HONEY AND BLANCKENBERG
versus
LOURENCE ERASMUS VERMAAK
and
TERENCE COBDEN RHODES
and
GIDEON HWEMENDE
and
VALENTINE MUSHORE
and
ALFRED CHADEMANA
and
JOEL TANDERA
and
OLIVER CHIBAGE
and
FARAI MUTIZWA
and
CALISTO VENGESAI
and
REGISTRAR OF COMPANIES

HIGH COURT OF ZIMBABWE
TSANGA J.
HARARE, 6, and 20 November, 2013

Ms S Njerere, for Applicant
S K.Chivizhe, for 1st & 2nd Respondents
Ms M. Kenende, for 4th - 9th Respondents

Opposed application

TSANGA J **The background**

The Applicant Honey and Blanckenberg, instituted interpleader in terms of r 30 of High Court Rules for the court to declare to whom it should pay an amount of $70 000 currently held in trust as rentals for certain companies. According to applicant's affidavit, the companies in question are being laid claim to by nine different respondents. The tenth

respondent, the Registrar of Deeds, was cited to throw light on the question of ownership by virtue of certain statutory returns that have been filed with it. Despite the assistance that the court would indeed have obtained from the tenth respondent's comments, none were availed as the tenth respondent did not participate at all in these proceedings.

The companies in question, namely Beverly East Properties and Karoi Properties (the companies) were established by the late Brian James Rhodes who died on 29 July 2006. At least this much is not in dispute. The companies own commercial premises described as 184 Mutare Rd; 186 Mutare Rd; 188 Mutare Rd; 194 Mutare Road, all in Msasa.

These premises are leased. Until October 2011 the rentals were being collected by an estate agent, namely, Robert Root and Company. They discontinued agency and accounted to applicants for rentals held by them. Certain tenants have continued paying rentals to applicants. The applicant averred in its affidavit that it is currently holding $70 000 in trust by way of accumulated rentals form these tenants.

In its affidavit the applicant lays out the conflicting claims that it has been saddled with as emanating from triple sources. The first set of claimants for the rentals is a Trust called Phoenix Trust which the deceased is said to have established in 1998. The first and second respondents are identified by the applicants as Trustees asserting that the Trust is the lawful owner of the entire share capital in the companies and to whom applicants should account for the rentals held as representatives of the companies.

The second claimant, also laying claim to the rentals is said to be Gideon Hwemende, the third respondent, (a former employee of the deceased) whom the applicant indicates in its affidavit as having made diverse claims to share holdings in the companies ranging from 40%, to 60%, as well as to the entire ownership of the companies.

The third set of claimants are the fourth to ninth respondents who in their capacity as Directors appointed by the third respondent, lay claim to interests in the companies.

The affidavits and various annexures filed by the different claimants bear the hallmarks of a dramatic 'corporate soap opera' characterised by intrigue, alleged chicanery, resultant grievance. It is necessary to set out the facts somewhat fully from the papers filed of record as they have a bearing in determining in whose favour the balance emerges in terms of this interpleader application.

The facts

Mr Lourence Vermaak, the first respondent, initially submitted an opposing affidavit on 12 March 2013 which was later withdrawn and expunged from the record by court order obtained as a result of a default judgement. From the correspondence on file, the reason for the seeking that this initial opposing affidavit be withdrawn was because it had been obtained through coercion. However, by the time of its withdrawal, the third to ninth respondents had filed their own opposing affidavits in which they drew heavily, in asserting their claims, on this initial affidavit. Even after the first and second respondents had filed their new affidavits, the third to the ninth respondents appear to have ignored the fact that this document was obliterated by an order of this court.

Whilst bearing in mind that the document was wiped out, it is necessary to set out briefly its contents in order to give some context to the election by the third to ninth respondents to hang on its every word despite the court order stating that it is expunged from the record. In the expunged affidavit, the first respondent averred that he had resigned as Trustee of Phoenix Trust and Director of Beverley East Properties which is not in dispute. He denied having laid claim to owning or representing the companies. He asserted that he had appointed himself as Director when he saw that the companies were lying idle. He also swore that the second respondent, Terence Cobden Rhodes, had been appointed fraudulently by him (with one Kenny Regan) without his knowledge and that second respondent was not even aware that he is a director or was a director. In a dramatic twist to the applicant claim of a dispute, the first respondent refuted that the share holdings in the companies were in dispute in any way. He also stated that the third and ninth respondents are current directors and shareholders of Beverly East Properties and that he had no problems with this nor did he have any interest in the matter. Attached as annexures were letters of withdrawal as Director of Beverly East Properties.

The eighth respondent, Farai Mutizwa, in his purported capacity as Director of Beverly East Properties deposed to an affidavit in which he essentially embraced the first respondent's affidavit as embodying the correct position. He confirmed that the first and second respondents had resigned and had not laid any interest in the companies as they had resigned as both directors and company secretaries. He also stated that ownership and control are in the hands of the remaining respondents and that there are no contradictory or competing interests. He also said that the third respondent is a director in the company. He referred to the only dispute as that pertaining to Directorship of Karoi properties, a case which he said they were making frantic efforts to resolve. In that case which I will allude to

later, JUSTICE ZHOU ordered tenants of Karoi properties to deposit rentals into the account of the Registrar until the matter of ownership is resolved. The fourth, fifth, sixth, seventh and ninth respondents submitted affidavits in support of the eighth respondent's averments.

The third respondent, who was separately represented, initially deposed to his own affidavit on 18 March 2013. He withdrew through a letter from his legal practitioners to the Registrar of the High Court, two days after its submission on the 20 of March. In its place, he submitted an affidavit stating that he too was embracing the affidavit deposed to by the eight respondent. It is necessary to state briefly the contents of this affidavit as its content have a bearing on why it was withdrawn. In addition, its contents also have some bearing on the first respondent's later affidavit.

In his initial affidavit, he gave a totally different picture of the share ownership pertaining to the company compared to that deposed to by the first respondent. He did not assert full ownership but instead claimed that he had acquired 60% of the shareholding, with the remaining 40% belonging to the estate of the late Brian James Rhodes. He sought to shed light on how he came to own what he asserted as 60% of the company. In essence, his claim was that he had been employed as clerk by Brian James Rhodes in 1990 who was sole shareholder of companies. He was elevated to controlling all the accounts for the companies in 1992 which included mining companies. He said that when Brian James Rhodes became old, he proposed that he buy shares in Beverly East Properties in 1999 so that he could become the majority shareholder. His claim was that the deceased said he would work out a plan since the third respondent did not have money.

He asserted that in 2002 the said Brian Rhodes indicated that he was handing him 60% of the company and drew up shareholding agreements. He also gave him the title deeds of three properties Lorely, Beverly East and Karol Properties. He further averred that by 2006 had paid up for the 60% shareholding in each of the two companies and that at the time of his death Brian Rhodes owned 40% of the company. He further submitted that he himself had fallen ill and for seven years and could not control the two companies. It was during this time he said that the companies had been left with no Directors and that the first and second respondents had illegally appointed themselves. He alleged that there is no record of how Phoenix Trust came to own 80% or 100% of the shareholding in the two companies.

He had submitted documents to support his claim in the form of receipts from a petty cash book to show purchase. He also attached annexures of the share agreements in Beverly East and Karoi properties. Also among the annexures was a copy of a letter purportedly by

Brain James Rhodes offering the third respondent the properties in 2002. Also included was company resolution also from 2002, appointing the estate agents as managers of the property.

Turning back to the first respondent, he withdrew his initial opposing affidavit on the 27 May 2013. Having the court's blessing to breath freely again and file new papers on the basis of a court order granted by JUSTICE MATHONSI under case No. HC 3889/13, he filed a new opposing affidavit on the 12 July 2013. Equally unfettered by the first respondent's initial affidavit, the second respondent also filed his own opposing affidavit.

In his new opposing affidavit, the first respondent disputed the third respondent's claim to share holding on a number of grounds. He asserted that from the evidence produced by the third respondent he could not be owner as he had failed to produce proof of actually paying for the shares, neither had he shown any proof of paying any capital gains tax on the shares as required by the Capital Gains Tax Act [*Cap 23:01*]. He also stated that no such share transfers were ever processed by the first respondent's company that was at the time managing the two companies as company secretaries. In addition, he attached a number of annexures which included a document examiners report disputing the signatures to the share agreements that had been produced by third respondent. The examiner opined that the signatures could have been forged but that he required to see the originals. What clearly does not help third Respondent's claims is that also included were a proven forged letter in which he had claimed 100% ownership from 40% through indigenisation. The first respondent also questioned why the company needed to be indigenised if as claimed by the third respondent in the affidavit he had initially filed, he already owned 60% which would mean the company was already compliant with indigenisation.

The second respondent, Terence Cobden Rhodes, submitted an affidavit as Trustee of Phoenix Trust. He asserted that he has never resigned as Trustee of Phoenix or Director of Beverly East Properties (Pvt) Ltd and Karoi Properties (Pvt) Ltd. He insisted in his affidavit that the entire shareholding of the two companies is with Phoenix Trust. He refuted the claim by the third respondent that he owns 60% of shareholding of either company.

The issues

Having brought the application as an interpleader the Applicant court made it clear that it is a disinterested party in the proceeding and will abide by the decision of this court.

Mr Chivhizhe counsel for first and second respondents, argued *in limine* that fourth - ninth respondent have no *locus standi* as the Directors in their personal capacity. Owing to the

distinct legal persona of a company which is separate and distinct from its members and shareholders, he argued that they cannot arrogate to themselves to sue what can only be legally suffered by Beverly East Properties and Karoi Properties. Where wrong is done to a company the proper complainant is the company itself. The following cases were cited in support of these averments *Salomon* v *Salomon & Co Ltd* [1897] AC 22*; Dadoo Ltd. & Others* v *Krugersdorp Municipal Council* 1920 AD 530*; Foss* v *Harbottle* (1893) 67 ER 169*; Wallersteiner* v *Moir (*No 2) [1975] 1 All ER (CA) 849.

He also argued that the claim for fourth - ninth respondents must fail on the basis that they do have a direct and substantial interest in the matters as they are not even shareholders. He further submitted that their appointment as Directors rests on a person whose ownership is disputed and that one cannot appoint directors to a company to which one has been unable to prove ownership. He argued that the third respondent had failed to show ownership of the property and had merely managed to put forward a series of inconsistent claims.

The third respondent did not file any heads of argument neither did he appear in court on the appointed day. He was therefore in default and was barred.

Ms Kenende counsel for fourth to ninth respondents argued that there was no dispute of fact as regards ownership on the basis of the first respondent's initial affidavit, despite the fact that this had been legally withdrawn and substituted. She insisted that both first and second respondents had resigned from the company. She argued that Directors were properly before the court as it is their duty to manage the company as agents of the company.

Turning to these arguments. The rule is indeed well established that a company is a separate legal persona capable of suing and being sued in its own name. As such, shareholders have passive role especially where a company can use its corporate character to obtain redress for the alleged wrong. Where the wrong doers are the directors themselves there are obvious challenges in that they cannot bring a claim against themselves. Thus under the exception to the rule in *Foss* v *Harbottle* (supra) a shareholder can bring a derivative action as a corporate shareholder to address a wrong done to the corporation.

It seems to me that a practical approach to addressing the issue of the Directors *locus standi* in this case, is an analysis of the relationship between shareholders and directors and the roles attendant upon each. A person who has acquired shares in a company and can produce irrefutable proof of such ownership has a right to play a central role in the governance of such company. Among such roles that a shareholder is entitled to play include the appointment and removal of directors and addressing issues of their remuneration. The

appointment and removal of auditors as well as issues to do with their remuneration is another such role. Dealing with issues of management and business of the company and also any issues to do with the company's constitution is yet another.

Directors so appointed by a legitimate shareholder have the right to commence litigation in the company's name; to buy and sell property; to employ people and to conduct the business of the company among some of their rights. The difficulty on the case before me is that the Directors have been appointed by a person whose very claim to ownership is strongly challenged. The Directors in the persons of the fourth to the ninth respondents do not deny that they were appointed by the third respondent in his capacity as shareholder. As conceded by Ms *Kenende* none of them are shareholders.

The annexures that were included in this application by the first respondent indeed reveal that the third respondent's claim to share ownership rests on quick sand. As stated by the first Respondent, there is no evidence of the requisite tax having been paid for the shares as required by the law, neither is there actual proof of payment for those shares. Whilst admittedly not conclusive, the forensic report suggests that the signatures to the share agreements may have been forged. What clearly does not help the third respondent's claim to share ownership is the annexure of a court case involving him which details proven submission of a forged document in claim of 100% ownership to one of the properties in this case.

In the matter of *South Mark Trading*[1] *v Karoi Properties & Lorna Kruger & Retired Major Chademana & Gedion Hwemende & National Indigenisation Board* HH 52-2013 which this court takes cognisance of, the tenants of Karoi properties sought the guidance of the court as to whom to pay their rentals. Mr Hwemende (the third respondent in the current matter) claimed rentals on the basis of 100% share ownership of Karoi Company. He based his claim on a letter from the National Indigenisation & Economic Empowerment Board (NIEEB) dated 30 September 2011. That letter, which turned out to be forged, stated that Mr Hwemende who previously owned 40% now owned 100% shares in the company. NIEEB had written on January 20 2012 denying Mr Hwemende's claims and emphasising that the indigenisation process in the above mentioned properties is yet to be finalised.

JUSTICE ZHOU made the following remarks regarding the forged letter and the very tenor underlying the claim:

[1] There were 12 other companies cited in that matter.

> *"*The biblical aphorism: Whatever a man sows he will also reap' has lost its meaning in our society. This matter presents a sordid picture of a culture of wanting to reap where persons did not sow……. [2]
>
> The fourth respondent was aware that he could not just wake up to find himself as the holder of all the share in a company for free. He would know too that the indigenisation legislation does not operate in the manner that he sought to portray to justify his claim to a 100% shareholding in the first respondent*."*

In this particular matter, the third respondent initially claimed 60% before throwing his lot with the 100% claim. The third respondent has undeniably made claims that have ranged from 40% to 60% to 100%. What is before the court is evidence of claims to ownership which swing like a yoyo. It is evident that from the papers filed of record that the assertions of ownership lack veracity and consistency and merely lend credence to the proverb that liars should have good memories.

As this claim has been lodged in interpleader proceedings what the claimant must allege, is succinctly stated in the case of *Bruce NO* v *Josiah Parkes and Sons (Rhodesia) Pvt (Ltd) and Another* 1972 (1) SA 68 (R) where GOLDIN J at pp 69 stated as follows:

> " In my view in proceedings of this nature the claimant must set out such facts and allegations which constitute proof of ownership so that the question whether or not to refer the matter to trial would arise **only** in the event of there being a conflict of fact which cannot be decided without hearing oral evidence" (*My emphasis*)

The test whether a claimant has discharged the onus of proving his ownership is whether the probabilities are balanced in his favour. The case of *Corlett Drive Estates* v *Boland Bank BPK and Another 1979 (*1) SA 863 p 684 elucidates the purpose of setting out particulars of claim as follows:

> "The purpose inter alia of the setting out of the claimant's particulars of claim is to acquaint his opponent of the tenor of his case, so that the latter can be put in the position of deciding whether to oppose his claim or not."

I do not see any real dispute of fact on the basis of this interpleader that ought to be referred to trial as in my view the third respondent has not shown this court that he has any real basis for his assertion of ownership. The third respondent did not file heads or make an appearance. Notably the third respondent did not challenge the first respondent's application to withdraw his opposing affidavit which he said had been obtained by coercion.

[2] See page 1 of the cyclostyled judgement.

In interpleader proceedings, where a claimant does not deliver any details of his claim nor appear in support of a possible claim, the court can exercise discretion and order the claim lapsed. (See *Free State Consolidated Gold Mines Operations BPK* v *Sam Flanges (1997*) (4) SA 644 (O) at p 647). If the third respondent had full confidence in his claim, he would have made every effort to defend it to its logical conclusion. Instead he withdrew his affidavit in which he had purported to shed light on how he came to acquire the shares. In addition to the withdrawal, he chose to assert his claim on the foundation of the first respondent's affidavit which has been withdrawn and allowed to be substituted by the court. Thereafter, the third respondent could not thereafter be bothered to file his heads of argument or appear in court to file for upliftment of a bar. Given these realities the court is entitled to draw the adverse inference that in third respondent's own view, his claim had collapsed or for that matter that a guilty conscience needs no accuser.

Taking all the above into account, I do not think the evidence before this court shows that third respondent has a valid claim as a shareowner. Accordingly the claim by the fourth to the ninth respondents cannot stand as the third respondent who appointed them has failed to prove that he is indeed a share owner. I therefore uphold the point *in limine* raised by *Mr Chivhizhe* regarding the lack of *locus standi* by fourth to ninth respondents and their claim is accordingly dismissed.

The first respondent has made it very clear that he has no claim to the property and that his primary motive in filing the affidavit has been to shed light in his capacity as former Trustee and Director of the companies. He confirmed that he has resigned as both Trustee and Director.

I now turn to the claim by the second respondent and whether his claim justifies the release of the monies being held by the applicant to it as the successful claimant. The assets of Phoenix Trust are said to include the corporate stock of the two companies. The Trust, through its Trustees, is deemed the shareholder for the purpose of a bringing a derivative action against a wrong done to the company. The second respondent is stated as a Trustee as well as a Director of both companies. In his capacity as Trustee he therefore has legal title to the Trust property. Since the Trust is said to be the holder of the corporate stock whatever benefits this court may award accrue to the Trust in whom the companies are said to be vested.

Since the Trustee purports that the companies were transferred to the Trust some years ago by the late Brian James Rhodes, there must be in existence evidence which can be

produced in support of this claim. Such Trust document was not part of the annexures in this application.

As such, before the monies being held can be released, evidence of the Trust legally owning the companies must be furnished to this court through the Registrar of the High Court.

In the circumstances, I make the following order:

1. That the second respondent, Terence Cobden Rhodes as claimant in his capacity as Trustee of Phoenix Trust in whom the companies are held, is the lawful shareholder of the two companies.
2. That the second respondent, upon lodging with this court a valid Trust document effected by the deceased during his life time transferring the properties to the Trust, shall be entitled to require the Registrar of this Honourable court to release to the Trust, the sum of **$70 000** deposited with him in terms of r 206 (1) of the High Court Rules 1971.
3. That the third to the ninth respondents shall pay the costs of the applicants and the first and second respondents.

Honey and Blanckenberg, applicants legal practitioners
Winterton Holmes and Hill, first and second respondents legal practitioners
Tavenhave & Machingauta, fourth to ninth respondents' legal practitioners