THOMAS MABUZWE
and
NYASHADZAISHE SAMUKANGE
and
CHIPO CHIGUMADZI
and
MONTGOMERY HOLDINGS
versus
SIKHUMBUZO MPALA
and
NIGEL MBERIKWAZVO
and
WIMBAYI MUNYANYI CHIGUMBU
versus
SECURITIES AND EXCHANGE COMMISION OF ZIMBABWE
and
ZIMBABWE STOCK EXCHANGE
and
CHENGETEDZAI DEPOSITIRY COMPANY (LTD)
and
AXIA CORPORATION
and
ART CORPORTION LIMITED
and
DAIRIBORD HOLDINGS LIMITED
and
GENERAL BELTINGS HOLDINGS
and
INNSCOR AFRICA LIMITED
and
MASIMBA HOLDINGS LIMITED
and
SEEDCO LIMITED
and
SIMBISA BRANDS LIMITED
and
TRUWORTHS LIMITED
and
ZIMPLOW HOLDINGS LIMITED

HIGH COURT OF ZIMBABWE
MUZOFA J
HARARE, 3 & 11 November 2021

Urgent Chamber Application

T. Magwaliba with N Chimuka , for the applicants
NC Ndlovu with VB Sibanda for the 1st respondent
ABC Chinake with Nyathi , for the 2nd respondent
B Magogo with C Mahlangu for the 3rd respondent
GM Nyangwa, for the 6th respondent
Z Lunga for the 4th and 11th respondents
No appearance for the 5th, 7th , 8th ,9th and 12th respondents

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MUZOFA J: When I received this urgent chamber application I invited parties for case management .I gave directives for filing of the third respondent's opposing affidavit, the heads of argument and the applicant's answering affidavit. The matter was set down for hearing on the 3rd of November. On the date of hearing it turned out that the applicants' answering affidavit and heads of argument were not served on the fourth and eleventh respondents' legal practitioners. In their answering affidavit the applicants raised a preliminary point in respect of the fourth and eleventh respondents' affidavit. To avoid postponing the matter I heard the preliminary point , *Mr Lunga* who appeared for the fourth and eleventh respondents undertook to file a written response by the on the 4th of November and the *Mr Magwaliba* for the applicants undertook to file an answering affidavit and heads of argument by the end of day on the same date. Unfortunately the timelines were not adhered to.

In view of the preliminary points raised I opted to hear them and make a ruling . The outcome of the preliminary points will inform how this matter will proceed.

The parties

The applicants are shareholders in the respondent companies. More specifically in that the first applicant holds shares in the sixth, seventh, eighth, ninth, tenth and twelfth respondents. Proof of such holding was attached to the application. The second applicant is a shareholder in the in the fifth respondent, the third applicant has shares in the eleventh respondent , the fifth respondent holds shares in in the eighth respondent ,the sixth respondent is a shareholder in the fourth ,fifth and eleventh respondents and the seventh applicant is a

shareholder in the fourth respondent. Proof of such shareholding for all the applicants was filed of record.

The first respondent is the regulatory authority for the securities and capital markets. It is established in terms of s3 of the Securities and Exchange Act (Chapter 24:25) 'the Act'.

The second respondent is a company incorporated in terms of the law in Zimbabwe. It is licenced to operate a securities exchange in terms of the Act. It also operates a Central Securities Depository (CSD).

The third respondent is a duly incorporated company in terms of the laws of Zimbabwe. It is a CSD in the Zimbabwe Securities industry.

The fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh and twelfth respondents are public listed companies registered in terms of the laws of Zimbabwe.

Background facts

The first respondent regulates the issuance of licenses, the second respondent as an exchange and the third respondent as a CSD. It also regulates the trading of securities issued by the fourth to the thirteenth respondents to the public. The relational matrix between the respondents is that the fourth to thirteenth respondents issue shares to the public (hereinafter referred to as the issuers). The shares are listed on the second respondent's Exchange for a fee. The third respondent operates a CSD .It is the custodian of the shares or holds the shares in electronic form known as dematerialised form. The applicants are investors in the fourth to the thirteenth respondents. They are strategic partners among other investors in raising capital for the respondents.

In September 2014 the first respondent licenced the third respondent to operate as a CSD. It has been the sole CSD until the second respondent was licensed to operate a CSD. This marked the onset of competition in the capital markets that was unknown before. This case is a clear example of how the onset of competition has affected the regulation and operations of the capital markets.

In line with the said opening up of space in the market the first respondent in its capacity as the regulator issued Directive Number SS 15/10/2021 ' the Directive', to securities intermediaries on the migration of registers between CSDs on the 19th of October 2021.The directive essentially outlines the methodology applicable in the migration of registers between CSDs.

The applicants' case

The applicants aver that the Directive breaches the Companies and Other Business Entities Act. It is illegal and violates the applicants' freedom to contract with whom so ever they want and their freedom of association. More specifically in that the applicants have entered into contracts with the third respondent for the purposes of the custody, settlement and all related transactions of their shares issued by the fourth to thirteenth respondents. This was their sole choice independent of the issuers. The Directive empowers the boards of the fourth to the

thirteenth respondents to decide on the termination of the contracts with the third respondents and enter into contracts with another CSD which is primarily the one operated by the second respondent. This is unlawful. A share issued by a company is movable property .The shares remain the property of the investors who are the applicants. The issuers therefore cannot decide on the migration of the shares without the shareholders' consent. This is a violation of s3 of the Administrative Justice Act which enjoins an administrative authority to act lawfully, reasonably and in fair manner.

The directive effectively tramples on investor's property rights, violate freedom of contract and association and breaches the law. Instead of promoting high levels of investor confidence, encouraging free, fair and orderly capital markets the first respondent's directive effectively negates those fundamentals.

To this end the applicant seeks a provisional order for the stay of the implementation of the Directive and the resolutions, directives and notices passed by the fourth to the thirteenth respondents pursuant to the Directive pending the determination of the legal validity of the Directive on the return date.

The respondents' case

The third respondent filed what it termed a confirmatory affidavit. Since no relief is sought against the third respondent it indicated that it will abide by the decision of the court. The fifth, seventh, eighth, ninth, tenth and twelfth respondents did not file any opposition, that means they opt to be bound by the decision of the court. The first, second and the eleventh respondents opposed the application. Preliminary points were taken at the outset on urgency, lack of cause of action, non-exhaustion of internal remedies, incompetent order, defective certificate of urgency, lack of jurisdiction in respect of the order sought against the fourth and eleventh respondents and lack of *locus standi.*

On the merits the respondent aver that the applicants have no contract with the third respondent. The applicants are merely account holders with the third respondent. The accounts were opened following the decision of the issuers to engage the services of the third respondent. The contract is actually a tripartite agreement with the issuers, the third respondent and the transfer secretaries. The Directive simply sets out the migration process and does not interfere with any rights as alleged. This is a contrived application to derail the migration processes that have commenced.

Urgency

Even if a point was taken on jurisdiction, in my view the issue raised is not the jurisdiction of this court *per se* that is challenged. The issue is on the competency of the order sought against the fourth and eleventh respondents. In the absence of a jurisdiction issue in *strictu*, I deal with urgency at the outset.

What constitutes urgency is now trite. Two issues stand out for consideration the harm and time. The applicant must show that he is likely to suffer irreparable harm that any future intervention may not protect the applicant's interests adequately. There must be irreparable harm not mere harm that can be resolved even in the future without much prejudice. This assists the court to exercise its discretion on which cases to hear on an urgent basis. This point on the

harm is well expressed in the remarks of GOWORA J (as she then was) in *Triple C- Pigs & Anor v Commissioner General* HH 7/07 where the learned Judge stated;

> 'As courts, we therefore have to consider in the exercise of our discretion, whether or not a litigant wishing the matter to be treated as urgent has shown the infringement or violation of some legitimate interest and whether or not the infringement of such interest, if not redressed immediately, would not be the cause of harm to the litigant which any relief in the future would render *brutum fulmen'*

The applicant must also treat the matter as urgent by promptly seeking redress .In the now widely followed case of *Kuvarega v Registrar General and Anor* 1998 (1) ZLR 189 the point on time was aptly expressed that,

> 'What constitutes urgency is not the imminent 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 acting until the deadline draws near is not the type of urgency contemplated by the rules.'

Invariably the nature of the cause of action and the relief sought are important considerations. In *casu,* the cause of action giving rise to the harm contemplated is the violation of the applicants' freedom to contract and association. The Directive gives the issuers' boards the right to decide on where the shares are kept .It is said the Directive effectively terminates the applicant's contracts with the third respondent. To decide on urgency herein, the court must consider if there exists irreparable harm in the form of a violation of the alleged rights that cannot wait.

Generally it is the investor's sole prerogative to decide where, when and how to invest. The investor chooses the company to invest in. The main consideration is the return on investment. So it is acceptable in the capital markets that investors look to performing companies to invest. Without attempting to pronounce on the considerations broadly made I believe that is the primary consideration. The most important contract in the capital markets therefore is between the company and the investor. The contractual obligations that arise necessarily gives the company rights to make decisions on behalf of investors. In my view this is the primary and foundational contract between a company and the investor. Any interference with this contract by a party not privy to it may give rise to legal consequences.

Having noted that, in this case the applicants allege that they have entered into contracts with the third respondent. The first applicant attached a document titled Securities Account Opening /Update Form as proof of such contract. The respondents except for the third respondent dispute that this is a contract. The point made is that the contract is between the issuing company and the CSD. I agree with the submission. The third respondent is a CSD. Its operations are governed by the Chetengetedzai Depository Company Central Securities Depository Rules, 2014 "the Rules' among other instruments. In terms of Rule 8 the third respondent is the custodian of the securities. It records securities related transactions in dematerialised form to facilitate their trading in the Securities Exchange, coordinates settlement of funds between participants, facilitates the opening and maintenance of accounts for beneficial owners, and clearing of securities. Its role is limited to the settlement and

depository custodianship of shares. It is administrative in nature and does not in any way affect the applicants' investment or the return on investment.

Rule 2 subparagraphs 4 – 7 provides for the opening of accounts by a shareholder with the third respondent. The account is opened through a participant. The primary purpose of this account is to facilitate trade in any registered Stock Exchange. A participant is defined in s 68 of the Act as a person that is entitled to use the services and facilities of a central securities depository otherwise than solely as a depositor. The same section defines a depositor as 'the person who is named in the appropriate record or account of the securities depository concerned as the depositor of that security". The first applicant is the named person in the account he opened with the third respondent. He is therefore a depositor. He is not a participant. The opening of the account is directly linked or is dependent on the participant. It would appear the depositor's account is opened following a decision by the participant who are the companies/issuers. It is not an independent decision of the account holder. The Rules provide a template how the parties engage each other. The applicants are not part of the tripartite agreement. I accept that the account held by the applicants are not exclusively based on their right to contract with anyone but follow the decision of the issuer.

Having considered the relationship between the parties to establish if indeed an interest under threat exists, I consider the reasons set out for urgency. The certificate of urgency and the founding affidavit have few lines in common on urgency. The applicants aver that there is imminent harm to the capital and securities market. Public funds and the national economy ought to be protected. The urgency is thus of a commercial nature.

Indeed where commercial interests are under threat the court can hear a matter on an urgent basis. In *Silver's Trucks (Pvt) Ltd & Anor v Director of Customs & Excise* 1999(1) ZLR 490, at 492E-F, SMITH J (as he was then) accepted urgency in a case where the applicants' goods were held as lien by the respondent pending payment of unpaid customs duty. The applicants brought an urgent application for the release of the goods. The basis of urgency was that if the goods are not released immediately, the applicants will be forced into liquidation. That would result in 67 employees losing their jobs. The goods were purchased using a bank overdraft facility which attracted interest at the rate of 45% compounded monthly and the overdraft could not be settled until the goods were released and sold. I set out the details in the case to demonstrate the point that an applicant should not take refuge in just throwing the term 'commercial urgency'. That does not mutate the application. The applicant must demonstrate how the perceived commercial violation impinges on his/her rights for the court to immediately intervene.

The applicants simply indicate that investors would be impacted. Even if the court would accept that the applicants have a valid contract with the third respondent and the Directive in its effect interferes with the contract, the applicants have failed to establish urgency. It is not stated how they would be prejudiced even if the 'contract' is varied. The applicants do not share with the court the prejudice they will suffer that require immediate intervention. Bearing in mind that the third respondent's role is purely administrative, the alleged interference with the contract is not prejudicial to the extent of affecting the share value. That has not been alleged at all. It's a matter of where these shares are kept and the related

transactions are recorded. I can only imagine this dispute as one for where to keep property. The nub of the case is not so much about where it is kept but that the property remains safe and intact to retain its value. The mere storage of the dematerialised shares with the third respondent or whichever CSD does not affect its value. What affects its value is the performance of the issuers/the company.

The applicants' shares remain with their issuers of choice and the return on investment will not and cannot be affected by the mere fact of where the shares are kept or who does the administrative processes.

The applicants have failed to demonstrate that they will suffer irreparable harm if the matter is not heard on an urgent basis.

The real protagonists in this application are veiled. The founding affidavit leaves a lot to conjecture. The first applicant deposed to the founding affidavit on behalf of the other applicants. The other applicants filed the supporting affidavits. The first applicant says the need to act arose on the 19th of October 2021.This is when the Directive was issued. Thereafter he together with other applicants sought legal advice and they spent the weekend gathering the requisite evidence and preparing the instant application.

The averments are patently misleading and as suggested by one of the respondents they are a palpable lie meant to contrive this application. It is not in dispute that the first applicant purchased shares after 19 October. More specifically the first applicant acquired shares in the seventh, ninth, tenth and twelfth respondents on 25 October .The shares in the sixth respondent were acquired on the 26th of October. It follows then that the Directive was issued before the first applicant held any shares. The application was filed on 27 October a day or two after the first applicant purchased the shares. The conduct behoves of some undisclosed behind the scenes happenings. The real applicant is not before the court. The applicants are clearly a conduit for someone. I am inclined to accept the position by one of the respondents that the first applicant purchased the shares for the purposes of making this application. I cannot refer to the rest of the applicants since no evidence was attached as to when they purchased the shares. With that factual background clearly there is no way that the first applicant could have sought legal advice and gather evidence in this matter when he had no threatened interest on the 23rd of October. Good faith and full disclosure of all material facts is required of litigants. Generally courts frown at litigants who are not candid with the court. Depending on the extent or the effect of the non-disclosure the court can decline to hear a litigant on an urgent basis for that reason. See *Graspeak Investments (Pvt) Limited v Delta Operations (Pvt) Limited & Anor* 2001(2) ZLR 551(H)

I have made a finding that there is no demonstrated irreparable harm that warrant the court to hear the matter on an urgent basis. It becomes unnecessary to address the issue whether the applicants treated the matter as urgent. I just make a few observations.

If indeed the applicants had cause to act as a result of the alleged interference with their contracts they could have done so well before the Directive was issued. On 1 October 2021 the tenth respondent published its intention to migrate to the ZSE Depository with effect from 1

November 2021.This was obviously a decision by the board of Directors .The decision was not challenged by the applicants. The Directive only gave the companies processes to follow. I was not persuaded by the applicant's submission that the third respondent had issued a public notice advising that their rights shall be fully respected and they can change Depositories if so advised in terms of their applicable contracts and the law. This comfort notice was issued after the tenth respondent had advised of its intention. If there was a violation of a right it was then. Nothing was done to protect such rights. The twelfth respondent published its intention to migrate on the 20 October. The first applicant was not even a shareholder then. In view of the undenied facts the order sought in paragraph 2 becomes incompetent. The tenth respondent's decision was made prior to the issuing of the Directive.

The tenth and the twelfth respondents made their intentions to migrate known on the 1st and 20th of October 2021.The first applicant was not yet a shareholder in these companies. These companies had already made an internal decision to migrate which effectively would affect the first applicant's relationship with the third respondent. In my view with or without the Directive migration was imminent.

From the foregoing I find no reason to have the matter heard on an urgent basis.

Accordingly the matter is struck off the roll of urgent matters.

ChimukaMafunga Commercial Attorneys, applicants' legal practitioners

MawereSibanda Commercial Lawyers.1st and 6th respondent's legal practitioners

Kantor and Immerman,2nd respondent's legal practitioners

Ruzvidzo & Mahlangu Attorneys,3rd respondent's legal practitioners

Lunga Attorneys,4th and 11th respondent's legal practitioners

BeraMasamba, 10th respondent's legal practitioners