ALDERCRAFT INVESTMENTS (PRIVATE) LIMITED
versus
DAVE CAPSOPOLOUS
and
DANIEL CAPSOPOLOUS
and
DOROTA TRADING (PRIVATE) LIMITED
and
JOHN GRAHAM STEPHENS
and
NICOLA ELIZABETH STEVENS
AND CENTRAL AFRICA BUILDING SOCIETY
and
THE SHERIFF OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 11, 16 and 23 July 2018

Urgent Chamber Application

T. Magwaliba, for the applicant
R. Stewart, for first, second and third respondents
No appearance for fourth-sixth respondents

MUSAKWA J: This is an application for an interdict whose draft order is framed as follows:

"TERMS OF THE FINAL ORDER SOUGHT

That you must show cause (sic) this Honourable Court why a final order should not be made in the following terms:

1. The Applicant be and is hereby declared the 90% (ninety percent) shareholder in the 3rd Respondent. The 1st and 2nd Respondent (sic) shall do and sign all things necessary (sic) to endorse the said shareholding in favour of the Applicant on a CR 2 to be filed and issued at the companies registry within 10 day (sic) of this order. Failing which the 7th

Respondent be and is hereby ordered to do and sign all things necessary to effect the registration of such shareholding.

2. 1st and 2nd Respondent (sic) to pay costs of suit.

INTERIM RELIEF GRANTED

Pending the determination of this matter, the Applicant is granted the following relief:-

1. The 1st and 2nd Respondent (sic) and or anyone acting on their instructions be and are hereby interdicted from doing, signing, transferring, encumbering, ceding and or acting in any manner that shall have the effect of diminishing the Applicant's right/prospective right in the 3rd Respondent's assets, which right is inclusive of but not limited to the rights conferred to the 3rd Respondent pursuant to the contract entered into by it with the 4th and 5th Respondents.
2. The 6th Respondent be and is hereby interdicted from allowing transactions on the Bank account of the 3rd Respondent, being namely.

Account Name: Dorota Trading (Pvt) Ltd

Account No: 1005299668

Bank: Central Africa Building Society."

As can be noted, the draft order is inelegantly drawn. The facts of the matter are as follows: The applicant claims to be the majority shareholder in the third respondent, although this is disputed. The applicant bases this claim on the fact that a share certificate which is part of the applicant's papers shows that it owns 900 ordinary shares in the third respondent. Other share certificates show that the first and second respondents own 50 shares each. The authorised capital of the third respondent is 10 000 ordinary shares of US$1 each. Proceedings have been instituted under case number HC 4601/18 in which a declaratur is sought to the effect that the applicant is the majority shareholder in the third respondent.

In 2015 the third respondent entered into an agreement in which it borrowed US$2 800 000 from Gila Shabtai. According to the loan agreement the purpose of the loan was for

- Property development
- Purchase of assets or equipment; and
- Other purposes which did not contradict the Charter of the third respondent.

The loan was repayable at an interest rate of 7% per annum. The precursor to the loan agreement was a joint venture agreement that was concluded between the third, fourth and fifth respondents in 2014.

According to averments of Ofer Sivan, the executive director of the applicant, it was established on 3 July 2018 that the first or second respondent have begun disposing of the third respondent's rights and interest, being the developments effected on the fourth and fifth respondents' property. Such rights and interest constitute the sole asset of the applicant. It is feared that if such a development succeeds then the pending proceedings under HC 4601/18 will be rendered useless. It is also contended that the disposal of assets is being done without shareholder approval. In addition, it is contended that the applicant has been denied access to the third respondent's bank accounts.

In opposing the relief sought the respondents have raised three preliminary issues. The first such issue is that the applicant has no cause of action. The second issue is that the matter lacks urgency. The third issue is that of *lis alibi pendens*. I now proceed to deal with each of the preliminary points.

No Cause of Action

Mr *Stewart* submitted that the applicant has no cause of action as it is relying on a loan agreement to which it is not a party. He referred to exchange control authority from CABS dated 21 September 2015 in which authority was granted to register the offshore loan for US$2 800 000. The lender is identified as Gila Shabtai and the borrower is Dorota Trading (Pvt) Ltd. Essentially Mr *Stewart*'s submission amounts to that there is no privity of contract between the applicant and Gila Shabtai.

On the other hand, Mr *Magwaliba* placed reliance on the applicant's majority shareholding in the third respondent. He further submitted the applicant's claim of being the majority shareholder is what is anticipated to be confirmed by way of a declaratory order in the applicaction instituted under case number HC 4601/18. He further submitted that if the declaratory order is made, it will enable the applicant to exercise management control of the third respondent. Mr *Magwaliba* also submitted that through its shareholding in the third respondent the applicant invested in the immovable property development. Therefore the cause of action is not the recovery of the loan. The applicant's cause is that assets are being disposed of without shareholder approval. He made reference to s 183 (1) (b) of the Companies Act [*Chapter 24:03*].

Section 183 (1) (b) of the Companies Act provides that:

> "Notwithstanding anything in the articles, the directors of a company shall not be empowered, without the approval of the company in general meeting—
> (*a*) to issue or allot reserve shares or new shares to any director or his nominee save in so far as they are issued or allotted to him or to such nominee as a member on the same terms and conditions as have been simultaneously offered in respect of the said issue or allotment of shares to all the members of the company in proportion to their existing holdings;
> (*b*) to dispose of the undertaking of the company or of the whole or the greater part of the assets of the company."

Going by the above provision, it cannot be said that the applicant has no cause of action. Firstly, even if the applicant's claim to majority shareholding in the third respondent is being challenged, the matter is yet to be determined. Without a judicial pronouncement being made on the issue, it cannot be said that the applicant's claim to majority shareholding based on allotted shares lacks merit. The only handicap in the present application is that there is no detail on the extent of the assets that are said to be in the process of being disposed of. I would therefore hold that the applicant's cause is established. If the matter was to be heard on the merits, the applicant would have been found wanting in failing to particularise the extent of the disposal.

Urgency

Mr Stewart submitted that as far back as March 2018 Gila Shabtai got to know about the disposal of the properties. This was after he was requested to avail bank details into which the loan would be repaid. The housing units were sold in 2017. Therefore, according to Mr Stewart the need to act arose in March 2018. He further submitted that the applicant is said to be known to Gila Shabtai. He also submitted that the applicant became aware of the tender to pay off the loan in January 2018. Reference was made to correspondence attached to the respondents' opposing papers. Essentially the argument was that the sale of the units has been known for a while and the applicant failed to act timeously. Reference was made to the cases of *James Mushore* v *Councillor Christopher L. Mbanga N.O. and Others* HH-381-16 and *Document Support Centre* v *Mapuvire* 2006 (2) ZLR 240 (H).

Mr *Magwaliba* again placed reliance on applicant's entitlement to shareholder rights in terms of s 183 of the Companies Act. He also submitted that all correspondence that the respondents are relying upon as evidence that the applicant sat on the matter was never addressed to the applicant. In essence, he maintained that the need to act arose in July when

the applicant became aware of the disposal. Thus the irreparable harm the applicant seeks to forestall is the dissipation of its shareholder rights.

Correspondence on record shows that Matizanadzo and Warhurst legal practitioners have engaged Messrs C. Nhemwa and Associates in connection with a statement of account concerning the third respondent and Gila Shabtai. There is no suggestion in this correspondence about the involvement of the applicant. Therefore *Mr Magwaliba* is correct that the need to act arose when the applicant got to know about the disposal of the units in July 2018. Knowledge of the transactions on an earlier date by Gila Shabtai cannot be extended to the applicant.

Notwithstanding that the applicant did not delay in instituting the present application that does not dispose of the matter. The aspect of irreparable harm that is attendant on urgency requires scrutiny. It is not in dispute that the land on which the housing units were built is owned by the fourth and fifth respondents. As stated earlier on, the fourth and fifth respondents are the ones who entered into a joint venture agreement for the development and subdivision of their land into plots by the third respondent. The purpose of this housing development envisaged a disposal of the plots upon their completion. This is because clause 2.2.10 makes reference to prospective purchasers of the units. The purchasers were to be identified by the developer (third respondent). Clause 2.2.11 provides for agreements to be entered into between the developer and the purchasers. In addition the joint venture agreement provides for transfer of ownership to the purchasers by the fourth and fifth respondents.

Therefore, even if the applicant has interest in the third respondent, the disposal of the property that it complains about is not irregular and would not require the approval of the third respondent at a general meeting. The applicant has not shown in what way the housing units in question constituted assets of the third respondent that required its approval in a general meeting before disposal.

Lis Pendens

Mr *Stewart* submitted that the relief that what the applicant seeks in the final order is the same as that being sought in the HC 4601/18. As for requirements for *lis alibi pendens* he cited the case of *Metallon Gold Zimbabwe (Pvt) Ltd and Metallon Corporation PLC* v *Collen Gura* HH-263-16.

On the other hand Mr *Magwaliba* submitted that the interim relief being sought is not the same relief that is being sought in HC 4601/18. He further submitted that the court has the discretion to grant the relief being sought as framed or amended. Mr Mgwaliba then handed in an amended draft order whose net effect as regards the interim relief and the final is essentially

the same notwithstanding the difference in the wording. In any event, the final relief in the unamended draft order is not the same as that in HC 4601/18 despite there being some similarities to some extent. I could have exercised my discretion to hear the matter on the merits had the applicant managed to overcome the challenge to urgency. See *Metallon Gold Zimbabwe (Pvt) Ltd and Metallon Corporation PLC* v *Collen Gura supra.*

Disposition

Having found that that the applicant has failed to establish irreparable harm on the issue of urgency, it follows that the application fails at this hurdle.

In the result, it is ordered that the application be removed from the roll of urgent matters. The applicant is ordered to pay the first, second and third respondents' costs.

Messrs Mutandiro, Chitsanga & Chitima Attorneys, applicant's legal practitioners
Matizanadzo & Warhurst, first, second and third respondents' legal practitioners