

SIMON CHINGANGA
versus
TAPSON MADZIVIRE
and
MUNASHE SHAVA

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 7 June 2019 & 8 October 2020

URGENT CHAMBER APPLICATION –RETURN DAY

S. Mpofu, for applicant
S. Mushonga, for the 1st respondent
2nd respondent in default.

MANZUNZU J: On 26 November 2018 this court issued the following provisional order:

“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 resolutions purportedly made by the 1st respondent on the 3rd of November 2018 and afterwards concerning the applicant’s position in Adam Bede Manufacturing (Pvt) Ltd are invalid and hereby set aside.
2. It is declared that the 1st respondent has no casting vote in a meeting of the shareholders and cannot impose resolutions on applicant.
3. 1st respondent shall pay cost of suit on a legal practitioner client scale.

TERMS OF THE INTERIM ORDER

That pending determination of this matter, the applicant is granted the following relief:-

1. The resolutions passed on the 3rd of November 2018 which appear on annexure AA1 of the 1st respondent’s opposing affidavit and any changes effected thereafter to the shareholding or directorship of Adam Bede Manufacturing (Pvt) Ltd be and are hereby suspended.

SERVICE OF THE PROVISIONAL ORDER

The provisional order shall be served by the Sheriff/his deputy or the applicant’s legal practitioners.”

On the return day applicant sought the confirmation of the provisional order. The 1st respondent opposed the confirmation. The second respondent neither filed any heads nor attended court.

The background to this matter was aptly summarised by my sister CHIRAWU-MUGOMBA J when she granted the provisional order as follows;

“The background to this matter is as follows: - According to the applicant, a company (Adam Bede Manufacturing (Pvt) Ltd was incorporated on 4 May 2017. In support of his contention, applicant attached the certificate of incorporation, the CR 14 being a list of directors, articles and memorandum of association. The CR14 shows that the applicant is both a director and the company secretary. The applicant averred that he owns (1) share which he has not transferred to anyone in terms of article 1 of the articles of association. At a certain point, a shareholding agreement was drafted to include the second respondent as a shareholder but this never materialised. The applicant called for an extra ordinary meeting which was held on 3 November 2018. The meeting degenerated into chaos and at some point, the applicant left the meeting. Certain resolutions were made at the meeting which were to the effect that the applicant was no longer a shareholder, director and company secretary. Furthermore he discovered that his email had been blocked and that he had been removed as a signatory to the company’s bank accounts.

In response, the first respondent on the merits disputed the applicant’s version of events. He averred that resolutions were made as per annexure AA1 in tandem with Articles of Association item 59 (g). The applicant cannot be heard to cry foul when some of the resolutions were made in his presence and he is the one who called for the meeting. The applicant was not involved in the setting of the company which was actually started through a memorandum of agreement for the sale of a business between Hunting Furniture (Pvt) Ltd and Extreme Security Group (Pvt) Ltd represented by the first respondent. The applicant cannot impose himself as he was a mere ‘invitee’ to the company.

The second respondent averred that the applicant was not present when the company was formed. At the time that the company was formed, the second respondent was involved in a number of companies as a board member and he could therefore not sit on the board since he required clearance. The applicant was therefore invited as a proxy to take up one nominal share for purposes of incorporation until the second respondent had been cleared. The applicant never contributed financially to the setting up of the company but he was a mere proxy. The position on the CR 14 has changed and the second applicant has since been cleared to sit on the board of the company but the applicant refused to vacate his seat. The shareholding of the company was amicably restructured so that applicant holds 20% shares, first respondent 40% shares and second respondent 30% shares. In support of his contention, second respondent attached the share allotment and change in directorship registered with the registrar of companies. He averred that he was a signatory on the CBZ accounts from day one since he is the one who caused them to be opened. The applicant had improperly planned to have the second respondent removed from the company at the extra –ordinary general meeting.”

The cause of action is founded on the events of the extra-ordinary shareholders’ meeting of 3 November 2018. The convener of the meeting was the applicant in his capacity as the Company secretary. The notice listed the agenda items for discussion at the meeting. These are;

- “1. To discuss the financial statements for the year ended 31 May 2018 together with the reports of the directors and auditors thereon.
2. To propose elect additional Directors of the Company
- 2.1 Mr T Madzivire shall remain Director. He was appointed upon inception of the company and the terms has not yet expired.
- 2.2 Mr S Chinganga shall remain Director. He was appointed upon inception of the company and the terms has not yet expired.
3. To approve the remuneration of the Directors for the year ended December 2018.
4. To appoint Auditors for the current year. The current Auditors Braslyn Investments t/a Wilfaith Consultants shall be legible for appointment.
5. To prepare agenda items for the first Annual General Meeting and to set a date for such a meeting.
6. To regularize the company’s banking authorities and removal of Mr Munashe Shava as a signatory to the bank’s accounts.
7. To regularize the company’s letter head papers by deletion of Shava as a Director from his defacto operational position.
8. To give Shava a notice of termination of his engagement with Adam Bede Manufacturing Private Limited.
9. To appoint evaluators to value the company and its assets.”

The meeting was attended by the applicant, the first respondent and his legal practitioner Mr Mushonga, and Mr Madzedze the legal practitioner for Mr Shava. At this meeting the applicant and first respondent accused each other of wrong doing. There was controversy between the two. Applicant was bent on removing Mr Shava from a de facto position of director, while first respondent was bend on removing applicant from positions of Director, company secretary and shareholder. As a result, the applicant walked out of the meeting. Despite this state of affairs, applicant and the 1st respondent, each, came up with what they said were minutes of the meeting.

The pertinent part of the applicant’s minutes reads;

“Mr Madzivire on the advice of his lawyer resolved to remove Mr Chinganga from the company as shareholder, director and company secretary. This was not voted. Mr Madzivire indicated that he had the power to remove Mr Chinganga from the positions without reason, vote or contests. Mr Chinganga asked if Mr Madzivire was simply imposing this position to which question Madzivire assented.

As soon as that decision was made, Mr Chinganga was threatened with forceful removal from the premises and preferring not to escalate the problem he left the premises under protest. Mr Chinganga indicated that once he left there was no more meeting to talk about. He left again on the threat to bring security to manhandle him.

Effectively, the meeting failed to achieve its objective as no business was conducted except for unilateral decisions that were purportedly made by Mr T Madzivire.”

On the other hand first respondent’s minutes recorded the following pertinent issues;

- “2.2 It was noted and adopted that Mr Tapson Madzivire and Mr Munashe Shava were the founding members of the company.
- 2.3 It was noted and adopted that Mr Tapson Madzivire and Mr Munashe Shava contributed to the establishment of the company from its inception both financially and materially.
- 2.4 It was noted that Mr Simon Chinganga was invited by Mr Tapson Madzivire to the company without financial contribution.
- 3.1 It was resolved that Mr Munashe Shava by virtue of his contribution financially and materially be appointed as an additional director and shareholder of the company.
- 3.2 It was resolved that Mr Simon Chinganga be removed from the directorship of the company with immediate effect and from being company secretary.
- 3.2 It was resolved that the shareholding donated to Mr Simon Chinganga be withdrawn with immediate effect and he be removed from all company document and profile with immediate effect.”

These two documents self-exhibit the animosity which had developed between the parties.

The cause of complaint by the applicant is the resolutions as contained in the minutes by the first respondent which resolutions strip him of his positions as shareholder, director and company secretary as well as any consequential acts thereto. The issue is whether the resolutions are valid. The applicant says they are not and the respondents say they are valid. The respondents allege applicant held positions in the company as a proxy of the second respondent which position the applicant denies. Apart from such allegation the respondents did not prove it as a fact. This is even more so when one considers the CR 14 produced by the applicant and the return of allotments dated 3 September 2018 and CR 14 dated 2 September 2018, (which documents were filed with the Registrar of Companies on 23 October 2018,) attached in support of second respondent’s opposition. The parties’ names appear in these documents distinct of any position of a proxy. Reference was made in the written heads to annexure BBB2 as a document which proves the applicant’s position of proxy. Unfortunately no such document is part of the record.

The respondents’ written heads of argument took the angle of an attack on the propriety of the provisional order. It was argued there was no prima facie case established to warrant

the granting of a provisional order. That, in my view, is improper for the simple reason that this court is not sitting as an appeal court against its own judgment. The fact remains there is a provisional order which is extant.

The heads also dealt with urgency which is no longer in issue because the matter proceeded as an urgent application. Furthermore, the interim relief was said to be final. The first respondent also argued that the dispute was not for the courts as the same should be left to be resolved within the precincts of the company itself. Reference was made to the case of *Matanda and Ors v CMC Packaging (Pvt) Ltd and Ors* 2003 (2) ZLR 221 (H) 224A-B where the court expressed the general policy of the courts not to interfere with internal domestic affairs of a company.

However, *in casu*, the court's jurisdiction cannot be ousted where there are serious allegations of irregularities.

The relief sought by the applicant is more like a hybrid type of order where on one hand he seeks a declaratur and on the other hand consequential relief in the form of a prohibitory interdict. The requirements of a final order are well settled:

- (a) A clear right
- (b) Irreparable injury actually committed or reasonably apprehended
- (c) Absence of a similar protection by any other remedy

See; *Setlogelo v Setlogelo* 1914 AD 221; *Pauline Mutsa Makoni v Julius Tawona Makoni & Ano* HH -820-15; *Econet Wireless Holdings v Minister of Information* 2001 (1) ZLR 373 at 374 B; *Airfield Investments (Pvt) Ltd v Minister of Lands & Ors* 2004 (1) ZLR 511

It is common cause that the company was incorporated with only two directors, the applicant and the first respondent. Applicant's rights flow from the memorandum and articles in particular as provided for under s 27 of the Companies Act, [Chapter 24:03] which provides that:

"27 (1) Subject to this Act, the memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed by each member and contained undertakings on the part of each member to observe all the provisions of the memorandum and of the articles.
(2) All money payable by any member to the company under the memorandum or articles shall be a debt due from him to the company."

This means a member in his capacity as a member, may, without the company being a party to the action, enforce a right given to him by the articles against another member.

The issue of injury to the applicant arising from the first respondent's actions cannot be disputed. The first respondent purported to singly pass resolutions after stripping the applicant of his voting rights. When the applicant left the meeting there was no quorum as required by article 40. 1st respondent did not show that his actions were in line with the articles of the company. There was no special resolution to change the shareholding of the company as provided for under article 13 (r) (a) & (b). The meeting was not confined to the items on the agenda. The meeting was disorderly with topics outside the agenda thrown in and arbitral resolutions taken without voting.

In my view the applicant chose this litigation option because there is no alternative satisfactory remedy available.

The respondents have failed to show cause why a final order should not be made. The applicant has made a good case for the relief sought. An amendment was sought to the final relief sought and I did not hear the respondents say they were opposed to it. The amendment is to nullify any act that flows from the purported resolutions.

Disposition:

IT IS ORDERED THAT:

1. The provisional order granted by this Court on 26 November 2018 be and is hereby confirmed.
2. The resolutions purportedly made by the 1st respondent on the 3rd of November 2018 and afterwards concerning the applicant's position in Adam Bede Manufacturing (Pvt) Ltd are invalid and hereby set aside.
3. It is declared that the 1st respondent has no casting vote in a meeting of the shareholders and cannot impose resolutions on applicant.
4. Any action taken in terms of the purported resolutions is hereby set aside.
5. 1st respondent shall pay cost of suit on a legal practitioner client scale.

Munangati and Associates, applicant's legal practitioners

Mushonga, Mutsvairo and Associates, 1st respondent's legal practitioners

Mawere Sibanda, 2nd respondent's legal practitioners