ENERGY RESOURCES AFRICA CONSORTIUM (PRIVATE) LIMITED
and
ENERGY RESOURCES AFRICA (PRIVATE) LIMITED
versus
HAROLD CROWN
and
PORTRIVER INVESTMENTS (PRIVATE) LIMITED)

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 13 October, 4, 6, 17 November and 9 December 2015

Urgent Chamber Application

T. Magwaliba instructed by *M Remba*, for applicants
T. Mpofu instructed by *E.R. Samukange* with *G.R.J. Sithole*, for respondents

TAGU J: Dave Mashayamombe is a Zimbabwean national who is resident in Zimbabwe. The first respondent is Harold Crown a South African national who is resident in the Republic of South Africa. Dave Mashayamombe and the first respondent are co- directors of first applicant, a company known as Energy Resources Africa Consortium (Private) limited which is established in terms of the laws of Zimbabwe. Further, Dave Mashayamombe is also a director of the second respondent which is a company established in terms of the laws of Zimbabwe. Second applicant company is known as Energy Resources Africa (Private) Limited. The second applicant is a shareholder in the first applicant. Sometime in 2011 the first applicant and the second applicant entered into two projects with the City of Harare, (hereinafter referred to as (COH)). The first contract was for the rehabilitation of Firle Sewage Works and the second contract was for power generation at Firle Sewage Works. When the tendering commenced between the second applicant and the COH, the first respondent Harold Crown had been left out. Harold Crown then contacted Dave Mashayamombe and introduced himself as a representative of a South African company called CEMO Pumps (PTY) Ltd that was desirous of participating in the COH projects. An agreement was reached hence the formation of a Joint Venture company. At the

formation or registration of the Joint Venture company the first respondent Harold Crown was represented by an alter ego of its South African domiciled CEMO Pumps (PTY) Ltd. The Alter ego was Portriver Investments (PVT) Ltd, a Zimbabwean registered company herein cited as second respondent. These contracts are worth over US$ 13 000 000.00 (thirteen million United States of America dollars). Currently there are some disputes among the companies which this court has not been asked to adjudicate over. Suffice to state that despite that huge sums of money are involved in the contracts, the companies have since inception been operating illegally. They have been operating illegally in the sense that they have not been complying with tax obligations as set out under the Income Tax Act [*Chapter 23:06*], the Value Added Tax [*Chapter 23:12*] and the Companies Act [*Chapter 24:03*].

The applicants in a bid to regularise their operations and to comply with tax obligations have brought this urgent chamber application seeking the following relief-

"**TERMS OF THE FINAL ORDER SOUGHT:**

1. Respondents be and are hereby interdicted from performing any action under the Contract between City of Harare and First Applicant which in any way violates the Income Tax Act [Chapter 23:06], the Value Added Tax [*Chapter 23:12*] and the Companies Act [*Chapter 24;03*].
2. Respondents shall take all steps necessary to comply with First Applicant's statutory returns as and when they fall due.
3. The Respondents be and are hereby ordered to pay costs of suit.

INTERIM RELIEF SOUGHT

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

1. The First Respondent as the director representing the interest of the Second Respondent in the First Applicant be and is hereby ordered, upon service of this order:

a. to complete and sign the FBC Bank account application form which is required to open a bank account for the First Applicant at FBC Bank; and
b. to complete and sign a Rev 1 ZIMRA Form which is required by the First Applicant for purposes of its tax amnesty application.

2. Pending the determination by Zimra in First Applicant's application for tax amnesty, First Respondent be and is hereby interdicted from receiving any income due to First Applicant under the contracts with the City of Harare for the rehabilitation of Firle Sewage Works or for power generation.
3. First Respondent shall direct City of Harare to make payments due to First Applicant in terms of the Contracts, into the FBC Bank account to be opened by First Applicant.

SERVICE OF ORDER

This provisional order shall be served on the Respondents by the Applicant's Legal practitioners or by a person in the employ of the Applicant's legal practitioners or by the Deputy Sheriff."

At the hearing of the matter *T Mpofu* took three points *in limine*. The first point raised by *T Mpofu* was that the matter was not urgent. The second point was that the Certificate of urgency was not valid. The third point was that the resolution of directors was invalid. When the points *in limine* were raised I sat and heard arguments together with my brother Judge Justice Phiri. We initially reserved our ruling and we pondered over the submissions. Finally we were of the unanimous view that the points *in limine* lacked any merit and we dismissed them. I indicated that our reasons would follow in the main judgment. These are they.

AD URGENCY

The argument advanced by Mr *T Mpofu* was that the matter was not urgent. He submitted that the application was filed with this court on 9 October 2015. According to him there are two periods to be considered. He said the time to act arose in 2011 when the Joint Venture Agreement was made. The second time when the time to act again arose was on 30 September 2015. His argument was that the relief being sought by the applicants is that the first respondent has to co-operate on the resolution of Tax issue with ZIMRA. The need to rectify and or regularising the Tax issue was in 2011 when they started to operate. No reason why the co-operation of the first respondent was asked for since 2011. He said assuming the need to regularise arose as a result of Tax amnesty then the need to seek the co-operation of the first respondent would have arisen at the date when the amnesty was announced. He further, argued that if we are to say the amnesty was to end by the 30th September 2015 applicants knew the assistance of the first respondent was not forthcoming, and the application should have been brought by the 30th September 2015. Neither the supporting affidavit nor the certificate of urgency explains the delay. See *Kuvarega* v *Registrar- General and Another* 1998 (1) ZLR 188 (H) at 193 E - G where it was said-

> "What constitutes urgency is not the imminent arrival of the day of reckoning. A matter is urgent, if at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules. It necessarily follows that the certificate of urgency or supporting affidavit must always contain an explanation of the non-timeous action if there has been any delay."

Mr *T. Mpofu* argued that in the *Kuvarega* v *Registrar –General and Anor supra*, the applicant had delayed by two days. Hence in the present case the period from 30th September 2015 to 9th October 2015 was outside the Kuvarega time limit. He further argued that the

directive in the relief sought that the first applicant should receive the income from the proceeds of the two contracts should have been made in 2011. He prayed that the court should find that this application is not urgent.

The first applicant disputed that the need to act arose in 2011 or that it deliberately or carelessly abstained from action. It argued that the first applicant is indeed a tax payer who has been in default and sought to take advantage of the Tax Amnesty that expired on 30 September 2015. The first applicant argued further that it had not initially realised that it was violating the Tax laws, and now they have realised it and approached the second director who is Harold Crown to regularise the default. However, efforts to comply with the Amnesty directive have been obstructed by the first respondent and a shareholder who is the second respondent. The first applicant therefore denied that the need to act arose in 2011. To demonstrate what the applicant has been doing all along the applicant referred the court to various correspondences that took place between the first applicant's legal practitioners and the legal practitioners representing the first respondent. In their view the first respondent is hiding behind the fact that he is resident in South Africa and the tax authorities cannot reach him thereby depriving the government of money amounting to over US$ 18 000 000 (Eighteen million dollars). Urgency in this matter therefore does not only stem from what happened, but from what is about to happen should the first applicant fail to regularise its operations. They conceded that the tax amnesty period expired on the 30th September 2015, but argued that the tax authorities have accepted to extent the period in their favour. The letter dated 2 October 2015 stated as follows-

> "**RE: REGULARISATION OF ENERGY RESOURCES AFRICA CONSORTIUM (PRIVATE) LIMITED: YOUR CLIENT PORTRIVER INVESTMENTS (PRIVATE) LIMITED**
>
> We refer to the above matter.
>
> Mr. Dave Mashayamombe our client attended the Zimbabwe Revenue Authority ("Zimra") on 30 September 2015 in order to regularise the tax obligations of Energy Resources Africa Consortium (Private) Limited ("ERAC" or "the Company") as noted by ZIMRA during the tax amnesty period.
>
> Zimra issued a tax amnesty rejection Form TA 03, in which it requires additional information from the Company, that is (i) a Rev 1 Form and (ii) income tax returns for the period in which the Company seeks amnesty, which is from inception of business in 2011 to date.
>
> We attach the Zimra Form TA 03 issued by Zimra as well as the Rev 1 Form which the Company must fill. As you are aware, the tax amnesty period has already ended. However, since the Company submitted, on time, the Tax Amnesty Application and already attended

Zimra, it will be able to secure an extension of the amnesty subject to submitting the outstanding information.

We require the following from your client to enable urgent conclusion and submission of the documents:

1. Details of Mr Crown (see section 24 of Rev 1);
2. It is important for the Company to open a bank account (see Part VI Rev 1). For this both directors' signatures are required;
3. Copies of Mr Crown's identity documentation, his physical address and proof of residence.

May we please have the details and documents in paragraph 1 and 3, as well as an indication of two (2) banks which Mr Crown recommends, for Mr. Mashayamombe to open the bank account. Mr Crown's signature will be required as well.

As the matter cannot wait, your urgent supply of the documents in any event no later than midday of Monday 5th October 2015, will be appreciated.

Yours faithfully

DUBE, MANIKAI & HWACHA"

The above letter was responded to by the first respondent's legal practitioners on 6 October 2015 wherein they said:

"RE: PORTIRIVER INVSTMENTS (PVT)N LTD v ENERGY RESOURCES AFRICA (PVT) LTD

We refer to your letter of the 2nd of October 2015 whose contents have been noted.

We request the Zimbabwe Revenue Authority (Zimra) Form TA 03 which you make reference to in your letter. This will enable our client to substantively respond to your request.

We await to hear from you urgently.

Yours faithfully

E.R. SAMUKANGE
Senior Associate
VENTURAS AND SAMUKANGE"

To show that the first applicant treated this matter as extremely urgent the first applicant's legal practitioners responded to the first respondent's legal practitioners by letter dated 7 October 2015 supplying the requested information as follows-

"**REGULARISATION OF ENERGY RESOURCES AFRICA CONSORTIUM (PRIVATE) LIMITED: YOUR CLIENT PORTRIVER INVESTMENTS (PRIVATE) LIMITED**

We refer to your letter dated 6 October 2015.

Please find attached the following documents:

1. A ZIMRA Form TA 03 you requested.
2. A ZIMRA Rev 1 Form which your client needs to complete;
3. A company resolution to open a bank account with FBC Bank, and
4. An FBC Bank application form which requires the signature of Mr Harold Crown as the other director in Energy Resources Africa Consortium (Private) Limited.

If Mr Harold Crown is not presently domiciled in Harare to attend to the above, a power of attorney or proxy appointing a representative to sign on his behalf will suffice.

We would greatly appreciate your expeditious response because we need to get back to ZIMRA as soon as possible. May you kindly return to us the completed and signed documents by no later than Thursday the 8th of October 2015.

Yours faithfully

DUBE, MANIKAI & HWACHA."

However, according to the first applicant no response was ever received prompting them to file this urgent chamber application.

In our view, having considered the submissions we were of the unanimous view that what prompted urgency in this matter was the fact that the first respondent was not being co-operative and time was now of the essence since ZIMRA could have proceeded to throw away the first applicant's application for ever and proceeded to garnish the first applicant company. Urgency in this matter was activated by the amnesty which had now come to an end. It is not correct that time to act arose in 2011. It arose at the time of the announcement of the tax amnesty and the realisation by the first applicant that they were operating illegally and needed to regularise their operations. The applicant filed this application after previous efforts to get the co-operation of the respondents had failed. For these reasons we dismissed the first point *in limine*.

AD CERTIFICATE OF URGENCY

Mr *T. Mpofu* attacked the validity of the certificate of urgency deposed to by one Primerose Rudo Zvinavashe, a legal practitioner with the firm G N Mlotshwa & Company. He said it is invalid if one had sight of what she stated in para(s) 2 and 3 where she said-

"2. On 30th September 2015, Zimra requested First Applicant to submit a Rev 1 Form duly completed and signed, failing which the First Applicant's tax amnesty application would be declined and the First Applicant would become liable to paying tax penalties for non- compliance with tax obligations as set out under the Income

> Tax Act [*Chapter 23: 06*], the Value Added Tax Act [*Chapter 23:12*] and the Companies Act [*Chapter 24:03*].
>
> 3 First Respondent is a director of the First Applicant and has a fiduciary duty to act in the best interests of the First Applicant. Such duty obviously encompasses the responsibility to complete and sign the Zimra Rev 1 Form which must be submitted to Zimra in order for First Applicant's tax amnesty application to be granted."

Mr *T. Mpofu* went on to say that the certificate did not state why the action was not taken nearer the 30th September 2015. Finally he said the certificate was issued on 18 September 2015 but the application was filed on 9 October 2015. In his view Primerose Rudo Zvinavashe did not apply her mind. Reference was made to the case of (1) *Oliver Mandishona Chidawu* (2) *Broadway Investments (Pvt) Ltd* (3) *Danoct Investments (PTY) Ltd* (4) *Danno Investments (Pty) Investments (Pty) Ltd* v (1) *Jayesh Sha* (2) *TN Asset Management (Pvt) Ltd* (3) *ISB Securities (Pvt) Ltd* (4) *Zimbabwe Stock Exchange* (5) *Conserve (Pvt) Ltd* SC – 12/13. In particular Mr *T. Mpofu* quoted in full what was stated in the case of *General Transport & Engineering (Pvt) Ltd* & *Ors* v *Zimbank Corp (Pvt) Ltd* 1998 (2) ZLR 301 where it was stated by GILLESPIE J that:

> "Where the rule relating to a certificate of urgency requires a legal practitioner to state his own belief in the urgency of the matter that, invitation must not be abused. He is not permitted to make as his certificate of urgency a submission in which he is unable to conscientiously concur. He has to apply his own mind and judgment to the circumstances and reach a personal view that he can honestly pass on to a judge and which he can support not only by the strength of his arguments but on his own honour and name.
>
> ……It is therefore an abuse for a lawyer to put his name to a certificate of urgency where he does not genuinely believe the matter to be urgent. Moreover, as in any situation where the genuineness of a belief is postulated, that good faith can be tested by the reasonableness or otherwise of the purported view. Thus where a lawyer could not reasonably entertain the belief he professes in the urgency of the matter he runs the risk of a judge concluding that he acted wrongfully if not dishonestly in giving his certificate of urgency."

Mr *T. Magwaliba* challenged Mr *T. Mpofu*'s submissions and stated that the date of the 30th September 2015 was indeed made in the certificate of urgency and that there is no rule that says many dates have to be stated. As regards the date of the 18th September Mr *T. Magwaliba* dismissed it as a mere typographical error that did not invalidate the certificate.

In *casu* we noted that the certificate of urgency in the case of Chidawu and others supra is different to the one before us. In the Chidawu case it was clear that the legal practitioner who had deposed to the certificate of urgency had indeed not applied his mind because his was but a case of copying and pasting a certificate that had been made by another practitioner in another case. We agreed with Mr *T. Magwaliba* that the issue of the date of the

18th September 2015 was but a typographical error. That alone did not show that Primerose Rudo Zvinavashe had not applied her mind to the case brought before her. Her certificate of urgency is very valid and we dismissed the second point *in limine*.

AD RESOLUTION OF THE BOARD OF DIRECTORS

Section 169 of the Companies Act [*Chapter 24:03*] deal with the issue of directors and other officers. The section says:

> "**169 Directors and secretary**
>
> (1) Every company shall have not less than two directors, other than alternate directors, at least one of whom shall be ordinarily resident in Zimbabwe.
> (2) Every company shall have at least one secretary ordinarily resident in Zimbabwe.
> (3) Every person signing the memorandum of a company shall, until other directors are appointed, be deemed to be a director of the company and be liable for the duties and obligations of a director:
>
> Provided that where a person signs the memorandum, whether as agent or otherwise, on behalf of some other person who is not qualified to be a director of the company, the first-mentioned person shall be deemed to be a director.
>
> (4) ……."

And section 170 of the same act says-

> "**170 Validity of acts of directors**
>
> The acts of a director or manager shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification."

In *casu* Mr Mashayamombe and the first respondent are directors in the first and second applicants. Mr Mahsayamombe is resident in Zimbabwe while the first respondent Harold Crown is resident in South Africa. Mr Mashayamombe brought this application after being authorised by a resolution of directors of the second applicant represented by Mr Mashayamombe and one TP Ntaisi. Mr *T. Mpofu* challenged the validity of the resolution of the board of second applicant on the basis that two directors were required to sign it. However, the applicants opposed the submissions on the basis that there is nothing that requires that two directors have to sign the resolution. In any case the applicants made a clear case why Mr Mashayamombe acted as he did. In para 8.6. of his supporting affidavit Mr Mashayamombe said:

> "8.6 First Applicant called for a board meeting of its directors on 9 July 2015, and First Respondent did not attend. A second board meeting was automatically convened on 16 July 2015 by operation of First Applicant Articles of Association and First Respondent did not

> attend again. A 3rd board meeting was held on 18 August 2015 and First Respondent sent its lawyer, armed with a proxy, to attend."

In our view, the first applicant did nothing wrong in signing the resolution in the absence of the first respondent who is elusive. So whatever Mr Mashayamombe did was above board and valid in terms of the duties of a director under the Companies Act for the benefit of the companies and the other directors. Even if he had not signed the resolution as he did we would still have accepted his founding affidavit on the basis that as a director he had personal knowledge of what was happening in the companies and could positively swore to an affidavit touching on the affairs of the company. He has sufficient authority to depose to any affidavit. For the above reasons we found no merit in the third point *in limine*. The third point is accordingly dismissed.

The court directed the parties to address the court on the merits. Before I deal with the merits there is one point that I want to make it clear for avoidance of doubt.

After we reserved our ruling on the points *in limine* on 14 October 2015 we deliberated over the issues and decided that there were no merits in the points *in limine*. I directed my clerk to set the matter for continuation on the 4th of November 2015 which was an available date. I advised the clerk to advise the parties to attend on that day. On the 4th November 2015 Mr *T. Mpofu* was not available. Mr *E.R. Samukange* appeared on behalf of Advocate Mpofu and I made an extempore ruling on the points *in limine*. However, Mr *Samukange* applied for postponement of the matter to the 6th of November 2015. It was only on 4 November that we realised that the applicant had filed on 22 October 2015 his answering affidavit. This the applicant had done without the leave of the court. That answering affidavit had no bearing on the decision which the court had already arrived at. This prompted Mr *T. Mpofu* to make an application for the recusal of this court on the basis that he had not been afforded the opportunity to file his own answering affidavit. The application was opposed by Mr *T. Magwaliba* who was of the view that though the document was improperly filed, it was not the fault of the court and the application by Mr *T. Mpofu* was tantamount to forum shopping after hearing that the points *in limine* were going to be dismissed and that the full reasons were to follow in the main judgment.

After hearing submissions I agreed with Mr *T. Magwaliba* and dismissed the application for recusal on the basis that the court had not had sight of the applicant's answering affidavit and had not been influenced in any manner by that document. As things stand that document should not be considered as part of the record.

I will now turn to deal with the merits of the application.

In his submissions Mr *T. Magwaliba* urged the court to grant the relief sought on the basis that applicants are duty bound to comply with the law and the respondents have to be compelled to do their party. Harold Crown is based in South Africa and does not stand to suffer for non- compliance of the law which Mashayamombe will suffer. He argued that the applicants have a clear right and the first respondent has to comply. The trade of the first applicant has to be registered for tax purposes and a bank account has to be opened to facilitate payments to ZIMRA. He said the respondents are beneficiaries of a tax avoidance scheme and want the *status quo* to be maintained. Hence when ZIMRA acts and refuses to grant amnesty to first applicant it would be Dave Mashayamombe who would suffer the consequences. Hence the balance of convenience favours the grant of the order.

However, Mr *T. Mpofu* opposed the application stating among other things that this is not a tax compliance issue but that the applicants want to get the proceeds of the contracts which are not due to them. Further, he said that the first respondent cannot be compelled to pay tax because the first applicant has never traded from the day of its inception citing the fact that the agreement was never signed. He further said it is the second respondent who is doing the work and is supposed to be paid. As regards the second applicant his argument was that it lacked the *locus standi* in this matter. He said because of the existence of extradition processes between Zimbabwe and South Africa the taxman can still garnish or prosecute Harold Crown if he failed to meet his tax liabilities. Mr *T. Mpofu* urged the court to dismiss the application on the basis that there are disputes of facts as regards who has a contract with the COH. Another point he raised was that the no- joinder of the COH makes the application fatally defective.

Having considered the submissions the court found that a shareholder and or director of a company have to comply with the laws of the land. In *casu*, the second applicant is a shareholder in the first applicant. Dave Mashayamombe is a director in the first and second applicants. On the other hand Harold Crown is a director in the first applicant while Portriver Investments (Pvt) Ltd is a shareholder in the first applicant. It is not disputed that Harold Crown is a resident of the Republic of South Africa. If any penalty is to be imposed it is Dave Mashayamombe and the applicants who have to be affected. From the papers and submissions it clear there is a tax avoidance scheme involving the respondents. The applicants are now determined to regularise their operations and to take advantage of the Tax Amnesty. This can only be possible with the co-operation of the respondents, especially the

personal details of Harold Crown. To dismiss this application would be tantamount to blessing and abetting the tax avoidance scheme. It will be allowing the illegal situation to prevail. This is not in the interests of the applicants and the fiscus. The balance of convenience weighs in favour of the applicants since the tax amnesty application being pursued by the applicants is intended to regularize first applicant's tax obligations to ZIMRA and ensure compliance with the provisions of the Income Tax Act, Value Added Tax Act and the Companies Act. The non-jointer of the City Of Harare is not fatal to the application. I have not been convinced that there are disputes of facts here. What is clear as day light is that the respondents want to continue trading and receiving large sums of money without paying taxes. This is unacceptable. There may be disagreements over other issues that resulted in the issuance of Summons which is pending but that does not stop the parties from complying with the mandatory requirements of the law.

In my view, all the requirements for an interdict and an application for an order that the respondents produce information and documents required by the applicants in order to enable the applicants to regularise its tax obligations with the Zimbabwe Revenue Authority (ZIMRA) in terms of Statutory Instrument 163 of 2014 Finance Act (Tax Amnesty) Regulations 2014 have been met.

In the result I make the following order-

It is ordered that the application is hereby granted.

Dube, Manikai & Hwacha, applicants' legal practitioners
Venturas & Samukange, respondents' legal practitioners