HWANGE COLLIERY CO. LTD
versus
HWANGE COAL GASIFICATION CO. (PVT) LTD & 8 Ors (HC5171/13) [Case 1]

HWANGE COLLIERY CO. LTD
and
HWANGE COAL GASIFICATION CO. [PVT] LTD & 6 Ors (HC5105/13) [Case 2]

HWANGE COLLIERY CO. LTD
and
TENDAI SAVANHU& Anor (HC5331/13) [Case 3]

HWANGE COAL GASIFICATION CO. (PVT) LTD
and
KINGDOM BANK LTD &2 Ors (HC4861/13) [Case 4]

HWANGE COAL GASIFICATION CO. (PVT) LTD
and
STANBIC BANK LTD & 2 Ors (HC4895/13) [Case 5]

HWANGE COAL GASIFICATION CO.
and
GUO FENG & 6 Ors (HC4897/13) [Case 6]

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 27 June 2013, 5, 11 & 24July 2013

Urgent Chamber Application

T. Mpofu, for the Applicants in Cases 1, 2 & 3
T. Dzvetero, for 1st, 3rd & 6thRespondents in Case 1; for 1st, 2nd & 4th Respondents in Case 2
J. Samukange, for 1st, 2nd, 4th & 5th Respondents in Case 1; for 1st, 5th& 6th Respondents in Case 2; and for both Respondents in Case 3
I .Chagonda for 1st and 5th Respondents in Cases 5 & 6 respectively

MAFUSIRE J: There has been ferocious litigation in a space of four months pitting several protagonists. The dispute was convoluted and the issues multifaceted. At the centre was a company called Hwange Coal Gasification Company (Private) Limited. For ease of reference I shall refer to this company as the **Coal Gasification Company**. The one protagonist was a Chinese company by the name of Taiyuan Company Limited. The variants

to that name, vehemently disputed by the other protagonists, were Taiyuan **Sanxing** Company Limited and Taiyuan **Sanxing Economic and Trade** Company Limited. I shall come back to the dispute over this company's name later. But hereafter I shall refer to it as "**Taiyuan**".

The other protagonists were two Chinese nationals and businessmen called Guo Feng ("**Feng**") and Su Longmin ("**Longmin**"). In the hearing before me, and for convenience, the two were referred to as the "**Samukange faction**".The reason shall soon become apparent. The next lot of protagonists were Zimbabwean nationals and businessmen Cephas Msipa ("**Msipa**") and Gilbert Chahwanda or Chawanda ("**Chawanda**"). In the hearings they were referred to as the "**Dzvetero faction**".

The next lot was Hwange Colliery Company Limited ("**Hwange Colliery**"). Three commercial banks, Stanbic Bank Zimbabwe ("**Stanbic**"), Kingdom Bank Zimbabwe ("**Kingdom**") and Allied Bank Zimbabwe ("**Allied Bank**") were cited in some of the cases. The last protagonist was one Tendai Savanhu ("**Savanhu**").

Apart from the urgent chamber applications listed as cases 1 to 6 above there had been two others before them. They had pitted essentially the same parties. At the time of the hearing three other proceedings in the form of a court application and two actions were still pending.

The litigation related to the protagonists' investment in, and control of the two companies Taiyuan and the Coal Gasification Company. The brief background is that in October 2006 some Chinese nationals, including Feng and Longmin, got associated in a joint venture with some Zimbabwean nationals that included Msipa, Chawanda and one Leo Mugabe ("**Mugabe**"). The object of the joint venture was to invest in various ventures. For that purpose the Chinese nationals usedTaiyuanas the special purpose vehicle. Both Feng and Longmin were directors. The special purpose vehicle used by the Zimbabwean nationals was a company called Stoat Mining (Private) Limited ("**Stoat**") in which Mugabe, Msipa and Chawanda were directors.

In 2007 Taiyuan, now comprising both the Chinese and the Zimbabwean nationals, on the one part, and Hwange Colliery on the other, entered into a written agreement for the construction of a coke oven and a battery at Hwange Colliery on the basis of build, operate, own and transfer ("**the BOOT agreement**"). In June 2011 the parties obtained an investment

licence from the Zimbabwe Investment Authority ("**the ZIA licence**"). The ZIA licence stipulated a shareholding configuration of 75% for Taiyuan and 25% for Hwange Colliery.

The Coal Gasification Company was the special purpose vehicle formed by both Taiyuan and Hwange Colliery. The shares were held 75% by Taiyuan and 25% by Hwange Colliery. The principal object of the Coal Gasification Company was the processing and carbonization of coal from resources within Zimbabwe. In terms of the BOOT agreement the configuration of the board of directors for the Coal Gasification Company would be 5 from Taiyuan and 2 from Hwange Colliery. The chairman of the board would be a Taiyuan appointee. Taiyuan's representatives on the first board comprised Feng and Longmin as executive directors; Msipa and Chawanda as non-executive. Another Chinese national by the name of Zhang JinYuan ("**JinYuan**") was the chairman. From Hwange Colliery came Savanhu and one Fred Moyo ("**Fred Moyo**") then chairman and managing director respectively.

Taiyuan and Hwange Colliery soon clashed. One of the points of contention by Hwange Colliery was that the Coal Gasification Company had breached the BOOT agreement. Hwange Colliery moved to cancel that agreement and to seek damages. Under HC 537/13 it sued both Taiyuan and the Coal Gasification Company for damages amounting to $21 million. The matter was still pending at the time of the urgent chamber applications.

The other bone of contention by Hwange Colliery was that it had been induced to enter into an agreement with a non-existent company. This allegation stemmed from the confusion surrounding the identity of Taiyuan. The BOOT agreement and the ZIA licence identified Taiyuan as Taiyuan Sanxing Company Limited. However, Hwange Colliery alleged that such a company did not exist and that only after the BOOT agreement had been executed was a company called Taiyuan Sanxing Economic and Trade Company Limited formed in China.

Hwange's further bone of contention was that its BOOT partner, Taiyuan, was in turmoil. Its shareholders were at each other's throat. This allegation stemmed from the fact that the Chinese and the Zimbabwean nationals were bringing a series of applications against each other in the name of the Coal Gasification Company with both factions claiming to be the legitimate and authorised representatives of that company. Hwange Colliery was apprehensive that its investment in the Coal Gasification Company would be dissipated.

Hwange Colliery further claimed that Taiyuan had reneged on its pledge to bring into the country an amount of US$40 million as part of its injection into the joint venture. Therefore Hwange Colliery was seeking cancellation of the BOOT agreement.

Within the Coal Gasification Company itself matters soon came to a head. In March 2013 JinYuan, as chairman, called for the holding of an annual general meeting. It was scheduled for 24 April 2013. Feng and Longmin were vehemently opposed to that meeting. They moved to block it. On 19 April 2013 they filed an urgent chamber application under case no HC 3003/13 in the name of Taiyuan Sanxing Economic and Trade Company Limited. Messrs G N Mlotshwa & Co represented the applicant.Hwange Colliery was cited as the substantive respondent. One Ananias Banda, the company secretary, and the Registrar of Deeds, were cited as nominal respondents. The matter came before MAWADZE J. A point *in limine* was taken that the Taiyuan as cited was not the Taiyuan as was recorded on the ZIA licence and with which Hwange Colliery had entered into an agreement. Mr *Mlotshwa* conceded. The application was dismissed with costs on the point *in limine*.

The AGM went ahead as scheduled. Among other resolutions Feng and Longmin would be suspended from the Coal Gasification Company. A day after the AGM, i.e. on 25 April 2013, Feng and Longmin, in the name of Taiyuan Sanxing Economic and Trade Company Limited, filed an ordinary court application under HC 3160/13 for an order nullifying the AGM and all the resolutions taken thereat. At the time of the hearings that application was still pending.

In May 2013 Feng and Longmin were formally suspended and called to a disciplinary hearing to answer various charges including one of fraud. The suspension letters were signed by Msipa as director. Feng and Longmin were eventually dismissed as executive directors in default of appearance at the disciplinary committee.

The Coal Gasification Company reconstituted its board of directors. The new board wrote to the banks, Stanbic, Kingdom and Allied Bank to "freeze" the company's accounts. On 5 June 2013 Feng and Longmin, together with three other Chinese nationals were barred access to some Harare premises rented by the Coal Gasification Company from Hwange Colliery. The one letter was signed by Chawanda. The other, in long hand, was signed by one Chininga who was said to be from Hwange Colliery. But this was disputed.

Feng and Longmin went on the attack. They threatened the banks and warned them not to take instructions from persons that were not signatories to the accounts. Feng reminded them that he was the signatory and that the signing instructions had been given by him.

On 6 June 2013, before BERE J, Feng and Longmin obtained a spoliation order in the name of the Coal Gasification Company against Mugabe and Hwange Colliery. They were granted unhindered possession and control of the aforesaid premises. Mugabe and all those claiming rights through him were ordered to maintain peace and to allow undisturbed access to the applicant and to return any company documents and office keys. However, in subsequent proceedings Hwange Colliery claimed that Feng and Longmin had been *mala fide* in that they had obtained the spoliation order not with any genuine intention to re-occupy the premises but merely to gain access in order to pilfer company assets such as office furniture and to cart them away to unknown destinations.

On 20 June 2013 Feng and Longmin filed two further urgent chamber applications ("**the twin applications**"). They were almost identical. They were both in the name of the Coal Gasification Company as the applicant. The applicant, in reality Feng and Longmin, was now represented by *Venturas and Samukange*. The one application was under HC 4861/13. It is case no 4 above. In that application it was sought to "unfreeze" the account at Kingdom Bank. The respondents were Kingdom, Chawanda and Msipa. Antonio & Dzvetero represented Chawanda and Msipa. Hwange Colliery was not cited. Kingdom remained neutral and sought to abide by the court order.

The other application was filed under HC 4895/13. It is case no 5 above. In that application the first respondent was Stanbic. That bank also remained neutral and agreed to abide by the order of the court. Again Hwange Colliery was not cited.

HC 4895/13 came before DUBE J. She heard it on 24 June 2013. The matter was settled by consent. The parties agreed to an interim order. The freeze on the Stanbic account would be uplifted. The authorised signatories would be Fred Moyo, one Tafara Gadzirai ("**Gadzirai**") and Feng. These would have unconditional access to the account. Gadzirai would counter sign for all withdrawals. The actual wording of the material portion of the order was as follows:

> "That pending the final determination of this matter, Applicant is granted the following relief:

1. The 1st Respondent be and is hereby ordered immediately and forthwith upon service of this order to unfreeze the Applicant's account being 0240057759001 held by the 1st Respondent.

2. Applicant's authorised signatories named Fred Moyo, Tafara Gadzirai and Feng Guo shall have unconditional access to the account for the purposes of transacting on behalf of applicant provided that Tafara Gadzirai shall counter sign for all payments."

HC 4861/13 came before MATHONSI J. He heard it on 26 June 2013. The parties also agreed to an interim order. It was almost identical to the one by DUBE J. However before MATHONSI J could consider the application and the draft order by consent, Hwange Colliery applied to be joined to the proceedings. This was granted. The matter was postponed to the following week.

As the *Samukange* faction filed the twin applications aforesaid the Dzvetero faction also filed its own. This was done on 21 June 2013, i.e. a day after the twin applications. The Dzvetero application was filed under HC 4897/13. It is case no 6 above. It was also in the name of the Coal Gasification Company as applicant. The respondents were Feng, Longmin, Hwange Colliery, Allied Bank, Stanbic, Kingdom and a firm of chartered accountants called Welsa International Chartered Accountants.

The Dzvetero application came before me. The basic relief sought was also to unfreeze the bank accounts but to appoint the accountants as the sole administrators of those accounts pending the determination of the court application by the *Samukange* faction under HC 3160/13. That was the application in which the validity of the AGM and the resolutions made thereat were being challenged.

It was upon perusal of the Dzvetero application that I became aware of the one *Samukange* application under HC 4895/13 which had been placed before DUBE J. At that stage I was neither aware of the other *Samukange* application under HC 4891/13 that had been placed before MATHONSI J nor of the rest of the other proceedings referred to above.

I did not immediately set down the Dzvetero application. I had queries. One of the averments in that application was that an extraordinary general meeting to resolve the entire shareholder issues in the Coal Gasification Company had been scheduled for 24 June 2013. Excluding the intervening weekend the 24th June 2013 was the next business day. So in my view there could have been no reasonable apprehension of an irreparable harmen suing in that short space of time. Furthermore, it was common cause that it was the Dzvetero faction that

had ordered the freeze on the bank accounts. Therefore, I wondered why the intervention of the courts was being sought when the issue was now properly set for resolution in the boardroom by the "corporate parliament" of the company. The supreme rule-making authority of a company rests with a general meeting of the members; see GOWER's *Principles of Modern Company Law*, 4th edat p 18.

At that stage I was unaware that one of the issues that had triggered the twin *Samukange* applications was that the banks had taken the position that given the apparent turmoil in the Coal Gasification Company and that given the conflicting instructions and threats that they were receiving in respect of those accounts the banks would not unfreeze the accounts in the absence of a court order.

I called for the record of the one *Samukange* application under HC 4895/13. But by that time the aforesaid order by consent by DUBE J had already been granted. However I then became aware of the other *Samukange* application under HC 4861/13 which had been placed before MATHONSI J and of the rest of the other applications referred to above.

I then called for all the records. Only thereafter did I get to appreciate the multifaceted disputes. I set down the Dzvetero application for hearing on 27 June 2013. Mr *T Mawere* represented Hwange Colliery. Mr *T Dzvetero* represented the Dzvetero faction and the Coal Gasification Company. Mr *J Samukange* represented the *Samukange* faction and also the Coal Gasification Company.

At the hearing Mr *Mawere* expressed concern that Hwange Colliery had not been cited in the twin *Samukange* applications and that the consent order by DUBE J had far reaching consequences that were prejudicial to Hwange Colliery in that, among other things, Fred Moyo whom the two warring factions had selected as a co-signatory to the bank accounts was no longer employed by Hwange Colliery and that therefore he could not possibly represent it.

It was further pointed out by Mr *Mawere* that the resolutions that the *Samukange* faction had used as authority to bring their twin applications in the name of the Coal Gasification Company had been signed by Savanhu yet Savanhu had since been dismissed from the board of Hwange Colliery. In the premises Mr *Mawere* gave notice that Hwange Colliery had filed, or would be filing three urgent chamber applications; (1)- for an order that Hwange Colliery be joined to HC 4895/13 and to vary the consent order by DUBE J so that Fred Moyo would be removed from the list of signatories and replaced by someone else

properly appointed by Hwange Colliery; (2) – for an anti-dissipation interdict to prohibit the disposal of any of the assets of the Coal Gasification Company, especially the coal stocks, coking oven and battery, by anyone purporting to act on behalf of that company until Hwange Colliery's claim for the cancellation of the contract and for damages under HC 537/13 was determined; and (3)- for an interdict against Savanhu to stop him from masquerading as a director, representative and appointee of Hwange Colliery on the board of the Coal Gasification Company because he had been dismissed.

Mr *Samukange* vehemently opposed the intended applications. Essentially, Mr *Samukange's* submission was that the choice of Fred Moyo as a co-signatory to the bank accounts in terms of the consent orders was motivated not by his previous connection to Hwange Colliery but by the fact that he was a neutral person and that he was still a director of the Coal Gasification Company anyway even though he might have lost his employment with Hwange Colliery. Mr *Samukange* further submitted that in terms of the agreement between the parties Hwange Colliery would not be involved in the day to day management of the Coal Gasification Company, that the issue of signing on bank accounts was one of management and that therefore Hwange Colliery was in effect seeking to sneak into the management of the Coal Gasification Company by the back door. He further submitted that the dispute between the two factions was not one for shareholders but one involving company management and that the interdict against Savanhu would be opposed on essentially the same basis, namely that until Savanhu was properly removed from the board of the Coal Gasification Company by that company itself Hwange Colliery had no right to do so especially given that it was just a minority shareholder.

The anti-dissipation order would be opposed on the basis that its effect would virtually paralyse and collapse the Coal Gasification Company the business of which was essentially the processing and disposal of coal.

Given the multifaceted nature of the dispute and the issues between the parties, and given that they were so intertwined it was readily agreed that all the matters would be consolidated and heard by a single judge. Barring any unforeseen objections or complications it was agreed that I would hear the matters myself. The hearing was adjourned to a later date to be advised. Hwange Colliery's three applications were subsequently filed under HC 5171/13, being case no 1 above; HC 5105/13, being case no 2 above and HC 5331/13, being case no 3 above.

Eventually I caused the matters to be set down for hearing on 5 July 2013. Hwange Colliery was now represented by Advocate *T Mpofu* and Stanbic by Mr *I Chagonda*. On that day a new issue arose. It was on the consent order by DUBE J. It was for that single issue that Mr *Chagonda* was appearing. The new issue was this: it transpired that the parties could not agree on the interpretation of that order. Stanbic thought that the order could either mean that the three signatories Feng, Fred Moyo and Gadzirai had all to sign for any bank withdrawals but that the order could also mean that any two of them could sign for as long as one such signatory was Gadzirai. The two factions favoured the interpretation that allowed any two to sign for as long as one of the signatories was Gadzirai. On the other hand, Hwange Colliery was vehemently opposed to that interpretation as it was feared that there could be connivance just to facilitate withdrawals. Consequently Hwange Colliery favoured a restrictive interpretation that would allow withdrawals only when all the three signatories would sign.

On behalf of Stanbic Mr *Chagonda* submitted that given the several threats for damages against it, the bank would not permit any withdrawals until such time that the new signing arrangement was clarified. The matter was adjourned to 11 July 2013 because Mr *Samukange* did not have some of the papers in the applications by Hwange Colliery.

Before the resumption of the hearing on 11 July 2013 the Dzvetero faction had withdrawn its application under 4897/13. Therefore, the issue as to whether the interim management of the bank accounts could be placed in the hands of the chartered accountants had automatically fallen away. But yet again a new issue had arisen! It was also on the consent order by DUBE J. Previously, on the day that the order had been granted, i.e. 24 June 2013, the *Samukange* faction had been represented by Advocate *Firoz Girach*. When the parties had come unstuck at Stanbic as aforesaid they had convinced themselves that what really they had consented to was the arrangement that any two of the three signatories could sign for any withdrawals for as long as one of such signatories was Gadzirai. Thus the parties had then arranged to instruct Advocate *Girach* to approach DUBE J and seek an amendment of the consent order so that it would align with what allegedly was their true intention and true agreement.

With Mr *Dzvetero's* consent DUBE J had amended the order. But there was a problem. Hwange Colliery had not been consulted. Both factions had become aware during the second sitting before me that Hwange Colliery was disagreeing with such an interpretation and that not only would it be opposed to such an amendment but also that in its

own application to be joined to those proceedings and for an amendment to that order it would move for an express provision that all the three signatories would have to sign for any withdrawals.

Furthermore, since all the matters had been consolidated and would be heard by me, the propriety of pulling out the single record for purposes of amending the single order in terms which were disputed and in the absence of such an interested party as Hwange Colliery and without disclosing to both Advocate *Girach* and DUBE J that Hwange Colliery had in fact since filed its urgent chamber applications aforesaid was questioned. Advocate *Mpofu* for Hwange Colliery expressed serious concern on the development.

Be that as it may, I concluded the hearing on 11 July 2013. The crisp issues were (1) whether Hwange Colliery was entitled to have the consent order by DUBE J amended in such a way as to remove Fred Moyo from the list of the bank signatories and have him replaced by someone else from its stable; (2) whether Hwange Colliery was entitled to have that consent order further amended so that it would reflect that all withdrawals from the bank accounts would be signed for by all the three signatories, whoever they would eventually be, (3) whether Hwange Colliery was entitled to the anti-dissipation interdict against the property of the Coal Gasification Company pending the resolution of its action for the cancellation of the contract and for damages in HC 537/13, and (4) whether Savanhu should be interdicted from holding himself out as one with authority to represent the Coal Gasification Company and from attending meetings of, signing documents for and on behalf of and representing himself as one with authority to represent that company.

I now deal with each of these matters in turn.

(1) WHETHER HWANGE COLLIERY WAS ENTITLED TO REMOVE FRED MOYO FROM THE LIST OF SIGNATORIES AND SUBSTITUTE HIM WITH ANOTHER

In its application under HC 5105/13filed on 27 June 2013 Hwange Colliery, after setting out the nature of the multifaceted dispute between the disparate parties, made the point that it was so undoubtedly an interested party that it was manifestly improper for it to have been excluded from the twin *Samukange* applications. As final relief Hwange Colliery sought an order that it be joined to those proceedings. It also sought costs against any party that would oppose its application. As interim relief Hwange Colliery sought an interdict against Fred Moyo to restrain him from representing the Coal Gasification Company in any

capacity whatsoever, particularly as signatory to that company's accounts or as its director. Hwange Colliery also sought as an interim relief an amendment to the consent order by DUBE J so that it would read as follows:

> "Applicant's authorised signatories namely Staford Ndlovu, Tafara Gadzirai and Feng Guo all signing together shall have unconditional access to the account for the purposes of transacting on behalf of Applicant."

The effect of the amendment sought by Hwange Colliery was obviously to remove Fred Moyo from the list of the bank signatories and to substitute him with Staford Ndlovu and to ensure that any bank withdrawals would have to be signed for by all three signatories.

The parties' arguments regarding the position of both Fred Moyo and Savanhu on the board of directors for the Coal Gasification Company has already been set out. During the hearing it appeared Fred Moyo, who was neither represented nor present, was contesting his termination of employment with Hwange Colliery. However, that was not the basis for opposition by the *Samukange* faction..Furthermore, that was not an issue before me.

Hwange Colliery predicated its argument on clause 4.5 of the BOOT agreement. In both its application and in argument before me Hwange Colliery referred to that agreement as the joint venture agreement between itself and Taiyuan. On the other hand the *Samukange* faction stressed that it was not the joint venture agreement but just the BOOT agreement. As a matter-of -fact the written document neither called itself the joint venture agreement nor the BOOT agreement. In the preamble it simply referred to itself as an "Agreement for the construction in Zimbabwe of a Coke Oven and Battery on a Build, Operate, Own and Transfer (BOOT) basis". In clause 4 it was recorded that the parties would incorporate a company in Zimbabwe with limited liability the principal object for which would be the processing and carbonization of coal from resources within Zimbabwe and that the name of such company, subject to the approval by the Registrar of Companies, would be known as "**Zimbabwe Coal Gasification Company Limited** or alternatively Hwange Coal Gasification Company Limited ('the Company')".

The term "Company" was defined to mean "the project vehicle that will be incorporated for purposes of implementing the project". By "Project" was meant the planning, feasibility study, design, engineering technical services, construction,

commissioning, operation, owning in Zimbabwe and transfer of a coke oven battery, etc. as specified.

In my view whether the agreement was a joint venture agreement or the BOOT agreement seems immaterial and nothing turns on it. I have consistently referred to it as the BOOT agreement simply for ease of identification. Clause 4.5 dealt with the respective rights of the BOOT partners to appoint directors to the board of the Coal Gasification Company. Taiyuan was entitled to appoint 5 directors. Hwange Colliery was entitled to appoint 2. The total number of directors would be 7.

Mr *Mpofu* argued that Fred Moyo and Savanhu had been appointed onto the board of the Coal Gasification Company by Hwange Colliery. The two held their directorships in that company at the pleasure of Hwange Colliery. The choice of Fred Moyo as one of the signatories to the bank accounts in terms of the consent order necessarily stemmed from his previous position as an appointee of Hwange Colliery onto the board of the Coal Gasification Company. Fred Moyo having lost his employment with Hwange Colliery and having been removed from its own board could no longer remain as its representative on the board of the Coal Gasification Company. It was extremely harmful to the interests of Hwange Colliery in the Coal Gasification Company for Fred Moyo to be appointed signatory even in an interim capacity especially given the turmoil in that company.

On the other hand Mr *Samukange's* argument was that the two factions had settled for Fred Moyo as the third signatory to the bank accounts purely as he was considered to be a neutral party. It was not on the basis that he had previously been an appointee of Hwange Colliery onto the board of the Coal Gasification Company. His appointment as a signatory was not for the purposes of representing Hwange Colliery.

Mr *Samukange* further argued that Hwange Colliery was a mere minority shareholder in the Coal Gasification Company. It had no right either in terms of the BOOT agreement or any other agreement to be involved in the day to day management of that company. That right had been entrusted to Taiyuan, particularly his faction. Signing bank accounts was part and parcel of the day to day management of a company. By imposing its own choice of signatories Hwange Colliery was seeking to "sneak" into the management of the Coal Gasification Company by the back door.

Mr *Samukange* referred to clause 7 of the BOOT agreement. It provided as follows:

"7. **Management during Operation Period**

During the agreed 10-year Operation period after commissioning of the Project, Taiyuan shall:

7.1 operate and manage the Project in terms of a Management Contract to be entered into with the Company; Management Contract shall stipulate details with respect to the content, method and costs of management.

7.2 ensure that the Project is operated, maintained and managed according to accepted standards and shall report regularly to the Board of Directors of the Company.

7.3 ……
7.4 ……
7.5 ……."

Mr *Mpofu* argued that other than the BOOT agreement there were no further agreements entered into by the parties and that clause 7 was irrelevant.

In my view it is evidently untenable for the *Samukange* faction to want to rely on any prior agreements or the status *quo* pertaining to the management of the Coal Gasification Company when everything else seemed to have gone wrong. The situation obtaining in the Coal Gasification Company was abnormal. One faction was getting a director or directors aligned to it to sign resolutions authorising it to bring proceedings in the name of the company. The other faction would do exactly the same. At the hearing there was this remarkable situation that two sets of legal representatives purported to represent the same company. As I observed at the beginning, this court had been called upon on numerous other occasions in just a space of four months to resolve board room wrangles. These were abnormal times for the Coal Gasification Company and all those associated with it. This was starkly demonstrated by the two orders which both factions had consented to. Feng said before the disputes he had been the sole signatory. But obviously with the consent orders he now had to contend with two others.

Furthermore, even accepting that the choice of Fred Moyo had been motivated by the fact that he was a neutral party, a position disputed by Hwange Colliery, he certainly was not

a man from the street. If neutrality was the sole factor, no doubt there would be numerous other neutrals. The choice of Fred Moyo was demonstrably influenced by the fact that he had been a board member of the Coal Gasification Company. He still appeared on the list of directors for that company's Form CR 14.

I accept the argument that the tenure of Fred Moyo's directorship on the board of the Coal Gasification Company was at the pleasure of Hwange Colliery. He having left Hwange Colliery Fred Moyo no longer had any business being associated with the Coal Gasification Company in any capacity, including as signatory to the bank accounts for that company.

Hwange Colliery was the only other shareholder in the Coal Gasification Company, albeit a minority one. However, the majority shareholder, Taiyuan, was itself rocked by internal squabbles. It was not unreasonable for Hwange Colliery to become apprehensive. It was not unreasonable for it to seek to be involved in proceedings that had a material bearing on its interest in the company in which it had helped establish and in which it was the only other shareholder with reserved seats on the board. At any rate, the entire arrangement that persons who previously had no signing powers on the bank accounts of the company now did was only an interim and stop gap measure taken with the reasonable view to keep everything intact or under control until the disputes were permanently resolved.

In terms of clause 7 of the BOOT agreement above it was obviously contemplated to enter into a management contract for the management of the BOOT project. But it appears that this never materialised. Therefore the only guiding document on the rights and duties of the BOOT partners remained the BOOT agreement.

In the premises I find that the application by Hwange Colliery in which it sought the amendment of the consent order by DUBE J to remove the name of Fred Moyo from the list of signatories and to have it substituted with that of Staford Ndlovu had merit. However, before I grant that application it is necessary to deal with the issue of joinder.

Hwange Colliery's application to be joined to the proceedings was sought as a final order. Strictly speaking, until it was joined it could not properly seek to interfere with the order to which it was not a party. Thus it could not properly seek to have the consent order by DUBE J amended before it was joined. However, I hold the view that this was merely a technical error in drafting. The relief sought as an interim order should first have sought the joinder and thereafter the rest of the orders sought. For the sake of expediency I am prepared to condone the error. After all, the substantive relief being pursued is the removal of Fred

Moyo from the list of the bank signatories and his substitution thereof with someone else. I also appreciate that the preparation of the papers could have been made in a rush in view of the perceived urgency.

Misjoinder or nonjoinder of parties is governed by Order 13 r 87. The relevant provision is sub-rule (2) (b). It reads as follows:

> *"(2) At any stage of the proceedings in any cause or matter the court may on such terms* ***as it thinks fit justand either of its own motion or on application*** –
>
> *[a] …….*
>
> *[b] order any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, to be added as a party;" [emphasis added].*

The purpose of joinder is largely convenience or necessity. Joinder saves time, effort and costs. HERBSTEIN &VAN WINSEN The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa, 5th ed[1]at p 215 state:

> "A third party who has, or may have, a direct and substantial interest in any order the court might make in proceedings or if such an order cannot be sustained or carried into effect without prejudicing that party, is a necessary party and should be joined in the proceedings, unless the court is satisfied that such person has waived the right to be joined."

Under r 87 the court is given a wide discretion. The court can order joinder even in the absence of an application by any person. In this case not only was there an application but also it was not opposed. The only mistake was that Hwange Colliery sought it as part of the final relief. Thus Hwange Colliery is entitled to be joined as a party to the proceedings in HC 4895/13.It is also entitled to have the consent order by DUBE J on 24 June 2013 amended by the deletion of Fred Moyo's name therefrom and having it substituted thereof with that of Staford Ndlovu.

[1] Edited by Cilliers A C, Loots C & Nel H C

[2] WHETHER HWANGE COLLIERY WAS ENTITLED TO HAVE THE CONSENT ORDER BY DUBE J FURTHER AMENDED SO THAT IT WOULD REFLECT THAT ALL WITHDRAWALS FROM THE BANK ACCOUNTS WOULD BE SIGNED FOR BY ALL THE THREE SIGNATORIES

I was not satisfied that Hwange Colliery's reason for wanting all three signatories to sign for any withdrawals was properly articulated. In reality this particular aspect seemed to have been raised as an appurtenance to the main concern relating to Fred Moyo. These matters are really crying out for resolution in the boardrooms of the corporations involved. The court should not be extensively involved any more than it should. After the consent order by DUBE J the Dzvetero faction had become satisfied with the measure of protection afforded by that interim signing arrangement. As a result it went on to withdraw its own application under HC 4897/13 that had been placed before me.

The Coal Gasification Company is a going concern. One of the reasons cited for the urgency of the matters was that there were recurrent expenditures such as salaries and utility bills as well as on-going contractual obligations that needed to be paid. That was why the freeze on the bank accounts had to be lifted as a matter of urgency to avoid causing irreparable damage to the company.

I consider that by seconding one of its men to the Coal Gasification Company as an interim co-signatory to the bank accounts of that company Hwange Colliery has achieved a measure of protection. It should now be up to the board of that company to sort out the interim signing arrangement rather than to allow a minority shareholder to make further in-roads into the management of the company. In the absence of the consent of the other parties I am not convinced that Hwange Colliery should have its way on this. The court should not get involved in such detail. It was all right to do so when the original parties before DUBE J agreed between themselves and consented to the order. Furthermore, it appeared throughout the hearing that all the parties were satisfied with Gadzirai being a co-signatory in whatever signing arrangement. He was still a co-signatory even after the amendment of the order by DUBE J which relaxed the signing arrangement to allow any two to sign instead of all three.

In the premises the further amendment sought by Hwange Colliery to have all three signatories signing for any bank withdrawal is denied.

[3] WHETHER HWANGE COLLIERY WAS ENTITLED TO THE ANTI-DISSIPATION INTERDICT AGAINST THE PROPERTY OF THE COAL GASIFICATION COMPANY PENDING THE RESOLUTION OF ITS ACTION FOR THE CANCELLATION OF THE CONTRACT AND FOR DAMAGES IN HC 537/13

In a nutshell the argument by Hwange Colliery on this point was said to be the need to preserve the assets of the Coal Gasification Company until the disputes, particularly its action for damages, were resolved. It was argued that Hwange Colliery had a serious apprehension of harm that given the upheaval in its BOOT partner, Taiyuan, and the free for all situation obtaining in that company it was reasonable to interdict anyone associated with that company, as an interim measure, from taking any action that would dissipate its assets before the conclusion of the matters.

The draft order sought by Hwange Colliery was couched as follows:

"IT IS ORDERED THAT:

Pending the finalisation of litigation under case number HC 537/13;

1. The 1st (the Coal Gasification Company), 2nd Taiyuan), 3rd (Msipa), 4th (Feng), 5th (Longmin) and 6th (Chawanda) Counter Respondents acting together, or any one of them or any number of them in combination be and are hereby interdicted from selling, transferring or in any other way encumbering 1st Counter Applicant's (*sic)* movable and immovable property, specially the coal stocks and coking oven battery currently situated at the 1st Respondent's (*sic)* yard at Hwange without the prior written approval of the Counter Applicant through its nominated representatives.

2. In the event that the 1st, 2nd, 3rd, 4th, 5th and 6thCounter Respondents acting together, or any one of them or any number of them in combination sells the property aforementioned pending the final determination of the matter under case number HC 537/13, they be and are hereby interdicted from using, moving and or disposing of the proceeds of such sale without the prior written consent of the 1st Respondent [*sic*], which proceeds shall be deposited into any of the accounts of the 1st Counter Respondent held with 7th (Kingdom), 8th (Stanbic) or 9th (Allied Bank) Respondents.

3. That 1st, 2nd, 3rd, 4th, 5th and 6th Counter Respondents acting together, or any one of them or any number of them in combination be and are hereby interdicted from opening any other bank account with any other institution, or otherwise circumventing the three specific accounts held with 7th, 8th and 9th Counter Applicants (*sic)*.

4. That any Counter Respondent who opposes the Counter Application shall pay Counter Applicant's costs of suit on the higher scale of legal practitioner and client."

During the hearing it was clarified that the anti-dissipation interdict was not meant to affect funds held at the banks.

I am satisfied that given that the Coal Gasification Company was a going concern with substantial financial commitments on a day to day basis such an order would cripple the company and eventually collapse it. Whilst I found Hwange Colliery's fears to be reasonable under the circumstances nonetheless, I have considered that firstly, the signing arrangement above is a good measure of protection for everyone, and secondly that since the interdict related mainly to the coke oven and battery there was minimal danger of its dissipation. That was a structure that was fixed to the ground. It was in the nature of an immovable property. It could only be removed by stripping off its components. It was built on the premises of the Hwange Colliery itself. Therefore Hwange Colliery could easily monitor the structure and take remedial action if anyone tried to tamper with it.

The coal stokes are the raw materials for the production of the coke. Such an order, as Mr *Samukange* pointed out, would virtually close down the company. That would be unfortunate. Such a consequence is certainly not what was intended. It is for these reasons that Hwange Colliery's application under HC 5171/13 is hereby rejected.

[4] WHETHER SAVANHU SHOULD BE INTERDICTED FROM HOLDING HIMSELF OUT AS ONE WITH AUTHORITY TO REPRESENT THE COAL GASIFICATION COMPANY AND FROM ATTENDING MEETINGS OF, SIGNING DOCUMENTS FOR AND ON BEHALF OF, THAT COMPANY

In resisting Hwange Colliery's application Mr *Samukange* relied on the Articles of Association of the Coal Gasification Company. He argued that in terms of article 17 the directors were appointed <u>for life</u> unless they resigned or were removed in terms of the specific circumstances outlined therein. He submitted that the court should bind the parties to their agreement. He said Hwange Colliery was not entitled to recall Savanhu from the Coal Gasification Company even if he might no longer be with Hwange Colliery. It was up to the Coal Gasification Company itself to properly remove him from its board in terms of its Articles of Association.

Article 17 read as follows:

> "17 NO ROTATION OF DIRECTORS
> The provisions of Regulations 90 to 96 or Part 1 of Table 'A' shall not apply. A Director shall not be subject to retirement by rotation, and shall continue to hold office until he or she dies, resigns or is disqualified in terms of Regulation 89 of Part 1 of Table 'A' or removed from the office in terms of Regulation 97 of Part 1 of Table 'A'"

In brief, Regulations 90 to 96 of Table A in the First Schedule to the Companies Act, *Cap 24: 03*provide for the rotation of directors of a company. In terms of those regulations all the directors of a company retire from office at the first AGM. One third of them retire in subsequent AGMs in the order specified. Retiring directors are eligible for re-election. The company may fill the vacancies of retired directors. The company can increase or reduce the number of its directors. The directors themselves can fill casual vacancies.

Thus the net effect of the exclusion of Regulations 90 to 96 of Table A by article 17 of the Articles of Association of the Coal Gasification Company and replacing them with its own peculiar provision was that any person appointed as director of that company held office for life unless he or she resigned or became disqualified in terms of Regulations 89 or 97.

It was common cause that Savanhu had neither resigned from the Coal Gasification Company nor had become disqualified in terms of Regulation 89 or 97.

Regulation 89 of Table A provides for the disqualification of a director on various grounds. These include the failure of a director to acquire a specified shareholding in the company where he or she is required to do so; a director becoming afflicted by a legal, mental or physiological disability such as insolvency, insanity or conviction of specified offences; a direct or who is underage or who a court has removed from office or a director with prolonged absenteeism from board meetings. None of these were issues before me in respect of Savanhu.

Regulation 97 of Table A provides for the removal of a director by a company itself through an ordinary resolution which is preceded by a special notice. It was common cause that as far as Savanhu's directorship in the Coal Gasification Company was concerned this had not happened. On the contrary, it was submitted that he was still very much wanted and that he was still being called to that company's meetings.

On the Savanhu issue the crisp point for determination was the effect to be given to article 17 *vis-a-vis* clause 4.5 of the BOOT agreement. I should point out that clause 4.5 had in essence been duplicated in article 11 of the same Articles. It was couched as follows:

> "11 DIRECTORS
>
> Hwange Colliery Company to appoint 2 [two] directors and Taiyuan Sanxing Company to appoint 5 (five)."

It was most unsatisfactory for me to have to determine the respective rights of the BOOT partners in such a summary fashion as the urgent chamber applications obliged me to do. The legal issues were of considerable importance. But they were not, and could not have been properly canvassed or ventilated when the matters had come to court under certificates of urgency. Therefore the conclusion that I have come to in this matter should be understood only in the context of the peculiar facts and circumstances of the matter.

As pointed out earlier the *Samukange* faction was able to claim the authority to bring proceedings in the name of the Coal Gasification Company largely on the basis of a purported resolution of the board of directors for that company signed by Savanhu. Hwange Colliery's application to interdict Savanhu was based on what it claimed to be the harmful effects of Savanhu's conduct. Dealing specifically with this point, Hwange Colliery's deponent to the founding affidavit in HC 5331/13, after setting out how Fred Moyo and Savanhu had been removed from its own board and how that removal had been communicated to the Coal Gasification Company through the company secretary and how at the same time replacement names had been forwarded, went on to aver as follows:

> "14. It is therefore beyond dispute that the 1st Respondent (i.e. Savanhu) was removed from 2nd Respondent's board (i.e. the Coal Gasification Company) by his former appointee, the Applicant (i.e. Hwange Colliery).
>
> 15. However, sometime in June 2013, 1st Respondent attended an opaque board meeting which culminated in him signing a certain resolution authorising one Guo Feng to represent the company in certain litigation matters.
>
> 16. ……..
>
> 17. After 1st Respondent was dismissed by the Applicant, the term of office of Mr. Fred Moyo with whom 1st Respondent formerly served on the board of 2nd Respondent as Applicant's appointees expired. The said Fred Moyo also ceased to be part of both Applicant and 2nd Respondent.

18. ……..

19. While all this happened, Mr. Guo Feng and Su Longmin, the other board members of the 2nd Respondent, being representatives of the Taiyuan Sanxin (sic) Company Limited were also dismissed by their principals and replaced. ……..

20. ……..

21. The harmful effects of 1st Respondent's actions are seen by what resulted from this action. Armed with this resolution, Guo Feng filed a series of urgent chamber applications for control of signing rights over the 2nd Respondent's bank accounts. Applicant was conveniently not cited in any of these applications in spite of being a major shareholder in 2nd Respondent. ……."

In my view the directorship of the Coal Gasification Company was a closed shop if regard is had to clause 4.5 of the BOOT agreement and article 11 of the Articles of Association. The directors were appointed, not elected, by the two shareholders in terms of the agreed ratio. An appointee is one who is chosen or placed by someone else in a job or position of responsibility. This does not follow the process of an election which entails a formal appointment following a formal process of voting. Article 17 referred to elected directors who would otherwise retire by rotation in terms of the provisions of the Regulations to the Companies Act.

In my view the exclusion by article 17 of the application of Regulations 90 to 96 in Table A did not take away the shareholders' rights to appoint their own directors to the board of the Coal Gasification Company. I accept the argument that Fred Moyo and Savanhu held office as directors of the Coal Gasification Company at the pleasure of Hwange Colliery. I consider that the power to appoint must have entailed the power to remove or to recall.

Having been removed from the board of Hwange Colliery and having been expressly recalled from the board of the Coal Gasification Fred Moyo and Savanhu no longer represented anyone in that company. To hold that once having been appointed to the board of that company they occupied the office for life unless removed in the circumstances proscribed by article 17 would lead to absurd results. Among other things, it would mean Hwange Colliery would cease to have any representation on that board. Even Taiyuan itself, the majority shareholder, would also cease to have any representation in the event that it also recalled its own appointees as was alleged in respect of Feng and Longmin. I do not think that

it was ever intended that the Coal Gasification Company would at any time be controlled by anyone else other than the appointees of the two respective shareholders in the prescribed proportion until the expiry of the BOOT agreement.

In the circumstances I am prepared to grant the relief sought. After all it is only an interim measure. The matter shall properly be argued on the return day.

COSTS

Except for Stanbic virtually all the other parties sought costs against each other on the higher scale. On the single day that he appeared Mr *Chagonda*, for Stanbic, sought costs on behalf of that bank and that they be paid by whoever would be ordered to pay the costs. I consider that all the parties have been partially successful in some ways and partially unsuccessful in others. I consider that in view of the convoluted and multifaceted nature of the dispute this is a proper case for each party to bear their own costs.

In the final result it is ordered as follows:

1. Hwange Colliery Company Limited be and is hereby joined as a party to the proceedings instituted in this court under the case references HC 4861/13 and HC 4895/13.

2. The interim order by consent issued by Honourable Dube J on 24 June 2013 in HC 4895/13 be and is hereby amended by the deletion of the name "Fred Moyo" wherever it appears and the substitution thereof with the name "Staford Ndlovu". The interim signing arrangements agreed to, or ordered in these matters shall apply in relation to all the bank accounts for Hwange Coal Gasification Company [Private] Limited.

3. Mr Tendai Savanhu is hereby interdicted and restrained from holding himself out to any person or body whatsoever as one with authority to represent Hwange Colliery Company Limited in any manner or capacity.

4. Mr Tendai Savanhu is hereby further interdicted and restrained from attending any board meetings of the Hwange Coal Gasification Company (Private) Limited or from

signing any documents or making any representations or statement of authority in relation to that company.

5. The application by Hwange Colliery Company Limited for an interim anti-dissipation interdict against the property of Hwange Coal Gasification Company (Private) Limited be and is hereby dismissed.

6. Each party shall pay their own costs.

Venturas & Samukange, applicant's legal practitioners in HC 4861/13 and 4895/13; respondent's legal practitioners in HC 4897/13, HC 5105/13, HC 5331/13 and HC 5171/13

Antonio & Dzvetero, applicant's legal practitioners in HC 4857/13; respondent's legal practitioners in HC 4861/13, HC 4895/13, HC 5105/13, HC 5331/13 and HC 5171/13

Mawere & Sibanda, applicant's legal practitioners in HC 5105/13, HC 5331/13 and HC 5171/13; respondent's legal practitioners in HC 4897/13

Atherstone & Cook, respondent's legal practitioners in HC 4895/13, HC 4897/13, HC 5105/13and HC 5171/13