the shares of the first respondent.

During the latter part of 2004 the first respondent proposed a rights issue to shareholders. Pursuant to this proposal, on the 30<sup>th</sup> of December 2004, it published a notice of the above-mentioned EGM. Thereafter, it issued a Circular to Shareholders, dated the 7<sup>th</sup> of January 2005, designed to raise a total of Z\$60 billion through the rights offer.

The Circular (at pp. 6-8) elaborates the purpose of the rights offer as being, *inter alia*, to increase the first respondent's local underwriting capacity and to expand and re-capitalise its regional operations. It also spells out (at p. 3) a shareholders' calendar, being the time-table fixed to realise the key stages of the proposed rights issue, including the EGM scheduled for the 28<sup>th</sup> of January 2005.

The Applicant contends that the real motivation for the rights issue is to dilute the percentage shareholding of Endurite and UKI in the first respondent. The latter firmly disavows any such motivation and contends that the rights offer is a perfectly lawful commercial exercise intended to benefit its shareholders.

### **Reasons for Judgement**

The reasons for dismissing the application are as follows:-

1. The applicant has failed to establish any meaningful urgency behind the application. It chose to act less than 24 hours before the EGM scheduled for the 28<sup>th</sup> of January 2005, despite having been aware of that meeting and its purpose during or before December 2004. Moreover, as conceded by counsel for the applicant, it would be perfectly feasible for the applicant to institute litigation to safeguard its interests at any time after the EGM and before the rights issue is finalised.
2. The applicant has failed to pursue alternative remedies and measures to protect its rights. More specifically, nothing was done to challenge the specification of Endurite and UKI in August 2004, whether by way of review proceedings or otherwise. Furthermore, no steps appear to have been taken to obtain the second respondent's approval, in terms of section 10 of [Chapter 9:16], allowing Endurite and UKI to carry on their ordinary course of business. Thus, the requisite approvals, if timeously sought and obtained, might have enabled both entities to fully participate in the rights issue, whether before, during or after the EGM. Indeed, this avenue is potentially still available to the applicant.
3. On the merits, the applicant has patently failed to adduce sufficient evidence to challenge the declared purpose and objectives of the rights issue as presented by the first respondent. The facts submitted by the parties cannot justify the court's interference with the evidently lawful processes initiated by the first respondent in pursuit of its legitimate corporate objectives.
4. The balance of convenience is clearly in favour of the first respondent. It has decided to re-capitalise in order to achieve its declared commercial and financial objectives. It has set in motion the relevant processes that are legally

and practically necessary for the rights offer to be properly managed and executed. Any interference with these processes, otherwise than on solid factual and legal grounds, would not only threaten the first respondent's financial viability but would also undermine its corporate reputation. On the other hand, as I have already mentioned, the applicant has available to it other avenues which it is at liberty to pursue in order to protect its rights and interests.

For the above-stated reasons, the application was dismissed with costs.

*Costa & Madzonga*, legal practitioners for the Applicant.

*Kantor & Immerman*, legal practitioners for the 1<sup>st</sup> Respondent.