MUNASHE SHAVA
versus
SIMON CHINGANGA
and
TAPSON MADZIVIRE
and
ADAM BEDE MANUFACTURING (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 31 October 2019 and 19 February 2020

Opposed application

T Magwaliba, for the applicant
S Mpofu, for the 1st respondent

TAGU J: This is a court application for a declaratory order. The order being sought reads as follows-

> "1. That Applicant be and is hereby declared to be the holder of 30 ordinary shares in the 3rd Respondent, with the 1st Respondent holding 20 ordinary shares and the 2nd Respondent holding 40 ordinary shares in the same company.
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> 2. The Applicant be and is hereby declared a director of the 3rd Respondent.
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> 3. 1st Respondent is hereby ordered to restore Applicant's name as a director on the company letterhead, and such name shall remain on such letterhead for as long as the Applicant is a director of the 3rd Respondent.
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> 4. 1st Respondent be and is hereby interdicted from purporting to clients and associates of the 3rd Respondent that he is a holder of 50% of the 3rd Respondent's issued share capital, or any number of shares which he does not hold, and /or purporting that Applicant is not a shareholder/director in the 3rd Respondent to such clients and associate.
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> 5. The 1st Respondent shall pay costs of suit."

The facts of this matter are long and complex. They can be summarized below as follows- In August 2016 the second respondent was approached by the directors of a company called Hunting

Furniture (Pvt) Ltd t/a Adam Bede and was offered to buy the business of the said company. The second respondent then approached the applicant and advised him of the opportunity. The applicant became interested. Applicant and second respondent teamed up and pooled resources for the purposes of raising the amount required to buy the said business. They agreed to buy the Adam Bede brand through a Special Purpose Vehicle (SPV). That time second respondent had a shell company called Extreme Security Group (Pvt) Ltd which had never traded. They decided to use this company. They executed an agreement on 30th August 2016 between themselves. A further agreement of sale was eventually executed between Hunting Furniture (Pvt) ltd t/a Adam Bede and Extreme Security Group (Pvt) Ltd. Applicant and second respondent then assumed management of the newly acquired company on 1st November 2016. They became joint signatories for the company's bank account. They alternated to meet working capital requirements. They operated the said business until they decided to register a new company which would utilize the brand and goodwill of Adam Bede. That is when an idea to incorporate the third respondent was mooted by applicant and was approved by second respondent. They then approached Valid Accounting and Tax Services (Pvt) Ltd through its sister company Winds Global Capital (Pvt) Ltd and requested to register a company with the name Adam Bede.

The applicant and second respondent agreed to be 50% shareholders in the new company in the same manner they had been in Extreme Security Group (Pvt) Ltd. Applicant then requested a Mr. S.T. Hove the director of Valid Accounting and Tax Services (Pvt) Ltd to act as his nominee shareholder and proxy director in the new company pending clearance with his employers to meet incorporation requirements in terms of the Companies Act. Unfortunately, Mr. Hove declined for professional reasons. Second respondent then indicated that he could get a proxy director and nominee shareholder from his other security company to stand for applicant. That is when the first respondent was engaged. Mr. Hove then proceeded to register Adam Bede Manufacturing (Pvt) Ltd on 4th May 2017. The arrangement was that the directors would be Mr. Tapson Madzivire and Mr. Simon Chinganga (being applicant's proxy) with each holding 1 share each. Valid Accounting and Tax Services (Pvt) Ltd was appointed to handle the secretarial affairs of the new company.

Applicant then opened a bank account for the new company with CBZ Bank Ltd. First and second respondent were to be the signatories. The applicant remained the director responsible for company finances.

Trouble then started when applicant indicated that he had been cleared by his principles and could now be on official company documents, that is, to be a director and shareholder in third respondent. The first respondent then refused to sign necessary papers to effect the regularization claiming to be part owner of Adam Bede Manufacturing (Pvt) Ltd. First respondent claimed that he held 50% of the stake in the company in his personal capacity. In a bid to compromise without litigation applicant and second respondent decided to reward first respondent with some shareholding as a token of appreciation for his acceptance to stand in as applicant's nominee shareholder and proxy director. They agreed to restructure the shareholding in such a way that Munashe Shava holds 40 ordinary shares, Tapson Madzivire holds 40 ordinary shares and Simon Chinganga holds 20 ordinary shares. However, first respondent could not accept that and suggested that Tapson Madzivire holds 40 ordinary shares, Munashe Shava holds 30 ordinary shares and he holds 20 ordinary shares and reserve 10 ordinary shares for a technical partner to be engaged in future in the event the company wishes to raise more capital. For the sake of progress the parties agreed to first respondent's suggestion. It was further agreed that applicant be added to the CR 14 as a third director, but first respondent rejected the suggestion. In a bid to remove the applicant as a director of the company the first respondent then called for an EGM meeting and did not advise applicant. The agenda was only brought to applicant's attention by the second respondent. At the Extra Ordinary General Meeting held on 3rd November 2018, unfortunately the first respondent was removed as director and company secretary. First respondent challenged his removal in an Urgent chamber application filed under case number HC 10298/18 claiming 50% shareholding. It is alleged the court did not grant the order sought by the first respondent but instead granted its own order returning the third respondent to the status quo as at or before 3 November 2018. The order did not specify what the status quo was. The first respondent is therefore insisting that he owns 50% of the company and claims that the applicant is no longer part of the company. It is in light of the above that the applicant now seeks a declaratory order pertaining to his rights as a shareholder and director in the third respondent.

At the hearing of the matter Mr. *Mpofu* for the first respondent raised a point *in limine* that there are material disputes of facts which cannot be resolved on papers but would require the leading of evidence. He referred to the opposing affidavit of first respondent wherein he said the first respondent denies ever being a nominee nor a proxy on behalf the applicant. He further

referred the court to several paragraphs in the founding affidavits that he said should be struck out in terms of Rule 141 of the Rules of this Honourable Court on the basis that those portions of the founding affidavit are argumentative, irrelevant, inconsistent and contradictory. He further urged the court to strike out the supporting affidavit of Mr. Hove on the basis that he is conflicted in that at one point he was supporting both parties then turned to support one of the parties.

In response Mr *Magwaliba* opposed the points *in limine* and urged the court to dismiss the point *in limine* suggesting that this matter can be determined on papers. He further suggested that the application to strike out should never have been made in the first place, firstly, on ethical grounds this was never raised before hence it is impermissible. He said the respondent cannot make such an application unless there was a counter application. He referred to the case of *Indium Investment (Pvt) Ltd* v *Kingshaven (Pvt) Ltd & Ors* 2015 (2) ZLR 40. He said the defendant or respondent cannot use a plea as a sword but a shield hence the application is unprocedural and unethical. On the issue of Rule 141 he submitted that the Rule only gives the court power to strike out any portion of pleadings. This is found under trial procedure and there is no rule under these rules to strike out any portion of an affidavit which has been sown under oath. As regards the affidavit by Mr. Hove he said the rule only applies to legal practitioners and not to any other person.

The law on material disputes is settled. In *Zimbabwe Bonded Fibreglass (Pvt) Ltd* v *Peech* 1987 (2) ZLR 338 (SC) at 339 it was said-

> "It is, I think, well established that in motion proceedings a court should endeavor to resolve the dispute raised in affidavits without the hearing of evidence. It must take a robust and common sense approach and not an over fastidious one; always provided that it is convinced that there is no possibility of any resolution doing an injustice to the other party concerned. Consequently there is a heavy onus upon an applicant seeking relief in motion proceedings, without the calling of evidence, where there is a bona fide and not merely an illusiory dispute of fact. See Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd1949 (3) SA 1155 (T) at 1165; S*offiantini* v *Moud* 1956 (4) SA 150 (E) at 154; *Joosab & Ors* v *Shah* 1972 (1) RLR 137 (G) at 138G-H; *Lalla* v *Spafford NO & Ors* 1973 (2) RLR 241 (G) at 243B; *Masukusa* v *National Foods Ltd & Anor* 1983 (1) ZLR 232 (HC)."

In my view, on the issue of proxy or nominee the first respondent said he drafted document at page 172 of the record. It shows the list of shareholders. At page 179 the first respondent gives each other the shares. At page 82 is the judgment containing the allegation brought by the first respondent against the other two parties. Again the attached Form Cr 2 and 14 shows the details of the parties. These documents are regular and hence the dispute can be resolved by resorting to

these documents. There is therefore no dispute of fact that cannot be resolved on the papers. As regards the provisions of Rule 141 they provide that –

> **"141. Powers of court in relation to pleadings**
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> At any stage of the proceedings the court may –
>
> (a) order to be struck out or amended –
> (i) any argumentative or irrelevant or superfluous matter stated in any pleading:
> (ii) any evasive or vague and embarrassing or inconsistent and contradictory matter stated in any pleading:
> (iii) any matter stated in any pleading which may lead to prejudice, embarrass or delay the fair trial of the action:
> (b) order either party to furnish a further and better statement of the nature of his claim or defence, or further and better particulars of any matter stated in any pleading, notice or written proceeding requiring particulars."

My reading of this Rule accords well with the reasoning of Mr. *Magwaliba* that the rule only gives the court the power to strike out any portion of pleading and this can only be found under trial procedure. The rule does not suggest that the court can order an applicant to strike out any portion of an applicant's founding affidavit given under oath, hence evidence given in a sworn affidavit cannot be struck out by relying on Rule 141 on applications. I also entertain a doubt that any person who is not a legal practitioner can be said to be conflicted, despite the person having been supporting both parties. The supporting affidavit of Mr. Hove therefore cannot be expunged of the record. For these reasons I dismiss the point *in limine*.

In the present case for an applicant for declaratory order to succeed the applicant must show direct and substantial interest in the subject matter of the suit. That is the applicant must have some right that falls to be investigated and determined.

In his opposing affidavit the respondent submitted that it was him and the second respondent who were in the fore front for the formation of Adam Bede using the resources they obtained from selling buses from National eye Security (Private) limited a company that was under judicial management. He averred that the agreement entered between applicant and second respondent to utilize second respondent's shelf company for acquiring the Adam Bede brand was a fraudulent document and that the dates were backdated to appear as if their agreement was entered into why before he and second respondent had already purchased the company.

My analysis of the papers presented before me clearly shows that indeed the second respondent and the first respondent knew each other before the purchase of Adam Bede. That is

the reason why the second respondent suggested to the applicant that he knew of a reliable young man who can stand in ae a proxy and nominee for the applicant. If indeed the applicant was not involved in the purchase of Adan Bede the million dollar questions would be why was the applicant involved in the first place? Why was Mr. Hove involved in the deals? I carefully read the supporting affidavit of Mr. Hove and it struck me that what he was saying was the truth of what transpired. I found no reason for Mr. Hove to lie under oath. The applicant's interest in the subject matter of this suit is very clear. He is a shareholder in the third respondent right from the inception but for the fact that he had not yet been cleared by his superiors he could not be put on the company papers. That is the sole reason Mr. Hove was approached in the first place. Surely if `first respondent and second respondent were the purchasers of the company they could have simply registered their names as shareholders and directors without having the trouble of having to involve the applicant. I am not convinced that the agreement between the applicant and the second respondent was a fraudulently drafted document. The financial contributions of the applicant and second respondent were as well put by the applicant that second respondent contributed US$ 180 000.00 while the applicant contributed US$160 000.00. The first respondent actually contributed US$0.00. First respondent merely want to cling to a company that he was roped in by the second respondent as a proxy and nominee of the applicant.

The applicant has managed to prove his case on a balance of probabilities and the relief sought will be granted.

IT IS ORDERED

1. That Applicant be and is hereby declared to be the holder of 30 ordinary shares in the 3rd Re4spondent, with the 1st Respondent holding 20 ordinary shares and the 2nd Respondent holding 40 ordinary shares in the same company.
2. The Applicant be and is hereby declared a director of the 3rd Respondent
3. 1st Respondent is hereby ordered to restore Applicant's name as a director on the company letterhead, and such name shall remain on such letterhead for as long as the Applicant is a director of the 3rd Respondent.
4. 1st Respondent be and is hereby interdicted from purporting to clients and associates of the 3rd Respondent that he is a holder of 50% of the 3rd Respondent's issued share capital, or

any number of shares which he does not hold, and/or purporting that applicant is not a shareholder/director in the 3rd respondent to such clients and associates.

5. The 1st respondent shall pay costs of suit.

Mawere Sibanda Commercial lawyers, applicant's legal practitioners
Munangati & Associates, 1st respondent's legal practitioners,
Mushonga, Mutsvairo and Associates, 2nd respondent's legal practitioners.