JAMESON RUSHWAYA
and
ANNIE RUSHWAYA
versus
TETRAD INVESTMENT BANK LIMITED
and
THE SHERIFF, HIGH COURT OF ZIMBABWE N.O.
and
SWIMMING POOL AND UNDERWATER REPAIRS COMPANY (PRIVATE) LIMITED
and
PATTERSON FUNGAYI TIMBA
and
THE REGISTRAR OF COMPANIES

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 26 March, 8 October & 29 November 2024

Opposed Application

P. Chitsa, with him *V. Masvaya*, for the applicants
Ms *H. Nare* for the first respondent
Ms *R. Kadhani* for the third and fourth respondents

ZHOU J: This is a court application for an order declaring a sale of shares in companies known as Tolrose Investments (Private) Limited and Aepromm Resources (Private) Limited and confirmation of that sale by the second respondent to the third and fourth respondents to be null and void. The applicants also seek an order declaring that they remain the shareholders in the two companies referred to above until their dispute with the third and fourth respondents has been resolved. Costs of suit are sought against any party that opposes the application.

The application is opposed by the first, second and third respondents. The latter two are represented by one firm of attorneys.

The background to the dispute may be summarised as follows: The first and second applicants are husband and wife. They claim that they were at all material times the holders of shares in the two companies referred above. From the papers filed of record the shares in the two companies were sold to the third and fourth respondents by the second respondent. The sale was

at the instance of the first respondent. The sale was in execution of a judgment obtained by the first respondent against the applicants in Case No. HC 6640/13. The applicants contend that at the time that the shares were attached in execution there were no share certificates in existence. They allege that following the attachment of the shares where no share certificates existed, some share certificates were fraudulently created through forgery, and the said share certificates were then used to transfer the shares to the third and fourth respondents.

The applicants also take issue with the valuation of the shares in the companies. They allege that the shares were grossly undervalued through connivance between some of the respondents.

The applicants further allege that they settled the debt owed to the first respondent which gave rise to the attachment of the shares.

The respondents deny that the share certificates were forged. They state that the sale of shares was done regularly by way of public auction. They contend that the share certificates used in disposing of the shares were authentic.

Ms *Kadhani* for the third and fourth respondents raised what she characterised as a preliminary objection, which was that the applicants failed to plead the existence of a future or contingent right that would justify the declaratory relief being sought. Clearly, the so-called objection *in limine* is a contention that pertains to the merits of the application. The question of whether the applicants for a declarator have established a right, existing, future or contingent, is relevant to the merits because it speaks to the requirements to be established for the cause pleaded to succeed.

A point taken by the applicants regarding the authority of the deponent to the affidavit filed on behalf of the first respondent to represent that respondent was resolved by the production by consent of a resolution to prove the authority. The challenge to the deponent's authority has therefore fallen away.

As regards the merits of the application, it is clear that there is a material dispute of fact. The fact in dispute is whether the share certificates used to sell and transfer the shareholding of the applicants in the two companies named above were fraudulently created. This fact is material as the dispute revolves around it. The dispute cannot be resolved on the papers, as it will need evidence regarding the circumstances in which the share certificates of the applicants came into existence and whether they were created without the applicants' knowledge and or involvement.

This court has a discretion as to the future course of proceedings where there are material disputes of fact which cannot be resolved on the papers in motion proceedings, see *Adbro Investment Co Ltd v Minister of the Interior* 1956 (3) SA 345(A) at 350A; *Masukusa v National Foods Ltd & Anor* 1983 (1) ZLR 232(H) at 234D-F; *Mashingaidze v Mashingaidze* 1995 (1) ZLR 219(H) at 222C-G. As stated by CENTLIVRES CJ in the *Adbro Investment Co. Ltd* case, *supra*, the court may "*dismiss the application with costs or order the parties to go to trial or order oral evidence in terms of any rule of court. The first course may be adopted when the applicant should have realised when launching his application that a serious dispute of fact was bound to develop.*"

In casu none of the parties raised the issue of the dispute of fact. Indeed, apart from the contentions of the parties being mutually destructive on the factual issue of the alleged fraud and forgery, neither party led evidence regarding how the disputed share certificates came into existence. Applicants alleged that the certificates were not in existence and they never became aware of their existence until after the sale of the shares. The respondents in turn disputed the allegations of fraud but produced no evidence about when and how the share certificates came into existence. Oral evidence will therefore be required to resolve the factual dispute. I cannot readily find that the dispute was obvious to the applicants when they instituted the application in the absence of evidence to contest their assertion that they never saw the certificates until after the sale of the shares. For these reasons, this is an appropriate case for the court's discretion to be exercised by referring the matter to trial, with the court application standing as the summons and the notice of opposition standing as the notice of appearance to defend.

As regards costs, it is only fair that these be in the cause. The issue of the disputes of fact was not raised by any of the parties. It is a conundrum that confronted the court upon consideration of the submissions made on behalf of the parties.

In the result, IT IS ORDERED THAT:

1. The matter be and is hereby referred to trial with the court application standing as the summons and the notice of opposition as the notice of appearance to defend.
2. The applicants shall file their declaration within ten days from the date of this order.
3. Thereafter the filing of the rest of the pleadings and other documents and subsequent procedures shall be in terms of the rules of court.

4. Costs shall be in the cause.

ZHOU J: ……..

Chitsa & Masvaya, applicants' legal practitioners
Mawere Sibanda Commercial Lawyers, first respondent's legal practitioners
Atherstone & Cook, third and fourth respondents' legal practitioners