

**KUDAKWASHE SHANA**

**And**

**SMOLLY SHANA**

**And**

**SHANANA DISTRIBUTORS**

**Versus**

**MANALA LOVENESS MOTSI N.O.**

**And**

**NICHOLAS MASHIRI**

**And**

**REGISTRAR OF COMPANIES**

**And**

**REGISTRAR OF DEEDS**

**And**

**DEPUTY MASTER, HIGH COURT OF ZIMBABWE  
BULAWAYO N.O.**

IN THE HIGH COURT OF ZIMBABWE  
TAKUVA J  
BULAWAYO 10 NOVEMBER 2016 & 13 APRIL 2017

**Opposed application**

*S. Chamunorwa* for the applicants  
*L. Chikwakwa* for the 1<sup>st</sup> and 2<sup>nd</sup> respondents

**TAKUVA J:** The applicants obtained a provisional order on 4 February 2016 in the following terms:

Interim Relief

“Pending the determination of this matter, the applicant is granted the following relief:

1. The 1<sup>st</sup> and 2<sup>nd</sup> respondent be and are hereby interdicted from acting for and on behalf of the 3<sup>rd</sup> applicant, and interfering with the 1<sup>st</sup> applicant’s duties at 3<sup>rd</sup> applicant.”

Terms of the final order sought are as follows:

“That you show cause to this Honourable Court why a final order should not be made on the following terms:

1. The appointment of the 1<sup>st</sup> and 2<sup>nd</sup> respondent as directors of the 3<sup>rd</sup> applicant be and is hereby declared to be null and void.
2. It be and is hereby confirmed that the directors of the 3<sup>rd</sup> applicant are 1<sup>st</sup> and 2<sup>nd</sup> applicants until such time that they resign their office or are otherwise removed in terms of the law.
3. The 3<sup>rd</sup> respondent be and is hereby ordered to expunge from her records the names of the 1<sup>st</sup> and 2<sup>nd</sup> respondents with regards to their directorship in the 3<sup>rd</sup> applicant and to reinstate the CR14 dated 24 March 2014.
4. The 1<sup>st</sup> and 2<sup>nd</sup> respondents be and are hereby interdicted from interfering in the affairs of the 3<sup>rd</sup> applicant.
5. All actions carried out by the 1<sup>st</sup> and 2<sup>nd</sup> respondents purportedly on behalf of the 3<sup>rd</sup> applicant be and are hereby declared to be null and void.
6. The 1<sup>st</sup> and 2<sup>nd</sup> respondents be and are hereby ordered to pay the costs of this application on an attorney and client scale.”

The 1<sup>st</sup> and 2<sup>nd</sup> respondents opposed the confirmation of this order, hence this application. The background to this matter is that the late Samson Shana and his wife Smolly Shana incorporated themselves into a company called Shanana Distributors (Pvt) Ltd, the 3<sup>rd</sup> applicant herein. The 1<sup>st</sup> applicant is their son who was appointed a director in the company on 1 January 1006. Mr Shana held 50% shareholding in the company while his wife held the other 50%. It appears that Mr Shana divorced his wife and married the 1<sup>st</sup> respondent. Upon Mr Shana’s death, the 1<sup>st</sup> respondent was appointed the executrix dative of the estate of the late Samson Shana on 2 September 2014.

On 12 November 2014, the 1<sup>st</sup> and 2<sup>nd</sup> respondents altered the 3<sup>rd</sup> applicant’s CR14 by removing 1<sup>st</sup> applicant’s name and inserting their names as 3<sup>rd</sup> applicant’s directors. The

applicants contended that the 1<sup>st</sup> and 2<sup>nd</sup> respondents' actions are wrongful and fraudulent. They also argued that there is no other remedy available which is as effective as an interdict and that the balance of convenience favours the granting of the relief sought than its refusal.

First and second respondents who were self actors opposed the confirmation of the final order. However on the date for the hearing they were represented by Mr *Chikwakwa* who filed heads of argument conceding that the 1<sup>st</sup> and 2<sup>nd</sup> respondents cannot lawfully assume directorship of the 3<sup>rd</sup> applicant. He agreed that the final order be granted as prayed in paragraph 1, 2 and 3. As regards the 4<sup>th</sup> and 5<sup>th</sup> paragraphs, he argued that they were too wide and loosely worded. Finally, he argued that there is no justification at all for the 1<sup>st</sup> and 2<sup>nd</sup> respondents to pay punitive costs.

Mr *Chamunorwa* conceded that paragraph 4 was widely worded. He submitted that it be amended by the insertion of the word "unlawfully" to accommodate the lawful activities of 1<sup>st</sup> respondent as the executrix dative of late Samson Shana's estate. At the same time, that will ensure that 1<sup>st</sup> and 2<sup>nd</sup> respondents do not interfere with the lawful duties of the 1<sup>st</sup> and 2<sup>nd</sup> applicants as 3<sup>rd</sup> respondent's directors. He submitted further that paragraph 5 is not superfluous and should remain as prayed the final order.

As regards costs, Mr *Chamunorwa* insisted that the 1<sup>st</sup> and 2<sup>nd</sup> respondents be ordered to pay costs of this application on an attorney and client scale because in his view they fraudulently altered the CR14 for their own personal benefits. It was further argued that the respondents' concession is not sufficient to disentitle the applicants from and award of costs at a punitive scale. He relied on *Kenias Mutyasira v Barbra Gonyora NO & Ors* HH-180-14 and *Jicama 194 (Pty) Ltd and Karen Lotter NO & Anor* 6094/2007.

On the other hand Mr *Chikwakwa* argued that there is no need for the 1<sup>st</sup> and 2<sup>nd</sup> respondents who were self actors to be ordered to pay punitive costs because 1<sup>st</sup> respondent had been lawfully appointed and erroneously believed that she could run 3<sup>rd</sup> applicant without 1<sup>st</sup>

applicant's interference. Also, the fact that the final order had been widely drafted necessitating argument disentitled applicants to any order of costs as they are equally culpable.

Costs are in the discretion of the court and an award of attorney and client costs will not be granted lightly as the court looks upon such orders with disfavor and is loathe to penalize a person who has exercised a right to obtain a judicial decision on any complaint such party may have – see *Mudzimu v Chinhoyi Municipality* 1986 (3) SA 140 (ZH).

It is trite that the grounds upon which the court may order payment of attorney-client costs include, where a party has been guilty of dishonesty or fraud or had vexatious, reckless and malicious or frivolous motives or committed grave misconduct in the conduct of the case.

*In casu*, although the alteration of the CR14 could be some evidence from which fraud or recklessness may be inferred, there is a real possibility that the 1<sup>st</sup> respondent acted *bona fide*. The amendment or alteration was done after 1<sup>st</sup> respondent had been properly and lawfully appointed executrix. Quite clearly she overstepped her jurisdiction but her intention, if the background of the case is anything to go by was to protect the interests of the rest of the beneficiaries. Also, the fact that as soon as 1<sup>st</sup> and 2<sup>nd</sup> respondents got legal advice they consented to the granting of the final order in respect of those clauses not widely drafted, should weigh heavily in 1<sup>st</sup> and 2<sup>nd</sup> respondents' favour.

For these reasons, I will grant the final order in the following terms:

1. The appointment of the 1<sup>st</sup> and 2<sup>nd</sup> respondents as directors of the 3<sup>rd</sup> applicant be and is hereby declared to be null and void.
2. It be and is hereby confirmed that the directors of the 3<sup>rd</sup> applicant are 1<sup>st</sup> and 2<sup>nd</sup> applicants until such time that they resign their office or are otherwise removed in terms of the law.

3. The 3<sup>rd</sup> respondent be and is hereby ordered to expunge from her records the names of the 1<sup>st</sup> and 2<sup>nd</sup> respondents with regards to their directorship in the 3<sup>rd</sup> applicant and to reinstate the CR14 dated 24 march 2014.
4. The 1<sup>st</sup> and 2<sup>nd</sup> respondents be and are hereby interdicted from unlawfully interfering in the affairs of the 3<sup>rd</sup> applicant.
5. All actions carried out by the 1<sup>st</sup> and 2<sup>nd</sup> respondents purportedly on behalf of the 3<sup>rd</sup> applicant be and are hereby declared to be null and void.
6. The 1<sup>st</sup> and 2<sup>nd</sup> respondents be and are hereby ordered to pay the costs of this application on the ordinary scale.

*Messrs Calderwood, Bryce Hendrie & Partners, applicant's legal practitioners*  
*Sansole & Senda, 1<sup>st</sup> and 2<sup>nd</sup> respondents' legal practitioners*