REPORTABLE: (143)

(1) FARAI MATSIKA (2) FAIRGOLD INVESTMENTS PRIVATE LIMITED
V
MOSES TONDERAI CHINGWENA AND 38 OTHERS.

SUPREME COURT OF ZIMBABWE
BHUNU JA
HARARE 13 NOVEMBER 2020 & 15 NOVEMBER 2021

T. Zhuwarara, for the applicants

T. Mpofu with *S. M. Hashiti and Mapuranga,* for 1st, 3rd and 9th respondents.

T. Magwaliba, for 10th, 11th, 15 -22nd, 29th, 33rd respondents.

CHAMBER APPLICATION

BHUNU JA:

[1] This is an opposed application for condonation of late noting of an appeal and extension of time within which to file a notice of appeal. The applicant brings the application in terms of r 43 of the Rules of Court 2018.

THE PARTIES

[2] The 1st applicant is a former employee of the 3rd respondent (the company). He was employed as its Chief Executive Officer. He was dismissed from employment

sometime in 2015 following disciplinary proceedings. The 1st applicant claimed to own 30% shares in third respondent through the agency of the 2nd applicant a duly incorporated company and to that extent a juristic person. His claim to the directorship of the company is in dispute. He claims to be duly authorised to represent the second applicant, a factor which is also disputed by the respondents.

[3] The 1st and 2nd respondents are natural persons bearing the same surname of 'Chingwena'. The 3rd to 9th respondents are duly incorporated companies. The *10th, 11th, 15th -22nd, 29th, 33rd* respondents are also duly incorporated companies clothed with juristic personality. The remaining parties though cited did not appear to oppose the appeal.

[4] The 4th to 38th respondents are companies in which the 1st appellant alleges the company has investments liable to his 30% claim of the shares allegedly held by the 3rd respondent therein.

THE LAW

[5] The law relating to applications of this nature is well known such that it cannot be the subject of any controversy. The requirements for the application to succeed were spelt out in *Kombayi v Berckout*[1]. These are:

a). The extent of the delay.

b). the reasonableness of the delay and

c). the prospects of success on appeal.

[1] 1988 (1) ZLR 53 (S)

THE EXTENT AND REASONABLENESS OF DELAY

[6] It is common cause that the applicants filed their appeal within the prescribed 15 days period upon delivery of judgment on 7 September 2020. Owing to the tardiness of their legal practitioners they fortuitously failed to serve a copy of the appeal on the Registrar of the court *a quo* in breach of the Rules. The registrar was served only a day after the expiry of the *dies induciae*. In the circumstances, I find that the delay of only one day is not inordinate and that there is a reasonable explanation for the delay. Having come to that conclusion what remains to be determined are the appellants' prospects of success on appeal.

BRIEF SUMMARY OF THE CASE

[7] The 1st applicant approached the court *a quo* in terms of s 196 (1) as read with s 198 of the Companies Act [*Chapter 24:03*] complaining that the affairs of the company Croco Holdings (Private Limited) are being or have been conducted in a manner that is oppressive or unfairly prejudicial to the interests of some part of the members including himself. The section provides as follows:

> **"196 Order on application of member**
>
> **(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."

[8] The 1st applicant deposed to the founding affidavit wherein he averred that he owns 30% shares in the company whereas the 1st respondent owns the remaining 70%. His complaint is that the 1st respondent has been and is abusing his position as the majority shareholder. He alleged that the 1st respondent was conducting the company's affairs in an oppressive and prejudicial manner to its members including him. He averred that the 1st respondent and he were the promoters and founding directors of the company. The 1st respondent had however fraudulently removed his name from the company's register of directors.

[9] He proffered some documentary evidence tending to show that he was an initial subscriber of shares and Director of the company. To that end he submitted that all the essential company records showed that he owned 30% of the shares in the company. He contended that he subscribed for the shares in terms of a shareholding agreement he signed on 27 May 2006.

[10] The first applicant cast aspersions on the 1st respondent alleging that since 2014 he had conducted himself contrary to the shareholders' agreement. He further accused the 1st respondent of making decisions outside the forum of the Board of Directors.

[11] It was his averment that in frustration he offered to sell his shares to the 1st respondent but he was evasive and non-comital. Eventually the 1st respondent turned the tables against him and began to dispute his shareholding in the company. They however subsequently met and agreed that the shares be evaluated before disposal. Despite having ordered that evaluation of the shares be carried out, the 1st

respondent again made an about turn and denied ever having entered into such an agreement with him.

[12] Having failed to resolve their differences amicably, the 1st applicant alleged that the 1st respondent proceeded to suspend him from work leading to his dismissal from employment. He has since challenged his dismissal in the courts. On that score he complained that the first respondent had violated his rights as a shareholder which rights are protected by the Act. Consequently, he implored the court *a quo* to provide him with the following relief:

> **"WHEREUPON** after reading documents filed of record and hearing counsel;
>
> **IT BE AND IS HEREBY ORDERED THAT:**
>
> 1. A forensic audit and valuation of the 3rd respondent and its investments in the 4th to 38th respondent be and is hereby ordered to be conducted by an accounting firm registered in terms of the Public Accounts and Auditors Act [*Chapter 27:12*] to be appointed by the 39th respondent within 5 days of granting this order, all fees and costs of the evaluation being paid by the 3rd respondent.
>
> 2. 3rd respondent be and is hereby ordered to pay the applicants the full value of thirty percent (30%) of its total issued ordinary shares and 30% of its investments in the 4th to the 38th respondents within 5 days of completion of the forensic audit and valuation such value having been established in terms of paragraph 1 above.
>
> 3 3rd respondent be and is hereby directed to reduce 3rd respondent's share Capital once the full amount of its thirty percent (30%) issued ordinary shares have been paid by 3rd respondent.
>
> 4. The Sheriff of the High Court and or his lawful deputies be and are hereby ordered to execute terms of paragraph 2 above.
>
> 5. The 1st respondent pays the costs of suit on a legal practitioner and client scale."

[13] The respondents opposed the application arguing that the 1st respondent was never a shareholder of the company. They accused him of relying on forged fraudulent documents and challenged him to prove how he had acquired the alleged company shares. Riding on that challenge they raised a point *in limine* disputing his *locus standi*. They submitted that only a member of a company in the form of a shareholder can bring an application in terms s 196 as read with s 198. The 1st respondent not being a shareholder of the company was not a member of the company and therefore not qualified to bring the application before the court *a quo*.

[14] As a second point *in limine* the respondents challenged the 1st applicant's authority to represent the 2nd applicant.

FACTUAL FINDINGS OF THE COURT *A QUO*.

[15] The court *a quo* found that the application was founded on material falsehoods based on fraudulent documents. Both the shareholders' agreement and the share transfer documents were adjudged to be fraudulent documents. It also found that in relation to the point *in limine* the applicant was unable to explain two conflicting CR2 documents. Thus the court *a quo* upheld both points *in limine.*

[16] Ultimately the learned judge *a quo* upheld the two preliminary points and in the process found that the application was bad at law in that it did not meet the requirements of s 95 as read with s 196 of the Act. In the result he dismissed the application with costs.

PROSPECT OF SUCCESS ON APPEAL

[17] The *onus* of proof lies squarely on the 1st applicant to prove that if granted the court's indulgence he has reasonable prospects of success on appeal. The case of *Essop v S*[2] provides guidance on what is required of the applicant to discharge the onus of proof. In that case the court had occasion to remark that:

> "What the test for reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed therefore, the applicant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."

[18] The applicants' contention is that they have bright prospects of success on appeal because the court *a quo* ignored uncontested evidence which proved that the 1st applicant was indeed a shareholder in 3rd respondent. The 1st applicant further argued that the court *a quo* erred in holding that the shareholders' agreement and the share certificates were fraudulent documents.

[19] As we have already seen the respondents challenged the 1st applicant's *locus standi* and invited him to prove what he alleged. The respondent did not have to do more than to simply challenge the 1st appellant to bring forth credible evidence

[2] [2020] ZASCA 114 at para 6

that would reasonably persuade the appeal court to come to a different decision from that of the court *a quo*.

[20] The cardinal factual issue for determination in the court *a quo* was whether the 1st applicant was a shareholder of the company. It is settled law in our jurisdiction that an appeal court will not easily interfere with factual findings made by a lower court. To that extent, case law has set the test for discrediting and upsetting factual findings by a lower court so high that they cannot easily be overturned on appeal. In *Reserve Bank of Zimbabwe v Granger and Anor*[3] This Court held that:

> "An appeal to this court is based on the record. If it is to be related to the facts there must be an allegation that there has been misdirection on the facts which is so unreasonable that no sensible person who applied his mind to the facts would have arrived at such a decision. And a misdirection of facts is either a failure to appreciate a fact at all or a finding of fact that is contrary to the evidence actually presented."

[21] In this case the court considered all the evidence placed before it and came to the conclusion that the documents relied upon by the 1st applicant were forged fraudulent documents. The applicant's contention is that the shareholders' agreement and the share certificate are authentic and valid because they were prepared and signed by Gwatidzo the auditor. He accuses the court *a quo* of ignoring evidence he proffered to the effect that Gwatidzo admitted that he prepared the documents.

[3] SC 34/01

[22] As evidence of the alleged admission he filed a transcript of a long telephone conversation that he had with Gwatidzo[4]. That transcript does not support his assertion that Gwatidzo admitted preparing the disputed documents. This is what Gwatidzo said at p 16 of the transcript:

> "A. **MR GWATIDZO:** I actually do not remember preparing the shareholders agreement. Did I prepare the shareholders' agreement?
> …
> Q. **FARAI:** In all honest did you not prepare the transfer of shares?
> A. **MR GWATIDZO**: No it was done by Bekker Tilly."

[23] It is axiomatic that the authenticity of the questioned document was premised on them having been prepared and signed by the auditor Gwatidzo. Gwatidzo's denial that he is the author of the questioned documents was fatal to the applicant's case. It destroyed the whole foundation and basis of his case.

[24] In his opposing affidavit the first respondent averred that the 1st applicant forged the shareholders agreement document by superimposing his genuine signature on a copy of the agreement and then photocopying it. The 1st applicant did not lead any evidence to rebut the allegation. Failure to rebut the allegation of forgery of the material document was fatal to the applicants' case.

[25] To make matters worse the 1st applicant filed two conflicting CR2 forms. The first one showed that the company owned all the shares in the 2nd respondent Moses Tonderai Chingwena Family Trust. Upon realising that the first CR2 form was fatal to his case the 1st respondent filed another CR2 form with his answering affidavit

[4] Pages 16 to 29 of 1st respondent's answering affidavit.

contradicting the first CR2 which asserted that 3rd respondent owned all the shares in 2nd respondent.

[26]. These examples of the 1st applicant's shenanigans portray him as a dishonest devious person who is prepared to twist the truth in order to advance his nefarious cause. In light of his deceitful character the learned judge *a quo* cannot be faulted for holding that the 1st respondent's cause was founded on lies and fraudulent documents. That finding is amply supported by the evidence on record. For that reason the learned judge *a quo's* reliance on the dictum of NDOU J in *Leader Tread Zimbabwe (Pvt) Ltd V Smith*[5] is apt. In that case the learned judge observed that:

> "It is trite that if a litigant has given false evidence his story will be discarded and the same adverse inference may be drawn as if he has not given evidence at all.- see *Tumahole Bereng v R [1949] AC 253 nd South African Law of Evidence* IH Hoffman and DT Zeffert{3rd ed) at page 472, if he lies about a particular incident, the court may infer that there is something about it which he wishes to hide".

[27] This should really be the end of the matter as the 1st applicant has proven to be an unworthy dishonest litigant. For the sake of completeness, I however feel constrained to briefly deal with his other complaint that after finding that the 1st applicant had no *locus stand* the court *a quo* ought to have struck the matter off the roll instead of dismissing it.

[28] There is absolutely no merit in this submission for the simple reason that the court was clothed with an unfettered discretion. It is trite that appellate courts are always

[5] HH – 131 - 03

loath to interfere with the exercise of judicial discretion save where the exercise of such discretion is injudicious or contrary to public policy.

[29] The learned judge *a quo* was alive to the fact that he had discretion whether or not to dismiss the application. Having carefully examined the facts and the law he exercised his discretion with admirable efficacy. In dismissing the application he placed reliance on the Case of *Masukusa v National Foods Ltd & Anor*[6] where McNally J as he then was, had this to say:

> "Where the facts are in dispute the court has discretion as to whether to dismiss the application or allow the matter to go to evidence. The first course is appropriate where an applicant should, when launching his application, have realised that a serious dispute of fact was inevitable."

[30] The learned judge *a quo* took the view that the applicant took a conscious risk by taking the application route in the face of glaring facts pointing to a serious dispute of facts. For that reason he had to bear the consequences of the ineptitude of his lawyers who chose the wrong procedure. The course of action taken by the learned judge *a quo* finds support in the *dictum* of MULLER JA in *Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd*[7] quoted with approval in the *Masukusa* case *supra* where he observed that:

> "A litigant is entitled to seek relief by way of notice of motion. If he has reason to believe that the facts essential to the success of his claim would probably be disputed, he chooses that procedure at his peril, for the court in the exercise of its discretion, might decide neither to refer the matter for trial nor to direct that oral evidence on the disputed facts be placed before it, but to dismiss the application."

[6] 1983 (1) ZLR 232 (HC)
[7] 1982 (1) SA 398 (AD) at 430G - H

[31] The 1st applicant had previously engaged the 1st respondent and they had failed to reach an amicable settlement. He therefore knew as a matter of fact that the respondents were disputing his claim that he was the owner of any shares in the company. By extension he knew or ought to have known that they were also disputing his documentary evidence tending to prove that he had a 30% shareholding in the company otherwise they would not have disputed his claim.

[32] The 1st applicant's conduct in providing fraudulent evidence as demonstrated elsewhere in this judgment could only aggravate matters to his detriment. This is therefore a proper case where the naivety of the applicants' lawyers was properly visited on their clients as the applicants were not entirely free from blame.

[33] In the final analysis no fault or misdirection can be laid at the learned judge *a quo's* door in his treatment of the substantive issues and verdict.

COSTS

[34] In view of the 1st applicant's deplorable unbecoming behaviour in manufacturing fraudulent documents to deceive the court, costs at the punitive scale were eminently deserved in the court *a quo.* In the current proceedings before me there is no reason for departure from the general rule that costs follow the result.

DISPOSAL

[35] In the final analysis I hold that the appellants have no reasonable prospects of success on appeal. It is accordingly ordered that the application for condonation of

late noting of appeal and extension of time within which to make an appeal be and is hereby dismissed with costs.

Mutamangira & Associates, the 1st and 2nd the applicants' legal practitioners.

Atherstone & Cook the 1st, 3rd and 9th respondents.

Bera Masamba, the legal practitioners for the 10th, 11th, 15 -22nd, 29th and 33rd respondents.