RICHARD ZVINAVASHE N.O
versus
BIKITA MINERALS (PVT) LTD
and
THE MINISTER OF JUSTICE, LEGAL AND
PARLIAMENTARY AFFAIRS
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 21 November 2016 & 23 August 2017

Opposed Matter

J Koto, for the applicant
Ranchord , for the 1st respondent
Chimiti, for the 2nd respondent

FOROMA J: This is an application in terms of which the Executor testamentary of the estate of the late Vitalis Musungwa Gava Zvinavashe seeks an order that the Minister of Justice Legal and Parliamentary Affairs appoint an inspector to investigate the affairs of first respondent (a company) in terms of s 158 (a) (ii) of the Companies Act [*Chapter 24:03*] on the basis that the applicant believes that the said company my have fraudulently and or oppressively conducted its affairs to the prejudice of the deceased estate. The applicant believes that the first respondent may have attempted to unfairly forfeit the deceased's alleged 15% shareholding in the company. The application has been opposed by the first respondent which claims that the late Vitalis Musungwa Gava Zvinavashe did not hold any shares in it and thus there exists no basis nor has any basis been proved to justify the investigation of its affairs. Second respondent the Minister of Justice Legal and Parliamentary Affairs cited in his capacity as the Minister responsible for the administration of the Companies Act [Chapter 24:03] did not oppose the application presumably being content to abide the order of the court. The third respondent which has been cited in its

capacity as the authority which overseas the administration of deceased estates in Zimbabwe did not oppose the application.

The following matters are common cause between the parties –

i. The applicant is the eldest son of the late Vitalis Musungwa Gava Zvinavashe hereafter referred to as "the deceased" and also the executor testamentary duly appointed in terms of letter of administration issued to him by the third respondent on 22 April 2009.
ii. The deceased who died on 10 March 2009 at Harare was appointed a director of the first respondent on the 13th November, 2004 and at the time of his death he was still a director of first respondent.
iii. The deceased was appointed a director of first respondent on the same day and date as Dzikamai Calisto Mavhaire who at the time of deceased's demise was the chairperson of the Board of Directors of the first respondent.
iv. Janet Sakuerwa Mutasa of JSM Consulting Private Limited is the Company Secretary of first respondent.

In support of the application applicant deposed to an affidavit wherein he claimed that he was privy to the deceased's business interests and that he got to know that the deceased held 15% shareholding in the first respondent company although he does not disclose precisely how he got to know about the deceased's shareholding aforesaid as no share certificate for the said shares was produced. He sought from first respondent the details of the deceased's shareholding in first respondent and was advised by the Chairman of first respondent through letter dated 7 July 2010 that the deceased was not a shareholder of the company but only a director which information he did not readily accept perhaps also because on investigation he came to know that D C Mavhaire was a 21 % shareholder in first respondent. Applicant's doubt led him to make investigations with the Registrar of Companies where he came across information which did not settle the matter but raised suspicion in his mind. He came across a CR 14 form annexed to the founding affidavit as Annexure D signed on 7th March 2009 showing that the deceased had ceased to be a director of first respondent on 7 March 2009 on account of his death and yet the deceased died on 10 March 2009. In his founding affidavit the applicant actually avers that the CR 14 is a fraudulent document for the reason. He goes so far as to say in paragraph 27 of the

founding affidavit – "it is clear therefore that 3 days before his death the board of directors chaired by Honourable Mavhaire had already written to the Registrar of Companies through its consultants, to have my father removed from the office of Director on false claims that he had died."

By reason of his mistrust of Mr Mutumbwa (the deceased's personal lawyer who is supposed to have detailed information of the deceased's affairs) which mistrust stems from the fact that applicant considers that Mr Mutumbwa is conflicted by reason of also .being DC Mavhaire's personal lawyer and first respondent's lawyer. Applicant indicates that he could not rely on the information that may be provided by Mutumbwa in regard to this matter in these circumstances. His situation has not been made any easier by a soiled relationship with a sibling who he believes may have hidden from him documents pertaining to the deceased's affairs who applicant believes is in connivance with Mr Mutumbwa. Applicant harbours strong suspicions that there is connivance between the board of directors of first respondent and those who he believes have hidden the deceased's documents from him and for this reason he believes that he has no other way of establishing the deceased's shareholding in the first respondent company. The situation appears to have been further complicated by the applicant's claim that management of first respondent assured him that his father's shareholding was safe thus making the information he subsequently obtained from D.C Mavhaire suspect. It is for the foregoing reasons among others that he has considered it in the interests of the deceased estate that the court should order an investigation of the affairs of first respondent with a view to clarify the positon regarding any shareholding the deceased had in first respondent company.

First respondent in opposing the relief sought by applicant denies that the CR 14 is fraudulent as suggested by applicant and points out that there was a typographical error when the CR14 was prepared in that the information recorded in regard to the date of resignation of one of the directors namely Phillip Vermont Roger Harrison on 7 March 2009 was transferred to the entry in regard to the deceased. In support of this contention first respondent brought to the court's attention the face of the CR14 form from which respondent highlights that there are 2 dates namely 2 July 2009 being the date of filing of the CR14 and 10 July 2009 with the Registrar of Companies' stamp and signature at the top right hand side of the document being the date of processing to bolster the contention that the entry of 7 March 2009 was inserted in error.

Respondent also disputes that applicant had been advised by any of the staff at first respondent's premises that his father had any shares in the company as not only did applicant not attach supporting affidavits by anyone who conducted the interviews of first respondent's workforce but that none of the persons contacted at first respondent's premises would have been able to make such statement relating to the deceased's right to shares in first respondent.

First respondent strenuously maintained that no evidence was produced that the deceased held any shares in second respondent and stood firmly by D C Mavhaire's response to applicant that the deceased was not a shareholder in the first respondent company.

The first respondent's opposing affidavit was deposed to by its Company Secretary Ms J S Mutasa aforesaid.

Despite sterling efforts to dispute that the deceased had any shareholding in first respondent and attempting to discredit applicant's accusation or suspicion that the CR14 recording the date of death of his father as the 7 March 2009 was fraudulent, Ms Mutasa did not attempt to explain why the said CR14 form was recorded as signed by her on 7 March 2009. The absence of an explanation of the Company Secretary's signature on 7 March 2009 raises strong suspicion especially in light of the suggestion that the CR 14 in question was filed on 2 July 2009 and processed on 10 July 2009 about 4 months after its signature.

The first respondent also refers to an e-mail by Beauty Hwindizi dated 19 March 2009 as having been sent to enable her (J Mutasa's) office to prepare the CR14 for filing. No response to the e-mail has been furnished to the court. It is beyond doubt that the alleged date of resignation of Mr Harrison and the date of death of the deceased are not the same and that the response to the e-mail was not likely to have reflected them as the same date. For this reason it is not so readily understandable how the only two entries which were showing 2 different dates could have been confused as suggested if they were provided in response to the e-mail by B Hwindizi.

First respondent's counsel in its heads of argument argued that none of staff at first respondent's premises could have given the information alleged by applicant in regard to the alleged shareholding because such information was in the custody of the Company Secretary. The Company Secretary did not adduce evidence that her office exclusively held this information to the exclusion of any and all members of staff. It would not be strange for instance that the office of the Personnel Manager, or the Finance Manager might have had access to this kind of

information. Whilst it is true that details of first respondent's shareholding may be confidential it may not be so highly sensitive that it should be made inaccessible to senior managerial staff.

Company financial records are not a preserve of the Company Secretary. Such records are accessible to the Internal Audit Staff and it would not be surprising that the most junior book keeper in a private company would be able to access information pertaining to company dividend policy and consequently shareholding records. None of the parties disclosed the dividend records of first respondent which one expects would have revealed the dividends declared in the financial period under discussion and the beneficiaries of such dividends.

Applicant's lack of access to vital records of the company which he could not have accessed through the Registrar of Companies largely explains his frustrations which may also explain his decision to approach the court for relief.

The attitude of the first respondent has not been helpful to applicant especially considering that one is dealing here with the executor (who is also a son of the deceased) who has to grapple with co-beneficiaries who may not have been co-operative on issues that concern the deceased estate.

The applicant's concerns are understandable. He requires to bring to account all assets of the deceased estate for the benefit of the beneficiaries of the estate including the fiscus. The last thing he as executor would expect is any reason to suspect collusion on the part of the deceased's life time colleagues. In this regard first respondent has not allayed such fears.

First respondent strongly suspects that applicant believes that the deceased must have been a shareholder by virtue of his directorship which is not necessarily so

. That may well be so and such attitude is understandable especially given that applicant has come to know that D C Mavhaire with whom the deceased joined the Board of first respondent on the same day is the holder of 21% shareholding in first respondent. The attitude of the applicant has been prompted by first respondent's negative attitude to his legitimate search for information.

> Section 158 (6) of the Companies Act [*Chapter 24:03*] provides as follows-
> "Without prejudice to his powers under section one hundred and fifty seven, the Minister (a) shall appoint one or more inspectors to investigate the affairs of a company and to report there on in such manner as he directs if (a) the company by special resolution the court by order declares, that its affairs ought to be investigated by an inspector appointed by him."

While the legislature does not specify the circumstances under which the court shall order such investigation there can be no doubt that the court in determining when such order should be made will be guided by the need to do justice between the parties.

In the case of *Irvine & Johnson Ltd* v *Gelner & Company (Pvt) Ltd* 1955 (20 SA 59 C where the court was dealing with a similar provision it was held that

> "under s 95 (bis) the Minister must act if by special resolution the company declares or the court makes an order that its affairs ought to be investigated."

The use of the word "ought" denotes a variety of ideas e.g. rightness, duty advisability.

Where a court's power to declare that the affairs of a company should be investigated is not limited by specific mention of the circumstances when such power should be exercised the court is at large in the exercise of its judicial discretion and based on the facts placed before it to make such order for investigation if it deems it advisable or desirable to do so. It is not necessary therefore that a *prima facie* case should be established before the court can order an investigation. The need for investigation of its affairs will arise by virtue of the party seeking such investigation's inability to access evidence of the company's activities which are suggestive of grave impropriety.

Although applicant claims that he knows that the deceased held 15% in the first respondent he has not produced evidence to support this averment and yet the chairperson of the first respondent's board who himself holds 21% advises that the deceased did not hold any shares in the first respondent despite both of them having joined the board of first respondent at the same time. Applicant has no access to the minutes of first respondent's Board of Directors or shareholders meetings and resolutions leading to the appointment of both the deceased and D C Mavahire to the board of first respondent. Neither has the first respondent explained the process leading to D C Mavhaire acquiring 21% shareholding in first respondent save to suggest that this took place in 2012. Considering that the deceased was a co-director with D C Mavhaire presumably serving under the same conditions initially on appointment applicant can be excused for believing that the deceased may also have been allotted s ome shareholding even though he presented his belief as fact by stating that he came to know that the deceased held 15% shareholding in the first respondent.

In his answering affidavit the applicant claims that he is in possession of an audio recording in which D.C. Mavaire makes reference to the issue of his and the deceased's shareholding in the first respondent. This allegation though raised in an answering affidavit against the rule of practice that a party's case stands or falls on its founding affidavit is sufficiently weighty to deserve a response by the first respondent. The first respondent did not seek to avail itself of the opportunity to respond to the said allegation which it could easily have done in terms of Order 32 r 235. Instead the first respondent chose to simply object to the unprocedural introduction of the evidence through an answering affidavit.

The court did not invite the parties to play the audio recording as it considered that it would not be decisive in determining the matter. If anything such recording can only be of assistance to the investigations pursuant to any order the court might make.

The case of *Sage Holdings Ltd* v *The Unisec Group Limited and others* 1983 (1) SA 337 (W) referred to by the applicant in its heads of argument is instructive. Commenting on a similar provision of the law the court had the following to say "having regard to the principle laid down in various decided cases the approach of the court faced with an application under s 258 of the Act 61 of 1973 for an order directing an investigation into the affairs of a company should be the following:

(i) The court has a wide power to order an investigation into the affairs of a company if it considers it right and advisable to do so.

(ii) In deciding whether to make such an order the court may have regard to the matters enunciated in sub-section 2 of s 258. However the grounds upon which the court may act are wider than and not limited to these matters.

(iii) The grounds which make it right or desirable to order an investigation should be undisputed or clearly established, however a dispute in relation to the meaning or effect of these grounds even if such dispute is material, does not rule out the issue of such order. <u>Such dispute by itself establishes the very ground upon which an investigation becomes desirable</u>.(the underlining is my own for emphasis)

(iv) Where the court acts only on a suspicion of some grave impropriety, the suspicion must be well founded and have a solid and substantial base.

(v) The court should only act if it is satisfied that some object is likely to be achieved e.g. where the investigation might lead to a winding up or where steps may be taken to recover damages or property for the company.

(vi) The court should not act merely to satisfy disgruntled shareholder that they have no legitimate cause for complaint or where the evidence points to a suspicion that a director or shareholder has been guilty of Criminal Conduct not clearly related to the affairs of the company.

(vii) The section can be useful as a tool which enables the court to cause a company to be investigated where the management of such company has put itself beyond the reach of the ordinary shareholder.

In casu the court has been influenced by the fact that the applicant as an executor of the deceased's estate requires clear information on the first respondent's affairs in so far as such information may affect the winding up or and distribution of the assets of the deceased estate. This is particularly so given that the information can only be accessed fully through an investigation under an order of court. The deceased having been a member of the first respondent at the time of his death would have been entitled to access the information that the investigation into the first respondent is likely to bring to the fore there is no justifiable reason why the applicant should be deprived of similar access in the manner contemplated by the law as provided in s 158 of the Companies Act.

The applicant has offered not to burden the first respondent with the cost of any investigation and the first respondent has not demonstrated what prejudice if any it stands to suffer on account of the investigation. The court finds that it is desirable that the affairs of the first respondent be investigated for purposes of establishing the shareholding structure of the company and any consequential matters resulting from the said investigation in so far as the same may affect the winding up of the Estate of the late Vitalis Musungura Gavava Zvinavashe. It is accordingly ordered as follows-

(1) The second respondent be and is hereby ordered to appoint an inspector to investigate the conduct of the first respondent's affairs in terms of s 158 of the Companies Act [*Chapter 24:03*] and to make a report in terms of s 161 of the said Act.

(2) The 1st respondent shall pay the costs of this application

Koto & Co, applicant's legal practitioners
Hussein Ranchood & Co, 1st respondent's legal practitioners
Civil Division of Attorney General's Office, 2nd respondent's legal practitioners