N.K TRADING AFRICA GMBH & CO KG
and
MONACHROME (PVT) LTD
versus
TONDERAI KANYANGARARA
and
REGISTRAR OF COMPANIES AND OTHER ENTITIES N.O
and
MINISTER OF MINES AND MINING DEVELOPMENT N.O

HIGH COURT OF ZIMBABWE
CHIRAWU-MUGOMBA J
Harare, 5, 18 and 20 July 2022.

OPPOSED APPLICATION

R. H. Goba with *S Murondoti*, for the applicants
G.R.J. Sithole, for the 1st respondent
No appearance for the 2nd and 3rd respondents.

CHIRAWU-MUGOMBA J:

[1] This is a court application for a *declaratur* and consequential relief in terms of the High Court Act [*Chapter 7:06*]. The founding affidavit to the application was deposed to by one Traudel Kleuters who states that she is a shareholder and director of the first applicant and also a director of the second applicant. She states that the first applicant is a registered company operating in and based in Germany and that it is the shareholder of the second applicant. This was through the purchase of the entire undertaking and separately the entire assets of the second applicant through a scheme of arrangement whilst the second applicant was in judicial management. On the other hand, the second applicant is a company duly registered in and operating in Zimbabwe. Between the 12th of September 2012 and 4 December 2019, it was under judicial management.

[2]. The basis of the application is that the first respondent has held himself out to be both a director and a shareholder of the second applicant when this is not the case. He has threatened to enter into contracts with 3rd parties, harassed applicants' employees and demanded the company's mining certificates. He has also stolen the applicants' properties purportedly

acting on a void CR14 lodged with the second respondent whilst the company was in judicial management.

[3]. The second applicant has many registered mining claims. At the time that it was under judicial management, the judicial manager was one Christopher Masawi, *"Masawi''.* The latter as part of his role sought investors to take over the company and settle claims. A scheme of arrangement registered in this court under HC 10868/15 was entered into and after competition from potential investors, the first applicant emerged as the front runner. It then purchased the entire undertaking of the company. This included through an asset purchase agreement the entire assets of the second applicant. The transitional arrangement agreed to through Masawi in his capacity as the judicial manager was that first applicant would assume control of the assets which it had purchased whilst at the end of the judicial management process, there would be a cession of the second applicant. The first applicant would then be authorised to appoint new directors. The first applicant in pursuance of the above paid dues to creditors and advanced several loans to the second applicant.

[4]. The deponent's late husband one Nikolaus Kleuters, sought the assistance of individuals in running the affairs of the applicants. One such individual is the first respondent. At some stage, the first respondent lodged a CR 14 purporting to appoint directors, including himself to the board of the second applicant. Second applicant was subsequently removed from judicial management through an order of this court under HC 9113/19. An affidavit by Masawi confirms that the first applicant is the shareholder of the second applicant.

[5]. Upon removal of the second applicant from judicial management, the first applicant sought to appoint directors but the file could not be located at the second respondent. Nikolaus Kleuters also passed away. The first respondent took advantage of this death and led authorities to believe that he was a director of the second applicant. He went on to disrupt the activities of the second applicant in various ways. This includes interfering with the first applicant's attempts to appoint a board of directors.

[6]. The applicants therefore seek a *declaratur* and an interdict to stop the first respondent from holding himself as a director and shareholder of the second applicant as he is neither of the two.

[7]. The first respondent is strenuously opposed to the application. He raises several preliminary issues as follows. That (1) there are material disputes of fact that are not capable of being decided on paper, (2) that there is need to verify the status of the first applicant and

(3) that the second applicant is not properly before the court since he is one of the directors and has not been involved in this lawsuit.

[8]. On the merits, he makes the following averments. He is a director of the second applicant as per the CR 14 form filed with the second respondent. This status obtains unless legally altered. The deceased Nikolaus Kleuters only had 49% shareholding in the second applicant. It is not possible at law for a foreigner to hold 100% shareholding. He owns 19% shareholding as supported by a copy of shareholding structure from the Zimbabwe Investment Authority.

[9]. The first respondent was appointed a director of the second applicant at the same time as the deceased. He denied threatening anyone and contends that he has a right to be involved in the affairs of the second applicant.

[10]. In his heads of argument, the first respondent raised an issue relating to the payment of security for costs based on the first applicant's status as a *peregrini.* Mr *Sithole* abandoned this point after correspondence was produced by the applicants' legal practitioners to the registrar tendering security for costs.

[11]. The court *mero motu* as it is entitled to raised with the applicants' legal practitioners the propriety of attaching annexures to the answering affidavit without leave of the court. Mr *Goba* submitted that there was nothing amiss in this since an answering affidavit is a response to issues raised in the opposing affidavit. He drew the court's attention to R59(12) which reads as follows.

> (12). After an answering affidavit has been filed, no further affidavits may be filed without leave of the court or a judge.

He submitted that if there were any issues in relation to the annexures, the first respondent is not precluded from seeking leave of the court or a judge to file a further affidavit. I respectfully disagree with that contention. See *Nashe Family Trust* vs. *Chiwara and ors,* 2018(2) 212(H). The trite position of the law remains that an application stands or falls on its founding affidavit. The reason is that the respondent will not have an opportunity to respond to new issues raised in an answering affidavit. A respondent who perceives that they must attach annexures must seek leave of the court or a judge. This is done so that there is a clear road map on further affidavit(s). In my view R59(12) relates to supplementary affidavits in a situation where one of the litigants perceives that they need to supplement the information they have placed before the court. Accordingly, the annexures are expunged from the record.

[12]. The contention by the first respondent that there are material disputes of fact is misplaced. As is trite, courts must strive to take a robust approach in dealing with applications. See *Dube* vs. *Murehwa and anor,* SC-68-21. In my view, the central issue is whether or not the first respondent was properly appointed as director of the second applicant. I note that both the applicants and the first respondent have laid before the court facts that have little bearing on the dispute at hand. Those cannot be by any stretch of imagination be termed material disputes. They fall into the category of mere disputes.

[13]. The applicants have set out a clear trajectory of how the first applicant acquired the second applicant. This includes the court order in HC 9113/19 dated the 4th of December 2019 cancelling the judicial management of the second applicant. HC 10304/12 dated the 12th of September 2012 placed the second applicant under judicial management. The scheme of arrangement proposal of the applicant is attached. The sale of business assets agreement between Masawi and the first applicant is attached. HC 10868/15 dated the 28th of September 2016 is attached and confirms the scheme of arrangement as approved by the creditors and members of the second applicant. The order also confirms that the scheme is binding on all members and creditors. Masawi confirmed receiving payment of $2, 410, 236 for the scheme payment by the first applicant. The attempt by Mr *Sithole* to claim that the first applicant bought only assets and not shares thus it has no *locus* is clearly misplaced. Clearly misplaced as well is the contention that the applicants' status needs to be verified first. This is clearly clutching at straws by the first respondent.

[14]. The sole issue as stated above revolves around the appointment of the first respondent as a director and shareholder of the second applicant. The first respondent has skirted the issue. He has not responded to the assertion by the applicants that he could not have been so appointed whilst the second applicant was under judicial management.

[15]. In an illustrative judgment in *Filannino* vs. *Grimmel N.O and ors,* 532-21, MANGOTA J discusses the duties of a judicial manager and more importantly the fact that whilst in judicial management, no legal processes can take place against a company. It is pertinent to note that judicial management is now found in the Insolvency Act, [*Chapter 6:07]*. See *Mettallon God Zimbabwe (Pvt) Ltd and ors,* vs. *Shatirwa Investments (Pvt) Ltd*, SC-107-21. However, the second applicant is not affected since the new Insolvency Act was enacted in June 2018, after it had already been placed into judicial management.

[16]. It is clear from the C.R 14 that the first respondent was purportedly appointed a director of second applicant on the 31st of March 2017. At that time, the second applicant was still under judicial management. The second applicant was only removed from judicial management on the 4th of December 2019. During the period of judicial management, the company was in the hands of Masawi in his capacity as the final judicial manager. His powers were set out in s306 of the former Companies Act [*Chapter 24:03]*. see *BALASORE ALLOYS LTD* vs *Zimbabwe Alloys Ltd and ors, HH-228-15*. CHITAPI J explained as follows.

> "The final judicial manager exercises powers set out in s 306 of the Companies Act. The powers exercisable under the section include the take over from the provisional judicial manager the "management of the company and to comply with any direction or order of the court made in the final judicial management or its variation. The final judicial manager is required amongst other expectations to promote the interests of members and creditors of the company and to run the affairs of the company in a manner he considers most economical. The judicial manager's primary role therefore is to try and salvage the company out of the red. He or she takes or assumes the place of the directors and management of the company and carries out the statutory functions and obligations expected and required of the company."

[17]. The first respondent could therefore not have been appointed a director and shareholder of the second applicant. The Zimbabwe Investment Authority license does not take the first respondent's defence any further as it was issued on the 22nd of September 2017 at a time that the second applicant was still under judicial management. In any event, if the first respondent's appointment as director and shareholder is invalid, the license cannot cloth illegal acts with legality. Understandably, Mr *Sithole* was unable to advance any argument to support the first respondent's assertion that he is a director and shareholder of the second applicant. As he rightly submitted, this would have amounted to leading evidence from the bar because the first respondent as observed never responded to the assertion that he could not have been so appointed during a time when the second applicant was in judicial management.

[18]. The requirements for the granting of a *declaratur* have been set out in a plethora of cases. See *Johnsen* vs. *Agriculture Finance Corp*, 1995(1) ZLR 65 (S) in which GUBBAY CJ set out the requirements. The applicants have a real interest in the matter given the history enunciated above. This pertains to the acquisition of the second applicant by the first applicant as supported by a clear legal process. They have a right to protect the second applicant from falling into wrong hands under an illegal CR14. In my view, the applicants

have also set out a clear case for the grant of consequential relief. The first respondent's self-appointment as a director and shareholder of the second applicant is a nullity. All his acts in furtherance of the illegality are a nullity. Even if he had not committed any acts of sabotage against the second applicant, this would not turn his appointment into a legal act. The acts complained of by the applicants serve to show that having illegally appointed himself as director and shareholder of the second applicant, he is bent on disturbing its operations and to reap where he has not sown. For that reason, he will be slapped with an order of costs on a higher scale.

DISPOSITION

IT IS ORDERED THAT: -

1. The CR14 lodged by the first respondent with the second respondent dated the 3rd of April 2017 in respect of the second applicant be and is hereby declared null and void.

Consequently

2. It is declared that the first respondent is not a shareholder or director of the second applicant.
3. The first respondent and anyone acting through him or on his authority be and are hereby prohibited from being physically present at any mining claims registered in second applicant's name and from taking any assets belonging to the applicants.
4. Any act or conduct done or performed by first respondent whilst purporting to be a director or shareholder of second applicant be and is hereby declared null and void.
5. The second respondent be and is hereby ordered to accept for filing, any documents presented by the first applicant in its capacity as the shareholder in second applicant for the purpose of reconstituting the second applicant's board of directors.
6. The 3rd respondent be and is hereby ordered to accept payment of statutory fees for the claims registered in the name of the second applicant.
7. The first respondent shall pay costs on a legal practitioner to client scale.

Absolom Attorneys, applicants' legal practitioners.
Gurira and Partners, 1st respondent's legal practitioners