

RATIONAL INVESTMENTS (PVT) LTD

Versus

NGQABUTHO NCUBE

And

MEJU NCUBE

And

DAVID NCUBE

IN THE HIGH COURT OF ZIMBABWE

TAKUVA J

BULAWAYO 11 NOVEMBER 2017 & 3 MAY 2018

Opposed Application

B. Masamvu for applicant

I. Mafirakureva for respondents

TAKUVA J: The late M. C. Ncube and Pilate Mabhena representing the applicant were shareholders in the applicant in the following ratio 70% of shares were held by Pilate Mabhena while M.C. Ncube held 30%. Upon the death of M.C. Ncube, his estate was registered and the respondents were beneficiaries in that estate. The 1st respondent was chosen by his family to be a director of the applicant so as to safeguard their interests in the company. The parties faced some operational difficulties pending the winding up of the Estate Late M.C. Ncube. It was then agreed to get a new shelf company to run the affairs of the applicant until the estate had been paid up. A company called Grief Doctor started running the affairs of Falakhe Funeral Parlour [Falakhe]. Prior to this, the applicant was running the affairs of Falakhe Funeral Parlour.

Subsequently, the parties agreed that respondents be paid US\$11 500,00 being Estate M.C. Ncube's value for 30% shareholding in terms of the first and final distribution account. The applicant and Estate Late M.C. Ncube (represented by Ester Kelly Moyo of Moshel Executors & Trust (Pvt) Ltd) obtained a court order by consent in the following terms:

- “(1) The applicant pays 1st respondent US\$11 500 being 1st respondent’s value for 30% value of shares due to the 1st respondent as per the first and final distribution account.
- (2) The 1st respondent and its beneficiaries thereto shall not have any interests whatsoever in running the affairs of the applicant or Falakhe Funeral Parlour.
- (3) Each party shall bear its own costs.” (my emphasis)

Respondents gladly received payment but continued to occupy Falakhe’s offices, used its vehicles and 1st respondent refused to sign off his directorship under Grief Doctor Enterprises (Pvt) Ltd. This conduct drew the ire of the applicant leading to this application seeking the following relief:

- “(1) The respondents be and are hereby declared to be in contempt of court and are hereby committed to goal for a period of 90 days each, civil imprisonment suspended on conditions enumerated on 1(a) to (f) below:
- (a) 1st respondent is ordered within 24 hours to sign all papers resigning as a director of Grief Doctor Enterprises (Pvt) Ltd.
- (b) Respondents are ordered to surrender the motor vehicles belonging to Falakhe Funeral Parlour registration number ACX 3763 and ADY 0290.
- (c) The respondents are barred from Falakhe Funeral Parlour’s business premises.
- (d) Respondents are ordered to refund to Falakhe Funeral Parlour any monetary loss so incurred through them from the 23rd May 2017.
- (e) Respondents submit all company documents including motor vehicle registration books in their custody to Falakhe Funeral Parlour.
- (f) Respondents pay costs of suit on an attorney client scale jointly and severally the one paying the other to be absolved.”

The applicant’s case is simply that it is the founding company of Falakhe which company never disposed its assets to Grief Doctor. Grief Doctor was running the affairs of applicant up to the time respondents consented to the court order under HC 1682/16 referred to above. The applicant explained how and why Grief Doctor was formed. It also explained how Grief Doctor ended up operating from the same premises and using the same property as applicant in operating Falakhe’s business. What Grief Doctor and applicant have in common is that they both at some stage before the order under HC 1628/16 traded as “Falakhe Funeral Parlour”. As regards 3rd respondent’s alleged status as an employee of applicant, it has been contended that there is no contract of employment as 3rd respondent was brought by 1st respondent to protect their 30% shareholding. Now that this has since been paid, there is no valid reason for 3rd

respondent to remain at Falakhe. Therefore, applicant submitted that respondents are in contempt of court and the order it seeks is competent.

The application is opposed by the respondents on the following grounds:

- (i) The applicant has no *locus standi* to sue them because Grief Doctor Enterprises (Pvt) Ltd is operating as a separate legal persona distinct from the applicant. Perhaps, respondents' argument is fully captured in par 4.4 of their opposing affidavit which states;
 - “4.4 The order that the applicant alleges the respondents are in contempt only affected them in so far as being “beneficiaries of the Estate Late M. C. Ncube. It did not affect 1st and 3rd respondents; in their capacities as director and shareholder and employee of Grief Doctor Enterprises (Pvt) Ltd respectively. The order cannot be read to say it dismissed or fired them as directors of the applicant company or its directors (*sic*). Such an interpretation will be stretching the order to an extent that it then unlawfully interferes with vested rights.” (my emphasis)
- (ii) The order sought is incompetent in that it does not comply with the provisions of O43 of the High Court Rules 1971.
- (iii) On the merits, as regards the 1st respondent it was contended that the applicant cannot seek to remove the 1st respondent as a director of Grief Doctor without following the requirements of section 175 (1) of the Companies Act (Chapter 24:03) as this is grossly irregular and incompetent.
- (iv) The applicant no longer runs the affairs of Falakhe but rather, the same is being run by Grief Doctors Enterprises (Pvt) Ltd.
- (v) The 3rd respondent is an employee of Grief Doctor and it is incompetent to terminate his contract of employment through contempt of court proceedings.

The issues

1. (a) Whether applicant has *locus standi* to sue respondents?
(b) Whether the order sought is competent?
2. Whether the respondents were in contempt of court?
3. Whether the order granted under HC 1682/16 has the effect of terminating the directorship of the 1st respondent?

4. Whether there was an employment relationship between the 3rd respondent and the applicant or with Falakhe?

Dealing with the points *in limine* 1st, I find that the applicant has *locus standi in judicio* to sue respondents in casu because 1st respondent was appointed director of applicant on the basis that he was representing all beneficiaries of M.C. Ncube's estate. Pilate Mabhena and 1st respondent became the directors and shareholders in the applicant. Subsequently, 1st respondent and Mabhena became directors and shareholders in Grief Doctor and continued to run Falakhe as before with the same shareholding structure. The respondents' 30% shareholding was valued and the beneficiaries including the 1st respondent were paid in terms of the court order. Their relationship was therefore terminated at that stage. On these facts to allege that applicant has no *locus standi* in the dispute to protect its property is ludicrous to say the least. As regards the competency of the relief, I find that the purpose of contempt of court proceedings is to compel compliance with a court order. *In casu* the applicant has simply stated what specific conditions arising from the court order should be complied with at the expense of imprisonment. There is nothing grossly irregular about that. Respondents must be informed in specific terms what he must do. In respect of the 2nd issue, the law is clear. Contempt of court is committed when there is a willful and *mala fide* refusal or failure to comply with a civil court order. Its essential elements are that (i) an order was granted against the respondent; (ii) the respondent is aware of the order; and (iii) the respondent willfully disobeyed or neglected to comply with the order – see *Mangwiro & Ors v City of Harare* HC 2019/13; *Chihava Cowood and Anor v Mangena & Ors* HC 682/02.

In my view, 1st respondents is hiding behind a finger by suggesting that the order is inapplicable to him as a director of Grief Doctor, in that the applicant gave birth to Grief Doctor that is why 1st respondent held 30% of the shares and Pilate Mabhena had 70%. It must be noted that this shareholding structure is identical to how shares of the two companies were allocated in the applicant. Surely this cannot be a coincidence. It is common cause that Grief Doctors a company owned by 1st respondent and Pilate Mabhena was running the affairs of Falakhe. First respondent got involved as a beneficiary with an interest in 30% shares owned by the Estate Late

M. C. Ncube. First respondent was paid the value of 30% of the shares. He shared the money with the rest of the beneficiaries. Surely his interest in Grief Doctor was extinguished when the payment of the shares was made and accepted.

Viewed in this context, the order clearly prohibited the respondents from running the affairs of Falakhe. Respondents knew with complete precision what they were required to do, namely, stop interfering with the affairs of the applicant or Falakhe but they continued to do so. This notwithstanding that they had consented to the order through the Estate Late M.C. Ncube.

Further respondents' argument that they were not supposed to comply with the order because it amounts to an incorrect procedure of terminating their directorship is wrong and fallacious. This is because all orders of the court in general whether correctly or incorrectly granted, have to be obeyed until they are properly set aside – see *Culverwell vs Beira* 1992 (2) SA 490 W.

Equally so, the argument that the order does not apply to the 3rd respondent because of the existence of a contract of employment between him and applicant is devoid of merit. On the facts of this case, it cannot be said that there is a contract of employment in that the 3rd respondent found himself at Falakhe after he was referred there by respondents' legal practitioners as exhibited by annexure "AA". He was not hired by Falakhe, therefore, it cannot be said that there was *consensus ad idem* between the parties. A contract can only be founded upon true *consensus ad idem* of the parties involved. Even if it were to be accepted that he was an employee, the totality of the circumstances show that his employment was solely to safeguard the family "interest" in the applicant. It follows, logically therefore that once that interest ceased to exist, his services will no longer be required. For these reasons the order applies to the 3rd respondent as well as the 1st.

Accordingly, it is ordered that:

1. The respondents be and are hereby declared to be in contempt of court and are hereby committed to gaol for a period of 90 days each, civil imprisonment, suspended on conditions enumerated below:
 - (a) 1st respondent is ordered within 24 hours to sign all papers resigning as a director of Grief Doctor Enterprises (Pvt) Ltd.
 - (b) Respondents are ordered to surrender the motor vehicles belonging to Falakhe Funeral Parlour registration numbers ACX 3763 and ADY 0290.
 - (c) Respondents submit all company documents including motor vehicle registration books in their custody to Falakhe Funeral Parlour.
 - (d) Respondents are barred from Falakhe Funeral Parlour's business premises.
 - (e) Respondents are ordered to refund to Falakhe Funeral Parlour any monetary loss so incurred through them from the 23rd of May 2017.
 - (f) Respondents to pay costs of suit jointly and severally, the one paying the other to be absolved.

Dube-Tachiona & Tsvangirai applicant's legal practitioners
Messrs Moyo & Nyoni, 1st & 3rd respondents' legal practitioners