

EVANS NDEBELE

Versus

PESIN INVESTMENTS (PVT) LTD & 4 OTHERS

IN THE HIGH COURT OF ZIMBABWE
CHIWESHE J
BULAWAYO 15 MAY 2003

N M Fuzwayo for the applicant
T Ndlovu for the respondents

Judgment

CHIWESHE J: The applicant seeks a provisional order couched as follows:

“Terms of final order

1. That 2nd and 3rd respondents be and are hereby directed to within seven days of the service of this order upon them appoint a qualified accountant in consultation with applicant to evaluate the 1st respondent’s business assets at Fountain Farm and to pay applicant such value within 14 days of the making of the valuation.
2. Alternatively: that 2nd and 3rd respondents allow the applicant to withdraw all his assets he purchased from Pezulu Ranches (Private) Limited and those he brought into Fountain Farm and that applicant be paid his share of monies held by 4th and 5th respondents on behalf of 1st respondent.
3. That 1st, 2nd and 3rd respondents shall pay the costs of this application jointly and severally the one paying the others to be absolved.

Interim Relief granted

4. Pending the confirmation or discharge of this provisional order, 2nd and 3rd respondents be and hereby barred from collecting money realised from the sale of eggs at Fountains Farm. The banking of the money and management of the chickens/eggs business to vest in the farm manager Mr Jasper Mantshontsho.
5. That 4th respondent be and is hereby ordered and directed to freeze all withdrawals from 1st respondent’s current account number 014000884201 forthwith and to only allow for deposits into the account by Midsec Security Services (Private) Limited or Jasper Mantshontsho.
6. That 5th respondent be and is hereby ordered and directed to freeze forthwith all withdrawals from 1st respondent’s account number 01320 40557301 and 01420 40557301.”

The background facts to this application are as follows:

The applicant and the second respondent are relatives, the latter being applicant's paternal aunt. The third respondent is married to the second respondent and by virtue of that marriage an uncle to the applicant. The second and third respondents are the directors of the first respondent, a limited liability company duly incorporated in terms of the laws of Zimbabwe. The first respondent is a client of the fourth and fifth respondents both of whom are commercial banks.

The third respondent is a beneficiary of the current land reform exercise wherein she was allocated Fountains Farm which has been compulsorily acquired by Government from Pezulu Ranches (Pvt) Limited. Desirous to acquire certain assets owned by this company at Fountains Farm, the first respondent entered into an agreement of sale with the said company. The second and third respondents approached the applicant for financial assistance as the first respondent could not raise the purchase price. A second agreement was then negotiated between the first respondent and Pezulu Ranches (Pvt) Ltd. The applicant assisted with the negotiations and appended his signature to the agreement as a witness. The applicant says he subsequently injected six million dollars into the chicken project run by the first respondent at the farm. Further he says that he paid twelve million dollars being the purchase price of the assets in terms of the agreement between the first respondent and Pezulu Ranches (Pvt) Ltd.

Pezulu Ranches (Pvt) Ltd having been paid off, it now remained for the first, second and third respondents to work out the nature of the relationship that should govern their operations at Fountains Farm. According to the applicant it was agreed that he would be accommodated within the first respondent by way of a shareholding

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structure to be agreed upon with the second and the third respondents. According to the second respondent the applicant had the option in addition of simply settling for reimbursement of monies advanced plus interest.

To date no shareholding structure has been agreed. The applicant has been involved in various ways in the running of the business of the first respondent. He says he was signatory to all company cheques. He supervised all managerial staff including the bookkeeper. According to the applicant the second and third respondents have of late side lined him. They have acquired a parallel cheque book with which withdrawals are made without his knowledge. He alleges they are this way squandering business funds. On 26 February 2003 he lodged a formal complaint with them. No response was forthcoming. His requests for meetings have gone unheeded. Another formal complaint was made on 22 April 2003. The second and third respondents proceeded to instruct the fourth and fifth respondents to remove the applicant as a signatory to the first respondents' bank accounts. As a consequence the applicant avers under paragraph 11 of his founding affidavit as follows:

“This literally closes me out of the business. I am unable to know the financial situation of the company. I cannot access company accounts and will no longer be able to know how the money generated by the assets I single handedly purchased from Pezulu Ranches is being used.”

The applicant stated that he stands to suffer irreparable harm if this state of affairs is allowed to continue. It is for that reason that he now wishes that the bank accounts be frozen “to protect me while the assets are evaluated by a qualified accountant to determine how much I should be paid out by the first, second and third respondents.” Further he wishes that the second and third respondents be interdicted from conducting the business of the first respondent pending the resolution of this dispute. He suggested that a security company be tasked instead with the collection

and banking of monies realised from the produce of Fountain Farm

Such broadly are the background facts to this application. My view is that the applicant not being a director or shareholder of the first respondent has no *locus standi* to seek the relief he seeks. Secondly and in any event it is doubtful that this matter is one deserving of the urgent attention of this court.

I am in entire agreement with the second and third respondents' argument in opposition, namely that as no shareholding agreement is in place, the applicant cannot avail himself of the remedy he seeks. He has no stake in the running of first respondent. The fact that applicant was involved in the negotiations leading to the agreement between the first respondent and Pezulu Ranches (Pvt) Ltd and the fact that he signed the agreement as a witness does not make him a party to the agreement. Similarly being signatory to a company bank account does not of itself confer rights of ownership of the company. Further there is no averment that the first respondent is not in a position to reimburse the applicant should that become necessary either by agreement or through a court order. If any such averment has been made it has not been substantiated. To that extent the applicant has not shown that he stands to suffer irreparable harm in the event that the order sought is not granted. Further the present dispute has been going on since February 2003. For these reasons there is no urgency in the application.

The applicant's remedies lie elsewhere. In my view he should have proceeded by way of action. Even if he were adjudged to have followed the correct procedure by lodging this application he would not have succeeded on the merits.

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Accordingly the applicant has not in my view made out a good case for the relief sought. It is ordered that the application be and is hereby dismissed with costs.

Calderwood Bryce Hendrie & Partners applicant's legal practitioners
Messrs Cheda & Partners respondents' legal practitioners