ZESA HOLDINGS (PRIVATE) LIMITED
versus
SYDNEY ZIKUZO GATA

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 6 August 2020, 12 August 2020 and 28 August 2020

Urgent Application for an interdict

M Banda with *M Sinyoro*, for the applicant
L Madhuku, for the respondent

CHITAPI J: The applicant is Zesa Holdings (Private) Ltd a company duly incorporated and registered in accordance with the laws of Zimbabwe. The respondent Sydney Gata is the applicant's Executive Chairman. The applicant is a wholly owned Government of Zimbabwe company. The Government appoints the applicant's board of directors and also appointed the respondent in his capacity as aforesaid. The employment contract of the respondent as Executive Chairman was executed between the respondent and the Minister of Energy and Power Development representing Government. The employment contract was executed by the parties aforesaid on 27 February 2019. I will revisit the contract later in this judgment. The dispute I must deal with is therefore one involving the company and its Executive Chairman.

The applicant filed this urgent application for a provisional order which reads as follows in draft:

> TERMS OF FINAL RELIEF SOUGHT
>
> That you show cause to the Honourable Court why a final order should not be made in the following terms:-
>
> 1. Pending finalization of investigations into his conduct, respondent be and is hereby interdicted from accessing the applicant's premises wherever situate in Zimbabwe including access to its employees and platforms housing Applicant's documents and/or information.
> 2. That the costs shall be borne by the respondent on the scale of legal practitioners and client

INTRIM RELIEF GRANTED

Pending the determination of this matter the applicant is granted the following relief

1. Pending finalization of investigations into his conduct, respondent be and is hereby interdicted from:
    1.1 Holding himself out as Chief Executive Officer and Chairperson of the Applicant and calling for meetings in that capacity;
    1.2 Accessing the applicant premises wherever situate in Zimbabwe including access to its employees and virtual platforms housing applicant's documents and/or information

SERVICE OF THE PROVISIONAL ORDER

This provisional order be served on the respondent by Sheriff of this Honourable Court.

The respondent opposed the application strenuously on various grounds. The respondent raised several points in *limine* which I dismissed after submissions by the parties' counsel. I indicated that I would provide my reasons for the dismissal in the main judgment. The points in l*imine* were stated as follows:

(a) the applicant is not properly before the court as the deponent has no authority whatsoever to bring it before a court nor can the applicant be brought to court at the instance of the persons that purportedly authorized the deponent.
(b) the relief sought is not competent as both the interim and final reliefs are the same.
(c) there are material disputes of fact relating to the respondent's position that cannot be resolved on the papers
(d) on the deponent's averments, this court has no jurisdiction

I deal with the points in *limine* in turn. In regard to point (a) the respondent submitted through his counsel that he was appointed to the position of Executive Chairman of the applicant by his Excellence, the President of the Republic of Zimbabwe, E.D. Mnangagwa. It was averred that his position of Executive Chairman was special in as much it was made in extra-ordinary circumstances. The respondent attached two copies of what he presented as his letters of appointment. He averred that the "letters were signed by the Minister of Energy and Power Development as directed by his Excellency."

The first letter was dated 18 November, 2019 and was written by the then Minister of Energy and Power Development (hereinafter called Minister for brevity) Fortune Chasi (MP). In the letter it is stated that the Government had identified the respondent as the person to lead the applicant in the capacity of Executive Chairman. It was further stated therein that the respondent would be expected as the Executive Chairman of the board, to adopt a hands on approach and attend to issues on the operations of the applicant so that the power situation in the country is urgently resolved. It was further stated that the applicant would be provided with a detailed mandate regarding his board's tasks at the institution. The applicant was invited to sign the letter if he accepted the appointment. He did so on the same date that the letter was written, which was on 18 November, 2019.

The second letter was dated 18 December, 2019. It was again addressed to the respondent by the Minister. The Minister confirmed therein that it was the Government's wish that the applicant should be chaired by an Executive Chairman. The Minister set out the circumstances which had moved the Government to opt to appoint an Executive Chairman as opposed to a non executive Board Chairman. It was stated that the exigencies of the situation required that there be an Executive Chairman who would be hands on in managing the applicant. In paras 5 and 6 of the letter it was stated:

> "5. Given the foregoing, it is necessary that your Board sits to consider how best to implement this position by Government.
> 6. The appointment of an Executive Chairman does not absolve the Board from its fiduciary duty to properly run the Zesa Holdings (Pvt) Ltd efficiently in keeping with good corporate governance practices."

It was noted by the Minister in the letter that a Chief Operating Officer be appointed to deal with areas of potential conflict. It was also further noted that the appointment of the respondent was envisaged to be for a short period and not permanent as the need for the Executive Chairman would fall away once the power supply situation in the country had been stabilized.

In the course of the hearing, I directed that the employment contract proper which was said to have been executed between the applicant and the Minister should be availed. A copy thereof was filed in the answering affidavit whose filing I authorized. I propose to deal with the contents of the contract to the extent of its relevance to the points in *limine* raised. The employment contract which was headed service contract was executed on 27 February, 2019 by the Minister and the respondent. A reading of the contract clearly shows that it created a work relationship between the

applicant, described in the contract as "the company" and the respondent. For example in para 2.1 of the contract the respondent was required to agree with the company on where the respondent would be based. In para 3.1 of the contract, it was stated:

> "3.1 ……This fixed term contract of engagement supersedes any representations and undertakings made between the Executive Chairman and the company or the Shareholders."

The effect of this clause was therefore to displace the letters of 18 November 2019 and 28 December, 2018.

Clause 3.2 of the contract is also of importance. It provides as follows:

> "3.2. Should the Executive Chairman have performed his services to the satisfaction of the company in terms of reasonable criteria and targets determined by the company from time to time in consultation with the Minister, then, on expiry of appointment Period and subject to the company's business needs, the company may offer to the Executive Chairman a further contract, which contract:
> 3.2.1 shall endure for a period to be agreed to by the parties;
> 3.2.2 shall remunerate him at a level not lower than that which the Executive Chairman was earning at the termination Date."

Further clause 6 of the contract provided as follows:

> "6. In addition to the Executive Chairman's performance to be set out as above, the Executive Chairman shall:
> 6.1 carry out, in the capacity for which he is employed, such duties as are determined from time to time by the company's directors; the Minister or anyone authorized by them;
> 6.2 comply with reasonable directions given to him from time to time by the company's Directors; the Minister or anyone authorized by them;
> 6.3 …..
> 6.4 comply with all the company rules, regulations policies; practices and procedures laid down from time to time for the economic, efficient and harmonious operations of the company's business
> 6.5 …..
> 6.6 accurately, completely and with due diligence furnish the company's Directors, orally or in writing as the Directors may require, with any explanations or information which the directors may require from time to time..
> 6.7 without prior written consent of the Board, not to incur on behalf of the company or any company in the Group any capital expenditure in excess of such limited as he may be authorized from time to time or enter into, on behalf of the company or any company in the group, any commitment, contract or arrangement or otherwise than in the normal course of business or outside the scope of his normal duties or of an unusual onerous or long term nature."

It was noted that the contract provided for a remuneration package to be paid to the respondent by the company. The details of the remuneration were outlined. However, the same

was to remain confidential between the company which had the obligation to pay the package and the respondent. The details shall remain undisclosed in this judgment because the issues for determination do not require disclosure of the package and indeed other matters considered irrelevant for purposes of this application.

The applicant in the answering affidavit denied that the respondent was a Presidential appointee. It averred that albeit his contract of service having been executed by the Minister, the respondent was an employee of the applicant and was remunerated his salary and benefits by the applicant. Applicant also noted that the respondent was obliged to report to the applicant in the discharge of his duties. The respondent was also obliged to account to the applicant's Board which was also mandated to assign him duties to carry out apart from meeting performance indicators set by the Minister representing the shareholders (Government). It was also the applicant's deposition that the contract was clear on who the respondent's employer was and that it was the applicant. Applicant again averred that the applicant had a board of directors of which the respondent was part, as Executive Board Chairman.

Having considered the applicant's founding affidavit, the opposing affidavit, the answering affidavit, applicant's heads of argument applicant's service contract and arguments presented by counsel I am satisfied that the respondent is an employee of the applicant. The contract of employment executed by the Minister and the respondent shows that although the respondent was headhunted to be appointed as Executive Chairman of the applicant he remained answerable to the applicant through its board of directors and was required to comply with directives given by the company Directors, or by the Minister, including directions given by any person authorised by the Directors or the Minister. The respondent simply occupied the unique position of doubling up as the Chief Executive and board Chairman of the applicant, a situation which is not ideal because the respondent would chair the same Board which overseas the applicant's operations instead of being subordinate to it. The ideal situation would be to have an independent chaired board with management and respondent as Chief Executive being *ex officio* members where desirable. The Minister in his letters of appointment described the set up as unusual but noted that the move had been deliberately adopted to ensure that the Board Chairman becomes involved with operations of the applicant at the shop floor level so that he is hands on with the goings on.

It follows that there is no merit in the respondents' objection that the applicant does not have authority over the respondent nor to bring the respondents to court in the manner that the applicant did. The argument by the respondent's counsel that only the Minister as the other party to the contact and/or his Excellency The President of Zimbabwe are the only persons who can sue the respondent on matters arising out of the contract is not tenable. It is a construction of the contract which neither the Minister nor the respondent ever contemplated because it is absurd and illogical to give such a construction to the contract. In my view, if one considers the commercial context in which the service contract was entered into, it is without doubt that the Minister entered into the contract tying up the applicant and the respondent with the applicant being the employer and the respondent, the servant or employee. The applicant's powers over the respondent are laid out in the contract. The substance and not the form of the contract determines the nature of the contract and the relationships, obligations and powers of parties who feature in the contract.

In regard to the point in *limine* (b) the respondent submitted that the applicant was a company *sui generies* because all its shares are held on behalf of the State by persons approved by the President. It was argued that the applicant is not run in the same manner as those companies established exclusively in terms of the Companies and other Business Entities Act, [*Chapter 24:31*]. The main reason put forward was that the company was being run under a phase determined by the President which saw the appointment of the respondent in the form of an executive chairman. In paras 9 and 10 of the opposing affidavit, the respondent stated, thus—

> "9. This takes me to my role as Executive Chairman. Under the mandate given to me as executive chairman, meetings can only be convened with my approval and/or authorization. Under no circumstances can meetings be held without my knowledge or behind my back.
> 10. Further, only the Executive Chairman or persons authorized by him may institute proceedings for or on behalf of the applicant."

The applicant in answer stated in the answering affidavit that s 137 of the applicants Articles of Association provided for the holding of a Board Meeting at the request of any director of the company. I considered the articles of association attached to the answering affidavit and noted the correctness of the applicant's interpretation of Article 137. I considered the employment or service contract as alluded to herein. I did not find any clause that gives the respondent powers, let alone exclusive powers as he stated in paras 9 and 10 of his opposing affidavit as quoted, to call for or convene Board Meetings and to "institute" proceedings for and on behalf of the

applicant." Curiously though, the respondent spoke to his powers to institute proceedings but did not allude to powers to defend proceedings against the applicant which is absurd. The respondent impugned the Board Meeting which made a resolution to send him on mandatory leave on the basis that the meeting was convened without his approval. During the hearing, the respondent threw in another argument through his counsel arguing that he was not given notice of the meeting as required by the articles of association. The respondent was clutching at straw. The applicant averred that the respondent had on 27 July 2020 presided over an Extra-Ordinary Board Meeting at which allegations of impropriety by the respondent were discussed to which the respondent responded denying them. The respondent excused himself from the meeting. The Board later in the day received a letter from the Minister directing the Board to carry out an investigation of the allegations levelled against the respondent. The letter was copied to the respondent. All hell broke loose as the Board took steps to implement the Minister's directive, moves which the respondent resisted culminating in this application. The respondent it will be noted did not himself call for a Board meeting which he could have done. It is therefore ruled that the second point *in limine* had no substance and it was dismissed. The Board and the deponent to the founding affidavit had *locus standi* based on valid authority to represent the applicant and on the part of the Deputy Chairperson of the Board, to depose to the founding affidavit.

The third point *in limine* was a procedural one. The respondent's counsel argued that it is incompetent in an urgent application to seek interim relief which is similar to the final relief. It was submitted by respondent's counsel that the effect of couching the interim relief in the same terms as the final relief results in the matter ceasing to be urgent. I do no agree. A draft provisional order is exactly that. It is a draft and does not bind the court ot judge. It is just like a draft order in any other application. Rule 246 (2) of the High Court CAIVIL Rules 1971, reads as follows:

> "246 (2) where in an application for a provisional order, the judge is satisfied that the papers establish a *prima facie* case he shall grant a provisional order either in terms of the draft filed or as varied."

Therefore, whilst the terms of the final relief sought will not be tempered with at the stage of determining whether to grant a provisional order, the interim relief to be granted will be either as sought or as varied. It must follow that the fact that the interim relief sought is the same as the final relief does not remove the urgency of the application. It is within the judge's discretion to adjudge the application as urgent and to grant such appropriate interim relief informed by the facts

as will provide equitable temporary relief and regulate the subject matter dispute and how the parties should relate with the subject matter and with each other pending the return date. There have been several judgments of the Superior Courts to the effect that the interim relief sought should not be the same as the final relief intended to be sought on the return date. I have no issues with that. My view is that when considering the draft provisional order, the judge must keep in my mind that what the applicant proposes is a draft order. The nature, content and form of the provisional order to grant where a *prima facie* case is made out on the papers is one which the judge considers to be just and equitable in the circumstance of the case. I do not agree that a faulty interim draft order is justiciable as a ground to dismiss an applicant's urgent application. The judge is not bound by the draft and should where a *prima facie* case for the relief sought is demonstrated grant a varied interim order as would regulate the dispute and parties pending the return date. The nature of the relief to be granted is therefore a function of the judge. It follows that, the proposition by the respondent's counsel that a matter ceases to be urgent where the interim and final reliefs are couched in similar wording in a draft provisional order is an incorrect expression of the law. What is urgent is the matter and not the order, the latter being in the domain of the court, the draft order being the applicant's suggested order which may be granted as couched or as varied.

The fourth point *in limine* to the effect that there are disputes of facts which cannot be resolved on the papers does not have merit. The alleged significant dispute of fact averred is that the applicant holds that the respondent is its employee whilst the respondent avers that he is not an employee of the applicant but "an office holder operating under specific terms and responsibilities." In para 16 of the opposing affidavit it is stated—

> "16. More fundamentally, I am at work for all the 24 hours in a day. These are my conditions of appointment. I am daily accountable to the President and the Minister, on a daily basis, for the electricity supply situation in the country. Only the President through the Minister may send me on leave or approve my leave."

I do not consider it necessary to interrogate this point *in limine* in any greater detail than I have already done in that I determined that the respondent is an employee of the applicant and that he is under the authority and works under the direction of and reports to the Board and to the Minister in circumstances where the Minister has given directions on any issue which the respondent is required to attend on. The respondent's averment that he is not an employee of the applicant lacks merit. This point *in limime* is deservedly dismissed.

The respondent raised a jurisdictional issue and submitted that, assuming that it is determined that he is an employee of the applicant, the court should decline jurisdiction on the basis that this is a labour dispute which should be dealt with by the Labour Court. It was argued that the applicant did not advance any good reasons for preferring this court to the Labour Court. There has been a lot of legal debate on the jurisdiction argument of the powers and jurisdiction of this court in labour matters in the face of the existence of a specialized Labour Court created specifically to deal with labour matters. I do not intend to detain this judgment on this issue. The applicant's counsel referred me to the Supreme Court decision in the case of *Chris Stylainon & Ors* v *Moses Mubita & Ors* SC 7/17. In that judgment GWAUNZA JA (as she then was) had to answer the question whether or not the Labour Court has jurisdiction to grant an interdict or a declaratory order. The learned judge had this to say on p 8 of the cyclostyled judgment

> "The question that this order raises is whether or not the Labour Court has the jurisdiction to grant an interdict. Whenever the powers of the Labour Court came into question, it must always be borne in mind that it is a creature of statute (*Dombodzvuku* v *CMED) (Pvt) Ltd* SC 31/12; *Nyahora* v *CFI Holdings (Pvt) Ltd* SC 81/14 and thereafter can only exercise those powers that are given to it by the Labour Act, its enabling statute."

The learned judge then relying on the judgment of ZIYAMBI JA in *National Railways of Zimbabwe* v *Zimbabwe Railways Artisans Union & Others* SC 8/05 to the effect that the Labour Court can only entertain applications provided for under the Labour Act, then held that to the extent that an application for an interdict was not provided for under the Labour Act, the Labour Court had no power or jurisdiction to grant an interdict.

It follows that the jurisdictional point *in limine* is not well taken and must be dismissed. The issue at play here is not really the general exercise of the jurisdiction of this court in labour matters. The issue is whether the Labour Court is empowered to grant an interdict. It does not enjoy such power. The applicant was therefore properly advised to seek the relief of an interdict in this court.

The next issue to consider is whether the applicant has made a case for the grant of the interdict sought. The background to the application is set out in the applicant's founding affidavit deposed to by Tsitsi Makovah, the Deputy Board Chairperson of the Board of Directors of the applicant, duly authorized by a Board resolution passed on 30 July 2020. In summary, on 27 July 2020, the Minister wrote a letter addressed to the Board of Directors with copy to various state entities. Copy of the letter was directed to the respondent. The Minister mandated the Board to

investigate various listed serious allegations of corruption levelled against the respondent. It is well to capture para 5 of the letter wherein it is stated—

> "In this regard, you are directed, as the Board to immediately institute investigations in the allegations against Dr Gata and take the necessary steps in terms of all the relevant laws. In particular, the Ministry requires information on—
>
> - the lawsuits between Dr Gata and ZESA Holdings and whether or not they were declared to the Board, as the Ministry is not aware of any such declaration.
> - the allegation of five company vehicles for Dr Gata's personal use.
> - the alleged interference in a disciplinary hearing involving Mrs Norah Tsomondo.
> - the alleged transactions involving Tuli and a trust, whose registration and ownership is unknown to the Ministry.
> - the issue concerning the four consultants for whom (Cabinet Authority was sought to travel to South Africa for a study tour at Eskom. There is need to establish whether or not these individuals are on ZESA's payroll and if not, the basis upon which they were engaged;
> - any other conduct that the Board finds appropriate to investigate.
>
> The allegations appearing in the press are of a serious nature, which do not only put ZESA Holdings in bad light, but the entire Government and the Ministry in particular.
>
> You are therefore instructed to give this matter all the urgency it deserves to ensure that it is resolved within the shortest time possible to allow the Board to concentrate on its key mandate, that is ensuring availability of power.
>
> In all deliberations and investigations, the Board should ensure that the Executive Chairperson is accorded all his legal rights."

In a nutshell, the applicant's Board of Directors was simply directed by the Minister to investigate allegations of misconduct made against the respondent. The office of the President and Cabinet also wrote a letter dated 27 July 2020 to the Secretary of Energy and Power Development expressing the concern of that office over the allegations made against the respondent. The office recommended that the allegations should be investigated so that transparency is observed.

The allegations aforesaid were not only a matter of concern to the Minister and Office of the President and Cabinet, but to the applicant's Board because the Board had on 24 July 2020 raised the issues circulating in the press and other media with the respondent. On 27 July 2020 the respondent rubbished the allegations made against him at another Board Meeting at which he later excused himself. The Board scheduled another Board Meeting on 29 July 2020 which was aborted after the Board members were denied access to the venue allegedly on instructions from the respondent. The Board then met on 30 July 2020 in the Boardroom of the Ministry of Energy and Power Development having looked for an alternative venue. The meeting discussed the allegations again the respondent and further considered the Ministers' directive and other stake holders' concerns. Apart from authorizing the deponent of the founding affidavit to represent the appellant

in any civil proceedings connected to the allegations and appointing another board member to be acting Chief Executive Officer for the appellant, the meeting resolved as follows:

> "RESOLVED THAT in order to facilitate proper investigations into the allegations and allow due process to take place, Mr S.Z. Gata, as Chief Executive Officer be and is hereby ordered to proceed on mandatory leave to facilitate investigations with immediate effect.
> It was RESOLVED FURTHER THAT the leave shall be for an initial period of 90 days and with full pay and benefits."

On 30 July 2020, the respondent acknowledged the letter written to him by the Board Vice Chairperson directing that the respondent should proceed on mandatory leave. Although the Board Resolution had resolved that the respondent's leave be for 90 days, in the letter the period was cut down to an initial 60 days. In the letter the Board Vice Chairperson indicated that the Board needed to carry out the Minister's directive to investigate allegations against the respondent. In addition, it stated as follows in the letter:

> "…further, and as the Board and accounting authority, the Board has the power and mandate to investigate on its own accord, any misconduct that has come to its attention within organization particularly for executive management. Therefore, to facilitate the said investigations, the Board sees it appropriate to send you on mandatory leave for an initial period of 60 days from the date of this letter…"

The respondent trashed the letter aforesaid in an emotive response dated 30 July 2020 addressed to Board members. He described the letter as "null and void." It is a nullity. It is nothing". He accused the Board of committing an act of misconduct and warned it on its actions. The respondent argued that the resolutions of the Board were not binding because the meeting at which they passed was illegal as he had not called the meeting. He threatened that going forward

> "not a single meeting of the Board or Board Committee shall be convened without my express authority. I have also suspended sub-committee meeting until I receive the value, frequency and cost including detraction of the few remaining staff available."

There was therefore a standoff between the respondent and the rest of the Board. The respondent declared that he had to authorize all Board meetings single handedly. He unilaterally suspended Board sub-committee meetings until he individually was satisfied as to their value. In other words, as far as the Board's existence and function was concerned, only him would call the tune. Everything would start and end with him. The respondent declared his omnipotence regarding the management of the applicant. He declared a one center of power position in relation to exercising control over the applicant. It was more like treating the applicant as the personal property of the applicant. The standoff is what gave birth to the urgent application in *casu*.

In disposing of the matter, I have to consider whether the applicant has made out a case for an interim or temporary interdict. In this regard, ZIYAMBI JA in *ZESA Staff Pension Fund* v *Mushambadzi* SC 57/2002 stated as follows on p 4 of the cyclostyled judgement-:

> "Secondly, the remedy sought by the respondent in the court *a quo* was an interdict. It is trite that the requirements for a final interdict are:
> 1. A clear right which must be established on a balance of probabilities.
> 2. Irreparable injury actually committed or reasonably apprehended; and
> 3. Absence of a similar protection by any other remedy.
>
> See *Setlogelo* v *Setlogelo* 1914 AD 221 at 227*; Flame Lily Investment company (Private) Limited & Anor* 1980 ZLR 378*; Sanachem (Pvt) Ltd* v *Farmers Agricare (Pvt) Ltd* 1995 (2) SA78/A at 789 B. With regards to a temporary interdict, the following must be established:
> 1. A right which though *prima facie* established, is open to some doubt.
> 2. A wall grounded apprehension of irreparable injury.
> 3. The absence of any other remedy.
> 4. The balance of convenience favors the applicant."

The applicant averred that it was necessary to carry out the investigations already referred to herein without impediments including interference from the respondent. In this regard, I must take note that from correspondence to the other members of the Board written by the respondent, the respondent showed scant regard for the Board and took the position that he had absolute power over it to the extent of banning it from conducting meetings. He purported to suspend Board sub committees. He considers himself to be above the Board's control and that he is only answerable to the President acting through the Minister and to the Minister. The respondent openly defied the Board which directed him to take mandatory paid leave to facilitate investigations of serious misconduct on his part. The respondent has clearly shown that he will impede the Board in the carrying out of the investigations which centre on the respondent. The respondent has resolved to flex his muscles in a clear case of abuse of authority to trash and impede the Board's ability to carry out a lawful mandate. It is very disturbing that the Board Chairperson would confront and threaten other Board members instead of cooperating with his colleagues on the Board to clear the serious allegations made against him.

In the opposing affidavit, the respondent in addressing the merits averred that the applicant did not have a *prime facie* right because it had no "powers whatsoever" over him and could not send him on mandatory leave since he was not an employee. I have made determinations that the respondent is an employee and that the Board has power over him. The Board would therefore be

acting within its powers to send him on mandatory leave. The respondent's objection is thus resolved against him.

The applicant argued that there was no irreparable harm to be suffered by the applicant because investigations could be carried out without sending the respondent on mandatory leave. He also averred that "from the nature of the allegations, there is nothing to destroy or interfere with". This view is too simplistic given the poisoned relationship between the respondent and the Board, such standoff being caused by the respondent who has undermined the Board and its authority over him as well as the applicants authority as employer. Whether or not the harm to be suffered by the applicant is irreparable or not is a matter of fact. The circumstances of each case are considered to come to a decision on the nature and extent of the harm. The applicant had a duty to safeguard the interests of the applicant which is an artificial juristic person. The wellbeing and success of the applicant in its operations can only be fully realized if it is shepherded or steered as a ship by men and women of honour, unimpeachable character who are also knowledgeable in the management and operations of the company. The company at play in this matter is a public interest company which is responsible for production and supply of electrical power. The need for a reliable and constant supply of power is a given. There is irreparable harm if there is no resolution of the matters at play in this matter in that a successful organization cannot be allowed to be headed by functionaries and operatives who are corrupt where such corruption has been established. It is important for the company therefore to clean its house. Irreparable harm in this case may not necessarily be financial prejudice. The corporate image of the company must be safeguarded and continue to be built on. Again the issues at stake have not only aroused public interest generally but that of the Executive as evidenced by the letter from the Office of the President and Cabinet. In such circumstances the company must be protected in every aspect of its well being given the applicant's strategic nature, the damage it has suffered and continues to suffer by reason of the existence of the unresolved allegations of corruptions against its top operative is sufficient to amount to irreparable harm because the company continues to be damaged in its image and operation including human capital morale.

The respondent has also submitted that there is an alternative remedy of resolving the matter through mediation involving other stakeholders (President and Minister). I considered the service or employment contract and as already discussed, the Minister can give directives that the

respondent is required to abide by and implement. The Minister directed that the Board should hold an enquiry into allegations made against the respondent. The respondent took issue that the Minister did not direct the directive to him as Chairperson of the Board. The respondent's reaction was petty and self centred. Addressing a communication to "the Board of Directors as opposed to the "Chairperson of the Board" does not invalidate the communication since it can still be referred to the Chairperson. The directive can be lawfully and competently carried out by the Board. There is no justification to import an alternative dispute resolution mechanism in the enquiry directed by the Minister. In fact, it is the respondent who raised the issues in this matter to the level of a dispute requesting resolutions by mediation or other dispute resolution mechanism. A dispute requiring mediation arises after the completion of an enquiry depending on the results of the enquiry. The respondent is jumping the gun. There is no suitable alternative remedy provided for in the service contract or applicant's policy, principle and procedure manual which the applicant can follow especially so, given the respondent's belligerent and hostile but misplaced attitude that he is above the Board. In any event the alternative remedy proposed is not tenable because internally the issues at play can be dealt with effectively.

The respondent averred that the balance of convenience favoured that he should be allowed to continue attending to his work to ensure the availability of electrical and power. He argued that his removal would sow seeds of confusion and instability. The opposite would appear to me to be the most convenient remedy in that the balance of convenience favours the granting of the interdict. The situation obtaining is that the applicant as employer of the respondent intends to enquire into allegations of impropriety by the respondent, the allegations being related to or ensuing from the respondent's discharge of duty. The applicant without prejudicing the respondent of his salary and benefits had asked the respondent to go on mandatory leave for a defined period to facilitate investigations without interference by the respondent. Not only is such a course eminently proper but it is desirable and accords with corporate governance normatives. The balance of convenience cannot be served by keeping the respondent at the workplace. In the respondent's case, he had in any event expressly told the applicant's Board off and does not evince any intention to co-operate with it. He did not state anywhere in his opposing paper that he intends to have a change of heart and work with and within the Board and directive given by the Minister. He has through and through shown that in relation to the issue at play herein, he is a loose canon who is not subservient

to the applicant but to the Minister and the President. It would therefore be inconvenient to the applicant and the holding of the enquiries into allegations of the respondents acts of misconduct to allow the respondent to perform his duties during the holding of the enquiry.

Before I conclude, I must briefly discuss an intervening issue which arose in the course of hearing. At the close of submissions by the parties' legal practitioners I exercised the powers of the Judge provided for in r 246 (1) (a) of the High Court Rules in terms whereof the Judge may require a deponent to any affidavit filed in the application or any other person who in the Judges opinion can assist in the resolution of the matter to appear before the Judge and provide such information, on oath or otherwise as the Judge may consider necessary. I indicated to the parties that I required the attendance of the Minister of Energy and Power Development to give input on the import of the contract of service which he executed on one part with respondent as the other party.

The Minister Honourable Fortune Chasi (MP) was subpoenaed to attend before me on 14 August 2020 in the forenoon at 2:30 pm. The Minister obliged. However, before resuming the hearing the parties' legal practitioners and the Minister requested for a pre-hearing consultative meeting with me. In the meeting the Minister advised that he had been relieved of his position of Minister by appointing authority, His Excellence, the President, some two hours back. Discussion then revolved on whether it would be proper for him to give evidence as Minister when he was no longer Minister. I ruled that the ex-Minister could no longer speak to issues to do with the Ministry and that the incumbent Minister who had been simultaneously appointed at the time Honourable Chasi was relieved of his duties would be the one who could speak to official records in the Ministry to include the correspondence relating to this matter as were generated by the ex-Minister in his official capacity as Minister. In order not to further prolong the disposal of the application, and being satisfied that I could still determine the matter without input from the Minister, I dispensed with the need for such evidence and excused the ex-Minister from further attendance.

I was then advised of another development relating to the applicant. Counsel for the applicant advised that both the respondent and the current Board of Directors of the applicant had been suspended from their duties by His Excellency the President. It was submitted by the respondent's counsel that the application had become moot or academic since the Board which had made a directive to place the applicant on mandatory leave had been suspended and would

consequently not be in a position to investigate the allegations against the second respondent. The applicant's counsel disagreed and submitted that the application was not moot because another Board could be appointed. I agree with the applicant's counsel. The Minister directive was given at a time that he was in office and empowered to issue the directive for the investigation of the respondent. The respondent was also in office at the time the directive to suspend him was made. The directive of the Minister for the Board to carry out the investigation was not suspended by the suspensions made by the Presidential order. The execution of the Ministers directive is an internal matter to be dealt with by the Board of Directors of the applicant. The applicant filed this application through the Board before the Board's suspension from office. The suspension did not mean that there would be no Board forever to oversee the operations of the applicant. It becomes an internal matter for the applicant to grapple with. The applicant would obviously have other issues requiring the attention of the Board. What becomes of such matters as require Board actioning including this matter is an internal issue for applicant? Even the fact that His Excellence the President directed the Zimbabwe Anti-Corruption Commission (ZACC) to investigate the same issues raised by the Minister does not render this application moot. The investigations ordered by His Excellency to be carried out by ZACC do not substitute the investigations which the applicant's Board had commenced to do because the two should not be conflated. I was therefore not persuaded that the application had become moot by reason of a parallel process initiated by order of His Excellency, The President. The applicant is not the initiator of the Presidential generated suspensions nor the beneficiary or receiver of the results of the investigations to be carried out by ZACC. The process involved in this application is lawful, desirable and in line with sound principles of corporate governance.

In my judgment therefore the applicant has made out a *prima facie* for the grant of a temporary interdict to give effect to the placement of the respondent on mandatory leave in line with the company's procedure and policies manual. I already indicated that in an urgent application for a provisional order the Judge may issue an interim order as prayed for or as varied. In this case the interdict sought is to enable the smooth investigation of the matters raised by the Minister as observed by the Board of the applicant. I will grant an interim order which ensures that the investigations to be carried out by the applicant's Board of Directors are smoothly executed without interference.

Accordingly, the following interim relief is granted:

Pending the determination of this matter the applicant is granted the following relief:

(a) The respondent is ordered to comply with the directive given to him by letter dated 30 July 2020 written by the applicant's Board of Directors' Vice Chairperson placing the respondent on mandatory leave on conditions set out therein which are that;

(i) The mandatory leave will be for an initial 60 days.

(ii) During the mandatory leave period the respondent will be entitled to full pay and benefits.

(iii) The respondent shall not be allowed access to his office and to any other offices and places of operation of the applicant wherever situate in Zimbabwe unless by authority of the applicant.

(iv) The period of mandatory leave shall be reckoned from the date of this judgment.

Sinyoro and Partners, applicant's legal practitioners
Lovemore Madhuku Lawyers, respondent's legal practitioners