NORMAN ELIAS SACHIKONYE
versus
CAPITAL ALLIANCE (PRIVATE) LIMITED
and
DOUGLAS HOTO
and
NOEL BITI
and
SHEILA LORIMER
and
PELAGIA KAFESU

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE, 24 January and 7 November 2007

Court Application

A B Chinake, for the applicant
Advocate *H Zhou*, for the respondents

GOWORA J: The applicant is a former Chief Executive of First Mutual Limited. First Mutual Society was an insurance company offering products associated with life insurance and the provision of pension benefits and investments. Some time ago it undertook a demutualization process as a result of which shares were offered to members of the general public on 17 November 2003. As a result of the demutualization a limited liability company came into being as First Mutual Limited (FML). It was decided within FML itself that in order to motivate staff to perform better a certain percentage of the shares should be availed to the employees. A special arrangement was then made for employees who were part of the management structure to buy an agreed portion of those shares and in order to facilitate this a limited liability company was to be incorporated whose sole asset was to be the shares acquired for the management. Such company was Neotrangus Investments (Private) Limited which was acquired as a shelf company. Subsequently its name was altered to Capital Alliance which is the first respondent herein.

It is not in dispute that at its inception the applicant held 3900 of the issued share capital in the first respondent, Capital, which translated to 26% of the entire shareholding.

Consequently he was the controlling shareholder within Capital. As such the applicant was entitled to the beneficial interest of 218 400 000 shares in FML. Capital and FML subsequently ran into difficulties which caused their suspension from the list of companies on the Zimbabwe Stock Exchange during which period their shares were not trading. This resulted in Capital not being able to service its debts and as a result of compromise with its creditors a specific number of shares held by Capital in FML were transferred to those creditors to offset the sums due. The net effect of those transfers was that the shareholding of Capital in FML was reduced to 145 320 000 shares and the applicant's entitlement was then reduced to 37 783 200 shares in FML. On 2nd June 2004 for reasons that are not germane to this matter the applicant resigned from his employment with FML. In his founding affidavit he avers that he is no longer a director of Capital. In an answering affidavit signed by him on 13 March 2006 he suggests that he never resigned as a director of Capital, and in fact the respondents were challenged to prove that he had resigned as a director. The challenge has not been met. Whether or not he would have retained his shareholding after his departure from FML is one of the issues that is to be determined in this application.

Subsequent to the applicant's departure from FML, Capital disposed of a number of shares in FML. The applicant was not involved in the decision to sell the shares. It was his view that the respondents were precluded from doing this by the Companies Act [*Chapter 24:03*] and consequently he has now brought these proceedings for a declarator that the respondents had violated the provisions of the Act when they sold the shares and for consequential relief following upon the declarator.

Mr *Zhou* on behalf of the respondents has raised three defences to the application. The first is that there are disputes of fact on the papers which cannot be resolved on the papers. The second is that the applicant does not have the *locus standi* to bring these proceedings and lastly that the application itself is devoid of merit.

As to the first issue it was contended that there are material disputes of fact as would preclude this court from determining the matter on the basis of the papers filed by the parties. One of the alleged disputes of fact being alluded to is whether or not the applicant was ever a shareholder in Capital. Given the background to the demutualization process undertaken by FML and which has been detailed in the opposing affidavits and the respondents' heads of argument I am at a loss as to how this submission could have been made. In paragraph 15 of

the respondents' heads of argument it is stated 'Capital Alliance acquired 840 000 000 ordinary shares in FML's issued share capital at the time, as part of the management buy-in scheme conceived by the Executive Management of FML, and approved by the Board of Directors of FML'. The buy-in scheme, according to the respondents, was driven by the applicant. In paragraph 16 is the cryptic statement to the following effect-The concept and terms of the Management Buy-In scheme were conceived by senior management of FML who included, at the time, Applicant.

Turning to the documents themselves on the 26th October 2005, a meeting was held by the board of directors of Capital, amongst who were the second to fifth respondents. In discussing what was to be done about shares belonging to executives who had left FML it was noted that the applicant prior to his departure had 3 900 shares in Capital Alliance and in fact all the other shareholders detailed at that meeting were individuals and not corporate entities. It was further resolved at that meeting that the shares of former executives who were no longer with FML should be redistributed among current members in proportion to their existing shareholding. The redistribution then left the applicant with zero shares. The shares held by the second and fifth respondents climbed to 3307 from 1875 making the two of them the majority shareholders with 22.05% shareholding each. The minutes for that meeting were signed by the second respondent as chairman yet in his opposing affidavit he had the temerity to suggest that the applicant was never a shareholder in Capital. Clearly he was not telling the court the truth.

The respondents contend further that the applicant has never been a shareholder in Capital Alliance and that he had participated in Capital Alliance through a company called Mellowdew Investments (Private) Limited. As proof for this contention the respondents attached a document which appears to be some sort of register. Other than that it is not specifically identified to establish its origin. My view of the attitude taken by the respondents is that they are abusing court process.

Apart from a host of other numerous documents affixed to the papers by the parties, on which matter I shall discourse on later in the judgment, the respondents have attached two draft shareholders agreements. The first draft is dated 19 December 2003 and the first party thereto is Capital, with the second being an entity called Sachikonye Investments (Private) Limited. The rest of the parties are companies bearing the names of the other executives then

employed by FML who had participated in the scheme. The last page of this draft agreement however, bears the names of the individual executives who participated in the buy-in scheme. Featuring prominently at the top of the list is the applicant with a shareholding of 3 900 which is defined as 26%.

The next draft agreement is dated 17 September 2004 and again the first party is Capital with the second party thereto being Mellowdew Investments (Private) Limited. The names of the other parties are not germane to the resolution of the dispute but are supposedly registered limited liability companies. The last page of this draft again bears the names of the executives and again the applicant is recorded as having 3 900 shares which are again defined as 26%. It is pertinent to note that when this particular draft was prepared the applicant was no longer with FML, since he had left on 1st June 2004. The documents emanating from Capital however confirmed him as having, almost three months after his resignation, 3 900 shares in Capital. To cap it all the record bears a letter written by Douglas Hoto dated 1 October 2004 and addressed to the curator of Royal Bank. The letter starts by listing the original shareholders of Capital and again at the top of the heap is one N E Sachikonye with his 3 900 shares.

A certificate of incorporation confirms that Mellowdew was incorporated on 14 October 2003. On the other hand Neotrangus was incorporated on 2 September 2002 and changed its name to Capital Alliance on 23rd October 2003. The first meeting of the company, Neotrangus, was held on 5th September 2002 and the applicant was elected the chairperson. Thus, Mellowdew could not have subscribed to shares in a company which came into being almost a year before it, Mellowdew, was incorporated. In any event there are numerous documents on the file confirming that the applicant had 3900 shares in either Neotrangus or Capital.

It appears however that the shares that the applicant had in the first respondent are no longer available. The papers do not state what happened to the shares but the respondents contend that they are no longer available to the applicant. I can only assume, going by the minutes of the meeting of the board of Capital held on 26th October 2005 that they were distributed as stated therein.

The respondents further state that in terms of the draft agreements it was agreed that when an executive leaves employment the shares have to be offered to the rest of the

shareholders given that the scheme is for the benefit of senior employees of First Mutual. As such so the argument goes, the applicant has lost his right to those shares and consequently the right to institute these proceedings. I am not persuaded by that argument. The respondents have not produced any document to show that the applicant has either given up his shares or transferred them and consequently he is still entitled to the same.

As far as the draft agreements are concerned the papers are mute testimony to the fact that right up until the applicant left employment there were terms and conditions in the draft agreements on which there had been no agreement. At a meeting of the board of Capital held on the 18th November 2004 which was chaired by the second respondent, he, the second respondent, reported to the meeting that the shareholders' agreement had not been signed because there was disagreement between the directors of FML and Capital over some of the clauses. These minutes were signed by the second respondent as chairman of that meeting. Subsequently at a meeting held by the board of directors for Capital the second respondent having received a letter from the applicant changed tack and informed the meeting that the directors of Capital had taken the view that the terms of the shareholders agreement were binding even though such agreement had not been signed.

In addressing this issue Mr *Zhou* contended that the court should have recourse to Clause 10: 3 of the agreement. The question I ask myself is which agreement we are referring to. In the first agreement, the shareholders are companies bearing the names of the executives. I have not been informed whether in fact such companies exist or whether at the time the agreements were drafted they did exist. In the place of the applicant, the company is named as Sachikonye Investments (Private) Limited and it is not a party in this application. In the second draft agreement the shareholder supposedly representing the applicant is Mellowdew which although incorporated, never subscribed to shares in Capital. It also, is not a party to these proceedings. The only party who is before me who is named in the agreements in question is Capital. What normally brings a written contract into existence is its signature by the parties thereto. The agreements produced before me were not signed by any of the parties indicated thereon.

The applicant, on the papers before me is not a party to any of the agreements produced by the respondents. In so far as the companies named as parties to such agreements, there is no evidence which has been adduced on the papers to show a link with the applicant

such as could lead this court to conclude by this court that such companies should be in the capacity of nominees of the applicant, given that a company is a separate legal entity to its members. In fact no proof was even adduced to show that the applicant was a member of either company. In order therefore to hold him to the agreements, the respondents had to show that he was privy to the contract despite not being a party thereto. The respondents by contending on the one hand that the applicant never owned shares in Capital and that the shares were owned by Mellowdew have shot themselves in the foot in that they cannot then be seen to arguing that the terms that would have bound Mellowdew can bind the applicant. The applicant could only be bound by the agreement if he was a shareholder and according to them he was not. Thus the applicant cannot be bound by unsigned agreements to which he is not even a party or signatory. If the respondents seek to bind any party to the agreements, it would have to be Mellowdew and the other companies cited therein as parties.

The other telling factor is that when the second draft agreement was prepared the applicant had resigned from his post with FML. If the terms and conditions had been concluded by the time he left why did the directors of Capital seek another draft. The papers are very clear on this point and it is mischievous for the respondents to contend that the draft agreements are binding on the applicant.

One of the contentious issues was what was to happen to the shares of an employee who departed from FML. I accept the contention by the respondents that there were concerns that if a departed employee carried on participating in the scheme this would defeat the whole purpose of the scheme which was meant to benefit current employees and thus drive the performance of FML to greater heights. When one has regard to the attitude that the respondents have adopted, that the applicant never was a shareholder in Capital, it seems illogical for them to then argue that the applicant lost his shares when he left FML. It cannot be possible for one to lose what he never had. Either the applicant was a shareholder or he was not. Even assuming the shares had been held by accompany instead of him, how would his leaving FML affect the shares held by the company.

Notwithstanding this, the applicant was a shareholder whose shareholding had not been given up by him at the time he departed. The shares were in fact appropriated by the other shareholders. From the various documents submitted by both sides it appears that the understanding was when a participating executive left FML the board would select a

participant to take his or her place. The interest of the departed executive would be valued and notional liabilities set-off. The respondents did not follow this course. They have neither formally offered to buy the shares nor have they indicated to the applicant by what method the surrender by him of his shares should be dealt with. He was not paid off for his shareholding and the respondents refuse to state with any certainty what happened to those shares. When he left FML no decision had yet been made as to how the shares of departing executives would dealt with as reflected in the letter written to him by the board Chairman of FML on 2 July 2004, the pertinent portion of which reads as follows:

> 'As regards your participation in Capital Alliance, no decision can be made at the present time. It would be improper to make any decision about Capital Alliance until the outstanding matters regarding that company are resolved and concerns of stakeholders, including the Board, the Regulators, management and staff have been addressed.' *(the underlining is mine)*

This letter belies the contention by the respondents that agreement had been reached that when a participating employee left FML their shareholding had to cease, principally due to the manner in which the shares had been financed as the lenders required security for the due payment of the monies advanced for the purchase. The respondents do not tell us when a decision was actually made and by whom such decision was made regarding the applicant's continued participation in Capital. In the absence of proof of what that decision is and whether it put paid to his participation in Capital and in what manner and on what terms, he, the applicant, therefore still retains the right to those shares as there was no transfer from himself to some other party and in fact they could not be appropriated without value without notification to him. There is no doubt that the applicant had the stated number of shares in the first respondent and his *locus standi* to bring these proceedings is not in any doubt.

The respondents admit that a disposal of 45 million First Mutual shares was effected. It is not disputed that the disposal was not authorized by the company in general meeting but occurred as a result of a decision made by the directors of the company namely. At the time of such sale the first respondent held 145 320 000 First Mutual shares. The beneficial value to the applicant was some thirty seven thousand odd shares. The disposal has left him holding legally a lesser number. He was not consulted about the disposal and the respondents do not deny this. The applicant seeks accordingly a declarator from this court to the effect that the

disposal of those shares was unlawful and in violation of s 183 (1) (b) of the Companies Act [*Chapter 24:03*]. The specific provisions of the section in question are in the following terms:

> 1. 'Notwithstanding anything in the articles, the directors of a company shall not be empowered, without the approval of the company in general meeting-
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> a)
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> b) to dispose of the undertaking of the company or of the whole or the greater part of the assets of the company.
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> 2. No resolution of the company shall be effective as approving of the differential issue or allotment of shares to a director or the disposal in terms of paragraph (b) of subsection (1) unless it authorizes, in terms, the specific transaction proposed by the directors.'

In this application I am concerned with subsection (1) paragraph (b). The applicant's contention is that the directors did not obtain the approval of the company in general meeting before they disposed of the 45 million shares in contention. The respondents admit that they had not obtained approval but that the sale was subsequently ratified. The section proscribes the disposal of the undertaking of the company or of the whole or the greater part of the assets of the company. The company concerned did not have an undertaking which has been defined as 'business or enterprise'. See *Mutare Rural District Council v Chikwena*[1] wherein GUBBAY CJ explained the word in the following terms:

> 'The word undertaking is of variable meaning. Basically, the idea it conveys is that of a business or enterprise. In the Australian case of *Top of the Cross (Pty) Ltd v Federal Commissioner of Taxation (1980) 50 FLR 19,* WOODWARD J said at 36:
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> > 'Frequently, the word 'undertaking' is used in circumstances where it is interchanged with either the word business or enterprise and with varying shades of meaning. Sometimes it is used alone, sometimes by way of distinction from the assets of the owner and sometimes as a synonym for business. Sometimes it is used to embrace the property which is used in connexion with the undertaking as well as the debts and liabilities which have arisen in relation thereto.'

[1] 2000 ZLR (1) 534 (S)

The sale of an undertaking or the whole of the assets or a greater part thereof in contravention of s 183 (1) (b) in the absence of a resolution by the company authorizing such disposal has been held to be null and void. See *Ngatibataneyi (Pvt) Ltd v Tobias Venganayi & Anor*[2]. In this instance, Capital was a vehicle for the ownership of shares in FML by the executive of the latter. The shares therefore constituted the assets of Capital, and could not be described as a business or undertaking. There is consequently a distinction from an undertaking and the assets of the company in this instance.

The applicant therefore needed to show that the disposal of the 45 million shares fell within the ambit of the section and was thus null and void. Prior to the disposal Capital had beneficial ownership to 145 320 000 shares in FML. The directors then disposed of 45 500 000 of those shares leaving a balance of just under 100 million shares. A comparison of those figures will show that what was disposed of was about 30% of the entire shareholder. It does not constitute the whole of the asset of the company. The question next to be asked is whether the portion sold then constituted the greater part of the assets of the company. Neither legal practitioner provided any authority to the court on the definition of the phrase. I came across an English case in which the phrase has been defined. In *Bromley & Others v Tryon & Others*[3] LORD SIMONDS L.C. described the 'greater part' as meaning anything over one half. If the respondents for instance had disposed of 51% of the FML shares held by Capital then they would have disposed of the greater part of the asset of Capital. In this instance they only sold about 30% of such asset and they did not dispose of the greater part. Their action therefore did not fall foul of the section. The actions of the respondents would only be null and void if they had disposed of the whole or the greater part of the assets of Capital. That is not the case in this situation and I find unfortunately that the application for a declarator is not well founded. The sale of 45 million odd shares did not infringe the provisions of the section and the court cannot issue the declarator that the applicant seeks.

In light of my finding that the sale was not null and void as prescribed in the section it then becomes unnecessary for me to determine whether or not the applicant's request for the calling of a meeting is necessary as such meeting was tied up to the alleged illegal disposal of the shares. In any event by the time the matter was set down for hearing before Messrs Biti and Hoto had left Capital. In the premises I find for the respondents in this case.

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[2] SC 13/07
[3] 1952 A.C 265

Earlier on in the judgment I made reference to the bulky documents filed by the parties. The application itself including the papers filed on behalf of the respondents covers some 346 pages. This excludes the heads of argument filed by the respective legal practitioners which themselves are extensive. Of the 346 pages constituting the application I have two draft agreements which have not been signed the provisions of which are almost identical. I have documents relating to Mellowdew which do not connect the company with the applicant. The entire Memorandum and Articles of Association of Mellowdew has been attached as well as those of Neotrangus. The value of these documents to the resolution of the dispute is completely lost on me. I also have various pages relating to the allotment of shares in various companies, the probative value of which is lost on me. Both sides in this matter have contributed to the unnecessary filing of voluminous documents which are not pertinent to the issues at hand. It becomes difficult for me to assign blame. The parties should not be made to suffer financially by paying for the cost of photocopying or the origination of documents that are completely unnecessary, and as a result I will not order costs against any of the parties.

The application is dismissed with no order as to costs.

Kantor & Immerman, legal practitioners for the applicant
Dube, Manikai & Hwacha, legal practitioners for the respondents.