HC 8916/01

ERNEST MATANDA AND 15 OTHERS
versus
CMC PACKAGING (PRIVATE) LIMITED
OBERT DUVE CHIVASA
JOSEPH NEHUMBA
JOSEPH CHIPUNDHLA
GODFREY MUNYORO
JOHN MUTASA
and
NYASHA NYONI

HIGH COURT OF ZIMBABWE
HUNGWE J,
HARARE, 20 August, 2003

Court Application

Mr *Machingura* for applicants
Mr *H Simpson* for the respondents

HUNGWE J: In this application the applicants seek an order -

a) directing the respondents to engage Kudenga and Company Chartered Accountants (Zimbabwe) to undertake an audit of the company's books for the 12 months periods between October 1996 and 31 December, 1999;

b) setting aside a resolution by the shareholders adopting an agreement entered into by both parties to this dispute on 10 February, 1997 and substituting in its stead the following-

"Each holder of fully paid up shares of the Company shall be entitled, in General Meetings. to one (1) vote for each fully paid up ordinary share held by such member".

This application is brought in terms of Section 198(1) which states -

"(1) If the Court is satisfied that an application under section 196 and 197 is well founded, it may make such an order as it thinks fit for giving relief in respect of

the maters complained of".

In terms of section 196(1) a member of a company may apply to the Court for an order in terms of section 198 on the ground that the company's affairs are being or have been conducted in a manner which is oppressive or unfairly prejudicial to the interests of some part of the members including himself.

The first respondent deposed to the founding affidavit on behalf of the applicants. In it he complains basically of the unfairness of the shareholding structure as well as the voting rights and powers of the directors and the employees.

The background to this complaint can best be understood by a brief resume of how lst respondent, in which all applicants and 2nd to 7th respondents are shareholders and members, was created.

The applicants, and all the respondents except lst respondent, terminated their contracts of employment with a company called Carnand-Metalbox between 1995 and September 1996. They agreed to apply that their terminal benefits towards the initial purchase of the assets and equipment of their former employer through lst respondent which was then incorporated for the purpose. Their joint resources were only $110 000,00. $2 million was required for the purchase.

In order to make the purchase lst respondent needed that $2 million. In order to start business a further $900 000,00 was required as working capital. 1st respondent obtained funding for this as loans from Scotfin and Unibank respectively. The 2nd to 7th respondents as directors, guaranteed these loans in their personal capacities.

As they had undertaken personal risk in favour of the lst respondent, the directors demanded preferential treatment in the allotment of shares and voting rights. The applicants resided preferential treatment on the allotment of shares. The matter was resolved by an agreement that the director enjoyed greater voting rights than the applicants.

On the basis of that agreement, a Shareholders Agreement was drawn and signed by the parties. It is Annexure "A" to the papers and is dated 17 April, 1997. In terms of that Agreement the directors enjoy 19 votes when voting as a bloc as compared to 18 for the applicants when voting as a bloc although in terms of shareholding they command only 36% of shares as opposed to the 64% for the applicants. This is the main bone of contention in this matter.

I consider the rest of the other complaints raised by the applicants as insignificant.

There have been no regular meetings of the shareholders and those that have been held

were after pressure had been brought to bear on the management. Secondly it is said that management has not carried out an audit of the company's affairs despite a resolution of the general meeting to that effect.

Thirdly they also say no information has been supplied by management in respect of the status of their pension contributions towards their group pension fund.

In response to these three complaints the respondents have demonstrated, on the papers, that in fact meetings have been held. The source of their dissatisfaction is that the applicants want a detailed report on every administrative aspect of the lst respondent. The respondents have explained that they have made a business decision that once it is economically justifiable to invite high profile auditors as requested by the applicants, they will do so. At the time this was demanded of them it was not worth it. The respondents have also demonstrated compliance with their statutory obligations in respect of pension and tax payments.

Before a member invites the Court to interfere in the internal arrangement of a private company that member must be reminded of the words of CENTLIVRES CJ in *Levin* v *Felt and Threads Ltd* 1951(2) SA 401 at 414-415 where he stated -

> **"It is not part of the business of a Court of Justice to determine the wisdom of a course adopted by a company in the management of its own affairs. I cannot find any trace on the Statute of a suggestion that the Court ought to review the opinion of the company and its directors in regard to a question which primarily at least is domestic and commercial".**

See also HAHLO, H.L. *South African Company Law Through the Cases* 4th Edition p 275.

***Nkala & Nyapadi on Company Law in Zimbabwe* 1995 Edition p 307.**

Unless it is shown that the respondents acted *mala fides* in making those decision complained of, in Court ought not to interfere with internal business decisions made in the proper interests of that company. There is no allegation on the papers that in failing to hold general meetings regularly the respondents were intent on deceiving the shareholders, or that an audit could reveal a fraud on the applicants; or an abuse of power.

Section 196 speaks of oppressive or unfairly prejudicial conduct by the respondents. It seems to me that that could only have been raised in respect of the voting rights of the directors. The answer to that lies in the shareholders agreement to which the applicants are signatories. There is no allegation that the applicant's consent to that agreement was improperly obtained or that it was induced by fraud.

In fact the agreement is along the usual lines.

It provides for mechanisms for its review i.e. after five years. That avenue has not been explored.

In any event the arrangement set out, quite properly in my view, protects those shareholders who have prepared to put their neck on the block so to speak, in respect of the survival of the company.

In my view the application is ill conceived. I am not satisfied that there are grounds upon which the intervention of the court can be justified.

In the result the application is dismissed with costs.

***Dube, Manikai & Hwacha* , applicant's legal practitioners**
***Manase & Manase* , respondent's legal practitioners**