HH 623-21
HC 5554/21

MOHAMED REZWAN KHAN
versus
NAZREEN RESOURCES [PVT] LTD
and
JAHANGIR BIN MOHAMED IBRAHIM HANIFA
and
ABDUL SATTHAR MOHAMED RAZMI

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 25 October 2021

Urgent chamber application

Date of written judgment: 8 November 2021

Ms *G. Wagoneka*, with her Mr *L. Mundieta*, for the applicant
Mr *R. Dembure*, for the second and third respondents
No appearance for the first respondent

MAFUSIRE J

[1] This was an urgent chamber application for an interdict. I dismissed it soon after argument. I held that the application did not establish a cause of action. I gave my reasons *ex tempore*. The applicant now wants them in writing. He says he wants to appeal. By all means.

[2] The applicant and respondents 2 and 3 are all shareholders in the first respondent ["***the company***"]. The applicant is a 30% shareholder. The second respondent is a 60% shareholder. The third respondent is a 10% shareholder. Their relationship as shareholders is governed by a Shareholders' Agreement.

[3] The interdict sought by the applicant is to restrain respondents 2 and 3 from enforcing certain resolutions passed at an extraordinary general meeting of the company on 7 October 2021["***the EGM***"]. He singles out two resolutions for impeachment. The one required all members of the company, that is himself, and respondents 2 and 3, to pay up in full for their shareholding in the company within 7 days of the EGM failing which

the defaulting members would automatically forfeit their shareholding. The other resolution required the formalisation of the registration, with the Companies' Office, of the new directorship of the company within 14 days of their reappointment; the issuance of the reconfigured share certificates within 7 days, and the registration of the confirmed shareholding within 14 days.

[4] The interdict is sought as interim relief. Costs on an attorney and client scale are sought against respondents 2 and 3, but only if they oppose the application. As final relief on the return day, the applicant seeks a show cause order why respondents 2 and 3 should not be interdicted from unlawfully forfeiting the applicant's shares in the company, and why they should not pay the costs of suit on an attorney and client scale.

[5] The draft order is patently defective. The defect is elementary. The provisional order seeks a final order under the guise of interim relief. You do not seek a final order on an interim basis. Since *Kuvarega v Registrar-General & Anor* 1989 (1) ZLR 188 (H), the courts have consistently made this point. It is surprising it keeps coming back.

[6] That the draft order seeks a final order as interim relief is not the only respect in which it is defective. The interim relief is sought, "*[p]ending determination of this matter* …" But the determination of the matter is pending nowhere. It is the same relief being sought on the return day. The Shareholders' Agreement has an arbitration clause. Any dispute of whatever nature between the shareholders in respect of virtually everything to do with their shareholding in the company should be resolved, firstly by negotiation, failing which by arbitration.

[7] Ms *Wagoneka*, for the applicant, concedes that the matter is pending nowhere. No negotiations or arbitration proceedings are pending. None have been initiated. None have been contemplated. In previous judgments, I have repeatedly said a provisional interdict is simply a pain killer pending surgery: see *Cawood v Madzingira & Anor* HMA 12-17 and *Main Road Motors v Commissioner-General, ZIMRA* HMA 17-17. It is temporary relief for the preservation of rights pending a proper determination of the dispute. But Ms *Wagoneka* is unfazed. She dismissively suggests that the draft order can always be amended. She says it in such a way as if an amendment is just there for

the asking. This particular draft order cannot be amended. There is no cause of action supporting the relief sought.

[8] In paraphrase, the applicant's case is this. In terms of the Shareholders' Agreement he would pay for his 30% equity in kind, not cash. He would provide the technical expertise and strategies in setting up the company. The second respondent would inject US$400 000 in cash and in kind. It is not altogether clear what the third respondent's contribution would be. But that is of no concern for the purposes of this application. The applicant claims he has since fulfilled his obligations. He draws attention to clause 3.2 of the Shareholders' Agreement. It provides, "*It is agreed that the parties have all subscribed in full to their shareholding in the Company either in cash or in kind*". He claims or implies that this is proof that he paid for his shares. Of course, it is no such proof. To subscribe for shares in a company is not the same thing as paying for them. But that is just one of the misconceptions by the applicant.

[9] Distilled, the applicant's cause of action is this. Contrary to the parties' agreement, respondents 2 and 3 have connived to unlawfully deprive him of his shareholding. They called for that EGM and passed those resolutions [the meeting was held virtually]. Although he attended the meeting and voted against the resolutions, respondents 2 and 3 used their majority shareholding and passed them. He says the resolutions are prejudicial to him. He stands to lose his shareholding within 7 days.

[10] The applicant claims his application is made in terms of s 223 of the Companies and Other Business Act [*Chapter 24:31*] ["***COBE***"]. To him this provision has codified the common law rule that entitles and empowers a member of a company to approach the court for relief where the affairs of that company are being conducted in a manner which is oppressive or unfairly prejudicial to himself or herself.

[11] The courts do not readily interfere in the day to day management of companies. They do not intervene in the domestic affairs of companies, except in exceptional circumstances. A properly constituted board of directors of a company is that company's "parliament". From time to time this parliament passes laws for the governance of the company. This is done through resolutions passed by a majority vote

at properly constituted meetings. Even the applicant himself makes the point. He says in para 45 of his founding affidavit:

> "It is trite at common law that it is not permissible for the Courts to interfere in the domestic affairs of a company on account of a disgruntled shareholder."

[12] So why is the applicant coming to court? He thinks his situation is an exception. He argues that the rule of company law above is not cast in stone. He says the courts can intervene where a resolution, or proposed resolution, is illegal or unconstitutional, or is a fraud on the minority. Surprisingly, he alleges none of these things. He does not point to any impropriety or irregularity in the notice issued by the company calling for the EGM. He does not suggest any unlawfulness in the proposed agenda. All he says is that he objected to it for what he perceived to be an attempt by the second respondent to take sole control of the company. He does not allege any impropriety or irregularity in the conduct of the EGM. He does not allege any chicanery in the voting process. He does not allege any illegality in the manner the resolutions were tabled and voted for. He does not allege any unconstitutionality or fraud.

[13] The applicant's gripe is simply that he is unhappy with the resolutions that were passed. He perceives them to be unfairly prejudicial to him. But that is not a ground for a court's intervention. Parliament passes many laws that some sections of the public may be unhappy with. But for as long as the promulgation process is procedural and constitutional, the courts will not intervene. *In casu*, the applicant argues that s 223 of COBE, paraphrased above, has codified the common law. But this means nothing. The provision has not altered the common law to permit intervention by the courts where there is no cause. The applicant has to show conduct in the manner the company is run which amounts to oppression or unfairness or prejudice. At the EGM he was simply outvoted. He is simply unhappy that he was outvoted. That is not oppressive or unfair or prejudicial conduct. It is democracy. You win some. You lose some.

[14] The proper running of companies and the administration of justice would be severely hampered if every time a shareholder is unhappy with a resolution passed by a company at a properly convened and structured meeting the courts intervene. Section 223 of the

COBE, or the common law rule behind it, is manifestly referring to a consistent pattern of behaviour by those controlling the company to abuse their vantage positions to oppress or prejudice some member or members of the company for self-interest. *In casu*, the concern of the majority vote was recapitalisation of the company. Its operation were grinding to a halt as none of the shareholders, except the second respondent, had injected any cash into the company. Allegations by respondents 2 and 3 are that in fact, it is the applicant that is running the company to the ground.

[15] A closer look at the applicant's papers and his argument before me show none of the rights that he purports to vindicate. His argument is that the agreement amongst the shareholders was that his 30% shareholding would be paid for in kind. He alleges he was the one that ran around to stitch the deal together. He was the one that ran around to obtain the investment certificate from the Zimbabwe Investment and Development Agency. He was the one that provided the technical expertise and strategies to set up the company. He draws attention to clauses 3.2 and 16 of the Shareholders' Agreement.

[16] However, nowhere in the Shareholders' Agreement is it provided that the applicant's 30% equity in the company would be considered paid for if he did all the things he alleges he did. Clause 3.2 says the parties agree that they have all subscribed in full to their shareholding in the company, either in cash or in kind. But as pointed out already, to subscribe for shares in a company is not the same thing as paying for them.

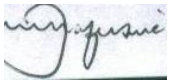
[17] Clause 16 of the Shareholders Agreement provides that the second respondent would finance the company by injecting cash in the sum of US$400 000. It also records that the applicant would be an active partner in the operations of the company and that he would provide technical expertise for such operations. Plainly, this provision does not say or even imply that such duties or obligations would be considered payment for the applicant's shareholding. The application is thoroughly ill-conceived.

[18] Clause 4 of the Shareholders' Agreement deals with the shares and the share capital of the company. The authorised share capital is 2 000 000 ordinary shares. The issued share capital is also 2 000 000. Clause 4.3 goes on to say that any proposed issue of new shares or variation of rights attached to the shares should be done by way of a

special board resolution [*my underlining*]. The applicant cannot complain that at a properly constituted forum, the company's Parliament, following due process, passed a law or resolution that he does not like. He has no case.

[19] I did not even need to refer to the issues raised by the respondents in the opposing affidavits relating to the applicant's alleged misappropriation of the company's funds and assets, or the other alleged conduct almost bordering on fraud. The applicant manifestly had no leg to stand on. It was for these reasons that I dismissed his application with costs.

8 November 2021



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