DAHAW (PRIVATE) LIMITED
and
NYASHA NOREEN NYOROVAI DEL CAMPO (NEE MUJURU)
versus
WILLDALE LIMITED
and
WASHINGTON CHIDZIWO N.O.
(In his capacity as the Chairperson of the Willdale Limited)
and
DOCTOR JOICE TEURAI ROPA MUJURU
and
KUMBIRAI MUJURU
and
CHIPO MUJURU
and
KUZIVAKWASHE MUJURU

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 25 March 2022 & 6 April 2022

Urgent Chamber Application

T Sibanda, for the applicants
Ms *E Drury*, for the 1st respondent
2nd respondent in person
L Madhuku, for the 3rd – 6th respondents

MUREMBA J:

1. The first respondent is scheduled to hold its Annual General Meeting (AGM) on 7 April 2022. The first applicant is the largest shareholder with 39.55% shares in the first respondent. The applicants were prompted to file the present application by the letter the second applicant received from the first respondent on 11 March 2002. The letter is to the effect that at the Annual General Meting of 7 April 2022 no votes cast by the second applicant and the third to the sixth respondent on behalf of the first applicant

will be taken into account unless there is a court order or a deed of settlement authorizing or instructing such.

2. The second applicant is Nyasha Noreen Nyorovai Del Campo (Nee Mujuru). She is the biological daughter of the third respondent, Dr. Joice Teurai Ropa Mujuru and a sibling to the fourth to sixth respondents, Kumbirai Mujuru, Chipo Mujuru and Kuzivakwashe Mujuru.

3. The second applicant averred that she is the sole shareholder and director of the first applicant and that the third to sixth respondent fraudulently appointed themselves as shareholders and directors of the first applicant. This is vehemently disputed by the third respondent who averred that the first applicant is a family business in which all the children have equal shares and the third respondent has the majority shares.

4. It is common cause that this dispute over the shareholding and directorship of the first applicant is pending in this court under HC 254/22 and in the Supreme Court under SC 76/22. In HC 254/22 the second applicant brought an Urgent Chamber Application seeking a provisional order to interdict the disbursement of the dividend due to the first applicant from the first respondent directly to the third respondent pending the nullification of the appointment of the third to sixth respondent as directors of the first applicant on the return date. The provisional order was granted. Dissatisfied with the order, the third to sixth respondent appealed to the Supreme Court under SC 76/22. The appeal is yet to the heard.

5. It is the pending dispute which prompted the first respondent to write the letter dated 11 March 2022 to the second applicant saying that at its Annual General Meeting of 7 April 2022, it will not take into account any instructions given prior or any votes made by either the second applicant or third to sixth respondent on behalf of the first applicant unless there is a court order or a deed of settlement entered into by the parties instructing it to do so.

6. The applicants seek the following interim relief pending the return day:

(a) An order barring the first respondent from interfering in the business affairs of the first applicant including its exercise of the right to vote at the Annual General Meeting of the first respondent on 7 April 2022.
(b) An order setting aside resolutions 6 and 7 adopted by the first respondent to be passed at the Annual General Meeting for they were adopted without consultation with the applicants.
(c) An order barring the third to sixth respondent from purporting to act or represent the first applicant in any fora including at the Annual General Meeting of the first respondent on 7 April 2022 pending the finalization of their appeal in SC 76/22.
(d) An order that the *status quo ante* of the first applicant's shareholding and directorship before changes were effected on 21 September 2021 by the third to sixth respondent shall remain in effect until HC 254/22 and SC 76/22 are finalized.
(e) A declaration that the first applicant's shares be counted towards all resolutions to be passed at the meetings of the first respondent.

7. The respondents except the second respondent, Washington Chidziwo who is the chairperson of the first respondent are opposed to the application. The third to sixth respondent even raised some points *in limine*.

8. In response to the respondents' notices of opposition, the applicants filed answering affidavits and raised some points *in limine* which I deal with hereunder.

9. In response to the first respondent the applicants' point *in limine* is that there is no board resolution authorizing the deponent Nyasha Matonda to act on behalf of the first respondent even if he is the Chief Executive Officer of the first respondent. In response Ms. *Drury* for the first respondent tendered an "extract from the minutes of a meeting of the directors of the first respondent passed in terms of Article 118 of the Company's Articles of Association." The extract states that Nyasha Matonda is authorized to represent the first respondent in all legal proceedings and that any acts of Nyasha Matonda in respect of litigation including Dahaw (Pvt) Ltd and its shareholding are therefore authorized and where necessary ratified. The extract was signed on 22 March 2022 by five out of the seven directors. Two directors who include the second

respondent Washington Chidziwo who is the chairperson of the first respondent did not sign.

10. Ms. *Drury* submitted that it was due to time constraints that the first respondent was unable to timeously furnish the resolution giving authority to its deponent to represent it in these proceedings. A timeline within which the notice of opposition was supposed to be filed before the hearing had been given and it was not possible to have the resolution prepared within a day.

11. Mr. *Sibanda* in response to the extract tendered by Ms. *Drury* submitted that the extract is a fraud because it does not state when and where the minutes were made, when the meeting was conducted and who was invited to that meeting. He submitted that the second respondent as the chairperson of the first respondent did not even sign it and this makes the resolution invalid.

12. In response Ms. *Drury* submitted that in terms of Article 118 it is not a requirement that a resolution be signed by the chairperson. It is enough that it is signed by a majority of the directors and once signed it is deemed to have been passed on the date it was signed. Ms. *Drury* submitted that meetings are separate from resolutions and what requires chairing and signing by the chairperson are meetings and minutes thereof.

13. I will dismiss the point *in limine* because the allegation of fraud is without merit. No evidence of fraud was tendered and nothing on the document speaks to fraud. In addition, the two counsels interpreted Article 118 of the first respondent's Articles of Association differently, but that Article was not tendered for the benefit of the court. The law says he who alleges must prove. The applicants who are challenging the resolution did not prove that Article 118 requires the chairperson of the first respondent to sign the resolution. They ought to have tendered the Article in question. I cannot therefore say that the resolution which was signed by five out of seven directors is invalid. In *Dube* v *Premier Service Medical Society Aid* SC 73/19 it was held that when challenged, a person who purports to represent a legal entity must produce proof of his authority to represent such entity. *In casu*, Nyasha Matonda did exactly that. He

complied with the law. The resolution serves to show that the first respondent is aware of the proceedings and that it gave Nyasha Matonda the authority to act on its behalf.

14. The applicants raised a point *in limine* to the third to sixth respondent's notice of opposition. It was submitted that there is no notice of opposition from the fourth to the sixth respondent since there are no affidavits by them. The third respondent, Joice Mujuru has no authority to depose to an affidavit on their behalf in terms of the law even if they are out of the country. It was submitted that the fourth to the sixth respondent did not comply with the rules of this court. Mr. *Madhuku* submitted that it is not necessary for litigants to file papers or affidavits. Litigants can appear through their legal practitioners. He further submitted that the statement by their legal practitioners indicating that they are opposed to the application is sufficient to bring them before the court.

15. If I had not given instructions that the respondents should file opposing papers, I would say Mr. *Madhuku* was correct in his argument. However, I gave instructions that opposing papers be filed. Therefore it was necessary for the fourth to the sixth respondent to comply with the rules of the court. Mr. *Madhuku's* argument would have been valid if he had simply indicated that due to time constraints the fourth to sixth respondent were unable to file opposing papers and that he was presenting oral arguments on their behalf. The error that he made was to make the third respondent's notice of opposition incorporate the notice of opposition of the fourth to sixth respondent without them filing supporting affidavits. In terms of r 58(4)(a) of the High Court Rules, 2021:

> "An affidavit …. shall be made by the applicant or respondent, as the case may be, or by a person who can swear to the facts or averments set out therein."

Whilst the third respondent could swear positively to the facts set out in the opposing affidavit that she deposed to, the fourth to the sixth respondent did not file supporting affidavits to show their presence or to place themselves before the court. Being out of the country does not bar a person from placing before the court the necessary affidavit. In this day and age of technology, documents can be prepared, scanned and sent within

a few minutes from outside the country. I will thus uphold the point *in limine* that the fourth to the sixth respondent are not before the court.

16. The third respondent raised six (6) points *in limine* which I deal with hereunder.

(a) The first applicant being a separate legal persona has not instituted the proceedings and cannot be taken to have instituted them through the second respondent.

17. The third respondent averred that she is the first applicant's largest shareholder and denied that the first applicant had instituted these proceedings. There is no resolution showing that the first applicant is litigating in this matter and there is no resolution showing that the second applicant was authorized to institute these proceedings on behalf of the first applicant. The second applicant has no automatic authority by virtue of being a shareholder and director to represent the company. A company being a separate legal *persona* can only validly institute legal proceedings in its own name if it has resolved to do so through its duly authorized agents. The third respondent averred that it is wrong for the applicant to be referring to the first applicant as her company.

18. In response the second applicant averred that she was suing under a derivative action on behalf of the first applicant on the grounds that the first applicant's affairs are being handled in an oppressive and prejudicial manner. So, she was suing to safeguard its investments and vested interests in the first respondent. The first applicant is hamstrung and at this point cannot act.

19. I am in agreement with Mr. *Madhuku* that a company is a separate legal *persona*. Therefore when it is suing and there is a challenge relating to whether or not it has authorized litigation, the authority that it granted should be produced as evidence. It is now settled law that when authority to sue is challenged it must be produced. See *Dube v Premier Service Medical Aid* SC 73/19. The authority can even be tendered from the bar as was done by the first respondent's counsel. As was correctly submitted by Mr. *Madhuku,* it is legally wrong or incorrect for the second applicant to describe the first applicant as her company and for her to then aver that on that basis she is entitled to sue

on behalf of the first applicant. Being a shareholder and director of the company does not clothe her with authority to represent the company. The company has to authorize litigation and the person to represent it. The second applicant therefore ought to have furnished a resolution to show that she was authorized by the first applicant to act on its behalf and that it authorized the litigation.

20. The averment that the second applicant was suing under a derivative action to protect the interests of the first applicant is misplaced. s 61of the Companies and other Business Entities Act [*Chapter 24:31*] provides :-

61 Derivative actions by members on entity's behalf

(1) A member or shareholder of a company or private business corporation may bring an action in court in such person's name and on the company's behalf against any manager, officer or director referred to in sections 54 or 55 to enforce, or to recover from that manager, officer or director damages caused to the company by violation of, duties owed by that manager, officer or director to the company under this Act or any other law including laws against fraud or misappropriation.

(2) Such an action may be brought by one person in the person's own name and on the company's or corporation's behalf or by two or more persons in their names acting together on the company's or corporation's behalf.

(3) An action may be brought under this section only in cases in which:
(a) damage or a breach of duty to the company itself is claimed; and (b) the plaintiff was a member or shareholder at the time of the acts which are complained of, or acquired that status as a result of a transfer of that person's interest or shares from a person who had that status at that time; and
(c) the plaintiff holds interests or shares representing at least ten per centum of the private business corporation or company's voting power (which in the case of a private company or public company shall mean ten per centum votes of the ordinary shares), and where two or more plaintiffs bring the action together the holdings of all of them shall be counted for this purpose; and
(d) the plaintiff has previously requested the manager or controlling members of the private business corporation or board of company in writing to rectify the acts which are complained of, and that request was refused or not responded to within thirty days (but the court on good cause shown to it may dispense with this requirement).

21. Clearly under a derivative action, a member or a shareholder of a company may bring an action in their name on behalf of the company against a manager, officer or director to enforce or to recover from that manager, officer or director damages caused to the company by violation of duties owed by that manager, officer and director to the company. What it means is that the company will be incapacitated to act to protect itself and as such it cannot sue. So, a member or shareholder sues on behalf of the

company to protect the company's interests. The third parties that that are sued are insiders of the company such as managers, officers or directors and they are sued for allegedly causing harm to the company.

22. The case of *Minister of Mines & Ors* v *Grandwell Holdings (Pvt) Ltd & Ors* 2018 (1) ZLR 660 (S) at 665E explains the derivative action very well. It states that it is a trite principle of company law that when a company is wronged by outsiders it should sue to vindicate its rights since it is a legal *persona* with its own corporate identity, separate and distinct from its directors or shareholders and with its own property rights and interests to which alone it is entitled. An exception to this rule arises when the wrong doers are the persons who control the company. They will obviously not allow the company to sue them so that the wrong can be remedied. In such circumstances a shareholder is allowed to appear as the plaintiff. He/she acts as a representative of the company to enforce rights derived from the company. The action is brought by him/her in his own capacity to vindicate the company's rights. See page 666D. It was held that there are requirements that must be met for a derivative action to be taken. It must be clear that the company has been prevented from instituting proceedings by the alleged wrongdoers in control of the company. It must be alleged and proved that the wrongdoers have refused to institute the action. See page 666E.

23. *In casu*, the facts or circumstances of the matter do not fit under s 61(1). If the first applicant was unable to take any action to protect itself then it would not have sued as it did. Only the second applicant's name would be appearing on the application. The mere fact that the first applicant is appearing on the application as an applicant means that it is able to act on its own. A company cannot sue under a derivative action to protect its own interests. It is only a member or a shareholder that can do so on its behalf using rights derived from the company. Besides, the party being sued is not an insider of the company, but an outsider. So, suing under a derivative action in terms of s 61 of the Act is not applicable.

24. I thus uphold the point *in limine* that the first applicant is not before the court since no resolution was furnished to show that the first applicant authorized litigation and that it authorized the second applicant to represent it.

(b) *Second applicant cannot institute proceedings in her name on behalf of the first applicant for the matters raised in this application.*

The third respondent averred that this point *in limine* follows the first point *in limine* above. If the first applicant is found not to be properly before the court, it follows automatically that the second applicant falls away because she cannot sue in her own name on behalf of the first applicant. In para 4 of her founding affidavit she said that she is suing in her capacity as the director of the first applicant and also under a derivative action to protect her company. As was correctly argued by Mr. *Madhuku* both capacities are not competent at law. This is because a director cannot institute proceedings on behalf of a company because, as I have already discussed elsewhere above, it is a separate legal *persona*. It sues on its own. I have also discussed how a derivative action is brought under s 61 of the Act under the first point *in limine* above. The application and the second applicant do not meet the requirements of a derivative action. As already discussed, it is only a member or a shareholder and not a director who can sue under a derivative action. I will thus uphold this point *in limine* as well. The second applicant is not before the court.

25. So, there being no applicants before the court I will strike off the matter from the roll with costs.

It be and is hereby ordered that:

1. The matter is struck off the roll.
2. The applicants shall pay the 1st, 2nd and 3rd respondents' costs.

Govore Law Chambers, applicants' legal practitioners
Honey and Blankenberg, first respondent's legal practitioners
Mundia & Mudhara, third, fourth, fifth and sixth respondents' legal practitioners