OFFER SIVANI
and
ADLECRAFT INVESTMENTS (PVT) LTD
versus
GILAD SHIBTAI
and
MUNYARADZI GONYORA
and
GLADIOUS NHEMWA

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 7 April 2022

Opposed Urgent Application

T Nyamakura, for the 1st applicant
R Dembure, for the 2nd respondent
T Mapuranga with *GR Sithole*, for the 1st and 2nd respondent
K Shamhu, for the 3rd respondent

CHITAPI J: It is necessary to set out the background to this matter because without such background, this judgment will not be easy to follow and/or appreciate. The background aforesaid is set out in my judgment HH 550-21. I therefore incorporate by reference, judgment HH 550-21 aforesaid. I must record that judgment Number HH 550-21 was appealed against under case number SC 403/21. The appeal does not, however, impugn the factual findings made in relation to the background facts which gave rise to the dispute amongst the parties. *Ex abundata cautela* that a position maybe taken that judgment HH 550-21 cannot properly be adopted as setting out the factual background on account of it being on appeal, I will briefly set out the background facts.

The dispute in the matter revolves around the ownership of the second applicant. The first applicant claims to hold the entire shareholding in the second applicant in that he avers that he owns all the twenty (20) issued shares in the second applicant. He claimed to have purchased the second applicant as a shelf company on 25 March 2011 where-after he invested in the company which became a going concern. The second respondent carries on business

specializing in technical and mining equipment. The business is domiciled in Harare, Zimbabwe.

In relation to the applicants' relationship with the first respondent, the first applicant averred that the first respondent loaned some money to the second applicant as evidenced by a written loan agreement dated 25 March, 2015 entered into by the first respondent as the lender and the second applicant as borrower represented by the first applicant. The loan was for an amount of $9 million in the form of "equipment machinery and spare parts". The purpose of the loan was to be utilized for various purposes set out on the agreement. In essence the loan was to be utilized for the operations of the first applicant. The loan was to be repaid by 31 December, 2018. The first applicant averred that the first respondent was then appointed as a non-executive director in the second applicant to safeguard his interests as a lender. The first applicant attached a copy of a CR 14 Form dated 19 May, 2015 which shows that the first respondent was appointed a director in the second applicant on 13 January, 2015. The second and third respondents were as shown on the same CR 14 appointed directors of the second respondent on 19 May, 2015.

The first applicant averred that in the course of the conduct of the business of the second applicant's, operations bank accounts were opened by him on behalf of the second applicant with him, the first applicant as the sole signatory. Accounts were opened with STANBIC and FBC Banks. The first applicant attached copies of the resolutions of the directors of the second applicant who included the second and third respondents authorizing the first applicant to represent the second respondent in the opening of the accounts aforesaid and further to be the sole signatory on the accounts. The first applicant averred that he has always been the Chief Executive of the second respondent.

The first applicant averred that the first respondent without a board resolution nor engaging in consultations with him purported to take over negotiations for payments of outstanding payments due to the second applicant by one of its major customers and debtor namely the Zimbabwe Consolidated Diamond Company (ZCDC). ZCDC had an equipment hire contract with the second applicant. The contract had run from 2016 to 2020. The second applicant in terms of the equipment hire arrangements hired out its machinery to ZCDC for which payment was due. The first applicant averred that the first respondent by letter dated 18 March, 2021 and addressed to Mr Mabudu the Chief Executive Officer (CEO) of ZCDC advised ZCDC to hold over talks on settlement of amounts due and owing to the second

applicant until the first respondent had arrived in Harare around April 2021. The first respondent followed up on the letter with another letter dated 21 Apri8l 2021 addressed to the Chief Financial Officer of ZCDC, a Mr Gobvu. The first respondent in the said letter listed two bank accounts to which he directed that future and current payments towards the second applicant's dues should be directed or deposited. The two accounts were listed as Get Buck Bank Account No. 001203000000423 being a $ZWL denominated account and account No. 001206000000086 being an FCA denominated account. The creation of these accounts and deposits made therein largely ground the dispute amongst the parties.

It was common cause that deposits and debit transactions were made on the account aforesaid as from 1 January, 2021. The first applicant averred that not only were the bank accounts opened without his knowledge or a valid resolution, but that the respondents abused deposits made therein by misappropriating the money. The first applicant deposed that he made a report to the police against the respondents who, however, were not arrested on account of police failing to locate them. The first applicant further attached bank statements showing further debits made in the period to 15 July, 2021. It is not possible to conclude that all the debits made represented genuine company expenditure. What discerns the eye however, is that several payments were made to supermarkets and the restaurants apart from payments to several other shops. Those easily catching the eye were payments to TM Borrowdale, Café Nush, Great Wall Restaurant, Bon Marche Brooke, Lion and Cheetah Park and others. As I have indicated, apart from raising the eye, there would need to be conduct an audit of the books of accounts of the second applicant to get a clearer picture of the presence or otherwise of misappropriation of funds. The first applicant averred that the transactions on the two accounts were not supported by any account books or invoices hence suggesting that the expenses were not for the company business.

The first applicant averred that the respondents continued to misappropriate funds and to misuse the name of the second applicant for their own ends. The relationship of the parties became frosty and toxic to the point that they took each other to court in case number HC 4405/21 wherein the claim was for harassment of the second applicant's employees who were purportedly dismissed by the respondents who had taken steps to subject the employees to a disciplinary hearing. Case number HC 4405/21 was determined by TSANGA J who noted that the second applicant was indeed embroiled in a shareholder and director dispute which required resolution.

The first applicant avered that he then caused the issue of summons against the respondents in case number HC 4541/21 for a declaration to the effect that the first and second respondents committed a fraud against the second applicant in the period March 2021 and August 2021 and further that they be declared to have misappropriated the second applicant's funds totaling USD$1 300 000.00 in the period January 20212 to August 2021. The amount was made up of credits of $ USD300 486.67 deposited on 27 April, 2021; $USD500 000.00 deposited on 20 May, 2021 and $USD500 000.00 deposited on 20 May, 2021. The other relief claimed on the summons is that the second and third respondents should re-imburse the USD$1 300 000.00 with 5% *mora* interest. Further the applicants prayed for an order for removal of the second and third respondents as directors of the second applicant and a further order that the first applicant appoints new directors to replace the second and third respondents and costs of suit.

The applicants followed up the summons case by filing this urgent application for a provisional order wherein the applicants prayed for an interdict in the interim. The details of the provisional order are as follows:

TERMS OF THE FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms –

1. The 1st and 2nd Respondents be and are hereby interdicted from operating account numbers ZWL 001203000000423 and FCA001206000000086 held under Getbucks Bank in the name of second applicant in any way so as to prejudice the second Applicant's rights and without the first Applicant's knowledge pending the determination of HC 4541/2021.

2. The Respondents' conduct be and is hereby declared to have caused a deadlock in the second Applicant company, thereby creating irreparable prejudice and harm to the said second Applicant.

3. The Respondents' operation of an account in the name of the second Applicant with Getbucks under ZWL 001203000000423 and FCA001206000000086 be and is hereby declared to be an abdication of their duty of care as espoused under the Companies and Other Business Entities Act [*Chapter 24:31*].

4. Any transactions entered into between the Respondents and other entities pursuant to paragraph one and two herein are declared invalid and thus set aside.

5. The resignation of 3rd Respondent as director and company secretary of second Applicant be declared binding on him and of force and effect and consequently, any and all resolutions signed by 3rd Respondent be declared null and void and he be barred from representing the second Applicant in any capacity.

6. Respondents shall pay costs of this suit on a legal practitioner and client scale.

TERMS OF THE INTERIM RELIEF GRANTED

Pending the determination of this matter on the return date, the applicants are granted the following relief:

1. The 1st and 2nd Respondents be and are hereby interdicted from operating account number ZWL 001203000000423 and FCA001206000000086 held under Getbucks Bank in the name of second Applicant in any way so as to prejudice the second Applicant's rights and without the first Applicant's knowledge pending the determination of HC 4541/2021.

2. The 1st and 2nd Respondents be and are hereby interdicted from accessing and misappropriating funds from any of the second Applicant's bank accounts pending the determination of HC 4541/2021.

3. The Respondents be and are hereby interdicted from posing out the public or soliciting business as a parallel second Applicant pending the determination of HC 4541/2021.

4. The 3rd Respondent be interdicted from acting or presenting himself as a director and/or company secretary of second Applicant pending determination of HC 4541/2021.

5. The Respondents be interdicted from conducting a disciplinary hearing on the 15th of September 2021 against second Applicant's employees pending a determination of HC 4541/2021.

The respondents vehemently opposed the application and filed apposing affidavits. Although there was a challenge to urgency, I nonetheless determined that the matter be heard as an urgent application. It is in the discretion of the court reached upon a proper consideration of the circumstances of each case to pass a matter as urgent and agree to enrol and hear it on an urgent basis. Apart from other considerations, I have always considered with the greatest respect to positions taken in other decided cases that the remarks of MAKARAU J (as she then was) in the case *Document Support Centre* v *Mapuvire* HH 117/06 lucidly sets out the most critical consideration in determining whether the matter be heard as an urgent case. The learned judge stated on p 4 of the cyclostyled judgment.

> "….. In my view urgent applications are those where if the courts fail to act, the applicants may well be within their rights to dismissively suggest to the court that it should not bother to act subsequently as the position would have become irreversible and irreversibly so to the prejudice of the applicant.
> It is in my view that the issue of urgency is not tested subjectively. Most, litigants would like to see their disputes resolved as soon as they approach the courts. The test to be employed appears to me to be an objective one where the court has to be satisfied that the relief sought is such that it cannot want without irreparably prejudicing the legal interest concerned."

In casu, it was my view that the second respondent as a legal *persona* needed to be protected by the court from having its assets in the form of the USD $1 300 000.00 dissipated without a proper account as this could lead to the demise of the second applicant. The parties' positions clearly indicated a poisoned corporate discord amongst the shareholders and directors of the company wherein there were existing accounts held with Stanbic and FBC banks from which the second applicant's operations were conducted with the first respondent coming in and causing the opening of the Get Bucks accounts and directing a divergence of funds due by ZCDC to the second applicant to the new account which was now operated by the respondents to the exclusion of the first applicant who however solely signed the existing account. Where a dispute albeit of a commercial nature involves an internal fight for the control of a company and the facts established show that the protagonists being shareholders and or directors of the company even though their positions be disputed have set up parallel centres of power and have diverted company assets and individually control them, a court is justified to urgently intervene to serve the corporate *persona* from being destroyed from within because of the bickering in ownership. Such urgent intervention ensures that the corporate *persona* remains afloat. In that

way, upon the dispute being resolved, the protagonists will still have something to fight for. Besides, the demise of the company has ripple effects to workers, creditors and other interested parties. A juristic *persona* may therefore in appropriate circumstances be in need of protective relief for its survival pending resolution of disputes which impact negatively on its very existence.

Thus, despite the protestation on the lack of urgency of the matter raised by the respondents, I was inclined to allow the application to proceed to be heard on merits on the urgent roll. The serious dispute of ownership and control of the second applicant and the creation of parallel management centres of power and financial operations called from an urgent enquiry into the matter. In fact the first respondent stated as follows in para 35 of his opposing affidavit:

> "35. AD PALAGRAPH 5
> This is admitted save to state that the first applicant is currently not the Managing Director. The second applicant resolved to change the bank accounts after realizing that the first applicant was misappropriating funds and embezzling second applicant funds abusing the fact he was the sole signatory to the Stanbic and FBC Accounts."

The above position clearly showed turmoil in the second applicant because the Stanbic and FBC accounts were not closed. The first applicant remained the sole signatory on the said accounts. The respondents were in control of a newly opened account with Get Bucks Bank. A company cannot operate like that. Urgency was beckoning, calling upon the court to accept to deal with the matter urgently. I obliged in the exercise of my discretion.

The next points *in limine* were an objection that the court did not have jurisdiction to deal with the application. The first and second respondents raised the issue. The third respondent objected that the first applicant did not have *locus standi* to seek the relief he was seeking on account of his being neither a minority nor majority shareholder of the second applicant. In this regard and to place the nature of the application into perspective the applicants claimed to bring a derivative action under s 62 of the Companies and Other Business Entities Act [*Chapter 24:31*]. In summary the provisions of that section allows a member or shareholder of a company or business corporation to bring an action in such person's name and on behalf of the company against any manager, director of officer to enforce or recover from the officer, manager or director damages caused by violations of duties owed to the company under that Act or any other law including laws against fraud and misappropriation. Remedies claimable

are provided for in s 62. I shall revert to this when I discuss the nature of the relief sought herein.

In relation to jurisdiction. The argument put forward by the first respondents was that because the previous of s 61 of the Companies and Other Business Entities Act [*Chapter 24:31*] permitted a member to bring a derivative "action", the use of the word action precluded the bringing of proceedings contemplated therein by way of application. I disagreed with that interpretation in judgment HH 550/21. The first and second respondents under case Number HC 382/21 appealed against the judgment upon my finding that the court had jurisdiction to deal with the dispute, through motion proceedings as opposed to a summons or action procedure.

Consequent on the filing of the appeal SC 382/21 argument was presented on the effects of the notice of appeal on the continuity of the hearing of the application. As it was my view that the appeal was noted against an interlocking order without leave, and that the court's jurisdiction could not be ousted by the noted appeal. The first and second respondents then filed an application to the Supreme Court under case No SC 402/21 for an order of stay of the continued hearing of this application pending appeal No SC 382/21. In the light of the pendency of case No SC 402/21, the hearing of this application was then postponed pending the decision on the application for stay aforesaid by the Supreme Court. I dealt with the application on 24 November, 2021 when the parties advised that the first and second applicants had withdrawn case Number SC 402/21. The hearing of this application could therefore continue following my determination that the appeal challenge on jurisdiction to the Supreme Court did not suspend the hearing of this application.

And then there had been a development which changed the character of the application. On 1 October, 2021 the first and second respondents purported to place the second applicant under voluntary corporate rescue in terms of s 122 of the Insolvency Act, [*Chapter 6:07*]. They appointed one Alexious Dera of INA Chartered Accountants as the Corporate Rescue Practitioner as provided for in s 122(3)(a) of the Insolvency Act. On 6 October, 2021 the Master of the High Court formalized the appointment of the corporate reserve practitioner and issued a certificate of appointment of the said Alexious M. Dera as such. The appointment was challenged in an urgent application filed by the first applicant challenging the process of and the said appointment. The challenge was filed under case No 5436/21. It became necessary to await the outcome of the application because the outcome would define the *locus standi* of the

second applicant as well as the nature of its participation in the application since the effect of corporate reserve is inter alia to stay proceedings against the company.

Case Number HC 5436/21 was determined by MUSITHU J in judgments HH 650/21 and HH 668/21. The learned judge suspended the operation of the resolution executed by the first and second therein as they are herein placing the second applicant herein under corporate reserve. The first and second applicants appealed against the judgment. The appeal reference is case Number 463/21.

To complete the picture I can now upon reference to records on the matter record that the first applicant filed an application for leave to execute MUSITHU J's order pending appeal under case Number 6970/21. The application was granted by WAMAMBO J on 12 January 2022. This development however took place after the present application had been argued before me on 30 November, 2021. As at 30 November 2021, the corporate rescue practitioner was still a part of the proceedings by virtue of the appeal filed against the judgment of MUSITHU J.

On 30 November, 2021, the application proceeded to be heard since the application for stay of hearing pending the hearing of the appeal against my order that my judgment was not suspended by notice of appeal had been withdrawn and /or parties had before the Supreme Court agreed that this application is determined to finality. The corporate rescue practitioner was joined as a respondent in his capacity as such in relation to the second applicant. It was submitted that the corporate rescue practitioner wanted the second applicant under corporate rescue to be a respondent and to cease to be an applicant. The position suggested was legally untenable because the second applicant already had affidavits and documents filed as an applicant. The affidavits and documents aforesaid could not transform to opposing papers. After submissions made by counsel, the second applicant represented by the corporate rescue practitioner withdrew from the application. Counsel agreed that the application proceeds without the second applicant. The matter was then argued on the merits. I shall continue to refer to this second applicant company such for convenience.

Counsel for the first applicant submitted that the first applicant was a shareholder of the second applicant and enjoyed derivative powers under the common law and statute to seek the relief he sought in the application. There is on the other hand an acceptance that the first applicant is a director of the second applicant. He was not consulted when the accounts in issue on this application were opened and subsequently operated without his involvement. There

was no valid resolution of the second applicant passed prior to opening the account. The first responded admitted in his opposing affidavit that he is the one who opened the accounts because the first applicant as sole signatory was misappropriating the second applicant's funds in the Stanbic and FBC accounts as sole signatory.

Counsel argued that a run-down of the debts and withdrawals done on the accounts showed that they were not for operational costs since most of them were for personal expenditure in supermarkets and restaurants. Counsel argued that it was necessary for the court to regulate the subject matter of the *lis* HC 4541/21 in order that the matter did not become academic.

Counsel for the first and second respondents submitted that a special plea had been filed in case number HC 4541/21 to which the first applicant had not responded and was barred for failure to file heads of argument. I have noted that the special plea was withdrawn on 11 November, 2021. That puts paid to the argument based on an alleged bar against the first and second applicants.

The first and second respondents submitted that the first applicant was not a shareholder or member of the second applicant. It was submitted that since the derivative action envisaged by s 62 of the Companies and other Business Entities Act should be brought by shareholders or members, the first applicant lacked *locus standi*. This argument could only be properly determined on the return date. There is acceptance by all parties that there is a dispute on the shareholding of the second applicant. The prayer sought herein is for an interim interdict pending the determination of the action filed in case number HC 4541/21. The requirements for an interim interdict are settled.

They are:-

a) a *prima facie* right which may be open to some doubt.
b) a well-grounded apprehension for irreparable harm of the interim relief be not granted.
c) the balance of convenience favours the grant of the interdict.
d) no other satisfactory remedy. See *Mushoriwa* v *City of Harare* HH 195/14; *Broadcasting Authority of Zimbabwe & Anor* v *Dr Dish (Pvt) Ltd* SC 62/18; and *ARTUZ & Anor* v *Zanu (PF) & Anor* HMA 36/18.

The first applicant has demonstrated more than a *prima facie* right to the relief sought. He attached a copy of his share certificate which *prima facie* evidences his shareholding in the

second applicant. The first and second respondents disputed the first applicant's shareholding. This is a factual matter to be determined on the return date or in case number HC 4541/21. The first applicants' fear of irreparable harm was well grounded. The second respondent admitted that the accounts in issue were opened by him without the first applicant's involvement even as director. The purpose of the accounts appeared to have been to receive payments from ZCDC and to disburse them without the involvement of the first applicant even as director. The balance of convenience favours the grant of the interdict. In this regard I quote the remarks of MUSITHU J in the case of *Ofer Sivan* v *Gilad Shabtai & 3 Ors* HH 668/21 wherein the learned judge stated on p 8 of the cyclostyled judgement:

> "The purpose of a provisional order or an interlocutory injuction as it is called in some jurisdiction was explained in the English case of *Attorney General* v *Punch Limited & Anor 2002 UKHL* 50 as follows:-
>
> > 'The purpose for which the court grants an interlocutory injuction can be stated quite simply. In *American Cyanamid Co* v *Ethicon Ltd* 1975 AC 396, 405 Lord DIPLOCK described it as a remedy which is both temporary and discretionary. Its purpose is to regulate, and where possible to preserve the rights of the parties pending the final determination of the matter which is in issue".

There are genuine concerns on the part of the first applicant that if the disputed accounts are not protected from withdrawal by the first and second respondents, there will be nothing left of that money to the prejudice of the first applicant's rights. As far as the balance of convenience is concerned there will be no irreparable harm to be suffered by the first and second respondents since the accounts will remain frozen. At the same time the second applicant having withdrawn from the application and not filed any papers to set out its position it will have to abide the decision of the court.

Counsel submitted that there were material disputes of fact not capable of resolution on the papers. This again is an argument to be resolved on the return date. For purposes of the interim order the court is obliged to grant the provisional order if on the papers, the court is satisfied that the applicant has established a *prim facie* case either on the terms proposed by the applicant in the draft order or as varied. I have already indicated that the second applicant is being run on parallel management structures whereby the first applicant is signatory to a set of accounts. His authority to do so is not disputed. The first and second respondents control the accounts in issue here which were opened in disputed circumstances. Those accounts cannot remain at the whim and control of the first and second respondents. The second applicant must be protected from having its assets being dissipated in unclear circumstances. The first and second respondent in their affidavit averred that the first applicant did not have or produce

books of account to evidence his claim that the accounts were being abused. This is a strange submission because on the contrary the first and second respondents are the ones who must show that they put the money to beneficial company uses. They did not even offer to submit to an audit to clear that the withdrawals were genuinely done for the benefit of the second applicant.

The only other argument advanced was that the relief sought was similar both in the interim and final reliefs sought. I agree that para (s) 1 on the interim and final reliefs are similar. I do not consider the similarities in the relief sought to be fatal to the application because the court is permitted to grant a varied order which adequately protects the subject matter of the main dispute. The critical issue in an application for an urgent provisional order is to ensure that the second respondent's funds are protected. The remedy should not be a contentious one because there is no loser or winner if an order to preserve the money is granted. It is a win win order for the warring parties.

The first applicant has also prayed for orders that the respondents must be interdicted from posing as directors of the second applicant and soliciting for business as a parallel second applicant. The circumstances of the case justify the grant of such an order in part because the second applicant evidently gave contrary and unilateral instructions to a creditor to deposit money belonging to the second applicant into accounts specially opened for the purpose and the accounts were run without the knowledge of the first applicant. I cannot however grant an order that the first and second respondents should not pose as directors of the second applicant because they in fact remain directors until validly removed. As far as the third respondent posing as director is concerned, the third respondent indicated that he was no longer a director or company secretary of the second applicant and in any event, he stated that he was standing by his papers filed of record. As far as the prayer to stop the conducting of disciplinary hearings of the second applicants' employees is concerned, such an order amounts to a pre mature interference in the domestic affairs of a corporate. The employees concerned are not party to this application. They can assert their rights separately.

This order does not negate the corporate rescue status of the company which is under challenge. The corporate rescue practitioner is free to seek a variation or discharge of the order in the event that he needs to access and use the funds in those accounts which will be frozen by this order.

In the result, the provisional order will issue as varied in the interim relief which shall now read as follows:

Pending the determination of this matter on the return date the following relief is granted:

1. The first and second respondents are interdicted from operating the following accounts pending the determination of Case No. HC 4541/21 or an order as made to the contrary: Getbucks in the name of Adlecraft Investments (Pvt) Ltd
    a) $ZWL 001203000000423
    b) FCA001206000000086
2. The first and second respondents shall not solicit for business on behalf of Adlecraft Investments (Pvt) Ltd applicant outside of the knowledge and consent of the first applicant who is their co-director.

G Sithole Law Chambers, 1st applicant's legal practitioners
Mabulala & Dembure, 2nd applicant's legal practitioners
Rubaya & Chatambudza, 1st and 2nd respondents' respondent's legal practitioners
C Nhemwa & Associates, 3rd respondent's legal practitioners