HB 175/16
HC 2693/15

WARMAN ZIMBABWE (PVT) LTD
And
C H WARMAN HOLDINGS (PVT) LTD
And
WENDY ANNE KING N.O.

Versus

STEWART DHLIWAYO
And
ZWELIBANZI LUNGA
and
MANDLAKHE NCUBE
and
MINISTER OF YOUTH INDIGENISATION
& EMPOWERMENT
and
REGISTAR OF COMPANIES
and
MERCHANT BANK OF CENTRAL AFRICA
and
NATIONAL MERCHANT BANK
and
ECOBANK ZIMBABWE
and
EXHIBITION ENTERPRISES (PVT) LTD
and
TRUSTEES OF WARMAN ZIMBABWE MANAGEMENT
SHARE TRUST
and
TRUSTEES OF WARMAN ZIMBABWE EMPLOYEE
SHARE TRUST

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 15 & 30 JUNE 2016

Opposed Application

Advocate T. Mpofu for applicants
Z. Ncube for respondents

MAKONESE J: First applicant is Warman Zimbabwe (Pvt) Ltd, a duly registered company under the laws of Zimbabwe. Second applicant is a duly registered company in

Australia and is the majority shareholder, holding 99.9% shares of 1st applicant. Third applicant is Wendy Anne King, acting in her capacity as the Executor of the Estate of the Late C H Warman. The Estate of the Late C H Warman has a minority shareholding of 0.1% in 1st applicant. First respondent in this matter is employed by 1st applicant as Branch Manager at Bulawayo. His status with 1st applicant is the subject of the dispute before this court. Second respondent is a former senior employee of a National Indigenisation and Economic Empowerment Board. Third respondent is an employee of the 1st applicant. Fourth respondent is the Minister of Indigenisation and Economic Empowerment who is responsible for the supervision and conduct of the indigenization policies in Zimbabwe. The 6th to 11th respondents are all parties who have been cited by virtue of their substantial interest in the matter.

The applicants seek an order in the following terms:

"It be and is hereby ordered that:

1. The Indigenisation of 1st applicant which was based on an unauthorized indigenization plan submitted by 1st respondent be and is cancelled.
2. The appointment of 1st, 2nd and 3rd respondents as directors of 1st applicant is unlawful and of no effect.
3. The allotment of shares in 1st applicant to 9th, 10th and 11th respondents is unlawful and of no force or effect.
4. The cancellation and substitution by 1st, 2nd and 3rd respondents of 1st applicant's Articles of Association is invalid and of no force or effect.
5. 4th, 5th and 6th respondents are hereby directed to remove the names of the 1st, 2nd and 3rd respondents wherever their names appear as signatories in 1st applicant's bank accounts held by them.
6. Cost on a punitive scale against 1st and 2nd respondents jointly and severally with the one paying the other to be absolved."

This application is strongly resisted by 1st respondent who raised various points *in limine*. At the hearing of this matter I listened to arguments on the preliminary issues and on the merits. I reserved judgment. I will deal with each of the preliminary issues raised by the 1st respondent but before doing so it is necessary to set out the brief background to this matter.

Background

C H Warman Holdings (Pvt) Ltd, a registered Australian company, being the sole shareholder of Warman (Pvt) Ltd had a trading relationship, through its South African subsidiary, Weir Minerals Africa (Pty) Ltd. After lengthy negotiations it was resolved that Weir Minerals and C H Warman Holdings would manage Warman Zimbabwe (Pvt) Ltd. Weir Minerals took over the running of Warman Zimbabwe in 2008. All capital expenditure had to be approved by Weir Minerals. All staff recruitment was directed and approved by Weir Minerals. Technical support services and the payroll were controlled and managed by Weir Minerals. First respondent was appointed to manage Warman Zimbabwe on 7th August 2002. First respondent also acted as the Company Secretary for Warman Zimbabwe. Sometime in 2015, 1st respondent commenced initiatives to comply with the indigenisation of Warman Zimbabwe, in terms of laws of Zimbabwe. To that end, 1st respondent engaged the Ministry of Indigenisation and Economic Empowerment, resulting in compliance with the indigenisation laws. First respondent avers that at all material times he kept the shareholders informed at all stages of compliance. A dispute has now arisen with the applicants alleging that 1st respondent fraudulently allocated shares to himself without the knowledge and consent of the shareholders. A resolution was passed on 12 October 2015 authorising Tariro Memezi Nyoni to sign all documents necessary for the purpose of instituting legal proceedings against the respondents. A separate resolution was also passed empowering Tariro Memezi Nyoni to manage and transact the business affairs of Warman Zimbabwe, including marketing and sale of products and purchasing of stock and generally to manage the company's employees, and to prosecute and defend any claims against the company. This court is essentially called upon to declare illegal and non-binding the indigenisation of Warman Zimbabwe, which it is alleged was done without the authority of the shareholders.

Preliminary Issues

I now proceed to deal with the points *in limine*.

No Company Resolution authorizing Tariro Memezi Nyoni to institute proceedings

It is contended on behalf of the 1st respondent that the Board of Directors of Warman Zimbabwe never convened a meeting where a resolution was passed giving authority to Tariro Memezi Nyoni. 1st respondent argues that as the Company Secretary he ought to have generated such a resolution following a properly constituted Board meeting. 1st respondent argues that the absence of a valid company resolution is fatal to the court application. For this reason alone, 1st respondent avers that the application ought to be dismissed without consideration of the merits.

Section 9 of the Companies Act (Chapter 24:03) provides that:

> "A company shall have the capacity and powers of a natural person of full capacity in so far as a body corporate is capable of exercising such powers."

In *Madzivire & Ors* v *Zvariradza & Ors* 206 (1) ZLR 514 (S), the Supreme Court held that:

> "… a company, being a separate legal persona from its directors, cannot be represented in a legal suit by a person who has not been authorized to do so. This is a well established legal principle, which the courts cannot ignore. It does not depend on the pleadings of either party." The court cited with approval the remarks in *Bursten* v *Yale* 1958 (1) SA 768 (W) where it was held that the general rule is that directors of a company can only act validly when assembled at a board meeting.

There is no evidence that the Board of Directors of Warman Zimbabwe served any notices of a meeting to pass the required resolution authorizing Tariro Memezi Nyoni to represent the applicants. Failure to convene a Board meeting renders the resolution authorizing Tariro Memezi Nyoni invalid. The applicant did not seek the leave of the court to file a proper resolution. It is my view that the court application, is for that reason not properly before the court.

<u>Wendy King (NO) had no *locus standi*</u>

The first respondent contends that there is no documentary proof that Wendy King has the appropriate Letters of Administration to deal with the affairs of the Estate C H Warman. It is

further alleged that the Master of the High Court is not cited as a party to the court application. I observe that this point was not seriously pursued by the 1st respondent. In my view there was no need to cite the Master of the High Court for purpose of Rule 248 (1) (a) of the High Court Rules, 1971. The rule provides as follows:

> "In the case of any application in connection with –
>
> (a) the estate of a deceased person; or
> (b) the appointment or substitution of a provisional trustee in insolvency or of a provisional liquidator of a company or trustee of other trust funds;
> a copy of such application shall be served on the Master not less than ten days before the date of set down for this consideration, and for report by him if he considers it necessary or the court requires such a report."

A clear reading of the provisions of Rule 248 (1) (a) indicate that the requirement under this rule finds no application on the facts of the present case. That point *in limine* was therefore not well taken. The court shall therefore not detain itself on that point.

Whether there is material dispute fact which cannot be resolved on the papers

The version of events deposed to in the founding affidavit, opposing affidavit and answering affidavit reveal that the parties are locked in a dispute over the company known as Warman Zimbabwe. On the one hand the applicants contend that they have an open and shut case. The 1st respondent purported to indigenize the company when he had no authority to do so. Further, 1st respondent allocated shares to himself when he had no legal basis to act in that manner. For his part first respondent contends that all material times he kept the shareholders in the loop as regards the company's indigenization processes. The applicants were clearly aware or ought to have realised that there was a material dispute of facts in this matter. For this reason, the matter should have proceeded by way of action proceedings to allow the parties to lead *viva voce* evidence.

See the cases of *Magurenje* v *Maphosa & Ors* 2005 (2) ZLR 44 (H); *Nyazorwe* v *Guta & Ors* H-234/88; *Masuku* v *National Foods Ltd & Anor* 1983 (1) ZLR 232

Where there is a genuine dispute of fact, the court has a discretion whether to dismiss or refer the matter to trial. It has no escaped my notice that the applicants treated the issue of whether or not a dispute of fact exists in a very cursory manner. The issue is dealt with in applicants' heads of argument in the following manner:

> *"The first point taken by first respondent is that there are material disputes of fact which dispute cannot be resolved on affidavit evidence. This point is ill taken. The matter stands to be resolved on issues that are common cause such that first respondent was appointed by no one to the Board and that no shareholder disposed of their shareholding. Not only should the matter be resolved on issues that are common cause, the legal implications of those issues are very dear. That with respect is the end of the matter,"*

At the time the deponent to the founding affidavit commenced the application proceedings he was aware of the factual disputes in the matter. This dispute revolves around whether the 1st applicant sought to indigenize the company of his own free will without the express or implied authority of the shareholders. That dispute cannot be resolved without leading *viva voce* evidence. In my view, this is not a matter where the court should, in the exercise of its discretion, dismiss the matter but refer it to trial.

Accordingly it is ordered as follows:

1. The matter be and is hereby referred to trial and the papers filed of record shall stand as pleadings.
2. The applicants to pay the costs of suit.

Messrs Coghlan & Welsh, applicants' legal practitioners
Messrs Ncube & Partners, respondents' legal practitioners