MILLICA MUNYAKA HCHC70/23

versus

CALISTO MUTSWIRI

and

CALYNA ENTERPRISES (PVT) LTD

HIGH COURT OF ZIMBABWE

COMMERCIAL COURT DIVISION

Harare, 8 June 2023

R. Kadani, for the Applicant

T. Matiyashe, for the Respondents

OPPOSED APPLICATION

CHIRAWU-MUGOMBA J

On the 6th of June 2023, I gave an *ex-tempore* judgment in this matter. I have been requested for reasons and these are they.

The roots of this matter are from a matrimonial matter between the applicant and the 1st respondent. They are formerly wife and husband. On the 27th of January 2011, the court granted a decree of divorce and other ancillary relief. What is apparent however is that a property called 2523 Kadoma Township of stand 2546 measuring 1988 square metres and held under deed of transfer number 1316/2001, hereinafter 'the property' was not dealt with. It is registered in the name of the 2nd respondent. The applicant and the 1st respondent hold 50% shareholding each in the 2nd respondent. For all intents and purposes, they considered the property as their matrimonial home. The 1st respondent remains in occupation. The parties have reached a deadlock on how the property should be distributed. The applicant therefore seeks an order that the 1st respondent be directed to buy-out the applicant's 50% shareholding in the 2nd respondent at a fair value determined by an independent valuator ; that if there is no compliance, the 2nd respondent be dissolved and assets liquidated with the applicant and 1st respondent sharing the proceeds and costs equally. The application is

premised on the provisions of section 62(1) of the Companies and Other business entities Act [Chapter *24:31*].

In their notice of opposition, the respondents aver that the claim has prescribed; that the applicant has used a wrong procedure; that she has misunderstood the concepts of directorship and shareholder; that indeed the 2nd respondent has never traded and therefore no profit has been made and that the 1st respondent financed the construction at the property and therefore the applicant will be unjustly enriched.

At the hearing after submissions on the preliminary issues raised, I asked the parties to address me on the meaning and input of s62(1) of the Act in relation to the word 'action' that appears therein as well as in s62(2). I also directed the parties to the meaning of the word 'action' as it appears in the High Court Rules of 2020.

Mr. *Kadani* submitted as follows. The legal action referred to in the Act is broad enough to encompass both an application and an action. That material disputes arise in both action and application proceedings. What ought to concern the court is whether or not those specific disputes can be resolved on the papers. The action referred to in s62 does not specifically define the meaning and reference to legal action is broad enough to encompass both proceedings by way of action or application. In *casu*, the material averments that the applicant relies on have not been disputed. The court therefore has jurisdiction to entertain the matter, whether by application or action.

Mr. *Matiyashe* made the following submissions. Whenever there is use of the word 'action', a litigant must approach the court through summons and not by way of an application. Therefore the use of application as the procedure was improper.

In response Mr. *Kadani* referred the court to the provisions of *s59* of the Act which reads as follows, ' Power of court to grant relief to defendants or potential defendants in certain cases. That unlike in *s62*, it is clear from that section that there is reference to actions and defendants. Therefore proceedings have to be by way of summons because there are material disputes of fact. Section 62 is however very broad. For instance s62(2)(i) makes provision for an award of damages. That would entail a dispute of fact. And an aggrieved party can only proceed by way of summons. In *casu*, the court is dealing with a matter of a

deadlock which has not been denied by the respondents. The question will be, what then will be referred for trial?

The issue as raised by the court *mero motu*, as it is entitled to, revolves around the meaning of the word action and whether it is broad to include an application.

Section 62 of the Act reads as follows.

> **Court remedies in deadlock, fraud, oppression and other situations; piercing the corporate veil**
> (1) In a legal action by a member of a private business corporation or a company the court may order one or more of the remedies listed in subsections (2) and (3) of this section if it is established that—
> (*a*) the managers or directors, or the member, of the entity are deadlocked, whether because of even division in their number or another reason, and irreparable injury to the entity is likely to be caused to the entity's business or the business can no longer be conducted to the members' advantage, or
> (*b*) the managers, directors or any other persons in control of the entity have acted illegally, fraudulently or oppressively toward the petitioning member.
> (2) In an action under subsection (1) the court shall have the power to order one or more of the following remedies or similar remedies—
> (*a*) dissolution or liquidation of the entity, but if the court finds that the grounds stated in subsection (1) are curable, it may order a reasonable time period for cure;
> (*b*) the performance, variance or setting aside of any transaction or other action of the entity or its members, managers or directors;
> (*c*) the cancellation or amendment of a provision of the entity's constitutive documents;
> (*d*) the removal of any manager, director or officer, or the appointment of any person as a manager, director or officer;
> (*e*) an investigation of the financial effects of any matter in dispute, which may include a forensic audit;
> (*f*) the appointment of one or more inspectors to investigate the acts complained of or of a custodian to manage the business of the company or corporation for a term and under conditions determined by the court;
> (*g*) the submission of the dispute to mediation or other non-binding alternative dispute resolution;
> (*h*) the payment of dividends or other distributions;
> (*i*) the award of damages to any aggrieved party;
> (*j*) the purchase by the company or corporation or another member or shareholder of all of the interests or shares of the petitioning member or shareholder for their fair value as determined by the court
> (3) If the court finds that—
> (*a*) the juristic form of the private business corporation or company has been abused by the board, or a manager, director or officer or any one or more members of the company or private business corporation, for their own or some other person's advantage; or
> (*b*) any acts done or omitted to be done by or on behalf of the private business corporation or company constitutes an unconscionable abuse of the juristic person of the private business corporation or the company; the court may declare the entity not to be a juristic person with respect to the said abuses, acts or omissions and impute those abuses, acts or omissions to the persons responsible for them in their personal capacities

Section 62(1) and (2) include keywords "action". The analysis would have to be whether the word is peremptory or directory. Innes CJ in *Schierhout* v *Minister of Justice* 1926 AD 99 at 109 spelt out the consequences of non-compliance with a statute as follows.

> "It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no force or effect. …And the disregard of a peremptory provision in a statute is fatal to the validity of the proceedings affected."

Courts have wrestled with the issue as to whether a statute is peremptory or directory. See the authorities referred to by PATEL J(as he then was) in *Chiroswa Minerals (pvt) Ltd and anor vs. Minister of Mines and ors,* 2011 (2) ZLR 274 (H). See also *S vs Gatsi, State vs. Rufaro Hotel (pvt) Ltd,* 1994 (1) ZLR 7(H).

The word action is defined in the High Court Rules, 2020 in R2 as, 'means a proceeding commenced by summons'. In my view, the fact that the word appears in both s62(1) and s62(2) is not accidental. I am fortified in my view that the nature of the relief that a court can grant, speaks to matters in which evidence should be led. In *casu,* although the applicant stated that there are no disputes of fact, the position taken by the respondents is very different. I do not see how the applicant can justify the relief that she seeks on the basis of affidavits. This in my view supports the position that I have taken, being that the applicant ought to have commenced by way of summons.

On costs, the respondents are not entitled to any since they did not raise the issue.

DISPOSITION

The application be and is hereby dismissed with each party to bear its own costs.

Atherstone and Cook, Applicant's Legal Practitioners

*Matiyashe Law Chambers, R*espondents Law Chambers