JOHN FARLEY PIETERSEN

And

MARK JOHNSTONE

Versus

DURATION GOLD ZIMBABWE (PVT) LTD

And

ALL FLAME MARKETING (PVT) LTD

And

COMPETITIVE MARKETING (PVT) LTD

And

DGL INVESTMENTS NUMBER TWENTY ONE (MAURITIUS)

IN THE HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 27 JUNE 2022 AND 30 MARCH 2023

Opposed Application

S. Nkomo, for the applicants
G. Nyoni, for 1st to 4th respondents

MOYO J: The applicant seeks an order to the following effect:-

1. Applicants be and are hereby declared as majority shareholders of 2nd respondent jointly and severally owning 57,45% of the shares.

2. The share certificate purporting that 4th respondent is the 100% shareholder of 2nd respondent be and is hereby declared null and void.

3. 1st, 2nd, 3rd and 4th respondents bear the costs of suit on an attorney and client scale.

Preliminary Points

At the hearing of the application, the applicants raised a preliminary point to the effect that there is no opposing affidavit before the court as the deponent is not competent to swear to the events as he was not present. In their answering affidavit (paragraph 3) the applicants aver that the deponent to the opposing affidavit is making averments based entirely on hearsay as he was not employed by the respondents and was never a part of the transaction and agreements entered into, and that it was Raymond Smithwick and Natasha Britten who participated in the transactions.

A look at paragraph 2 of the opposing affidavit shows that the deponent says the information is within his personal knowledge and that he can swear positively thereto. An argument is also made on the fact that the respondents' deponent does have knowledge of what he avers on per his position. This becomes a dispute of fact which the court cannot resolve on a preliminary basis. The preliminary point needs evidence to be led in order to resolve it, I cannot find for either party in this respect as it is one party's averments against another, there is nothing that this court can use to discern this fact. The applicants cite the case of *Bubye Minerals Pvt Ltd & Anor* v *Rani International Ltd* 2007 (1) ZLR 22 (SC). In the Bubye Minerals case, again, it is the respondent that was objecting to an affidavit by the applicant and the applicant had an opportunity to respond in an answering affidavit. It was thus common cause that the deponent had no knowledge.

In any event there was a factual dispute in the Bubye Minerals case unlike in this case where the facts are common cause. The narrative by both parties as to what transpired is the same. The only dispute is a legal one that is to say, whether the relief sought should be granted on the alleged facts. The objection is thus not properly taken in my view and it is accordingly dismissed.

On the issue of 2nd applicant's affidavit that there is no founding affidavit by the 2nd applicant I hold the view that there should be one founding affidavit in application proceedings and additional affidavits in support thereof. I hold the view that the averment in the 2nd applicant's supporting affidavit that he has read the 1st applicant's affidavit and he associates

himself with the contents therein should suffice in standing as a supporting affidavit because we have read the founding affidavit and we are aware of what the 2nd applicant is supporting. It is for these reasons that respondents' point *in limine* will not be upheld but dismissed.

On the merits, the applicants seek 2 orders, firstly, that they be declared as majority shareholders of 2nd respondent with a compliment of 57,45% of the shareholding and that the share certificate purporting that 4th respondent is the 100% shareholder of 2nd respondent be and is hereby declared null and void. The summary of the facts are that the applicants and respondents are business associates. 1st applicant entered into an agreement with 1st respondent wherein his 50% shareholding in 2nd respondent was sold to 1st respondent. Shares were later transferred to 4th respondent who was a nominee of the 1st respondent. The shares were allegedly sold for $1 700 000,00 but the purchase price was never paid in full. The parties then allegedly entered into another agreement where claims known as Marvel claims were sold and subsequently transferred to 2nd respondent. The purchase price was again never paid. The parties later entered into another agreement, the joint venture agreement wherein they agreed what each party would bring in and that the joint venture agreement cancelled all other agreements entered between themselves prior to the joint venture agreement.

A dispute later arose as to whether applicants have any shares in 2nd respondent. That is the dispute that gave birth to this litigation. Applicants seek a declaration that applicants be declared as the majority shareholders of 2nd respondent jointly owning 57,45% of the shares.

In making a declaration of rights, the court is being called to exercise a discretion. For the court to exercise a discretion, a case must be made first for such a declaration. Looking at the founding affidavit applicants entered into an agreement for the sale of shares wherein the purchase price remained outstanding and the shares were nonetheless passed on through a transfer.

The purchasers of the shares failed to meet their obligations of paying for these shares. The parties then entered into a joint venture agreement wherein the joint venture agreement allegedly cancelled all the other agreements between the parties. I hold the view that a clear case has not been made for the declaration I am being invited to make for the following reasons:-

1. These parties have gone into and out of agreements.

2. These parties have agreed on their contractual rights and obligations both on the 2 contracts for the sale of shares and on the 3rd contract in the joint venture. These 2 parties know what they intended and what their respective rights and obligations are.

It is my considered view that either party can approach the court, either to cancel an agreement or to enforce the other party to meet their obligations. I do not hold the view that I have powers to declare who owns what or rule over their intentions. I hold the view that a declaration of the shareholding and an order directing an amendment of the share certificates is not the appropriate remedy herein. I hold the view that the remedy available in this clearly contractual dispute should be a contractual one. I hold the view that the declaration I am being sought to make, where clearly the parties' contract in itself is not so clear *vis a vis* their intentions, would in essence amount to either reading into the contract or amending the contract for the parties which is inappropriate in my view. A declaration of rights in terms of a contract should be based on a set of facts where it is clear that the right exists. Here I am being called upon to adopt the applicants' view of an unclear set of events, and then impose it on both parties as the correct position. The parties should in my view attack each other's rights basing on the agreement they signed and clearly enforcing a particular term therein, not to seek that I interpret the entire set of events and declare to the parties that I believe that a certain result must ensue. I am unable to come to applicants' rescue in these circumstances.

I am accordingly unable to exercise my discretion and make the declaration sought as there is no clear set of facts upon which I would make such a finding and declare that which is not clear.

The application is accordingly dismissed with costs.

Mathonsi Ncube Law Chambers, applicants' legal practitioners
Messrs Moyo and Nyoni, 1st to 4th respondents' legal practitioners