

STALAP INVESTMENTS (PVT) LTD  
ZIMRE HOLDINGS LIMITED  
DOUGLAS MAMVURA  
and  
RAMSWAY (PVT) LTD  
versus  
WILLOUGHBY'S INVESTMENTS (PVT) LTD  
ITAI VALERIE PASI  
and  
CFI HOLDINGS

HIGH COURT OF ZIMBABWE  
MUZOFA J  
HARARE, 27 July & 7 November 2019

### **Opposed Application**

*A.B.C Chinake*, for the applicants  
*F. Mahere*, for the respondent

MUZOFJA J: This is an application made in terms of section 196 of the Companies Act (*Chapter 23:04*) hereinafter referred to as the Act, for a declaratur and ancillary relief for the nullification of an extra-ordinary general meeting of the third respondent held on 15 November 2017 convened by the first respondent and chaired by the second respondent.

The first, second, fourth applicants and the first respondents are companies duly registered in terms of the laws of Zimbabwe and are shareholders in the third respondent. The third applicant and the second respondent are non-executive directors in the third respondent. The third respondent CFI Holdings, hereinafter called CFI is a public company listed on the Zimbabwe Stock Exchange "ZSE". This matter concerns an acrimonious dispute between two groups of shareholders in CFI.

On 23 September 2015 CFI issued a circular to its shareholders calling for an Extraordinary General Meeting ( all EGMs hereinafter referred to as meetings) whose agenda among other issues was the disposal of 81% of Langford Estate (1962) (Pvt) an asset that it owned. The meeting was duly held in October 2015 and a resolution was approved among

others to dispose of the said property for US\$18 million (the Langford transaction) to Fidelity Life Assurance of Zimbabwe Limited hereinafter referred to as Fidelity in order to extinguish certain overdue interest bearing liabilities on CFI. A notice was subsequently issued through one of the local newspapers setting out the resolutions taken at the meeting. The Langford transaction was subsequently consummated.

In due course, after the acquisition of the property Fidelity announced through a newspaper article that its value had increased substantially due to an acquisition it made of a property worth US\$200 million for US\$18 million from CFI. This triggered discontent among some section of the shareholders who sought information on how this could have happened. The first respondent together with like mind shareholders, were of the view that the company had been prejudiced in the Langford transaction; they raised legal objections against it. They wanted the Langford transaction to be reconsidered in a meeting. A shareholder known as Messina requisitioned CFI to convene a meeting. No meeting was called. On 19 September 2017 the first respondent wrote a letter to CFI requisitioning a meeting to be convened within 21 days to reconsider or validate the Langford transaction. In the letter the first respondent advised that, in the event that CFI failed to call for the meeting, it shall proceed to convene the meeting. Despite these two requisitions CFI did not convene the meeting. True to its word, the first respondent by notice in one of the local newspapers called for a meeting. The meeting was held on 15 November 2017 (the November 2017 meeting). Only three directors and a number of shareholders attended the meeting. After a highly charged meeting the resolutions were placed to a vote. The chairman announced that none of the resolutions had been carried. Subsequently CFI issued a press statement setting out the special resolutions carried on the day which effectively reversed the Langford transaction and mandated the directors to cancel the Langford transaction and to recover costs and damages from the legal advisors and other professional parties that sponsored and advised on the illegal transaction and to recover all fees paid to such parties.

Following the said resolutions, the applicants approached this court for the following relief :-

“IT IS HEREBY ORDERED THAT:

1. It be and hereby declared that
  - 1.1 1<sup>st</sup> respondent did not comply with the Zimbabwe Stock Exchange Listing Rules section 11 and 16 in calling and holding the requisitioned meeting and that the

- failure by 1<sup>st</sup> respondent to so comply prejudiced the shareholders of the 3<sup>rd</sup> respondent. Consequently the requisitioned Meeting of 15 November 2017 be and is hereby set aside.
- 1.2 The 2<sup>nd</sup> respondent was not lawfully appointed as the chairperson of 3<sup>rd</sup> respondent for the purposes of the requisitioned Extraordinary General Meeting of 15 November 2017 and consequently she was not able to lawfully preside over the proceedings and therefore the proceedings are hereby declared a nullity.
  - 1.3 2<sup>nd</sup> Respondent acted improperly and in a gross unreasonable and irregular manner in her conduct of the EGM.
  - 1.4 3<sup>rd</sup> Respondent cannot hold Extraordinary General Meetings without complying with the Zimbabwe Stock Exchange Listing Rules or its own Articles of Association.
2. By extension and in the result, the requisitioned Extraordinary General Meeting of 15 November 2017 and/or any and all decisions purported to have been made thereat be and are hereby set aside.
  3. 1<sup>st</sup> and 2<sup>nd</sup> Respondents jointly and severally the one paying the other to be absolved, shall pay the costs associated with this application and the requisitioned Extraordinary General Meeting on a legal practitioner and client scale.
  4. A copy of this Order shall be served on the Law Society of Zimbabwe by the Applicants' legal practitioners for the Law Society of Zimbabwe to take any or such further action as it may wish in respect of the conduct of 2<sup>nd</sup> Respondent in connection with the manner in which she handled the requisitioned Extraordinary General Meeting of 15 November 2017.”

According to the applicants, the first respondent had the right to convene the meeting in terms of section 126 (3) of the Act. However in convening the meeting it did so in the name of the third respondent and it should therefore have complied with sections 11 and 16 of the ZSE Listing Rules (Listing Rules). Non compliance was prejudicial to the applicants and other shareholders in that the shareholders were eventually called upon to make decisions on inadequate information. Further that the second respondent was not appointed to chair the meeting in terms of CFI's articles of association. On those two points the November 2017 meeting is null and void. The applicants averred that the second respondent failed to conduct the meeting properly and therefore this judgment should be referred to the Law Society for appropriate action.

The application was opposed. Non compliance with sections 11 and 16 of the Listing Rules was not denied. It was justified on two grounds. Firstly that the Listing Rules only apply to listed companies and not to shareholders when they convene meetings, the obligation was on CFI to comply. Secondly that the applicants' nominated directors were in the majority and controlled the company, they made sure CFI would not comply to defeat the respondents' cause. On the

chairmanship it was argued that the second respondent was appointed in terms of the articles and she did not misconduct herself in chairing the meeting. In the main the respondents argued that the applicants did not suffer any prejudice as a result of the conduct complained of.

A point was taken for the respondents that this court should decline to hear this matter based on the common law non intervention rule. Indeed at common law the courts will not interfere in the domestic affairs of a company on account of a disgruntled shareholder. However the rule is not cast in stone. The courts can still intervene at common law where there is a deadlock in the affairs of the company or where a resolution *or* proposed resolution or act by the directors is illegal or unconstitutional or in fraud of the minority see *Hahlo's South African Company Law through cases* 6<sup>th</sup> Ed,1999 at page 403.The legislature has also made some inroads into the rule by way of section 196 of the Act which 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 so oppressive or prejudicial.

The section provides a mechanism for minority shareholder’s protection where the company business is conducted to their prejudice. The courts therefore can very well hear the matter. It is for the applicants to prove that some oppressive or unfairly prejudicial conduct to its interests has been perpetrated or is being perpetrated. Courts have related to what constitutes oppressive or prejudicial conduct.

In dealing with a similar provision 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.”

In *Wilds Home Owners Association and Others v Van Eeden and Others* (53643/09) [2011] ZAGPPHC 101 (25 May 2011) it was held that the test is one of fairness where the court noted that there must be evidence “of a visible departure from the standards of fair dealing and a

violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely.” In *Regal Legal Costs Negotiators Ltd 1999* BCLC 171 ChD 19 cited in *Wilds Home Owners Association (supra)* the court related to when a member can resort to such an application and noted,

“If the company through its directors or in a general meeting exercised its powers to conduct the affairs of the company in an unfairly prejudicial manner which failed to give effect to the legitimate expectations of its contributories and the state of affairs could not be cured by the petitioners through the exercise of the power available to them, then a petition..... would lie.”

A reading of the authorities and the law on the issue shows that the applicant has to show that some conduct or omission has taken place or is taking place. The application cannot be found on anticipatory conduct. The applicant should show that the conduct was a visible departure from the standards of fair dealing, that the conduct was prejudicial to the applicants and some section of the members. In this case the court has to determine whether the conduct complained of was prejudicial to the applicants or any other shareholders.

#### *Compliance with the listing rules*

Section 126 of the Act sets out the right of a requisitionist to convene a meeting and the applicable procedure. In terms of section 126 (3) of the Act the first respondent was within its rights to call for the November 2017 meeting. Subsection (4) thereof sets out how such a meeting should be convened:-

“Any meeting convened under this section by the requisitionist shall be convened in **the same manner as nearly as possible**, as that in which meeting are to be convened by Directors.” (*my emphasis*)

The ordinary meaning of convene is simply to call together or summon. A reading of the section shows that where a requisitionist calls a meeting in terms of section 126 of the Act they should do so in a like manner as the Directors would do.

The procedure for convening a meeting of a public company such CFI is regulated by the Act, the company’s articles and the Listing Rules. Sections 33 to 37 of the articles deal with the calling of a meeting. The salient features are that shareholders can call a meeting and the procedure should be as prescribed in section 103 of the repelled Companies Act (*Chapter 190*) the equivalent of s 126 of the current Act. Three copies of the Director’s Annual Report and Accounts and all notices to shareholders should be sent to the secretary of the Zimbabwe Stock

Exchange. Sections 11 and 16 of the Listing rules, 2002 require that a circular be issued together with the notice for the members to get adequate information. Before publishing the notice and the circular in the newspapers the documents have to be submitted to the ZSE committee. The ZSE committee is a regulatory body whose mandate is to ensure fair trading and facilitate an open and efficient market for trading of securities .It is therefore mandatory that where a listed company intends to call a meeting it has to seek the approval of the committee and lodge with it specified documents in those sections. The committee's role is to scrutinize the documents to ensure that as far as possible the relevant facts are adequately disclosed. Where it is satisfied by the information in the documents informal approval of the documents will be granted. Article 33- 37 as read with section 126 of the Act therefore lays down the procedure to be followed by Directors when they call a meeting. By virtue of subsection (4) of that section a requisitionist should call a meeting in the same manner.

In this case the first respondent only issued a notice in the newspaper setting out the agenda of the meeting and advising parties of the date and the venue. This cannot be said to be anywhere near or as nearly as possible to the manner directors convene meetings. A shareholder cannot be excused from complying with the Act and the articles; they are obliged as a matter of law to follow the proper processes. The articles of association bind the company and its members, they constitute a contract between the company and its members see *Hahlo's South African Company Law through cases* (supra). So CFI's articles are binding on the first respondent. This is the time honoured principle upheld in our courts thus in *Africa First Renaissance Corporation Limited v ACM investments and Others* HH 95 /08 the court held a meeting called by shareholders without complying with the company's articles a nullity. Where a shareholder convenes a meeting, it does so in the name of the company, to transact the business of the company therefore there cannot be any reasonable excuse for non compliance with the laid down procedures. A meeting is said to be valid where the person calling the meeting has the authority to do so, proper notice was given to every person entitled to attend the meeting, a quorum is present; and the rules and regulations of the organization or society are observed.

In this case there was no legal basis advanced for the proposition that a shareholder need not comply with the Listing Rules when it convenes a meeting despite the fact that it would transacting company business. From the above I come to the conclusion that the first respondent

was required as a matter of law to comply with the Listing Rules. The procedure adopted by the first respondent was foreign to the laid down procedure.

In the alternative the respondents pleaded incapacity to comply with the Listing Rules. I was not persuaded that the applicants' nominee directors prevailed on CFI not to comply. The fact that the applicants had the controlling stake in CFI was not disputed. However there was no evidence to substantiate the allegation. In any event it was within the first respondent to approach the courts to seek a remedy if indeed the allegations were founded. It was not for the first respondent to call a sham meeting to reverse resolutions already made. Such conduct could result in shareholders coalescing and holding sham meetings at every turn when they believe the resolutions made are not to their satisfaction. This should not be allowed. If indeed the first respondent had genuine grievances against the Langford transaction and believed CFI was prejudiced, it was open to the shareholders to approach the courts on a derivative action. Our courts recognize a derivative action is so far as it gives a member the *locus standi* to sue on behalf of the company see *Piras and Son (Pvt ) and Another v Piras 1993 (20 ZLR 245 (S); Minister of Mines and Mining Development and 3 Others v Grandwell Holdings (Private ) Limited and 2 Others SC 34/18*. The first respondent chose not to use the legal route but to convene a meeting unprocedural.

*Appointment of the second respondent as chairman.*

The applicants averred that the second respondent was not properly appointed to chair the November 2017 meeting, she was appointed by default. The second respondent disputed that her appointment as chairperson at the impugned meeting was unprocedural. She explained that on the day, three directors attended the meeting two of the directors elected not to contest any vote and stepped out of the running for election as chair of the meeting. It therefore became unnecessary to put the appointment of a chairperson to a vote.

The issue as to who chairs a meeting is set out in section 40 of the articles as follows,

“The chairman of the directors, or in his absence the Deputy – Chairman, shall preside as chairman at every Annual General Meeting of the company. If such officers have not been appointed, or if they be not present at a meeting within ten minutes after the time appointed for holding such meeting, or if they decline or neglect to preside, or intimate their inability to be present, the shareholders present or represented by proxy shall choose a director as chairman and if no director is present or if all the directors present decline, then the shareholders present or represented by proxy shall choose one of their own number to be chairman.” (*my underlining for emphasis*)

A simple reading of the section reveals that, it is only the chairman of the directors who chairs meetings, in his or her absence it is the deputy chairman who chairs meetings. In their absence the responsibility to choose the chairman goes to the shareholders present or represented by proxy. The wording is mandatory; they shall choose one of the directors to chair the meeting. The shareholders therefore have to be advised of the absence of the chairman and the deputy chairman. They choose the chairman from the directors present. It is only where the directors present decline or there is no director present that the shareholders can choose one of their own to be chairman.

From the second respondent's outline of what happened on the day. It is common cause that the chairman and the deputy chairman of the directors were not in attendance. It was therefore for the shareholders to choose a director. It would appear that the shareholders were not engaged in so far as the appointment of the chairman for this meeting was concerned. It cannot be a tenable argument by the second respondent that the other two directors declined appointment. It appears the two directors declined in a caucus meeting of the directors. Clearly that is not what is contemplated in section 40 of the articles. The first step was to place the issue to the shareholders to choose, if the two directors declined then it was for the shareholders to decide whether to not to vote on account of one director being available. To my mind, the rationale to put the issue of the chairman to a vote by the shareholders is to ensure that, the chairman of the meeting be an appointed person by the majority of the shareholders. I have no difficulty to conclude that the second respondent chaired the meeting by default, she was not voted into that position by anyone. This was an affront to the articles. The interpretation that it was unnecessary to put the issue of the chair to a vote is a subjective decision of the second respondent, had the decision been reached by the shareholders the court could maybe have come to a different conclusion.

A reading of the record proceedings shows that some shareholders including the applicants protested against the second respondent's decision to chair the meeting and the lack of information but that was not addressed. It is therefore within the applicant's rights to challenge the appointment of the second respondent as the chairperson. In *Marting v Van Oordt Russel and Co Ltd* 1939 CPD 106 the court held that where a shareholder present in a meeting does not protest against an illegality, he cannot subsequently challenge the proceedings on the



basis of the irregularity if the irregularities are such as could have been corrected. The applicants tried but their efforts came to naught. On this authority the respondent's point that the applicants are estopped from raising the issues herein because they attended the meeting and actively participated cannot succeed. The applicants relied on the case of *Herald Investments Share Block (Pty) Ltd v Meer and Others, Meer v The Body Corporate of Belmont Arcade and Another* 2011 (2) ALL SA 103 (KZD) where the court declined to rescue a shareholder who attended a meeting, participated during the proceedings but was not permitted to vote. The court held that the shareholder cannot rely on the defective notice to defeat the proceedings because by attending and participating it overlooked or sanitized the defective notice. The *Herald* case is distinguishable from the case before this court. In the *Herald* case the shareholder did not raise the irregularities during the proceedings. In this case both issues relied on by the applicant were raised by the applicant's representative but were not addressed. There was room that the alleged irregularities could be corrected. This is the import of the *Marting* case (supra). The approach makes good reason in that shareholders are not required to resort to courts at every turn but should adopt measures to let the company regulate itself. It is only where conduct by some section of shareholders becomes prejudicial that they can approach the courts.

Having found that the conduct complained of indeed took place, the court has to determine whether such conduct was prejudicial or oppressive to the applicants. The non-compliance with the Listing Rules meant there was inadequate information given to the shareholders on the day. The establishment of the ZSE Committee is meant to address one such mischief where the investing public may be called upon to make decisions with inadequate information. The applicants aver that there was no information on why the Langford transaction was to be reconsidered; there was no information on both the legal and financial implications of either carrying or not carrying the proposed resolutions. To my mind since the company is an association of persons for an economic purpose. It becomes imperative for shareholders to get the necessary information on the financial effects of either carrying a resolution or not. Shareholders invest in a company for a return; every decision made is made with a view to its financial implications. I am persuaded that the non-compliance went to the root of the substance of the November 2017 meeting and was prejudicial and oppressive. This was a matter of the first respondents railroading the shareholders into a preconceived decision. This is the nub of this

case. The chairmanship of the second respondent is peripheral in that it rendered the meeting null and void. I will revert to her conduct of the meeting later in his judgment.

In its draft order the applicants seek an order that this judgment should be referred to the Law Society of Zimbabwe for its consideration and take appropriate action in connection with the manner in which she handled the requisitioned extraordinary general meeting. The court is aware of the position that conduct by professionals described as disreputable and disgraceful should be construed in a wide sense to apply to any conduct that reflect on one's professional integrity see *Mitchell v Estate Agents Council 1996 (1) ZLR 222(SC)*. Obviously a finding on the issue is a matter of evidence. In this case the only evidence is borne in the record of minutes of the meeting. A reading of those minutes shows that this was a highly charged meeting with emotional outbursts. Of the parties before this court there was no saint. My view is there is inadequate information to make a decision on the issue. It is for the applicants if advised and so inclined to approach the Law Society for appropriate action.

The applicants prayed for costs on a higher scale for this application and the requisitioned November 2017 meeting. Costs usually follow the cause and nothing has been shown to justify a departure from that position. I shall grant the costs on a higher scale in respect of this application. However in respect of the meeting the costs are denied. This is for the reason that, in terms of section 126 (5) of the Act the law allows the costs of convening a meeting to be recouped from the directors that were knowingly party to the default in convening the meeting of the company. In this case it was alleged that the applicant's directors were in the majority, there is a high likelihood that they were complicit in the default by CFI in convening the meeting. Since the default by CFI directly led to the convening of the meeting by the first respondent, I find no basis to order costs against the respondents.

From the fore going the following order is made,

Judgment is entered for the applicant

It be and hereby declared that:-

- I. 1<sup>st</sup> respondent did not comply with the Zimbabwe Stock Exchange Listing Rules section 11 and 16 in calling and holding the requisitioned meeting and that the failure by 1<sup>st</sup> respondent to so comply prejudiced the shareholders of the 3<sup>rd</sup>

respondent. Consequently the requisitioned Meeting of 15 November 2017 be and is hereby set aside.

- II. The 2<sup>nd</sup> respondent was not lawfully appointed as the chairperson of 3<sup>rd</sup> respondent for the purposes of the requisitioned Extraordinary General Meeting of 15 November 2017 and therefore the proceedings are hereby declared a nullity.
- III. The 3<sup>rd</sup> Respondent cannot hold Extraordinary General Meetings without complying with the Zimbabwe Stock Exchange Listing Rules or its own Articles of Association.
- IV. 1<sup>st</sup> and 2<sup>nd</sup> Respondents jointly and severally the one paying the other to be absolved, shall pay the costs associated with this application on a legal practitioner and client scale.

*Kantor & Immerman, Applicants' Legal Practitioners*  
*Nyawo Ruzive Legal Practitioners, Respondents' Legal Practitioners*