

BROADWAY INVESTMENTS (PRIVATE) LIMITED

Versus

THE TRUSTEES FOR THE TIME BEING OF  
OLIVER MANDISHONA CHIDAWU TRUST

HIGH COURT OF ZIMBABWE  
COMMERCIAL DIVISION  
CHILIMBE J  
HARARE 2 November 2023 & 1 October 2024

### **Opposed application**

*D.Sanhanga* for applicant  
*N. Mutseyami* for respondent

CHILIMBE J

BACKGROUND

[1] Applicant seeks a declaratory order in the following material terms; -

1. It is declared that the respondent does not own any shares neither is it a shareholder of applicant and has no right and or title to claim as regards the exercise of shareholder powers/rights within applicant.
2. Any act done or performed by the respondent whilst purporting to be a shareholder of the Applicant be and is hereby declared null and void.

THE DISPUTE BETWEEN THE PARTIES

[2] This dispute emanates from the business empire founded by the late Mr. Oliver Mandishona Chidawu. Under the aegis Gombe Holdings (Pvt) Ltd, the group comprises of 18 entities including applicant. The group's chief executive officer is Ropafadzo Sibusiso Chidawu who deposed to the founding affidavit in her capacity as director of Broadway. Ropafadzo Sibusiso Chidawu claimed authority to institute present proceedings from a resolution dated 5 July 2023 issued by herself and one Thamsanqa Nhamoinesu as directors of Broadway.

[ 3] It is common cause that Broadway was incorporated on 19 October 1989. Its initial shareholders (at 50% each) and directors were Messrs Douglas Munatsi and William Zimani.

It is not in dispute that at a date not stipulated by either side, Messrs Munatsi and Zimani transferred their shareholding to Mr. Chidawu. What transpired thereafter is fiercely contested.

[4] Ms Ropafadzo Chidawu`s account went thus; -the respondent Oliver Mandishona Chidawu Trust was registered on 25 March 1992. Mr. Chidawu as the settlor, whilst a Mr. Ngoni Kudenga-deponent of the opposing affidavit-was appointed trustee. “At some point but at a date unknown to the applicant” (sic), the Oliver Mandishona Chidawu Trust began to present itself as the sole shareholder of applicant. This position was apparently accepted by all those associated with applicant. The reason, according to Ropafadzo Sibusisiwe Chidawu, being that applicant was being poorly governed at the time.

[5] Mr. Kudenga`s version was that on 30 August 1991, two certificates comprising 100% shareholding in applicant were issued to Mr. Chidawu (28,000 shares) and Mrs Spiwe Chidawu (3,200 shares). These share certificates were, according to Mr. Kudenga, cancelled when the two shareholders each transferred their entire shareholding to the Oliver Mandishona Chidawu Trust on 29 April 2003.

[ 6] Ms Ropafadzo Sibusisiwe Chidawu states in her affidavit that in 2021, in her capacity as chief executive officer of Gombe Holdings, she caused a due diligence to be conducted on the group entities. A firm of legal practitioners- Bamu Attorneys- carried out the deep dive. Their Ms Carole Bamu filed a report which was annexed to the founding papers. Ms Ropafadzo Sibusisiwe Chidawu relied quite heavily on this report.

#### THE DUE DILIGENCE REPORT BY BAMU ATTORNEYS

[7] I may observe in passing that Messrs Bamu Attorneys were also the company secretary for Gombe Holdings as well as Broadway. I itemise hereunder the findings from Bamu Attorneys` deep dive relevant to the present dispute; -

- i. Share certificate -7 Chidawu Family Trust (dated 29 April 2003). Upon a diligent search, we could not locate an entity called Chidawu Family Trust. Instead we located a Trust Deed by the name of the Oliver Mandishona Chidawu Trust.
- ii. It is our considered view that this share certificate was drafted in error and that the intended name for the Oliver Mandishona Chidawu Trust to be the shareholder of the company.

- iii. In accordance with section 153 (3) of the Companies and Other Business Entities Act, a duly executed share certificate by a director of the company and a company secretary shall be prima facie evidence that the shares duly exist to the member listed in the share certificate.
- iv. In the present stance (sic), notwithstanding that the member on share certificate number 7 is incorrectly stated, it does not invalidate the existence of the shares specifically when the share certificate has been duly executed by the Director and the Company Secretary.
- v. To rectify the error, a new share certificate, containing the same number of shares and share certificate number must be issued to the Oliver Mandishona Chidawu Trust.

[8] Mr Kudenga was materially in agreement with the last conclusion. He submitted that if the shareholding in applicant company was reposed in an entity called Oliver Mandishona Family Trust, then such was in error. The rightful recipient of the shares was the Oliver Mandishona Chidawu Trust. Accordingly, the shares ought to be registered in the name of Oliver Mandishona Chidawu Trust. Mrs Spiwe Chidawu filed a supporting affidavit to the opposing papers.

[9] The deponent indicated that she was the widow to the late Mr Oliver Mandishona Chidawu. She averred that the Oliver Mandishona Chidawu Trust was the correct and rightful shareholder of Broadway. What transpired, according to Mrs Chidawu is that both the late Mr Chidawu and herself executed share transfer forms conveying 28,800 and 32,200 Broadway shares respectively, to the Oliver Mandishona Chidawu Trust.

[10] The intention was to transfer to the Oliver Mandishona Chidawu Trust despite the error which both Mr Chidawu and her made in writing the transferee as “Chidawu Family Trust”. There was no such entity as the Chidawu Family Trust. As such, the deponent urged the court to disregard what she termed as a misnomer on the share transfer forms as well as the shares citing the shareholder as the Chidawu Family Trust.

#### THE POINT *IN LIMINE*

[11] A point was taken by the respondent Oliver Mandishona Chidawu Trust that there was no proper application before the court. Mr. Kudenga took the position that the resolution authorising Ropafadzo Sibusiso Chidawu to institute these proceedings was issued by non-

directors. Neither Ropafadzo Sibusiso Chidawu nor Thamsanqa Nhamoinesu-the issuers of that resolution, was a director of Broadway.

[12] Mrs Spiwe Chidawu echoed the objection, but for different reasons. Whilst she associated herself with Mr. Kudenga in disputing the validity of Ropafadzo`s directorship, she differed with him on Thamsanqa Nhamoinesu. The latter was a director of respondent, together with herself. Mrs Chidawu accused Ropafadzo of having attempted to oust her (Mrs Chidawu) as a director of applicant.

[13] This machination was however arrested after Mrs Chidawu instituted proceedings resulting in an order of this court dated 30 November 2022 in case number HCHC 307/22 restoring her status as director of Broadway. In addition, the court declared as invalid, CR6 Forms (list of directors) filed with the Registrar of Companies on 20 May 2021 and 23 August 2022.

[14] Despite the forceful argument accompanying it, this point may be dispensed with quickly. The answering affidavit carried a CR6 form of 13 October 2022. This reflected the directors of applicant as Spiwe Chidawu, Ropafadzo Sibusiso Chidawu and Thamusanga Gideon Nhamoinesu. The fundamental challenge to the validity of the resolution authorising Ropafadzo had been that it was issued by non-directors. This is not factually correct. The court order issued in favour of Mrs Chidawu is not offended by the CR6 form of 13 October 2022. It confirms the status of Thamusanga Nhamoinesu and Ropafadzo as directors of applicant.

[ 15] The authorities have stated this point with clarity<sup>1</sup>. Where the authority of an individual to represent a body corporate is challenged, proof thereof must be furnished. And where the court is seized with a matter of evidence, it applies the usual rules to establish its probative value. Ms *Sanhanga* for applicant, cited the decisions of *Direct Response Marketing (Pvt) Ltd v Shepherd* 1993 (2) ZLR 218 and *Delta Beverages (Sorghum Operations) and Anor v Everson Chirau* HH-421-18.

[16] In the former decision, this court, per ADAM J cited with approval, at pages 221-222, the remarks of WATERMEYER J in *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk* 1957 (2) SA 347 (C), where the court held thus [ at 351-352]; -

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<sup>1</sup> *Madzivire & Ors v Zvarivadza & Ors* 2006 (1) ZLR 514 (S) and *Cuthbert Elkana Dube v Premier Service Medical Aid Society & Another* SC-73 19.

“The best evidence that the proceedings have been properly authorised would be to provide by an affidavit made by an official by the company annexing a copy of the resolution but I do consider that that form of proof is necessary in every case. Each case must be considered on its own merits and the court must decide whether enough has been placed before it to warrant the conclusion that it is the applicant which is litigating and not some unauthorised person on its behalf. Where, as in the present case, the respondent has offered no evidence at all to suggest that the applicant is not properly before the court, then I consider that a minimum of evidence will be required from the applicant”. [ Underlined for emphasis].

[ 17] Herein, on a balance of probabilities, in the absence of any other argument impugning the resolution, I find that the resolution to institute proceedings was validly procured. The point *in limine* cannot, on that basis, succeed and will be dismissed.

#### THE LAW ON DECLARATORY RELIEF.

[18] [2] I now turn to the relief sought by applicant. This application is brought in terms of section 14 of the High Court Act [Chapter 7:06] which provides as follows; -

##### 14 High Court may determine future or contingent rights

The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination

[19] The requirements of declaratory relief were articulated in the leading decision of *Johnsen v AFC* 1995 (1) ZLR 65 (S) where the Supreme Court held as follows at page 72; -

“The condition precedent to the grant of a declaratory order under s 14 of the High Court of Zimbabwe Act 1981 is that the applicant must be an —interested person, in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court. The interest must concern an existing, future or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated thereto. But the presence of an actual dispute or controversy between the parties interested is not a prerequisite to the exercise of jurisdiction. See *Ex parte Chief Immigration Officer* 1993 (1) ZLR 122 (S)

at 129F-G; 1994 (1) SA 370 (ZS) at 376G-H; *Munn Publishing (Pvt) Ltd v ZBC* 1994 (1) ZLR 337 (S) and the cases cited. It was rightly not in contention before the court a quo that the appellant was an interested person. Accordingly, the first stage in the determination of whether it was competent to grant a declarator was met.

At the second stage of the enquiry, the court is obliged to decide whether the case before it is a proper one for the exercise of its discretion under s 14 of the Act. It must take account of all the circumstances of the matter. See *Reinecke v Inc Gen Insurances Ltd* 1974 (2) SA 84 (A) at 95C; *Dyson v A-G* Page 73 of 1995 (1) ZLR 65 (H) [1911] 1 KB 410 (CA) at 417; *Burghes v A-G* [1911] 2 Ch 139 at 156. What, in the end, constitutes a proper case is where some tangible and justifiable advantage to the applicant is shown to exist. See *Adbro Invtm Co Ltd v Min of Interior & Ors* 1961 (3) SA 283 (T) at 285B-C; *Reinecke v Inc Gen Insurances Ltd supra* at 93D-E.” [Underlined for emphasis]

[20] In her founding affidavit, Ropafadzo Sibusisiwe Chidawu laid several grounds as proof of applicant’s present and future rights. These revolved around the applicant’s shares. Firstly, the deponent claimed that it was applicant’s right and entitlement to organise its affairs to expected standard of propriety. Secondly, she contended that such mandate included addressing the present anomaly where respondent was incorrectly recognised as a shareholder of the company.

[21] Associated with this point was the undesirable state of affair’s where respondent assuming, enjoyed and exercised the rights of a shareholder. Whilst these were not; particularised, one may presume that they included influencing or guiding the affairs of applicant company. In addition of course, to partaking in the fruits of commercial activity.

[22] As a third point, Ropafadzo Sibusisiwe Chidawu averred that the applicant needed to clarify shareholder issues in its capacity as a 40% shareholder in Heritage Insurance Company (Pvt) Ltd. The latter had been issued with a compliance directive by the Insurance and Pensions Commission (IPEC) to resolve ultimate beneficial owner (UBO) issues in Broadway. It was further submitted in argument by Ms *Sanhanga* that applicant was similarly obliged by sections 72 of the Companies and Other Business Entities Act [ Chapter 24:31] (“COBE”).

[23] Section 72 of COBE requires all companies to maintain, update and lodge a register of beneficial owners behind the company's shareholding with the Registrar of Companies. The information is required for various public and regulatory purposes. These include various references by financial institutions, or anti-money laundering monitoring by the Financial Intelligence Unit.<sup>2</sup>

[24] Based on these contentions, Ms *Sanhanga* reiterated that the vesting of the share certificates in Chidawu Family Trust put paid to the matter. The respondent had no basis to object to the order sought. It was clearly not a shareholder of applicant. The averment by Mr Kudenga and Mrs Spiwe Chidawu that the Oliver Mandishona Chidawu Trust be substituted for the Chidawu Family Trust was untenable. Counsel therefore submitted that this was a proper case for exercise of the court's discretion.

[25] Mr Kudenga and Mrs Spiwe Chidawu basically assumed the position that respondent was indeed the sole shareholder of applicant. The fact that the actual share certificate number 7 was issued in the name of a different party-Chidawu Family Trust -was inconsequential. This issuance was a mistake. By implication, the argument in the opposing papers was that not only should the declaratur fail, but that the rights of respondent as shareholder be asserted.

[26] In the same vein, it was argued on behalf of respondent that; -

“The Applicant seeks a declaratory order confirming the shares in question are owned by the Chidawu Family Trust and not the Respondent.” -and that-

“It is submitted the Respondent has fully managed to show that it is a shareholder of the Applicant as it has attached documentation to this effect namely share transfer forms and share certificates from the former shareholders William Zimani and Douglas Munatsi to the late Oliver Chidawu and Spiwe Chidawu and subsequently to the Respondent albeit the misnomer.”

[27] On this basis, Ms *Mutseyami* for respondent, anchored her argument on the factual contention by Mrs Spiwe Chidawu that the intent was to transfer shares to respondent trust. It was also her submission that in a declaratory application, the competing interests of other parties were equally important.

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<sup>2</sup> An anti-financial crime unit of the Reserve Bank of Zimbabwe described inter alia, in section 299 of COBE.

## ANALYSIS OF THE ARGUMENTS

[28] The core issue to determine is whether applicant has successfully established the existence of a direct and substantial interest in the form of present, future or contingent rights or obligations. The subject matter herein concerns a shareholding dispute in a registered company. The doctrine of juristic or corporate personality forms a cornerstone of our commercial law. Flowing therefrom is a spectrum of rights and obligations in the realm of both codified and common law. The body corporate is invested with full rights as a juristic persona to champion its rights and interests. The Supreme Court observed thus at [ 10] in *Tindwa v The Sheriff of Zimbabwe & Anor* SC 94-22, per HLATSHWAYO JA (as he then was); -

“The concept of separate legal personality of a company is the cornerstone of company law. The cardinal principle of company law, as enunciated in *Salomon v Salomon & Co Ltd* [1897] AC 22 (HL) and *Dadoo Ltd & Others v Krugersdorp Municipal Council* 1920 AD 530 at 550, is that a company is a separate entity that is distinct from its members. The concept of corporate personality is that a company, once it is registered, acquires a personality of its own quite distinct from its members or shareholders. See *Welli-Well (Pvt) Ltd v Malvern Imbayago & Anor* SC 8/21 at p 6.”

[29] It is not in dispute that the shareholding in applicant company is recorded [ per the share certificates] as being vested in an entity named Chidawu Family Trust. The respondent Oliver Mandishona Chidawu Trust is a different persona from the shareholder Chidawu Family Trust. Despite this difference, respondent has appropriated for itself the rights of Chidawu Family Trust as shareholder.

[30] Granted respondent lays claim to the shareholding and has advanced reasons thereof. I raise two issues from that claim. Firstly, respondent claims that the shareholding in applicant company was incorrectly issued in favour of Chidawu Family Trust. And that such allotment was caused by an anomaly or misnomer. Despite recognition of that position, respondent took no steps to rectify the share register.

[31] Secondly, despite being visited with these proceedings, respondent did not elect to launch its own spear in the form of a counter application. It was content to brandish a shield, to use the parlance applied in the celebrated case of *Sumbereru v Chirunda* 1992(1) ZLR 240 (H).



This decision was cited with approval in *Dimbi v Ronwen Investments (Pvt) Ltd* SC 8-13 where the court held as follows per MALABA DCJ (as he then was) at page 3:-

“In *Sumbereru v Chirunda* 1992(1) ZLR 240 (H) it is stated that opposition to an application on notice of motion is a shield of defence not a sword of attack. A respondent who has an attack must mount a counter application in terms of rule 229A of the High Court Rules. The court *a quo* correctly concluded that the respondent company had an uncontested title. The appellant conceded in the court *a quo* that the property is registered in the name of the respondent.”

#### DISPOSITION

[32] In the absence of a similar counter attack, the applicant's prerogative over its corporate affairs becomes unassailable. This includes the right to deal with its share register as dictated by discretion, articles of association and the law. For the same reason, I am also persuaded that this matter warrants the court's discretionary intervention to grant the relief sought. I am however not inclined to grant the second part of the prayer seeking a declaration of previous acts of respondent as a shareholder.

[33] I advance two reasons for such reluctance. Firstly, the fuller facts regarding respondent's acts as shareholder were not pleaded. Applicant has not laid before the court the said acts as well as consequences thereof. Nor has it properly explained why its directors suffered that situation for as long as they did.

[34] Secondly, it is apparent from the papers that respondent has been acting as shareholder for the better part of two decades. Declaring as invalid all acts carried out by respondent in the capacity of shareholder, minus a fuller inquiry into such acts, might be more deleterious than helpful.

In the result, the following order is made; -

1. The application succeeds and it is declared that the respondent does not own any shares neither is it a shareholder of applicant and has no right and or title to claim as regards the exercise of shareholder powers/rights within applicant.

2. The respondent be and is hereby ordered to pay the costs of suit.

*Matizanadzo Attorneys*- applicant's legal practitioners  
*Gwaunza and Mapota* -respondent's legal practitioners

[CHILIMBE J\_\_01/10/24]