PROFESSOR PATSON ZVANDASARA
versus
DR GODFREY SAUNGWEME
and
DR MADEINE MAKONESE
and
BELVEDERE NURSING HOME (PVT) LTD
and
FINPOWER INVESTMENTS (PVT) LTD
and
MAINBRAIN TRADING (PVT) LTD
and
REGISTRAR OF COMPANIES N.O

HARARE HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 6 July 2017 & 28 February 2018

Opposed Matter

Adv L Uriri and *Adv T Mpofu*, for the applicant
Adv T Zhuwarara, for the respondents

MAKONI J: The applicant approached this court seeking an order in the following terms:

"1. The first, second respondents and any other directors, shareholders, officers, employees, security personnel and/or agents of the third, fourth and fifth respondents are ordered to refrain from conducting the third, fourth and fifth respondents' affairs in a manner that is oppressive and unfairly prejudicial to the applicant's interests and consequently are ordered to refrain from harassing or interfering with the Applicant directly or indirectly in his capacity as a member, shareholder and Managing Director of the first respondent.

2. The first and second respondents and nay other directors, shareholders, officers, employees, security personnel and/or agents for third, fourth and fifth respondents are ordered to allow the Applicant unhindered access into the premises of Belvedere Nursing Home (Pvt) Ltd as the third respondent's Managing Director including but not limited to unimpeded access to his office at the premises and smooth conduct of his normal duties and functions as the Managing Director.

3. The applicant is hereby authorised to purchase all the shares of the first and second respondents and other shareholders in third, fourth and fifth respondents at a fair value to be assessed by a professionally qualified person appointed by the incumbent President of the Institute of Chartered Accountants of Zimbabwe thereby making him a 100% shareholder OR Alternatively then incumbent President of the Law Society of Zimbabwe is hereby authorised to appoint an independent non-executive director who shall henceforth assume the position of director or chairman or chairperson of the third, fourth and fifth respondents with full powers to perform any necessary functions of that office and that no binding decision shall be made by either the first and second respondents or any member, shareholder or director of the third, fourth and fifth respondents without the written consent or approval of then aforesaid chairperson.

4. The first and second respondents shall pay costs of suit on legal practitioner-client scale."

The background of the matter is that the applicant is a registered medical practitioner and professor of medicine practicing in Zimbabwe. The first and second respondents are also registered medical practitioners practicing in Zimbabwe. The third respondent is Belvedere Nursing Home (Private) Limited a health institute registered and operating in terms of the laws of Zimbabwe. The fourth respondent is Finpower Investments (Private) Limited a registered company in Zimbabwe. Minbrain Trading Power is the fifth respondent a registered company in Zimbabwe. The sixth respondent is the Registrar of Companies in Zimbabwe N.O.

The applicant and the first and second respondents are shareholders in the third respondent which is wholly owned by fourth and fifth respondents. He was the managing

director of third respondent until 2010 when the legal battle between the parties started in the labour arena.

The battle is ongoing and there is an appeal pending in the Supreme Court. The battle emanates from the applicant's position as a Managing Director in the third respondent. The applicant contends that he was fired as Managing Director and the respondents aver that he resigned. The applicant instituted arbitral proceedings where an arbitral award was made in his favour. The respondents appealed against the award in the Labour Court. They also sought stay of execution of the award which was dismissed. The third respondent then appealed to the Supreme Court. The applicant then filed the present proceedings.

It was contended on behalf of the applicant by Mr *Mpofu* that the respondents are disobeying the judicial pronouncements made in favour of the applicant. That this is not a labour matter as the applicant is the Managing Director arising out of his position as a shareholder. When the respondents disobeyed a judicial pronouncement under such circumstances, they are not fighting his directorship but questioning the source thereof. The applicant cannot do anything about it because he is a minority shareholder.

Mr *Mpofu* further contended that the applicant is being side-lined from the third respondent's meetings at board level and at the members' level. He does not know how the entity is being run and yet this is an entity which he not only founded but in respect of which he holds some significant shareholding.

Mr *Mpofu* further contended that he gets no return arising out of him being a shareholder and a director. This is because there are people using their numbers against him. There is a case of the oppression of the minority.

Mr *Mpofu* concluded by saying that the applicant is entitled to an order which addresses the manner in which he has been oppressed by ignoring his right as Managing Director arising out of his shareholding which has been confirmed by a judicial pronouncement. He is also entitled to either buy out the other shareholders or let them do so upon proper valuation.

Mr *Zhuwarara* for the respondents started by attacking the relief being sought by the applicant. He submitted that the relief being sought in para 1 of the Draft Order is incoherent and has not been properly substantiated in the founding affidavit. The applicant's complaint is based on his failure to function as a Managing Director which clearly is an employment matter. He

speaks of interference directly or indirectly and this is not explained in the founding affidavit. He further submitted that in paragraph 2 he is seeking unhindered access to the premises of the third respondent as a shareholder. A shareholder is not entitled to such access but his entitlement is a dividend and voting at an Annual General Meeting on Extraordinary General Meeting.

He further submitted that in paragraph 3 the applicant is seeking this court to sanction the sale of all shares of the first and second respondents and other shareholders in third, fourth and fifth respondents for a fair value. The court is being asked to force the shareholders to dispose of their shares. Some of the shareholders have not been cited. He also contended that the applicant is not clear of the extent of his own shareholding as there is a pending dispute regarding that filed by the applicant.

The issue before the court is whether the applicant has satisfied the requirements of s 196 of the Companies Act [*Chapter 24:03*] (the Act) to enable him to obtain relief in terms of section 196 of the Act.

Section 196 of the Act provides:

> "(1) A member of a company may apply to the court for an order in terms of section one hundred and ninety-eight 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, or that any actual or proposed act or omission of the company, including an act or omission on its behalf, is or would be oppressive or prejudicial."

Section 196 provides:

> "(1) If the court is satisfied that an application under section one hundred and ninety-six or one hundred and ninety-seven is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of.
>
> (2) Without prejudice to the generality of subsection (1), the court's order may- (a) regulate the conduct of the company's affairs in the future;
>
> (b) require the company to refrain from doing or continuing an act complained of by the applicant or to do an act which the applicant has complained it has omitted to do;
>
> (c) authorize civil proceedings to be brought in the name and on behalf of the company by such person or persons as the court may direct;
>
> (d) provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly."

In *Livanos* v *Swartzberg and Others* 1962 (4) SA 395 (W.L.D.) at 397 A-D, CILLIÉ J had this to say when dealing with a section equivalent to section 196:

> "It has been stated in the cases of *Irvin and Johnson Ltd* v *Oelofse Fisheries Ltd.*, 1954 (1) S.A. 231 (E); *Marshall* v. *Marshall (Pty.), Ltd and Others*, 1954 (3) S.A. 571 (N), what the essentials of the sections are. They are that the Court must firstly be satisfied that the affairs of the company are being conducted in manner which is oppressive to part of the members of the company, including the applicant; secondly, that the facts otherwise justify the making of the winding-up order on the ground that it is just and equitable that the company should be wound up; thirdly, that to wind up the company would unfairly prejudice that part of the members of which the applicant is a member, and (as suggested in the case of *Irvin and Johnson*) fourthly, that the Court will only interfere if an order can be made with a view to bringing to an end the matters complained of.
>
> The first essential has a number of sub-divisions. Before acting the Court must find, *(a)* that there is oppression; *(b)* that it is the applicant as a member of the company who is oppressed; *(c)* that the oppression is caused by the conduct of another member or other members of the company; and *(d)* that the conduct relates to the affairs of the company. But l do not think it is always possible to keep these points separate and distinct when applying the section to the facts of the particular case."

TURBETT AJ in *Aspek Pipe Co (Pty) Ltd* v *Mauerberger* 1968 (1) SA 517 (C) had this to say:

> "It is quite clear, in my view, that an applicant for relief under this section (111) must show that the affairs of the company are being conducted in a manner oppressive to him as a member, or to some part of the members of the company as members of that company. In other words the conduct complained of must be oppressive to the petitioner qua shareholder and member … and not to him in some other capacity such as a director or servant or employee or agent of the company"

Looking at the facts of this matter, as put forward by the applicant, the question would be whether the applicant has managed to show that the affairs of the company are being conducted in a manner oppressive and prejudicial to him as a member.

I would want to agree with Mr *Zhuwarara* that the applicant appears to be confused as to what relief he seeks from this Court. Is he seeking relief in terms of the judicial pronouncements made in his favour for reinstatement as a Managing Director or is he seeking relief as a member who is being oppressed by the majority members. The applicant in paragraph 16 of his founding affidavit outlines the conduct of second and third respondents that he has complains of. He states:

"16. The second and third respondent's as members and/or shareholders of the fourth and fifth respondents have been conducting business of the third respondent in a grossly prejudicial manner and such conduct has been oppressive to myself as a member of the company in that they have jointly severally conducted themselves in a manner that includes but not limited to the following:

a) They have either expressly or verbally/ tacitly instructed their agents to block my access to my office and the third respondent's premises where I am employed as a Managing Director.
b) They have conspired, connived and/or colluded to frustrate the implementation of an extant and binding arbitral award which reinstated me as the third respondent's Managing Director after my botched unfair dismissal which they instigated was set aside by the arbitrator. I beg leave attach a copy of the arbitral award as Annexure "B" and Labour Court judgments upholding the arbitral award as Annexure "C" & "D". Suffice to mention that the arbitral award has not been set aside by any competent court of law but the first and second respondents have demonstrated utter contempt of that award and disdain of due process.
c) I am kept in the dark and being side lined from the affairs of the third, fourth and fifth respondents as I am not being informed of how the company is being run or being served with any notices for company meetings such as annual general meetings and other company meetings.
d) The first and second respondents acting in connivance have hired or mounted hooligans or thugs to deny me access to the third respondent's premises thereby effectively barring me from performing my duties as the third respondent's Managing Director."

It is only in sub paragraph (c) that the applicant places himself somewhere near provisions of section 196. He again makes cursory reference to the issue of oppression in paragraph 18 and 22. In the rest of the paragraphs of his founding affidavit, he is complaining about his being denied access to the third respondent as its Managing Director.

The above is confirmed in the relief that he seeks. His main complaint is premised on his inability to function as a Managing Director. I agree with Mr *Zhuwarara*, that this is an employment matter which is being related to in the labour realm. This should be dealt with separately from his rights as a shareholder.

In para 2 of the Draft Order he seeks unhindered access to the premises of the third respondent on the basis that he is the Managing Director of the third respondent. As stated above, this is an issue that is being dealt with in a different fora and cannot be related to in terms of s 196.

In para 3 he seeks that he be authorised to purchase all the shares of the first and second respondent and "other shareholders in the third, fourth and fifth respondents". The paragraph presents a few challenges. Not all shareholders, whose rights and interest are going to be affected by the order, are before the court. The applicant himself is not even clear about his shareholding. He, at some instances, refers to himself as the "major single shareholder" and yet Mr *Mpofu* in his address focused on the oppression of the minority shareholder. By his own admission, in the founding affidavit, the applicant has instituted action proceedings, in this court, in HC 1101/13 wherein he seeks the determination of his shareholding in the third, fourth and fifth respondents. Such matter is still pending.

What comes out clearly is that the applicant is aggrieved by the fact that the first and second respondents are disobeying a judicial pronouncement in that they have not reinstated him as the Managing Director as was ordered by the arbitral award. He then sought to argue that it is not a labour matter in that the respondents are not just fighting his directorship but the source thereof, which is his being a shareholder. As was stated in *Asapec Pipe Co (Pty) Ltd* supra, one can only petition the court in terms of s 196 if the conduct complained of must be oppressive to the petitioner in his capacity as a shareholder or member and not to him in the some other capacity such as a director or servant or employee or agent of the company. It would be stretching matters to suggest that the respondents are not only fighting the applicants' directorship but its source in that he became the Managing Director of the third respondent by virtue of being a shareholder of the third respondent.

For an applicant to get relief in terms of section 196 he must satisfy the essential elements enunciated in *Livanos* supra. He or she must give details, in the founding affidavit, of how the affairs of the company are being conducted in a manner that is oppressive or prejudicial to him or her as a member. One cannot expect the court to grant him relief based on generalised averments. The law is that, save in the exceptional circumstances, the courts will not interfere in the internal management of a company.

In *Matanda and Others* v *CMC Packaging (Pvt) Ltd and Others* 2003 (2) ZLR 221 (H) at 224 A-B, HUNGWE J in dealing with section 196 had this to say:

> "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 & Tweeds Ltd* 1951 (2) SA 401 (A) at 414-415 where he stated;

> "It is not part of the business of the court of justice to determine the wisdom of a course adopted by a company in the management of its own affairs[1]. I cannot find any trace in 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[2]"…"
>
> See also *H L Hlalo*, in *South African Company Law Through the Cases* 6 ed p 380; *Nkala & Nyapadi Company Law in Zimbabwe* (1995) p 307."

LORD ELDON, in *Carlen* v *Drury* (1812) 1 V 7 B 154; 35 ER 61 puts it this way:

> "This court is not to be required on every occasion to take the management of every playhouse and brewhouse in the Kingdom."

The same observation was made by DOWLING J in *Yende* v *Orlando Coal Distributors (Pty) Ltd* 1961 (3) SA 314 (W)

> "In general, the policy of the courts has been not to interfere in the internal domestic affairs of a company, where then company ought to be able to adjust its affairs itself by appropriate resolutions of a majority shareholders."

The applicant has failed to satisfy the requirements of s 196 as set out in *Livano's* case *supra*. In the words of FRIEDMAN J in *Garden Province Investment & Ors* v *Aleph (Pty) Ltd & Ors* 1979 (2) SA 525 D at 536 A:

> "What is it that the majority shareholder has done?"

The same question can be asked of the majority shareholders in this matter. He is therefore not entitled to relief in terms of s 196.

In the result l will make the following order:

1) The application is dismissed with costs.

Matsikidze and Mucheche, applicant's legal practitioners
Chihambakwe, Mutizwa and Partners, respondents' legal practitioners

[1] Citing Lord Loreburn in *Poole* v *National Bank of China Ltd* [1907] AC 229 AT 236
[2] Citing Lord Shaw in *Caldwell & Co Ltd* v *Caldwell*