OFER SVAN
versus
GILAD SHABTAI
and
MUNYARADZI GONYORA
and
THE MASTER OF THE HIGH COURT N.O.
and
ALEXIOUS DERA

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 18, 19, 21, 25, 29, October and 18 November 2021

Urgent Chamber Application-Interdict

T Nyamakura, for the applicant
T Mpofu, for the 1st and 2nd respondent
GRJ Sithole, for the 4th respondent

MUSITHU J:

BACKGROUND

The applicant and the first and second respondents are directors in entity called Adlecraft Investments (Private) Limited (hereinafter referred to as Adlecraft or the company). Adlecraft was incorporated according to the laws of Zimbabwe. It operates the business of earth moving equipment. A fallout arose between the directors following the passing on of a circular resolution by the first and second respondents placing Adlecraft under corporate rescue and supervision in terms of section 122 of the Insolvency Act.[1] The fallout culminated in the filing of the present application in which the applicant seeks the following relief.

> "**INTERIM RELIEF GRANTED**
> Pending determination of this matter, the applicant is granted the following relief:

[1] [*Chapter 6:07*]

(1) The operation of a resolution executed by the first and second respondents dated 1st October 2021 authorising the placing of Adlecraft Investments (Private) Limited under voluntary business rescue proceedings is suspended.
(2) The respondents are interdicted and restrained from implementing the terms of that resolution.

TERMS OF THE FINAL ORDER SOUGHT
That you now show cause to this Honourable Court why a Final Order should not be made on the following terms:

IT IS HEREBY DECLARED THAT:
(1) That the resolution dated 1st October 2021 attached to the application marked **"E"** endorsed under CRP3/21 is null and void.
(2) Adlecraft Investments (Private) Limited has only issued 20 shares, all of which are currently owned by the applicant as 100% shareholder.
(3) Consequent to the above declarations; the following consequential relief will be sought.
3.1 An order setting aside the resolution dated 1st October 2021 under CRP3/21
3.2 An order setting aside the appointment of fourth respondent as corporate rescue practitioner of Adlecraft Investments (Private) Limited.
3.3 An order interdicting and restraining the first respondent from representing himself out to the public or transacting on the perjured capacity of a holder of equity in Adlecraft Investments (Private) Limited.
3.4 The first and second respondents are ordered to pay the applicant's costs on an attorney and own client scale.

……."

The application was opposed by the first, second and fourth respondents. They raised several preliminary points at the outset. This judgment deals with those preliminary points. The third respondent prepared a report in terms of r 61. It was submitted in court through the applicant's counsel. Counsels for the first, second and fourth respondents strongly objected to its adduction citing improprieties surrounding its preparation at the request of one party, and the very manner of its tender in court. The matter was adjourned to allow the litterateur of the report, a Mr Gapara from the third respondent's office to come and explain the circumstances of its creation. After his testimony, and following exchanges between the court and the parties' counsels, it was concluded that the report was not relevant to the determination of the issue before the court. The report and the concomitant testimony of Mr Gapara were accordingly expunged from the record.

Before dealing with the plenteous preliminaries raised by the first, second and fourth respondents, it is perhaps critical to summarise the parties' respective positions as set out in the affidavits.

Applicant's Case

The application, save for the founding affidavit, cited two applicants. The first applicant was Ofer Sivan. The second applicant was Adlecraft. By notice of amendment filed on 12 October 2021, the citation of the first and second applicants was abandoned and substituted by the name Ofer Sivan as the sole applicant.

Applicant claims to be the director and sole shareholder in Adlecraft, by virtue of holding its entire issued equity. He claims to have acquired Adlecraft as a shelf company in 2011. From that point he became its executive director and was seized with the company's affairs. He dismissed the first respondent's claims of having a stake in Adlecraft as false. The first respondent claimed there was a holding company that allegedly held the entire issued share capital in Adlecraft. He claimed to be the majority shareholder in that holding company, and by extension the majority shareholder in Adlecraft. That claim was not based on the entity's constitutive documents, but rather a Zimbabwe Investment Authority (ZIA) licence.

In the course of the company's business, the applicant negotiated a loan with the first respondent to fund the company's operations. The arrangement was consummated through a loan agreement of 1 March 2015 between Adlecraft and the first respondent.[2] Clause 1.1 of the agreement stated that the lender was to lend "….funds to the borrower up to the amount of $9 000 000-00 (Nine Million Dollars and Zero Cents) (the "Loan") in the form of equipment, machinery and spare parts which has been imported to Zimbabwe". In terms of clause 2.2, the loan was advanced for purposes of mining contracts and other purposes which were not at variance with the memorandum and articles of association of the borrower. The applicant contends that the loan agreement was not one for purchase of equity. The loan amount was to be repaid in the normal course of business.

According to the applicant, the first respondent wanted some oversight on the activities of the company in order to protect his investment. He was appointed a non-executive director. The

[2] Loan agreement on page 72 of the record of the application.

applicant claims that the first respondent was never allotted any shares in lieu of the loaned amount. He was never involved in the management of the company's affairs. The applicant claimed that the bulk of the loaned amounts had since been repaid.

The applicant averred that the first and second respondents were on a warpath and sought to wrestle the company from him. The two co-directors stand accused of the following: they threatened disciplinary action against some employees of the company; they had also approached this court for spoliatory relief, which was clearly malicious as the two respondents are non-executive directors; the two directors opened alternative company bank accounts and they were also plundering the company's resources; the company's file went missing at the Companies Registry.

On 2 October 2021, the applicant received an email from the second respondent. Attached to the email was a circular resolution that the applicant was required to print and sign.[3] The draft resolution, which forms the gravamen of the applicant's complaint, reads in part as follows:

> **"CIRCULAR RESOLUTION OF THE BOARD OF DIRECTORS OF ADLECRAFT INVESTMENTS (PRIVATE) LIMITED OF THE 1st OCTOBER 2021**
>
> THE BOARD OF DIRECTORS of the company, having determined that the company is likely to experience financial distress within the next six (6) months, arising from the shareholder disputes which have spilled into the courts of law and are crippling the company's operations.
> AND AFTER NOTING that the company has reasonable prospects of being rehabilitated successfully, if it is placed under corporate rescue and supervision in terms of Section 122 of the Insolvency Act (Chapter 6:07), as there is still business and assets that can be utilized to create reasonable cash flows and restore the company to "going concern" solvency, the Board, therefore, resolved as follows:
> 1. That the company be and is hereby placed under corporate rescue in terms of Section 122 of the Insolvency Act (Chapter 6:07).
> 2. That ALEXIOUS M DERA of PNA CHARTERED ACCOUNTANTS, be and is hereby appointed the Corporate Rescue Practitioner of the Company in terms of Section 122(3) of the Insolvency Act (Chapter 6:07).
> 3. That Munyaradzi Gonyora be and is hereby authorized to issue a sworn statement on behalf of the company in fulfillment of the provisions of the Insolvency Act [Chapter 6:07]"

The applicant responded to the resolution through an email of 4 October 2021. The email reads in part as follows:

[3] See email on page 69 of the application and the draft resolution on page 70.

"REF: DEFECTIVE DRAFT CIRCULAR RESOLUTION OF THE BOARD OF DIRECTORS OF ADLECRAFT INVESTMENTS (PRIVATE) LIMITED OF THE 2nd OCTOBER 2021

I refer to the above matter in which I received your purported draft circular resolution on Friday the 2nd October 2021 with an instruction to print and sign the same.
I am taken aback at such instruction as it is patently defective for non-compliance with the requirements of the law.

I am further surprised that you have decided not to heed the sentiments of Honourable Justice Tsanga in her judgment under HC4465/21 that the directors will have to address their dispute. It would appear that you were negotiating for an out of court settlement as directed by Honourable Justice Chitapi under the pending Urgent Chamber Application proceedings in bad faith as it is now very clear that no intentions of resolving all issues between the parties is harbored.

I therefore cannot sign this purported draft resolution as it has no legal basis, more importantly because the company operations are not crippled, nor do they face any risk of being crippled within the next six months. The company is also not likely to experience any financial distress as you state. Should you proceed to sign the same, I shall be challenging the propriety of the entire process

I have copied this letter to Mr Gilad Shabtai for good order…."

The applicant contends that the resolution was irregular. No meeting of directors was held before the resolution was passed as required by the law. The resolution was not signed by all the directors required to be present at the meeting. The requirements for setting up a meeting at which such a resolution could be passed were not complied with. If ever a meeting was held, then it was invalid for want of compliance with the law. The company's articles of association had no provision for a circular resolution.

The resolution itself was allegedly founded on falsehoods. The company was not in financial distress. It had never failed to meet its financial obligations as and when they became due. There was no evidence that it would fail to meet its obligations even in the near future. The first and second respondents had not even related to the company's accounts to back up their claims. The appointment of the fourth respondent was resultantly a non event. He could not be validly appointed pursuant to an invalid resolution.

The application was accompanied by a certificate of urgency. It submits that the manner in which the first and second respondents acted, and the utter disregard of the law in passing the resolution that had serious repercussions on the affairs of the company craved for urgent

attention. In the founding affidavit, the applicant avers that he became aware of the draft resolution on 2 October 2021. At that stage, he did not consider it necessary to approach the courts since he expected a directors meeting to be convened. In any event, the resolution required his signature. He only discovered on 4 October 2021 that the resolution had been signed by the other two directors and served on the third respondent. He was never served with a copy of the resolution and the sworn statement supporting the resolution. It was at that stage that he instructed counsel to prepare this application.

First and second respondents' case

Their affidavits raised the following preliminary points: improper cause of action and an irregular certificate of urgency. At the hearing their counsel Mr *Mpofu* motivated the following additional preliminary points; uncertainty as regards the number of applicants; Ofer Sivan had no right to institute proceedings in his name; that the application was based on material falsehoods; and that there existed material disputes of fact.

As regards the merits, the first and second respondents denied that the applicant was the sole shareholder of the company. The shareholding structure as at 29 August 2018 excluded the applicant. The structure was as follows: Adlecraft Holdings (Pvt) Ltd 49%; Munyaradzi Gonyora 10%; Razaro Mapuwapuwa 10%; Stephen Itai Mangoda 10%; Chance Chitima 10%; Adlecraft Work's Trust 11%. The first respondent maintained that he held equity in Adlecraft Holding (Pvt) Ltd which had an extant shareholders agreement with the company. This is the shareholding structure that was relayed to ZIA when the company applied for an investment licence. That structure remained unchanged. Any contrary position would be an acknowledgment that a misrepresentation was made to ZIA. The share certificate certifying the applicant as the holder of 20 fully paid shares was dismissed as fake. It was never lodged with ZIA. The extant CR14 listed four directors of the company. These were the applicant, first and second respondents and one Claudious Nhemwa. At any rate, no CR2 form had been submitted to confirm the applicant's alleged 100% shareholding.

First and second respondents further claimed that a shareholders dispute existed between the parties. It had the potential to cause serious financial harm and for that reason there was need to entrust an independent third party with the affairs of the company to avoid further financial

damage. The applicant was allegedly running down the company. As the managing director, he had failed to repay the loans advanced to the company.

First and second respondents averred that the application was ill-conceived as the corporate rescue process was already underway. The court could not interdict a lawful process that was intended to save the company. More importantly, the third respondent and the registrar of companies had accepted the resolution. That resolution was passed by the majority board members. The resolution was therefore not afflicted by any illegality as alleged. The court was urged to dismiss the application with costs on the legal practitioner and own client scale.

Fourth respondent's case

The fourth respondent's opposing affidavit raised the following preliminary points: lack of urgency, irregular certificate of urgency and dirty hands. On the merits, the fourth respondent insisted that his appointment as corporate rescue practitioner was confirmed by the third respondent through a certificate of appointment of 6 October 2021. The grounds for his removal from that position were confined to those prescribed under section 132 of the Insolvency Act. At the time the applicant deposed to the founding affidavit, he was no longer a director of the company by virtue of section 130(2) of the Insolvency Act.

The existence of a shareholder dispute necessitated the placing of the company under corporate rescue whilst the parties resolved their differences. The applicant had refused to cooperate with the corporate rescue practitioner. The fourth respondent prayed that the application be dismissed with costs on a higher scale.

Submissions on the Preliminary Points

Irregular Supplementary Affidavit

On 14 October 2021, the applicant filed a document styled *"Applicant's Supplementary Founding Affidavit"*. The affidavit sought to deal with events that occurred after the filing of the founding affidavit. Mr *Mpofu* submitted that a supplementary founding affidavit could not be placed before the court after opposing affidavits were filed. An application had to stand or fall on the founding affidavit. Mr *Sithole* for the fourth respondent submitted that the supplementary affidavit was irregular. It was filed on 14 October 2021, after the fourth respondent had filed his opposing affidavit on 13 October 2021. It raised new matters that the fourth respondent did not

have an opportunity to deal with at this stage. The court was urged to expunge the affidavit from the record.

In response, Mr *Nyamakura* submitted that an irregular process must be dealt with in terms of r 43(1). The first and second respondents had dealt with the supplementary affidavit in their notices of opposition. As regards the fourth respondent, Mr *Nyamakura* submitted that the court was reposed with discretion to accept the affidavit in view of the urgency of the matter. Any perceived prejudice could be cured by affording the fourth respondent an opportunity to respond to the matters raised in the supplementary founding affidavit.

The law specifies the affidavits that must be filed by the parties, and their order.[4] Once a notice of opposition has been filed in response to the founding affidavit, no supplementary affidavit can be filed without the leave of the court. In *casu*, the supplementary affidavit was filed before the first and second respondents filed their notices of opposition. They responded to the supplementary affidavit in their affidavits. Indeed Mr *Mpofu* conceded that no prejudice was occasioned to the two respondents.

It is however in respect of the fourth respondent that clearly there is foreseeable prejudice. By the time that the applicant filed the supplementary founding affidavit, the fourth respondent had already filed his opposing affidavit. That supplementary affidavit seeks to deal with the conduct of the fourth respondent. While the court indeed has discretion to condone the filing of additional affidavits, allowing the supplementary affidavit to stand in the circumstances of this case would be stretching that discretion too far. The applicant's counsel was aware that the affidavit had been filed after the fourth respondent had already filed his opposing affidavit. No application was made to seek the leave of the court to allow the filing of the supplementary founding affidavit. The intention to seek such leave was not expressed in advance. The preliminary objection is upheld. The court cannot condone the clandestine filing of pleadings when the law that governs such process is clear on that point. The supplementary founding affidavit is accordingly expunged from the record.

[4] Rule 58 of the High Court Rules 2021

Urgency

Mr *Mpofu* submitted that the matter lacked urgency. The circular resolution that triggered the approach to this court was passed on 1 October 2021. The applicant only approached the court on 11 October 2021. The delay of 10 days was not explained. A litigant had an obligation to explain the delay in approaching the court. Reliance was placed on the case of *Kuvarega* v *Registrar General & Anor*.[5] That failure to explain the delay effectively put the applicant out of court. In the absence of an explanation, such delay was unpardonable.

Mr *Mpofu* further submitted that the matter lacked urgency for yet another reason. The certificate of urgency was defective as it failed to address the crucial question of urgency. It did not tell when the need to act arose. A matter was only classified as urgent on the basis of that certificate. It was clear that the certifying practitioner had not applied his mind to the question of urgency as required by the law. Counsel referred to the case of *Chidawu & 3Others* v *Sha & 4 Others*.[6] Further, the certificate of urgency cited two applicants, yet the founding affidavit only referred to one applicant. The certifying practitioner referred to the first and second applicants, yet the very affidavit from which he derived the powers to certify the urgency of the matter only referred to one applicant. That, according to Mr *Mpofu*, showed that the legal practitioner had either not read the founding affidavit, or he simply failed to apply his mind to the papers before certifying the matter as urgent.

Mr *Sithole* submitted that the matter was not urgent considering that the fourth respondent's role was to safeguard the interests of the company. He was appointed pursuant to a lawful process. The perceived harm was illusory. No prejudice had been demonstrated to justify the urgency. Counsel also pointed to another serious flaw in the certificate of urgency. It was undated. The absence of a date showed that the certifying practitioner did not relate to the papers that he ought to have considered. It was also difficult to tell whether the founding affidavit pre-dated the certificate of urgency. The application was not properly before the court.

In his response, Mr *Nyamakura* submitted that it was not a requirement of the law for a certificate of urgency to state any dates that founded the cause of action. He further submitted that at any rate the respondents had not demonstrated any prejudice caused by the alleged

[5] 1998 (1) ZLR 188 (H)
[6] SC 12/13

irregularities afflicting the certificate of urgency. The court was referred to the case of *Infralink (Private) Limited* v *The Sheriff Of Zimbabwe N.O & Two Others*[7] in which CHITAKUNYE J (as he then was) said:

> "A perusal of the copies of the application filed of record shows that it was signed but not dated. The same for the certificate of urgent. Such omission on its own would not be fatal to the application as indeed no prejudice would be suffered by respondent. The failure to endorse the date when the application and certificate of urgency were signed may be viewed as technical errors with no impact on the substance of the application. I did not hear respondent to allege that it had suffered any prejudice as a result of the omissions."

As regards urgency, Mr *Nyamakura* submitted that the applicant had in his founding affidavit gone to great lengths in explaining events that culminated in the filing of the application. The delay of 10 days could not be deemed inordinate in the circumstances.

Rule 60 (6) provides that:

> "Where a chamber application is accompanied by a certificate from a legal practitioner in subrule (4)(b) to the effect that the matter is urgent, giving reasons for its urgency, the registrar shall immediately submit it to the duty judge, handling urgent applications who shall consider the papers forthwith."

I pause to note that the new rule requires the registrar to submit the papers to a 'duty judge', instead of a 'judge' as per the old rules. That slight variation does not in my view, alter the intention of the law. The judge must consider the papers placed before him. The certificate of urgency must be read together with the rest of the papers placed before the judge. In the case of *Chidawu & Others* v *Shaa & Others* GOWORA JA (as she then was) considered a certificate of urgency as the "*sine qua non* for the placement of an urgent chamber application before a judge". In that matter, a legal practitioner preparing a certificate of urgency had simply copied the contents of a certificate of urgency prepared by another legal practitioner in a related matter. It was argued that the legal practitioner had not applied her mind to the facts of the case when she certified the matter as urgent. The court found that to be improper. GOWORA JA further remarked that "*In order for a certificate of urgency to pass the test of validity it must be clear ex facie the certificate itself that the legal practitioner who signed it actually applied his or her mind to the facts and the circumstances surrounding the dispute"*. The learned judge also cited

[7] HH-1/19

with approval the sentiments by GILLESPIE J in the *General Transport & Engineering (Pvt) Ltd & Ors* v *Zimbank Corp (Pvt) Ltd* matter.[8]

The circumstances of *Chidawu & Others* v *Shaa & Others* are remarkably different from the present matter. Though the certificate of urgency is undated and refers to a second applicant who is not a party to the proceedings, that irregularity is not so gross as to detract from the substance of its contents. The anomalies do not in my view suggest that the certifying practitioner did not apply his mind to the circumstances of the dispute. In paragraph 1 of the certificate, the certifying practitioner expresses the view that: the matter was urgent as the resolution by the first and second respondents did not comply with section 196(1) of the Companies and Other Business Entities Act (COBE); the resolution had drastic consequences on the business of the company and as such it had to be grounded on a firm legal foundation; the applicant had been rendered inessential thanks to an unlawful process; that there had been no delay in taking action from the time the need to act arose, as the applicant needed to carry out further investigations.

The certificate of urgency must not be read in the abstract. In paragraph 41 of the founding affidavit, the applicant explains that he only discovered towards end of day on 4 October 2021, that the circular resolution had in fact been signed by the first and second respondents and served on the third respondent. He was never served with a copy of the signed resolution and the accompanying sworn statement. It was after this realization that he approached his legal practitioners with instructions to file this application. The application was filed on 11 October 2021. The delay of ten days can hardly be construed as inordinate in light of the explanation tendered for the delay. It is the court's finding that the anomalies that afflict the certificate of urgency are not so grave as to make the application irregular and susceptible to

[8] 1998 (2) ZLR 301, where at pp 302E-303B he stated:

> "Where the rule relating to a certificate of urgency requires a legal practitioner to state his own belief in the urgency of the matter that, invitation must not be abused. He is not permitted to make as his certificate of urgency a submission in which he is unable to conscientiously concur. He has to apply his own mind and judgment to the circumstances and reach a personal view that he can honestly pass on to a judge and which he can support not only by the strength of his arguments but on his own honour and name.
>
> …….It is therefore an abuse for a lawyer to put his name to a certificate of urgency where he does not genuinely believe the matter to be urgent. Moreover, as in any situation where the genuineness of a belief is postulated, that good faith can be tested by the reasonableness or otherwise of the purported view. Thus where a lawyer could not reasonably entertain the belief he professes in the urgency of the matter he runs the risk of a judge concluding that he acted wrongfully if not dishonestly in giving his certificate of urgency."

striking off. For the reasons given, I also find that the application is urgent and accordingly the preliminary objections are dismissed.

No applicant before the court

The first leg of the argument was that it was unclear how many applicants were before the court. The cover page of the application cited two applicants. The certificate of urgency and the draft order also referred to two applicants. The founding affidavit referred to just one applicant. Counsel for the applicant confirmed later in the course of his address that Ofer Sivan was the only applicant. On 12 October 2021, a notice of amendment was filed. Its effect was to delete any reference to Adlecraft as the second applicant, and the substitution of Ofer Sivan as the sole applicant. That clarification in my view puts to rest the question of the number of applicants before the court.

The clarification also disposed of the second leg of the objection. It was to the effect that assuming the company was the second applicant, it was improperly before the court in the absence of a board resolution authorizing the institution of proceedings by the company.

That Ofer Silva has no right to institute proceedings in his name

It was submitted on behalf of the first and second respondents that the applicant ought to have instituted a derivative action as a shareholder of the company instead of approaching the court in his personal capacity. The company was then supposed to be cited as a respondent in the same proceedings. Mr *Mpofu* cited the case of *Grandwell Holdings [Private] Limited* v *Minister Of Mines & Mining Development and 5 Others*[9], in which the court acknowledged the availability of a derivative action to a shareholder not just in cases of fraud, but also in instances where the company is exposed to harm by those in control. The High Court decision was confirmed on appeal.[10] Mr *Mpofu* further submitted that the failure by the applicant to mount a derivative action meant that there was no applicant before the court.

In response, Mr *Nyamakura* submitted that as a director of the company, the applicant would have been entitled to receive notice of the meeting at which the resolution was to be

[9] HH-193/16

[10] *Minister of Mines and Mining Development & 3 Others* v *Grandwell Holdings (Private) Limited & 3 Others* SC 34/18

passed. As a director the applicant was entitled to challenge a resolution that he deed invalid. Counsel cited the case of *Robinson* v *Imroath & Others.*[11]

It is common cause that a derivative action exists as a remedy at the instance of a disquieted member of a company.[12] However in *casu*, the applicant's complaint is against the conduct of the first and second respondents as co-directors of the company. The applicant impugns the circular resolution of 1 October 2021 which was passed by the two directors. That circular resolution is the subject of the interim relief sought at this stage. The first and second respondents do not dispute that the applicant is indeed a director in the company. In fact, that's the very reason why they sent him an email on 1 October 2021. I find that the applicant is properly before the court to the extent that the injunction sought is aimed at the conduct of his co-directors. The objection is accordingly dismissed for lack of merit.

No cause of action

Mr *Mpofu* submitted that the relief sought by the applicant in the interim was incompetent. The court had no equitable jurisdiction to grant relief outside what the law prescribed. Counsel referred to section 123 (1)(a)(iii) of the Insolvency Act[13], which states as follows:

> **"123 Objections to company resolution**
> (1) Subject to subsection (2), at any time after the adoption of a resolution in terms of section 122, until the adoption of a corporate rescue plan in terms of section 146, an affected person may apply to a Court for an order—
> (*a*) setting aside the resolution, on the grounds that—
> (i) there is no reasonable basis for believing that the company is financially distressed; or
> (ii) there is no reasonable prospect for rescuing the company; or
> (iii) the company has failed to satisfy the procedural requirements set out in section 122"

Mr *Mpofu* further submitted that the recourse available to an aggrieved party was to approach the court for the setting aside of the resolution in terms of section 123. One could not seek the setting aside of corporate rescue proceedings. The application was therefore improperly before the court as it was done in total defiance of the law. Mr *Mpofu* further submitted that the decision to place the company under corporate rescue was made by directors and not

---

[11] 1917 WLG 159

[12] *Minister of Mines and Mining Development & 3 Others v Grandwell Holdings (Private) Limited & 3 Others* (supra). See also section 61 of the Companies and Other Business Entities Act [Chapter 24:31]

[13] [*Chapter 6:07*]

shareholders. Boards of directors operated on the basis of the majority. The circular resolution was the product of a decision of the majority in the board. The resolution therefore complied with section 196 of the COBE. Mr *Mpofu* also submitted that the resolution complied with article 8 of the company's articles of association. The article provides that a resolution passed at a directors' meeting shall be valid if supported by a simple majority. It did not matter that the resolution was passed at a virtual meeting. Section 196 approved of other ways of conducting meetings other than physical meetings.

Mr *Mpofu* argued that a decision of the majority was not vitiated by a failure to follow procedures. He made reference to the *Duomatic* principle espoused in the case of *In re Duomatic Limited.*[14] The principle provides that where all the shareholders who have a right to attend and vote at a general meeting of a company assent to a matter in a shareholders' agreement which could be carried into effect at a general meeting of the company, that assent is as binding as a general meeting's resolution. It did not matter whether the formal procedures for agreeing on a particular matter were stipulated in the Articles of Association, in the Companies Act or in a separate contract between the members of the company concerned.

What mattered instead was that all the members, who ultimately exercise power over the affairs of the company through their right to attend and vote at a general meeting, had reached an agreement on that matter. Consequently, as long as the members had previously reached an agreement, they were unable to purport that they were not bound by a particular matter simply because the formal procedure for assenting to it was not followed. Counsel cited a long list of cases that went along with the *Duomatic* dictum. Mr *Mpofu* further submitted that the abstention of one of the directors did not affect the validity of the resolution. Also inconsequential was the refusal to sign a resolution by one of the directors. Section 196 would create an absurdity if it was interpreted to mean that all directors had to sign the resolution, when the law recognized the right of a director to abstain from voting. For that reason, the section had to be interpreted in a way that accorded with the principle of majority rule.

In response, Mr *Nyamakura* submitted that the email to the applicant accompanying the circular resolution was not inviting the applicant to a meeting. It required the applicant to print

[14] *[1969] 2 Ch 365*

and sign the resolution. According to counsel, section 196(1) of the COBE was only complied with when all the directors signed the circular resolution. In short the section introduced the doctrine of unanimous assent. The letter of the law was very clear in that regard. The court would not interfere if all the directors entitled to vote signed the circular resolution. Counsel further submitted that section 196 was actually an exception to the general rule which required resolutions to be passed at a meeting at which the majority vote prevailed. Directors ordinarily acted when they are assembled as a board, with each director being entitled to due notice.[15] Failure to give such notice had the effect of rendering such decision unlawful.

Mr *Nyamakura* further submitted that the *Duomatic* principle actually entrenched the opposite of what the first and second respondents had done. According to counsel section 196 actually embraced the *Duomatic* principle. It only applied where there was unanimity. It was intended to protect the sanctity of meetings. The first and second respondents had not justified the reasons behind the passing of the circular resolution without any notice to the applicant. The resolution was therefore irregular.

As regards the failure to comply with section 123 of the Insolvency Act, Mr *Nyamakura* submitted that the section should not oust the jurisdiction of this court. The relief sought was not forbidden by the law. In any case, one could not separate validity of the process that yielded the resolution and the resolution itself. If the process was tainted by an irregularity, then the outcome was equally tainted. The court was referred to *Mcfoy* v *United Africa Co. Ltd*[16]. The resolution was therefore impeachable from its point of origin.

In reply, Mr *Mpofu* insisted that the decision to place the company under corporate rescue was the decision of the majority, and that was the end of the matter. The decision did not have to be preceded by any discussions between the directors. Section 196 was one of the many ways through which decisions were made. To that extent it could never be an exception to the *Doumatic* principle. The principle of unanimous assent did not apply once the majority voted for

---

[15] *Madzivire & 3 Others* v *Zvarivadza & 2 Others* 2006 (1) ZLR 514

[16] 1961(3) All ER 1169, where the court said:

> "If an act is void then it is in law a nullity. It is not only bad but incurably bad……and if the proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

the resolution. Mr *Mpofu* further submitted that the inherent jurisdiction of the court could not be invoked where the law was clear on the procedure to be followed. One ought to present their challenge within the prescription of the law. The law did not permit the stay of a lawful process. In any case, the applicant ought to have approached the court on an urgent basis via an urgent court application. The urgent chamber application was doomed.

Whether or not the applicant has a cause of action depends on how one interprets section 196 of the COBE as read with section 123 of the Insolvency Act. Section 123 (1)(a) provides for the grounds upon which a resolution may be set aside. A reading of sections 122 and 123 of the Insolvency Act shows that the law presumes that the resolution placing the company on corporate rescue was validly made. The two sections do not relate to those instances where an interested party seeks to challenge the validity of the resolution itself. The question that arises is whether an interested party who alleges an irregularity in the manner in which the resolution was passed is without a remedy? In my view, the fallback position is section 196 of the COBE. That section permits the taking of decisions by way of a circular resolution.

The applicant claims that a proper interpretation of that section denotes that all the directors of the company must sign the circular resolution. Mr *Nyamakura* referred to it as the unanimous assent. Mr *Mpofu* on the other hand argued that by operation of the majority rule and the *Doumatic* principle, the signatures of all directors were not necessary. What mattered was that the majority voted for the resolution. This was also consistent with article 8 of the company's articles of association. It is this court's view that the issue surrounding the proper interpretation of section 196 of the COBE does not arise for consideration at this stage.

Put differently, the question whether section 196 must be interpreted in harmony with the majority rule and article 8 of the articles of association is a matter to be considered as part of the merits of the dispute. This court cannot make that pronouncement at this stage. All that the court should be concerned about at this stage is whether there is a connection between the applicant, the company and the resolution which triggered an approach to this court. The question of whether or not the applicant has a cause of action must also be related to in that context. For that reason, it is the finding of this court that the issue of whether or not the applicant has a cause of

action was prematurely raised. It cannot be conclusively dealt with at this stage as it is tied to the merits of the dispute. The objection is accordingly dismissed.

Material falsehoods

It was submitted for the first and second respondents that the application was founded on material falsehoods. If the court found that the founding affidavit was indeed tainted with material falsehoods, then the court had no option but to reject it. The alleged material falsehoods were as follows. The applicant claimed to be the sole shareholder in the company. The ZIA Investment Licence attached to the application showed that there were other shareholders in the company. The applicant is not listed amongst the shareholders. The allegation that the applicant held 100% shareholding was inconsistent with representations made to ZIA. It was meant to mislead the court.

In reply Mr *Nyamakura* submitted that the allegation of falsehoods was not a preliminary point at all. The applicant disputed the first and second respondents' claims to shareholding in the company based on the ZIA Investment Licence. The ZIA Investiment Licence did not substitute the constitutive documents of a company that attested to the shareholding of the company. The investment licence did not create rights outside the constitutive documents of the company.

In his brief response Mr *Mpofu* maintained that the applicant had to comply with the country's indigenous laws as a foreign investor. He bore the onus to explain how he acquired the 100% shareholding in the company. He also had to explain how the other shareholders listed on the ZIA licence lost their shareholding in the company.

The alleged falsehoods relate to matters concerning the shareholding of the company. I pause to remark that this court has already noted that there is a shareholders dispute involving the company.[17] I agree with Mr *Nyamakura* that the dispute surrounding the company's shareholding must not be treated as a preliminary issue. It is part of the merits of the dispute.[18] The point *in limine* lacks merit and must fail.

Dirty Hands

[17] See *Adlecraft Investments (Private) Limited v Myburgh & Another* HH 538/21 at page 5 paragraph 16.
[18] See paragraph 2 of the terms of the final order sought on page 87 of the application.

Mr *Sithole* urged the court to withhold its jurisdiction as the applicant had approached the court with dirty hands. The applicant allegedly denied the fourth respondent access to the company premises to carry out his mandate as the corporate rescue practitioner. He also refused to surrender company documents to the fourth respondent. His conduct was at variance with s 135 of the Insolvency Act which obliged directors of the company to cooperate with the corporate rescue practitioner. The court could not be seen to condone a blatant violation of the law. Reference was made to the *Associated Newspapers of Zimbabwe (Pvt) Ltd.* v *Minister of State for Information and Publicity and Another* judgment.[19]

In reply, Mr *Nyamakura* submitted that it was not correct that the applicant refused to cooperate with the fourth respondent. The fourth respondent instituted proceedings under HC 5516/21 to compel the release of the company documents. That application was withdrawn before notices of opposition were filed. No reasons were given for the withdrawal. In any case, the fourth respondent's opposing affidavit did not set out when he was denied such access by the applicant. Nothing was placed before the court to show that the communication from the fourth respondent requesting information from the directors of the company was served on the applicant. It was further submitted that in any case, the applicant is alleged to have been removed as the company's managing director pursuant to a resolution by the first and second respondent. The second respondent had since been appointed as the acting managing director.

It is my finding that no evidence was placed before the court to show that the applicant refused to cooperate with the fourth respondent, let alone furnish the information that was requested. The fourth respondent's affidavit is deficient in that regard. It does not state when he was denied entry into the company premises by the applicant. It does not state whether the letters and notices addressed to directors of the company were served on the applicant, and if so when. More crucially, in the *Adlecraft Investments (Private) Limited* v *Cassandra & Another* judgment,[20] TSANGA J found that the second respondent had been appointed acting director of the company in the absence of the applicant who had allegedly abandoned his duties. It is not clear how the applicant would have been in possession of the company's documents, or denied fourth

[19] SC 111/04
[20] supra

respondent access to the company premises if he had ceased to be the managing director. The court finds the objection meritless and it is hereby dismissed.

Disputes of fact

It was submitted that the application is afflicted by material disputes of fact incapable of resolution on the papers. Mr *Mpofu* pointed to the applicant's averment that he holds 100% shareholding in the company yet ZIA licence cited several other shareholders. The applicant also accepted that the first respondent had advanced some loan amount to the company, yet the applicant was silent on his own contribution.

Mr *Nyamakura* denied the existence of material disputes of fact arguing that the matter was resolvable on the papers if the court adopted a robust and common sense approach. He further submitted that the alleged disputes of fact arose because of two documents that appeared to be in conflict with each other. These were the ZIA investment licence and the documents confirming the applicant's own shareholding. The applicant had however placed before the courts relevant documents to back up his claims. These were the Form No. CR 14, the transfer of shares form, and the share certificate issued in his favour on 14 August 2021.

In reply Mr *Mpofu* argued that urging the court to adopt a robust approach was an admission of the existence of the disputes of fact. There existed two conflicting versions of the shareholding in the company which required the applicant to show the process by which he acquired the entire shareholding.

It is the court's view that the materiality of the alleged disputes of fact do not arise for determination at this stage. The submission is inextricably tied to the merits of the dispute as regards the shareholding in the company. The court cannot resolve the issue without interrogating the circumstances under which the feuding parties allegedly acquired shares in the company. It is an issue for determination on the return date. It speaks to paragraph 2 of the terms of the final order sought. The objection is without merit and it is accordingly dismissed.

COSTS

Mr *Mpofu* had urged the court to make an award of costs on the attorney and client scale in the event that the court found in favour of the respondents on the preliminary points. Mr

Nyamakura did not address the court on the issue of costs. In view of the decision reached on the preliminary points, the issue of costs must be stayed for consideration together with the merits.

DISPOSITION

Resultantly it is ordered that:

1. The preliminary points are hereby dismissed for lack of merit.
2. Costs shall be in the cause.

Messrs Makuku Law Firm, applicant's legal practitioners
Rubaya and Chatambudza, first and second respondents' legal practitioners
Mabulala & Dembure, fourth respondent's legal practitioners