HB 177/16
HC 2339/15

TRUST NKOMO

Versus

KHUMBULANI NKOMO

And

TRUKUMB MINING ENTERPRISES

And

REGISTRAR OF COMPANIES N.O.

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 24 JUNE & 7 JULY 2016

Opposed Matter

S. Siziba for the applicant
K. Ngwenya for the respondent

MAKONESE J: In March 2002 the applicant and 1st respondent established a company known as Trukumb Mining Enterprises (Pvt) Ltd. The directors of the company were listed as applicant and 1st respondent in records held by the Registrar of Companies. The parties worked together for a short while when misunderstandings arose in 2003. Family members attempted to reconcile the parties but these efforts failed. Applicant withdrew from the company and went to South Africa to pursue other interests. Before applicant left Zimbabwe the parties engaged legal practitioners in a bid to resolve the dispute but this failed to yield any results.

Applicant has now instituted legal proceedings in this court seeking the following relief:

"1. The removal of the applicant from the list of directors of 2nd respondent be and is hereby declared null and void.
2. The 3rd respondent be and is hereby ordered to restore the status quo of the applicant in the list of directors of 2nd respondent.
3. The applicant and 1st respondent are declared the directors of 2nd respondent.
4. The 2nd respondent pays costs of suit on an attorney and client scale."

Applicant alleges in his founding affidavit that 1st respondent fraudulently and unilaterally removed his name from the list of directors despite the fact that the parties held equal voting rights and shares in the company. Applicant further contends that he neither resigned from the company nor consented to his removal as director of the company. The application is opposed by 1st respondent. He avers that whilst it is true that the parties agreed to work together in a company known as Trukumb Mining Enterprises, the applicant has not disclosed all the material facts surrounding the matter. The applicant has made bare allegations without being candid with the court and without placing all the relevant facts before the court. The 1st respondent explains that applicant is a close relative (1st respondent's sister's son). Realising that the company could not operate with one director, 1st respondent invited applicant into the company. It however, soon became apparent that applicant lacked a full appreciation of how a company was supposed to be run. Serious disputes arose between the parties. First respondent eventually approached legal practitioners to assist in the resolution of the dispute. On 14th January 2004 a letter was addressed to applicant in the following terms:

> "Trukumb Mining Enterprises
> P O Box 69
> FILABUSI
>
> Dear Mr Nkomo
>
> Re: TRUST NKOMO AND KHUMBULANI NKOMO
>
> We refer to our letter of the 9th December 2003, for which we have neither received your reply nor acknowledgement.
>
> We are informed that you have had several meetings with our client and no agreement was reached. That means you two as the only shareholders and directors of the company have reached a deadlock. In our letter above referred, we warned you that failure to resolve your differences would mean you have reached a deadlock. From what we are made to understand you have now reached a deadlock and the company can no longer function in terms of the law.
>
> The only solution left is to seek a court order suspending and freezing the operations of the company until you resolve the deadlock. No company may operate with one shareholder and one director as that would amount to breach or contravention of the provisions of the company's act.

We are instructed to give you, as we hereby do, seven days within which to resolve the deadlock, failing which, we have instructions to proceed to approach the High Court for an order suspending and freezing the operations of the company until further notice.

In that event, be warned that you shall personally bear the costs of the application.

Yours faithfully

Advocate S.K.M. Sibanda & Partners"

A response was generated to applicant's legal practitioners in a letter dated 19 March 2004, in the following terms:

"Advocate S.K.M Sibanda & Partners
Legal Practitioners
Bulawayo

Re: TRUST NKOMO AND KHUMBULANI NKOMO

Our client has had the opportunity to reflect on this matter and is of the view that this matter may be resolved amicably for the benefit of both directors of the company, more so in view of their blood relationship.

Our client is proposing that yours should amicably resign his directorship a requisite notice as provided for in the Articles. Our client will arrange a simultaneous appointment of another director. Your client is have as his sole and exclusive property the B1800 truck that is currently in his custody and ours will be liable for all the liabilities of the company.

The change of ownership of the motor vehicle shall be effected simultaneously with yours resignation through a resolution by the Board.

May we have your response.

Yours faithfully

MABHIKWA, HIKWA & NYATHI"

The parties' legal practitioners exchanged some correspondence up to the end of 2004. The applicant left the country for South Africa sometime in 2007. The applicant only re-surfaced in March 2014 when he came and sought employment with 1st respondent on 18 March 2014. Applicant entered into a written contract of employment as a contractor at one of the 1st respondent's mining claims known as Epoch 17 Mine. First respondent avers that applicant had virtually withdrawn from the company known as Trukumb Mining Enterprises before he left for South Africa. He had resigned and taken all the assets he alleged belonged to him. When he returned from South Africa he revived activities at his own mine, known as Little Wonder.

It is argued by 1st respondent that the claims by the applicant have no substance at all. In terms of clause 59 (c) of the Memorandum and Articles of Association of Trukumb, it is provided that:

> "a director shall *ipso facto* vacate office if he is not present personally or represented by an alternate Director at Board meetings for six consecutive meetings without leave of the Board."

It is common cause that applicant left to pursue personal interests in South Africa in 2007. He only came back to Zimbabwe in 2014. First respondent was responsible for the running of the company and complied with all statutory requirements, including the submission of tax returns in respect of the company. First respondent denies that he fraudulently removed the applicant from the list of Directors and contends that from all the correspondence between the parties' legal practitioners before applicant left for South Africa during 2004, it is clear that applicant had withdrawn his participation in the company affairs. In effect, 1st respondent contends that applicant retired himself from the Board by failing to attend consecutive Board meetings and that it was no longer necessary to obtain a court order as applicant had vacated the office of Director of the company. First respondent contends that by conduct, applicant left the company several years ago in 2007. When he came back in 2014 he even sought employment at one of 1st respondent's mining claims. In the result, applicant is misleading the court as he no longer has any interests in the company. He seized to be a Director by operation of the law.

Section 27 of the Companies Act (Chapter 24:03) provides as follows:

"Effect of memorandum and articles

(i) 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 articles."

I am left in doubt that when applicant left for South Africa in 2007 and pulled out whatever assets he thought belonged to him from the company he made a decision to make a clean break with the activities of the company when he failed to attend Board meetings for a period exceeding ten years. He could not reasonably expect to simply walk back into the company and seek to assert certain rights. He had *ipso facto* resigned his position as Director of the company.

In the case of *Knight* v *Bulie* 1994 13 ACR 553, HAYNE J held that:

"Even if the articles of association had required the directors to resign by letter in writing, the fact that an oral resignation made to the company secretary and accepted by the same was held to be a sufficient resignation."

It is my view that the applicant failed to disclose all the material facts pertinent to this application, in the faint hope that the court would be misled. It is trite law that an application stand or falls on the averments in the founding affidavit. See the case of *Graspeak Investments P/L* v *Delta Corporation P/L and Another* 2001 (2) ZLR 551 (H). In this matter, although the learned judge was dealing with material non-disclosures in an urgent application his sentiments regarding the making of misleading averments and the withholding of material information and making untruthful statements in a founding affidavit apply with equal force in the matter before the court. The applicant's non-disclosure relates to his failure to explain to the court the circumstances in which he parted ways with 1st respondent. I find that the non-disclosure goes to the root of the application and as such, it is clear that the applicant has not been candid with the court.

In the result, I find that the application for declaratory order is *mala fide* and calculated to deceive the court.

I would, accordingly dismiss the application with costs.

Mlweli Ndlovu & Associates, applicant's legal practitioners
T J Mabhikwa & Partners, 1st and 2nd respondent's legal practitioners