GAM PLASTIC (PVT) LTD

versus

MICHAEL ALBERT ROCHE

and

ANN TAKA GOREDEMA

and

MICHAEL MAGUCHU

HIGH COURT OF ZIMBABWE

MUTEMA J

HARARE, 13 March, 2012

**Urgent Chamber Application**

*C. Nhemwa*, for the applicant

*T.H. Gunje*, for the respondents

MUTEMA J: Gam Plastic (Pvt) Ltd (Gam) is situate at 30 Bristol Road in Workington, Harare. The three respondents collectively hold 50.19% shareholding in Gam.

One Cleopas Mashiri, the deponent to the founding affidavit stated that he is Gam’s managing director and is authorised to depose to the affidavit by virtue of a board resolution (Annexure ‘A’ to the founding affidavit) and copy of CR 14 reflecting the current directors of Gam. The copy of the CR 14 alluded to is not attached to the application. In 1997 the respondents concluded a shareholder’s agreement with Venture Capital Company of Zimbabwe (VCCZ) with whom the respondents are currently having legal wrangles over the shareholding structure in Gam.

Gam, in the urgent chamber application is seeking an interim relief ordering respondents and all those occupying the factory premises through them to restore possession of the premises, plant and machinery and assets to the directors of Gam and to keep peace with Gam’s management and board.

At the hearing the respondents raised essentially two points *in limine*, viz:

1. That Cleopas Mashiri has no *locus* to act for and on behalf of Gam in light of the fact that on 21 November, 2011 he was convicted in CRB 5015/11 in the magistrates’ court of contravening s 343 of the Companies Act [*Cap 24:03*] by misrepresenting information in CR 14 regarding the list of Gam’s directors;
2. There is in existence an arbitral award (annexure C3 to the opposing papers) which awarded *inter alia* that the Gam board of 10 June, 2011 be disbanded and in its place a new board be elected into office by the shareholders. In the event, since the new board has not authorised Mashiri to represent Gam and resolved to institute these proceedings, Mashiri has no authority to represent Gam.

It was submitted that on the strength of these points *in limine* the

application must fail.

Mr *Nhemwa* opposed the application *in limine*. Regarding the first point *in limine*, he argued that the conviction alluded to arose from the fact that Mashiri filed a CR 14 whose column 7 reflected that the respondents had resigned which was incorrect because they had been dismissed or suspended for various acts of misconduct. On 21 November, 2011 that CR 14 was duly replaced with one reflecting the correct changes and as of today that is the CR 14 before the company registry.

As regards the second point *in limine* Mr *Nhemwa* submitted that since the arbitral award has been appealed against by VCCZ the status quo obtains pending outcome of that appeal.

I pointed out to Mr *Nhemwa* that if the arbitral award emanated out of voluntary arbitration the law has no provision for its appeal but an application for its setting aside pursuant to the Arbitration Act, [*Cap 7:15*]. He then said he was not certain as to the correctness of what was filed between an appeal and an application to set aside the arbitral award. I directed him to furnish me with the correct position on 14 March, 2012. I then reserved my ruling on the application *in limine* pending elucidation of the above issue.

By 15 March, 2012 Mr *Nhemwa* had not fulfilled his undertaking to furnish me with the correct position regarding whether it is an appeal or an application to set aside the arbitral award that VCCZ has noted. It is safe to therefore conclude that it must be an appeal which would be incompetent resulting in the status quo not obtaining. This means that the arbitral award by honourable TAYLOR of 16 December, 2011 is binding upon the parties. That award ruled *inter alia* that the Gam board of 10 June, 2011 be disbanded and in its stead a new board be elected by the shareholders. Since the new board has not only not authorised Mashiri to represent Gam but not resolved to institute the current proceedings, Mashiri has no authority at law to represent Gam. The board resolution (annexure ‘A’) attached to Gam’s application authorising Mashiri to “sign all documents and to do what he deems necessary to prosecute and defend the company through the company attorneys in the matters for and against Gam…” was adopted on 15 November, 2011. This application was filed on 9 March, 2012. The resolution of 25 November, 2011 was overtaken by the arbitral award of 16 December, 2011. The new board, as awarded in the arbitration of 16 December, 2011 did not authorise Mashiri to represent Gam and did not resolve to institute these proceedings. In the event this resolves the second point *in limine* raised *supra* that Mashiri has no authority to represent Gam with the concomitant result that the urgent chamber application is not properly before the court.

Regarding the first point *in limine* *supra*, it is common cause that Mashiri was on 21 November, 2011 convicted of contravening s 343 of the Companies Act [*Cap 24:03*] and was sentenced to pay a fine of $500-00 (annexure ‘A’ to respondents’ opposing affidavits is an extract from the clerk of the magistrate court).

Section 343 of the Companies Act provides in subs (1) as follows:-

“(1) Every officer or auditor of a company or foreign company or any

other person employed generally or engaged for some special work or service by the company or foreign company who makes, circulates or publishes or concurs in making, circulating or publishing any certificate, written statement, report or account in relation to any property or affair of the company or foreign company which is false in any material particular, shall, subject to subs (2), be guilty of an offence and liable to a fine not exceeding level eleven or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment”.

In *casu* Mashiri had, as an officer of Gam, made, circulated or published a CR 14 on 13 June, 2011 indicating that some director(s) had resigned when they had not. In terms of s 173B (2)(b) of the Companies Act a secretary of a company, which Mashiri was when he was convicted and sentenced on 21 November, 2011 shall cease to hold office as such once he has been convicted of fraud, forgery or uttering a forged document and sentenced to serve a term of imprisonment without the option of a fine or to a fine exceeding level five. Level five is $200-00. Having been fined $500-00 for falsifying the CR 14 Mashiri ceased to hold the office of secretary for Gam. But that is not the end of the story. Section 173(1)(d) of the Companies Act disqualifies any person from being appointed a director of a company save with the leave of the court, if such person has been convicted of *inter alia* fraud, forgery or uttering a forged document and has been sentenced *inter alia* to a fine exceeding level five i.e. $200-00. Mashiri deposed to the applicant’s founding affidavit purporting to be its managing director. Having been convicted as stated above and sentenced to a fine of $500-00, he is disqualified to be appointed a director except with the leave of the court. No such leave has been displayed to the court in this application. In the event, also on that plank, Mashiri has no authority to represent Gam as a director.

Towards the final stages of writing this judgment the registrar brought to my chambers a notice of filing by Mr *Nhemwa* filed on 15 March, 2012 instead of 14 March, 2012 as earlier undertaken. That notice of filing relates to an application by respondents for registration of honourable TAYLOR’s arbitral award alluded to *supra* and the opposition thereof by VCCZ. That was not Mr *Nhemwa*’s undertaking at the hearing. He had undertaken to file papers clarifying whether VCCZ had appealed against the arbitral award or had applied for its setting aside. Opposition to an application for the registration of the arbitral award does not *per se*, maintain the status quo. That can only be achieved via an application for the setting aside of that award which is not the case *in casu*. In the event the papers filed by Mr *Nhemwa* are of no moment.

In the result, having found that Cleopas Mashiri who purported to represent Gam on the premises of a flawed board resolution as well as he being disqualified to hold any directorship in Gam on account of his criminal conviction had no *locus standi*, the urgent chamber application is not properly before the court and it is accordingly dismissed with costs on the scale of attorney and client.

*C. Nhemwa & Associates*, applicant’s legal practitioners

*Gunje & Chasakara*, respondents’ legal practitioners