NYASHA NOREEN NYOROVAI DEL CAMPO (Nee MUJURU)
versus
DR JOICE TEURAI ROPA MUJURU
and
KUMBIRAI MUJURU
and
CHIPO MUJURU
and
KUZIVAKWASHE LEANNE ZENGEZA (Nee MUJURU)
and
VALI CHARTERED COMPANY SECRETARIES
and
THE REGISTRAR OF COMPANIES
and
WILLDALE LIMITED

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 26 January and 11 February 2022

Urgent Chamber Application

T Sibanda, with him K Takundwa for the applicant
L Madhuku, for the 1st to 4th respondent
Ms V Musoa, with her Ms K Nyandoro, for the 7th respondent

ZHOU J: This is an urgent chamber application in which the applicant seeks an order interdicting the seventh respondent from disbursing the dividend due to a company known as Dahaw Trading (Private) Limited for the 2021/2022 financial year directly to the first respondent until the shareholding dispute in respect Dahaw Trading (Private) Limited is finalized. On the return date the applicant seeks the nullification of the appointment of the first to fourth respondents as directors of Dahaw Trading (Private) Limited and the cancellation of the forms in terms of which these respondents were appointed as directors. Applicant also seeks an order that the dividend due to Dahaw Trading (Private) Limited be deposited into the trust account of Chadyiwa and Associates legal practitioners. Applicant is further asking for a punitive order of costs against the first, second, third, fourth and fifth respondents.

The application is opposed by the first, second, third and fourth respondents. In addition to contesting the application on the merits these respondents raised objections in *limine* which I dismissed and advised that the reasons for the dismissal would be contained in the final judgment. The seventh respondent advised through its legal practitioners that it was not opposing the application and would abide by the decision of this court. It further advised that pending determination of the instant application it would not disburse the money in respect of the dividend due to Dahaw Trading (Private) Limited.

The material facts, which are largely common cause, are as follows:

The applicant is a daughter of the first respondent and the late Solomon Tapfumaneyi Ruzambu Mujuru. The second, third and fourth respondents are applicant's siblings, being daughters of the first respondent as well. In 2004 the applicant was appointed as director of Dahaw Trading (Private) Limited (hereinafter referred to as "Dahaw") by her late father who was the sole shareholder of the company. Dahaw is a company that was incorporated in 2004. In September, 2005 the applicant's father transferred 20 000 fully paid shares of one dollar each in Dahaw to the applicant. Applicant thereby became the sole beneficial owner of the shares in Dahaw. Following the death of applicant's father in 2011, the third respondent was appointed a director of Dahaw. Thus the applicants and third respondent became the only directors of that company from 2014.

Dahaw is the largest shareholder in the seventh respondent, Willdale, wherein it holds 39.55% of the shares. The seventh respondent is a public listed company that carries on the business of manufacturing bricks. The dividend declared in the seventh respondent was previously dealt with in accordance with the instructions of the applicant. At one time in or about January 2021 the applicant was informed that the dividend had been disbursed in accordance with instructions issued by the first respondent. The applicant queried that and asked the first respondent to account for the dividend and she duly complied.

It seems that the issue of the dividend payable to Dahaw in respect of its shares in the seventh respondent remained a bone of contention between the applicant on the one hand and the first respondent and her other daughters, on the other hand. By letter dated 9 December 2021 the first to fourth respondents' legal practitioners, Mundia and Mudhara, instructed the company secretary of the seventh respondent that the dividend for 2021/2022 which was due to Dahaw was to be deposited into the personal account of the first respondent. The details of the account were

given. In giving that instruction the lawyers presented themselves as representing Dahaw. The letter made reference to a resolution of Dahaw authorizing that payment arrangement. The resolution is signed by the second and fourth respondents as directors of Dahaw. Dahaw through Chadyiwa and Associates legal practitioners wrote a letter on 5 January 2022 asserting its entitlement to the dividend.

On 12 January 2022, the applicant became aware of a Form CR6 and a Form CR 11which were filled on 22 September 2021 by the fifth respondent. In terms of these documents the first, second and fourth respondents had also became directors of Dahaw. The shareholding structure had been completely changed in such a way that the first respondent became the majority shareholder with 11940 shares, while the applicant, second, third and fourth respondents had 1990 shares each. These documents, together with the instruction to pay Dahaw's dividend into the personal account of the first respondent triggered the filing of the instant application.

In opposing the application the first, second, third and fourth respondents raised four objections in *limine* – namely:

(a) that the founding affidavit was not valid,

(b) that the matter is not urgent;

(c) that the applicant has no locus standi to institute the application; and

(d) that the relief that is being sought is incompetent

On the merits the respondents contended that the appointment of the first, second, and fourth respondents as directors of Dahaw and the new shareholding structure of that company were agreed upon by the applicant and these respondents as a family at a meeting which was held in the United Arab Emirates in August 2021. They attached documents to the opposing affidavit of the first respondent.

The applicant objected in *limine* to the admission if the documents marked as annexures "A" and "A1" to the opposing affidavit of the first respondent and to the supporting affidavit of Dickson Mundia. Applicant moved that these documents be struck out. I indicated that since these objections on their own did not dispose of the matter even if they were upheld, the objections would be considered together with the merits of the matter.

Respondents' objections in *limine*

The objections will not necessarily be dealt with in the order in which they were submitted. Once the question of urgency is raised it should be related to first, since, once it is found that the matter is not urgent then the court does not proceed to consider the other matters raised in the papers.

Urgency

The respondents' objection to the urgent hearing of the matter is based on the fact that the seventh respondent received conflicting instructions regarding the disbursement of the dividend due to Dahaw on 25 November and 8 December 2021. It was argued that because the seventh respondent had not disbursed the money at the time that the urgent chamber application was filed then there was no urgency. I disagree. At the time that the application was filed the respondents had not withdrawn the instruction to the seventh respondent for payment of the dividend to be made into the personal account of the first respondent. This is the instruction that gave rise to the filing of the urgent chamber application. The respondents are vigorously defending the instruction, hence the threat of irreparable prejudice remains. The demand for the dividend to be paid as proposed by the respondents is based on the new shareholding and management structure of Dahaw, which the applicant is challenging. The respondents are defending the restructured shareholding and directorship as well. The applicant only became aware of these changes on 12 January 2022, which is the date when the need to act arose.

Mr *Madhuku* advanced a further submission in the alternative, that the case involved a family dispute. He submitted that the language used in the papers and the nature of the dispute excuse the application from being dealt with urgently. These are not legal propositions. There mere fact that family members are involved in a commercial dispute does not justify removing the matter from the roll of urgent matters.

Given the above reasons, the objection to the urgent hearing of the matter is without merit, hence it was dismissed.

The validity of the applicant's affidavits

The respondents' objection is that the applicant's founding and answering affidavits were not attested to before a commissioner of oaths. It is common cause that the two documents were sworn to before a Notary Public in South Africa who also verified the signature of the deponent.

The respondents' submission was that an affidavit deposed to outside Zimbabwe is only valid if it deposed to before a Commissioner of Oaths authorized in terms of the Laws of Zimbabwe. Rule 85 (2) of the High Court Rules, 2021, provides as follows:

> " Any document executed in any place outside Zimbabwe shall be deemed to be sufficiently authenticated for the purpose of production or use in any court or tribunal in Zimbabwe or for the purpose of production or lodging in any public office in Zimbabwe if it is duly authenticated at such foreign place by the signature and seal of office-
> (a) of a notary public, mayor or person holding judiciary office,….."

In r 85 (i) the term "document" is defined to mean "any deed, written contract, power of attorney, affidavit or other writing, but does not include an affidavit sworn before a commissioner."

The provisions cited above are clear that a document executed outside Zimbabwe before a notary public can be used in any court in Zimbabwe. The definition of document includes an affidavit. Mr Madhuku for the respondents seemed to rely on the exclusion from the definition of document of "an affidavit sworn before a commissioner". There is no confusion that arises from that exclusion, for the simple reason that such an affidavit on its own is acceptable for use in court without further authentication, as explicitly provided for by r85 (5). It would not make sense to require an affidavit sworn before a commissioner of oaths to be further authenticated before a noraty public or an affidavit sworn to and / or authenticated before a notary public to be further sworn to "be before a commissioner". In practice we know that every notary public is a legal practitioner (although not every legal practitioner is a notary public), and the person appearing before the notary public necessarily takes an oath. Both affidavits in this case show that the deponent took an oath and this is confirmed at the end of each of them. For these reasons, the raising of the objection is clearly vexatious.

The *locus standi* of the applicant

The respondent's objection is that the dividend which is the subject matter of the case belongs to Dahaw and not to the applicant and that, therefore, the applicant has no *locus standi* to interdict its disbursement. It was further argued that the applicant has not shown that she is exercising a derivative action. These are self-defeating arguments. In the first instance, the dividend was not about to be disbursed to Dahaw. Instead, the instruction was for it to be paid to the first respondent, to be deposited into her account. Quite apart from the questionable manner by which the money is being sought to be accessed, there is the more fundamental issue that the

interim relief is merely accessory to the final relief which challenges the manner in which the applicant's shareholding in Dahaw was tempered with and some shares appropriated in favour of the first to fourth respondents, as well as how the first , second and fourth respondents appointed themselves as directors of that company without her involvement as sole shareholder and one of the two directors. Clearly the aggrieved party on the substantive dispute is the applicant. She therefore has the *locus standi* to institute the proceedings in her own name, as what is at stake is her investment, her shareholding. Applicant does not even have to rely on the derivative action for the purposes of seeking the relief *in casu,* because she does not recognize the respondents as shareholders of Dahaw, it being her case that they fraudulently changed the shareholding of the company and also fraudulently made themselves its directors. This is therefore a dispute about control of the company. The objection that the applicant has no *locus standi* is therefore meritless. Applicant has a direct and substantial interest in the subject matter of the litigation, which is Dahaw, see *SA Optometric Association* v *Frames Distributors(Pvt) Ltd t/a Frames Unlimited* 1985 (3) SA 100 (0) at 1031-104F, *Zimbabwe Teachers Association and Others* v *Minister of Education* 1990(2) ZLR 48 (HC) at 52F -53E. In any event the requirements of the derivative action are clearly established. This aspect, is of course a matter for the merits of the application.

The relief sought

The submission made on behalf of the first to fourth respondent to justify the contention that the relief sought is competent lacks coherence. It was suggested that the applicant is seeking to interdict what has already happened because the respondents are already shareholders of Dahaw. The terms of the final order sought seeks the nullification of the documents in terms of which the respondents became the shareholders and, in the case of the first , second and fourth respondents, directors of Dahaw. There is no interdict that is being sought on the return day. The interdict sought in the interim relief is merely meant to ensure that the income of Dahaw does not get into the hands of the respondents pending determination of the question of the validity of their newly acquired shareholding and directorships. The submission that the horse has bolted is therefore misplaced.

The applicant's objections in *limine*

In the answering affidavit and in argument, the applicant objected to annexures "A" and "A1" to the opposing affidavit as well as to the affidavit of Dickson Mundia

The affidavit of Dickson Mundia

The deponent is the legal practitioner for the respondents. What he states in his affidavit is what he purports to have been told by his clients. His evidence is inadmissible hearsay evidence. The rules provide, in r 58 (4)(a) that an affidavit "shall be made by the applicant or respondent, as the case may be , or by a person who can swear to the facts or averments set out therein". Clearly. Dickson Mundia cannot swear to the facts or averments made in his affidavit. The fact stated are not within his knowledge. For these reasons, the affidavit is improperly before the court, and is accordingly struck out

The annexures

Annexure"A" to the first respondent's opposing affidavit is a document headed: "Statements of facts relating to the shareholding in Dahaw Trading (Pvt) Limited." This document is said to have been signed at Dubai on 27 July 2021 by the first to fourth respondents and the applicant. Applicant has distanced herself from the document and states that the signature put next to her name is not hers, but a forgery. Indeed, the signature bears no resemblance to her signature on the founding and answering affidavits. The document represents itself as an agreement. Annexure "A1" is headed "Affidavit". It purports to record an agreement entered into by the same parties as in annexure "A". It records that it was signed in the United Arab Emirates at 19000 hours on 5 August 2021. The applicant has also disputed the signature put against her name. This signature is different not only from the signature in annexure "A", but also from the signature of the applicant's on the founding and answering affidavits.

Applicant objects to the production of these two documents on the grounds that they have not been authenticated by a notary public or any of the other officers as enjoined in r 85(2). The provisions of this rule have been quoted above. Mr *Madhuku* for the respondents submitted that the documents are admissible because they merely support the evidence in the opposing affidavit. Rule 85(2) requires that for such documents to be produced or used in court they must be authenticated. These documents are photocopies, and have not been authenticated. More significantly, on the face of them, even the originals do not purport to have been authenticated. In the case of annexure "A" even though the documents calls itself an affidavit, it is neither authenticated nor sworn to before a commissioner of oaths. The two documents fall within the ambit of r 85(1) which defines documents to include "written contract", "affidavit", "or other

writing". The failure to meet the requirements of r 85 means that the annexures are in admissible; they cannot be produced or used in court. In the premises, annexures "A" and "A1" to the first respondent's opposing affidavit are stuck out.

The merits

The interim relief sought is in the form of a temporary or interlocutory interdict. The interim relief is being sought pending determination of the right of the parties in relation to the shareholding and directorship in Dahaw.

The requirements for an interim interdict to be granted are settled and have been espoused in numerous cases. They are:

1) That the right which is sought to be protected is clear; or
2) That (a) if it is not clear , it is *prima facie* established, though open to some doubt; and (b) there is a well-grounded apprehension of irreparable harm if interim relief is not granted and the applicant ultimately succeeds in establishing his right;
3) That the balance of convenience favours the granting of interim relief; and
4) The absence of any other satisfactory remedy.

See *Econet (Pvt) Ltd* v *Minister of Information* 1997 (1) ZLR 324 (H) at 344G- 345B, *Watson v Gilson Enterprises and Others* 1997 (2) ZLR318 (H) at 331D-E; *Nyika Investments (Pvt) Ltd* v *ZIMASCO Holdings (Pvt) Ltd and Others* 2001(1) ZLR (H) at 213G -214B

Whether there is a right in existence is a matter of substantive law; whether the right is clearly or only *prima facie* established is a matter of evidence, *see Nyambi and Others* v *Minister of Local Government ant Another 2012(1) ZLR 559 (H) at 574C. In casu* the right which is sought to be protected is the right to control the affairs of Dahaw, including protecting the assets of the company. The substantive relief which is being sought in the final order clearly shows that what is at issue is the shareholding and directorship of the company. The applicant has attached the share certificate, which is proof of her shareholding. She has also attached the Form CR14 dated 30 October 2014. The existence of these documents has not been disputed by the respondents. The respondents rely on company documents which were filed with the Registrar of Companies on 22 September 2021. They have not proved by evidence how the applicant lost some of her shares in Dahaw. The claim that the applicant consented to her some of shares being taken away has been

disputed. The first, second, third and fourth respondents could not just wake up one day as proud holders of shares in Dahaw without following the procedures provided by law for transfer of shares. Equally the respondents did not attach any resolution of the only two directors of the company authorizing the appointment of the first, second, and fourth respondents as directors of the company.

I therefore accept that the applicant has established a *prima facie*, right which deserves protection. The irreparable prejudice arises from the fact that the respondents seek not just to hold onto the shareholding and directorship of Dahaw, but seek to have the dividend due to the company deposited into the personal account of the first respondent. The motive for such a move is not legitimate, as no explanation has been given as to why the income of the company should be deposited into the personal accounts of a private individual. If the respondents proceed to share the money the company and indeed, the applicant as the only shareholders, would be irreparably prejudiced if she succeeds in getting the appointment of the first to fourth respondents as shareholder nullified.

The balance of convenience favours the granting of the interdict. The respondents suffer no prejudice at all if the interim relief is granted. On the other hand, if the income goes into the account of the first respondent and she expends the money, then the applicant and her company would be prejudiced if the provisional order is confirmed. There is no alternative satisfactory remedy which is available to the applicant except to seek the interdict to stop the depositing of the money due to Dahaw into the account of the first respondent.

In all the circumstances, the applicant has proved her entitlement to the relief sought.

In the result, the provisional order is granted in terms of the draft thereof filed of record.

Chadyiwa and Associates, applicant's legal practitioners
Mundia and Mudhara, 1st to 4th respondent's legal practitioners
Honey and Blackenberg, 7th respondent's legal practitioners