AFRICA FIRST RENAISSANCE CORPORATION LIMITED.
versus
ACM INVESTMENTS (PRIVATE) LIMITED
and
JRTM INVESTMENTS (PRIVATE) LIMITED
and
ASH INVESTMENTS (PRIVATE) LIMITED
and
FPS INVESTMENTS (PRIVATE) LIMITED
and
APWM INVESTMENTS (PRIVATE) LIMITED.
and
KINGDOM MEIKLES AFRICA LIMITED.

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE 9, 14, AND 16 OCTOBER 2008

Urgent Chamber Application.

A. Chinake for the applicant.
C. Anderson SC and E. Matinenga, for the 1st, 2nd. 3rd, 4th. And 5th respondents.
Mr Lloyd for the sixth respondent

UCHENA J: The applicant is a public company incorporated in terms of the Company laws of Zimbabwe and is listed on the Zimbabwe Stock Exchange. It has shares in the 6th respondent. It filed an urgent chamber application to this court seeking orders to regulate the holding of an extraordinary general meeting of the 6th respondent's shareholders convened by the 1st to the 5th respondents. At the hearing of the application, it applied to amend, its draft order by seeking a declaration that the convening of the extra ordinary general meeting, by the 1st to the 5th respondents is in terms of section 126 and 128 of the Companies Act (Cap 24:03) as read with Article 63 of the 6th Respondent's Articles of Association null and void.

The first to the fifth respondents are sister Companies controlled by the Meikles family. They are all shareholders of the 6th respondent. They in their capacity as shareholders issued a notice convening the meeting scheduled for the 23rd October 2008. The notice, Annexure B, to the respondent's opposing papers was signed by Mr John Moxon on their behalf. They each indicated in Annexure B their shareholding in the 6th respondent. The notice was therefore not issued by the Directors of the 6th respondent. They seek resolutions on the removal of three directors from the 6th respondent's Board of Directors, and the appointment of five new Directors whose details are given in the notice.

The 6th respondent is a company registered in terms of the laws of Zimbabwe. It is the company over which the applicant and the 1st to 5th respondents are in contention. The meeting convened by the 1st to the 5th respondents is intended to discuss and resolve issues on the removal of some of its directors and the appointment of new directors. It filed opposing papers in which it indicated an intention to abide by the decision of the court, and set the record straight in respect of what it has done following the notice convening the meeting, and what happened at its Directors meeting of the 23rd September 2008.

Points in limine

At the hearing of the 9th October 2008 the 1st to the 5th respondents raised two points *in limine*. *Adv. Anderson* submitted on behalf of the 1st to the 5th respondents that the applicant's application was not urgent. This point *in limine* was premised on the applicant not having taken action between the 23 rd September 2008 when the boardroom disputes in 6th respondent arose and the 3rd October 2008 when this application was filed. He argued that the delay was an indication that the urgency was self inflicted. He submitted, that the applicant had other remedies through which it could protect itself, before the meeting and at the meeting. therefore the case did not deserve to be heard on an urgent basis. *Advocate Matinenga* also for the 1st to 5th respondents submitted that the applicant did not have locus standi as it was not a shareholder in the 6th respondent.

Mr Chinake for the applicant in response to Advocate Anderson's submissions explained that the applicant is not a Board member of the 6th respondent and was therefore not aware of what happened on the 23rd of September 2008. He submitted that

applicant being 6th respondent's ordinary shareholder only got to hear of the Boardroom disputes and the proposed extra ordinary general meeting through the press on the 28th September 2008. He submitted that the 28th September was a Sunday, so the applicant started working on the application by instructing its legal practitioners on Monday the 29th September 2008 and filed this application on the 3rd October 2008. I am satisfied that the applicant has given a reasonable explanation for the delay. It does not therefore destroy the urgency of this application. In response to Advocate Anderson's submission that the applicant could take corrective action before the meeting or raise issues at the meeting as provided by the law to avoid any prejudice it may suffer, submitted that the applicant's main concern, was many shareholders would not receive the notices which were send by post and would not attend personally or by proxy. This is in my view a valid argument, as the failure by many shareholders to attend may give the 1st to 5th respondents an unfair advantage to push through their agenda unopposed. He also submitted that the meeting was not convened in terms of the law. It should therefore not be allowed to take place. If it does an illegal meeting would then decide on the affairs of the 6th respondent. This, is a valid argument. The legality of the meeting must be determined before it takes place. The application must therefore be heard on an urgent basis.

In response to Advocate Matinenga's submission that the applicant had no locus standi, Mr Chinake submitted that the applicant was a shareholder in the 6th respondent and therefore had locus standi. He produced two share certificates to prove that it was a shareholder. Mr Matinenga then conceded that applicant has locus standi.

The 1st to the 5th respondent's points in limine are therefore dismissed with costs.

Joinder and Postponement

After hearing the parties on the preliminary issues, I postponed this case to the 14th October 2008. After announcing my decision on the preliminary issue, on the 14th October 2008, I was requested by Mr Tawanda Nyambirai to hear an oral application for the joinder of Messers Nigel Chanakira, Rugare Chidembo and Calisto Jokonya and

Econet Wireless Holdings (Pvt) Ltd. into these proceedings. He submitted that he had already prepared affidavits which he could file by 1.00 pm if his application for joinder succeeds. He indicated that the parties who intended to be joined were seeking a slightly different relief from the applicant's, though the facts relied on were the same. The application was strongly opposed by the 1st to the 5th respondents and the applicant. Mr Chinake for the applicant submitted that Messers Chanakira, Chidembo and Jokonya were present at the board meeting of the 23rd of September 2008, which triggered the applicant's application, yet they did not take action but now want to benefit from the applicant's application. He submitted that the joinder would unnecessarily delay the applicant's urgent application and increase costs on the applicant's part. He further submitted that the parties seeking joinder can make their own separate application as the relief they are seeking is different from that being sought by the applicant. Advocate Anderson also opposed the application for joinder for the same reasons.

In reply Mr Nyambirai conceded that the applicants for joinder could make their own application but was worried that, that may result in different decisions being arrived at, different courts hear the cases. That in my view is not a valid reason for joinder. The joinder if granted will obviously delay this urgent application and will cause inconvenience to the applicant and the respondents who have opposed the joinder.

Mr Lloyd for the 6th respondent did not oppose the application as he wanted a postponement to enable the 6th respondent to engage the services of an Advocate. The postponement was opposed as the 6th respondent had indicated in its opposing papers that it would abide by the decision of the court. I am satisfied that the 6th respondent will suffer no prejudice if the postponement is not granted as it is already represented by an experienced lawyer who will in my view have no difficulty in following proceedings and making submissions were necessary as it intends to abide by the court's decision.

In the result the application for joinder is dismissed, and the applicants for joinder shall jointly and severally pay to the applicant and the 1st to the 5th respondents, the costs they incurred in respect of the application for joinder, the one paying the others to be absolved.

The issues.

The issues in this case are:-

1. Whether the notice issued by the 1st to the 5th is a valid notice in terms of the Companies Act. and
2. Whether or not the court can grant the regulatory orders sought by the applicant, to regulate the meeting scheduled for the 23rd October 2008.

The second issue is relevant in the event of a finding that the notice issued by the 1st to the 5th respondents is a valid notice. If the court finds, that the notice, is not valid and declares it to be null and void there will be no need to make a determination on it.

Validity of the notice

It is common cause that the notice convening the meeting scheduled for the 23rd October 2008 was issued by the 1st to the 5th respondents in their capacity as the 6th respondent's shareholders.

The validity of the notice depends on the provisions of the Companies Act which provides for the convening of extra ordinary general meetings.

The law

Mr Chinake for the applicant submitted that sections 126 and 128 (1) (b) of the Companies Act, as read with Article 63 of the 6th respondent's articles of association provides for the convening of an extra ordinary general meeting by the directors of the company. He further submitted that the 1st to the 5th respondents should have requisitioned the 6th respondent's directors to convene the meeting. He therefore concluded that the meeting convened by the 1st to the 5th respondents is a nullity and should be declared to be of no force or effect.

Advocate Matinenga who argued this point for the 1st to the 5th respondents submitted that article 63 of the 6th respondent's articles of association is a re-incarnation of section 126, and should not be read as taking away the 1st to the 5th respondent's right to convene the meeting in terms of section 128 (1) (b) of the Companies Act. He therefore argued that the notice calling for an extra ordinary general meeting of the 23rd October 2008 is valid, and the meeting should be allowed to take place.

Section 128 (1) of the Companies Act provides as follows:-

"The following provisions shall have effect in so far as the articles of a company do not make other provision in that behalf:-

a. Notice of the meeting of a company shall be served on every member of a company in the manner in which notices are required to be served by Table A.
b. Two or more members holding not less than one-tenth of the issued share capital may call a meeting."

The provisions of section 128 (1) (b) of the Companies Act, are clear. They entitle two or more shareholders, who hold one tenth or more, of the company's issued share capital, to call a meeting. That is however subject, to whether or not, that company's articles of association provides otherwise. If the company's articles, provides otherwise then the share holders referred to in subsection (1) (b), can not call a meeting as provided in section 128 (1) (b), but as provided in the articles of the company's association. The provisions of section 128 (1) (b), can only have effect if the company's articles of association do not provide otherwise, in respect of the provision of the section in issue. Section 128 (1) gives a company an option as to whether or not it intents to be bound by its provisions. If a company, does not want to be bound, it simply, makes provisions in its articles of association providing for the convening of meetings in a manner other than the one provided in section 128 (1) (b). If it makes such provisions then its meetings shall be held in the manner provided in its articles of association.

In the case before the court article 63 of the 6th respondent provides as follows:-

"The Directors may whenever they think fit, convene an Extraordinary Meeting, and the Directors shall forthwith proceed to convene an Extraordinary Meeting if and when required so to do in accordance with the provisions of the Statutes. Extraordinary Meetings of the Company shall be held at such places and at such times as the Directors may from time to time determine."

Article 63 provides for a procedure to be followed by shareholders who desire to call for an Extraordinary Meeting. They must requisition for it through the Company's Directors who shall forthwith call for the meeting but use their discretion as to the place and time where the meeting shall be held. The provisions of article 63 are different from the provisions of section 128 (1) (b) of the Companies Act. They therefore provide otherwise, and should in terms of section 128 (1) be followed. A reading of section 128

(1) (b) Of the Companies Act and article 63 of the 6th respondent's articles of association, therefore indicates that any calling of an Extraordinary Meeting must be by Directors either at their own instance or on requisition by members of the Company in terms of statutes. The reference to "in terms of statutes" is significant. It means the requisitioning shareholders must do so in terms of statutes, and must enforce their requisition in terms of statutes. If they have to act personally they should do so in terms of statutes.

The word "statutes" is defined in the 6th respondent's articles' definition section. It means the "Companies Act" or "any other law for the time being in force concerning companies and necessarily affecting the Company". The court must therefore look into the Companies Act for provisions, on how shareholders can call for an Extraordinary meeting or any meeting other than in the manner prescribed in section 128 (1) (b), which defers to the provisions of the Company's Articles of Association. Mr Chinake for the applicant submitted that section 126 provides the procedure to be followed. It provides as follows:-

> "(1) On the requisition of members of a company holding at the date of the deposit of the requisition not less than one-twentieth of such of the paid-up capital of the company as at the date of the deposit carries the right of voting at general meetings of the company the directors of the company, notwithstanding anything in its articles, shall, within twenty-one days of the deposit of the requisition, issue a notice to members convening an extraordinary general meeting of the company for a date not less than fourteen nor more than twenty-eight days from the date of the notice:
>
> Provided that if a special resolution is to be submitted the period of the notice shall not be less than twenty one days.
>
> (2) The requisition shall state the objects of the meeting and shall be signed by the requisitionists and deposited at the registered office of the company, and may consist of several documents in like form, each signed by one or more requisitionists.
>
> (3) If the directors do not within twenty-one days from the date of the deposit of the requisition issue a notice as required by subsection (1) the requisitionists, or any of them numbering more than fifty or representing more than one-half of the

total voting rights of all of them, may themselves convene a meeting, stating the objects thereof, on twenty-one days' notice, but no meeting so convened shall be held after the expiration of three months from the said date.

(4) Any meeting convened under this section by the requisitionists shall be convened in the same manner, as nearly as possible, as that in which meetings are to be convened by directors.

(5) Any reasonable expense incurred by the requisitionists by reason of the failure of the directors duly to convene a meeting shall be repaid to the requisitionists by the company, and any sum so repaid shall be retained by the company out of any sums due or to become due from the company by way of fees or other remuneration in respect of their services to such of the directors as were knowingly party to the default.

(6) Any officer of the company who is knowingly a party to a default in convening a meeting as required by subsection (1) shall be guilty of an offence and liable to a fine not exceeding level five or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment."

Subsection (1) provides as to which members can requisition the Directors for an extraordinary meeting, and what the Directors are required to do on receiving the requisition. The 1st to the 5th respondents should have requisitioned the Directors of the 6th respondent for a meeting instead of convening it themselves.

Subsection (2) provides for what should be stated in the requisition, its signing, where it should be deposited, what documents may accompany it and the signing of the accompanying documents. That is the procedure the 1st to the 5th respondents should have followed. They should have requisitioned the 6th respondent's Directors, for an extraordinary meeting, by depositing the requisition at the company's registered offices.

Subsection (3) provides for what requisitionists who qualify in terms of that subsection can do if the Directors of the company do not act in terms of subsection (1). They can themselves convene the meeting if they number more than fifty, or represent more than half of the total voting rights of all of them. They should state the objects of the meeting and must give twenty one days notice of such meeting. The 1st to the 5th

respondents should therefore have requisitioned for a meeting in terms of subsection (1), and if the Directors had failed to act in terms of subsection {1} they themselves, could if they qualified have acted in terms of subsection (3).

Article 63 as read with section 126 of the companies Act therefore lays down the procedure to be followed by a shareholder of the 6th respondent who wishes to call for an extraordinary general meeting. Section 128 (1) (b) which the 1st to the 5th respondents relied on defers to article 63. They therefore used a wrong procedure. While they have a right to initiate an extraordinary meeting by requisitioning the Directors, they had no right to convene the meeting themselves. They could only have convened the meeting themselves if after complying with section 126 (1) the Directors had failed to comply with their requisition. It is not lawful for shareholders to convene an extraordinary meeting before requisitioning the Directors to do so, and the Directors have failed to comply. The notice is therefore null and void and of no legal effect.

In the result the notice issued by the 1st to the 5th respondents convening an extraordinary general meeting on the 23rd October 2008, is declared null and void and of no legal effect.

The 1st to the 5th respondents shall bear the applicant's and 6th respondent's costs.

Messrs Kantor & Immerman ,Applicant' Legal Practitioners
Messers Scanlen & Holderness, 1st to 5th respondent's Legal Practitioners.
Messers Gill, Goglonton & Gerrans, 6th Respondent's Legal Practitioners.