

FARAI MATSIKA  
versus  
MOSES TONDERAI CHINGWENA  
and  
JAMES PRINCE MUTIZWA  
and  
ROGERS MATSIKIDZE  
and  
R.D MUKONDIWA  
and  
CROCO HOLDINGS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE  
MANGOTA J  
HARARE, 14 January, and 4 February, 2016

### **Urgent Application**

*I Ndudzo*, for the applicant  
*T Mpofu*, for the respondents

MANGOTA J: The applicant and the first respondent's wife [Anne-Marie Chingwena] were the prompters and founding directors of the fifth respondent. The two were the first subscribers to the fifth respondent's issued share capital.

The fifth respondent was born on 9 July, 2002. The certificate of incorporation, Annexure A, which the applicant attached to the application, is relevant.

Annexure E which the applicant attached to the application shows that:

- (a) the fifth respondent has two shareholders – and
- (b) the shareholders comprise:
  - (i) Moses Tonderayi Chingwena Family Trust [MTC] which has a shareholding of 70% – and
  - (ii) Farai Matsika [FM], the applicant, who holds a shareholding of 30%.

The shareholders did not state it in so many words. However, the shareholding structure appears to have influenced their division of labour in the fifth respondent. The first respondent

whose family trust holds 70% of the fifth respondent's issued share capital became the chairperson. The applicant who holds 30% of the fifth respondent's issued share capital became the Chief Executive Officer of the fifth respondent.

The applicant wears three hats in the fifth respondent. He is a Shareholder, Director and Chief Executive Officer. Similarly, the first respondent wears three hats in the fifth respondent. He is a Shareholder, Director and Chairman of the fifth respondent.

On 27 May, 2006 the applicant and the fifth respondent's family trust entered into what they called a Shareholders' Agreement. The applicant attached the agreement to his application. He called it Annexure D. Clause 3 of the annexure reads:

“AMENDMENT OF ARTICLES/MEMORANDUM

- 3.1 To the extent that there is a conflict between this Agreement and the Articles of Memorandum, this agreement shall apply.
- 3.2 Immediately after the signature of this Agreement, the Shareholders shall amend the Articles and Memorandum to accord with this agreement if necessary.”

It requires little, if any, evidence to recognise that the agreement takes precedence over any other document(s) of the fifth respondent. It can be likened to a contract which binds the applicant and the first respondent's family trust, if a comparison is favoured. The agreement's binding nature on the shareholders' respective functions and their relationship in the fifth respondent is obvious.

It was within the spirit of Annexures D as read with the other documents of the fifth respondent that the shareholders managed to conduct the affairs of the fifth respondent smoothly, efficiently and effectively. They carried out their functions well from the fifth respondent's birth up until 10 December, 2015 when matters which pertain to the present application surfaced.

On 10 December, 2015 the first respondent addressed a letter to the applicant. He did so in his capacity as chairman of the fifth respondent. The letter's contents were to advise the applicant of:

- (a) his suspension from work without pay and benefits – and following six allegations of misconduct which had been leveled against him
- (b) the misconduct hearing which the fifth respondent , through the first respondent, contemplated taking against the applicant.

The first respondent's letter was served upon the applicant on 11 December, 2015. On 14 December, 2015 the applicant's legal practitioners responded to the first respondent's letter. The relevant portions of the response read:

“7. Your purported suspension of our client through your letter dated the 10<sup>th</sup> of December 2015 which was delivered on Friday the 11<sup>th</sup> of December 2015 is a patent legal nullity for the following reasons:

7.1 You do not have any legal authority as an individual, chairman or shareholder to unilaterally suspend the Chief Executive Officer. Indeed, your letter is even conspicuously silent on the basis upon which you derive the authority to effect the suspension, the reason being simply that you lack such authority.

7.2 The Chief Executive Officer is accountable to the board of directors and not to you as an individual. Your power as a chairman only exists within the confines of properly convened board meetings. You have functionally made your role meaningless by your failure to convene board meetings of late.

7.3 Our client is part of the board of directors, he is also a shareholder with 30% shareholding interest. No notice of a meeting of the board with an agenda to suspend the Chief Executive Officer was circulated. Your letter is therefore a non event.

7.1 -----

8. -----

9. You thus have neither the authority nor the grounds to act as you have purported. Our client is within his rights to ignore the contents of your purported letter of suspension. He shall accordingly continue with duties as per his mandate.

10. Due to the extreme gravity of your attempt to unlawfully suspend our client, we are instructed to demand that you formally withdraw in writing the purported suspension by close of business today failing which we shall promptly proceed to institute legal action without any further notice to rescue the company from your illegalities....”[emphasis added].

The first respondent did not withdraw the letter of suspension as had been demanded by the applicant. He, instead, addressed yet another letter to the applicant. That letter is dated 17 December, 2015. Its aim and object were to advise the applicant of the disciplinary hearing date, time and venue of the same as well as the name of the disciplinary authority who had been selected for the purpose. The last mentioned point roped the second respondent into the equation. He was appointed as the disciplinary authority. He was given the mandate to nominate two other persons who would sit with him to determine the propriety or otherwise of the allegations which had been leveled against the applicant. The second respondent, nominated the third and fourth respondents as members of his committee.

Annexure H which the applicant attached to his founding affidavit showed that his disciplinary hearing was set down for 29 December, 2015 at 10 am. The venue for the same was given as No. 7 Lawson Avenue, Milton Park, Harare.

On the mentioned date and time, the Disciplinary Authority (the Authority) was at the venue of the hearing and so were what the Authority referred to as the complainant's representatives. These comprised a Mr T Nyamasoka, a Mr Chagudumba of Atherstone and Cook Law Firm. He represented the complainant. Also present was a Mr B Samudzimu who was described as a business consultant in the first respondent's office. Mr Samudzimu represented the fifth respondent at the hearing. Neither the applicant nor his legal representative, Mr Ndudzo, were at the hearing.

Prior to the date of the hearing, the second respondent received an e-mail from Mr Ndudzo of Messrs Mutamangira and Associates. The e-mail advised the complainant of the non-availability of Mr Ndudzo to attend the hearing which was scheduled for the day. He said he was out of the country and would be back on 5 January, 2016. He intimated, in the e-mail, that he would raise several objections before the disciplinary authority on the day of the hearing.

The above stated matters necessitated that the hearing be postponed to a future date. The hearing was, therefore, postponed to 7 January, 2016 subject to the parties attending to the following matters which the authority ordered them to address:

1. that the charge sheet be issued and served on the applicant by 5 January, 2016 (if it was not contained within the body of the suspension letter.)
2. that the applicant should prepare all the objections which he indicated that he wished to make and be ready to argue them on 7 July, 2016 at the hearing – and
3. that the applicant should prepare his defence outline and be ready to proceed in the event that his objections were not upheld.

In so far as the last issue was concerned, the authority's position was that, in ordering as it did, it in no way implied that the applicant's objections would be dismissed. It emphasised that it could not discuss the objections which were not, at that stage, known to it.

The disciplinary authority and the parties met at 9:30 am of 7 January, 2016. Present at the hearing were the applicant's legal representative, Mr Ndudzo. He was in the company of two of his colleagues a Mr Magombo and a Mr Mutevedzi of Messrs Mutamangira and Associates

together with the applicant as well as a Mr E. Gatsi who was described as a consultant. The complainant's team remained as it appeared before the authority on 29 December, 2015.

It was reported that, during the hearing, Mr Ndudzo made submissions and pointed out that the second respondent did not have authority over the applicant; that the second respondent's appointment was irregular and unlawful and that he did not recognise the second respondent or the disciplinary authority.

What transpired between the disciplinary authority and the applicant's legal practitioner on 7 January, 2016 did not come out clearly. The authority said Mr Ndudzo rendered the proceedings impossible owing to what it said was the legal practitioner's unbecoming conduct. The applicant, on the other hand, stated in para 6.9 – 6:13 as follows:

- “6.9 When the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondent (sic) indicated that proceedings would be convened on the 7<sup>th</sup> of January 2015 as per their purported ruling of the 29<sup>th</sup> of December, 2015 hereto attached as Annexure ‘H’, even though I did not recognise the validity of their appointment, I considered it important to instruct my legal practitioners of record to formally advise 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents of the objections.
- 6.10 In the meeting of the 7<sup>th</sup> of January 2015, 2<sup>nd</sup> respondent initially allowed my legal practitioner of record to present evidence on the obvious lack of authority on his part to act as a disciplinary authority. 2<sup>nd</sup> respondent and his colleagues were duly furnished with the constitution documents which establish that the acts of the first respondent in suspending me and subsequently appointing the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents as disciplinary authority were illegal.
- 6.11 As it became clear to the 2<sup>nd</sup> respondent that he did not have appropriate authority he threw a tantrum and viciously objected to the continuation of submissions by my legal practitioner on the absence of his lawful authority.
- 6.12 2<sup>nd</sup> respondent seemed very desperate and keen to scuttle the submissions proving his lack of authority and sought to abruptly hand down a ‘ruling’ on the point before it was fully made. The conduct of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents clearly betrayed their bias as they all actually forcefully deprived my legal practitioner and myself an opportunity to complete our submissions on their lack of jurisdiction.
- 6.13 My legal practitioner duly objected to the injudicious, biased and emotional manner in which the 2<sup>nd</sup> respondent was conducting the meeting. Subsequently, after a series of walk outs by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents, the meeting was discontinued with the 2<sup>nd</sup> respondent advising everyone present that he would be handing down a ‘ruling’ advising the parties of the next date of the meeting.”

What occurred between the disciplinary authority and the applicant's legal practitioner on 7 January 2016 caused the applicant to file an application with the Labour Court for review of the same. He said as much on the matter. He stated, in para 16:15 of his affidavit, that the improper conduct of 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents in failing to give any semblance of decency and professionalism to their own convened proceedings left him with no choice but to protect his interests through a review application in the Labour Court.

The applicant premised the present application on the outcome of the review process which he filed with the Labour Court. He moved the court to interdict the respondents from convening, participating or continuing with any disciplinary proceedings against him until his review application at the Labour Court has been heard and determined. He prayed that the respondents be interdicted from conducting themselves in any manner which was prejudicial to the determination of the confirmation of the final order of this application and/or from conducting themselves in any manner that was prejudicial to the determination of his review application which he filed with the Labour Court under case number LC/H/REV/02/15.

The first and fifth respondents opposed the application. The second, third and fourth respondents did not. They, instead, addressed a letter to the Registrar of this court. The letter was dated 12 January, 2016. Its contents advised the Registrar that they would abide by the ruling of the court in respect of the urgent chamber application which the applicant filed.

The first and fifth respondents submitted, among other matters, that:

- (a) the application was not urgent;
- (b) the application was improperly before the court as the Labour Court did have the mechanism to address the applicant's concerns – and
- (c) the applicant could easily have appealed against the decision of the authority or applied for a review of the same after the disciplinary hearing had been concluded.

Two established principles guide the court in its determination of applications of the present nature. These are:

- (i) whether or not the application is urgent – and
- (ii) whether or not the applicant treated the application with the urgency which it deserves .

Urgency, as stated in a number of case authorities, connotes that the matter which has been placed before the court cannot wait and, if it is allowed to wait, the consequences which arise from the delay of it being heard would be irreparably difficult, if not impossible, to correct. Urgency also connotes that the harm which the applicant would suffer, if the relief he is seeking is not granted, is not only of a very serious, but also of a very substantial, magnitude. It is for the mentioned reason, if for no other, that the court made provision in its rules for some matters to take precedence over others, to, as it were, be allowed to jump the queue and be heard earlier than all cases which were filed by some parties before the parties' urgent chamber applications.

In *casu*, the applicant's position was that the harm which he feared would work against his interests occurred on 7 January, 2016. He said it was at that stage that he realised that the authority which had been appointed to determine his case was not only biased against him but was also determined to see his downfall in the fifth respondent. He submitted that, having discovered the unbecoming conduct of the authority on 7 January, 2016 he filed the present urgent chamber application as well as the application for review of the proceedings of 7 January, 2016, on 8 January, 2016.

On the face of it, the application would appear to be urgent. That is so as it was filed only one working day after the conduct which the applicant complained of had allegedly occurred.

It is pertinent to mention that the applicant's complaint did not arise on 7 January, 2016. It arose on 10 December, 2015 when the first respondent addressed the letter of his suspension from working as the fifth respondent's Chief Executive Officer. That same cause continued to rear its ugly head to the displeasure of the applicant on 17 December, 2015 when the first respondent advised the applicant, in writing, of the date, time and venue of the disciplinary hearing. Annexures F and H which the applicant attached to his application are relevant in the mentioned regard.

The applicant's response which is contained in Annexure G was clear and unequivocal. He stated in no uncertain terms that:

- (a) the first respondent's conduct in suspending him was of no force or effect;
- (b) the first respondent, acting as the chairman of the fifth respondent or as a shareholder or an individual, did not have the power to suspend him from his work - and
- (c) he would ignore the first respondent's letter of suspension and would continue with his duties as per his mandate.

He demanded that the first respondent should formally withdraw, in writing, the suspension by close of business of 14 December, 2015 - the day of his letter of response – failing which he would promptly proceed to institute legal action without any further notice to the first respondent.

The letter of suspension of 10 December 2015 stated that, in due course, he would be advised of the date of the disciplinary hearing. The applicant, for reasons known to himself, did not respond to that portion of the letter of suspension. He also did not respond to the contents of annexure F wherein the first respondent wrote to advise him that a disciplinary hearing which

would determine his case had been set down for 29 December, 2015 at 10 am and at No. 7 Lawson Avenue, Milton Park, Harare.

It is evident, from the foregoing, that the applicant allowed the matter which pertained to his suspension to wait from 10 December, 2015 to 11 January, 2016 which is the day that he filed the present application. He allowed the matter which pertained to his hearing to wait from 17 December, 2015 to 11 January, 2016. He did so notwithstanding his spirited intention to promptly institute legal proceedings against the first respondent if the latter did not formally withdraw the suspension on 14 December 2015. He has not to date instituted the action which he threatened on 14 December, 2015.

The conduct of the applicant in the abovementioned regard is not consistent with that of a person who viewed the threat which was occurring to him as having been urgent. He took a back seat and waited for the first respondent to move. He only reacted to the threats which the first respondent piled upon him as and when these came his way.

The applicant insisted that the first respondent did not have authority over him outside convened meetings of the board. He remained alive to what he described as the illegal conduct of the first respondent in suspending him from work and in appointing a disciplinary authority to determine the allegations which had been leveled against him. He insisted that his relationship with the first respondent's Family Trust was regulated by the Shareholders Agreement, Annexure D, which the first respondent's Family Trust and him signed on 27 May, 2006. As a signatory to the annexure, he was aware of the remedies which were contained in the same in the event of breach of the Agreement by the first respondent. Clause 15 of the annexure makes reference to the issue of breach. It reads:

“15 BREACH  
If a shareholder commits a material breach of this agreement and fails to remedy such within 14 days after receipt of notice from the other shareholder [“ the Aggrieved Party] calling for the breach in question to be remedied, the following provisions shall apply:

- 15.1. ....
- 15.2. the aggrieved party shall be entitled to claim specific performance by the shareholder in breach; or
- 15.3. the aggrieved party shall be entitled to claim damages”

Nothing contained in this clause shall deprive any shareholder from exercising any rights and/or remedies which he may be entitled to in terms of common law or the Act, save for cancellation of this agreement unless that relief is granted by an order of court”.

It is stated, for the avoidance of doubt, that the fourteen (14) days which are stated in the clause which is under consideration came and went by without the applicant doing anything to safeguard his interests. He did not exercise his rights in terms of the annexure. He did not do so in terms of any other law. He simply did not act. He advanced no reason at all for his inaction.

The inaction of the applicant does not fall into the purview of what is viewed as urgent. The first and fifth respondents stated correctly when they submitted that the application which was placed before the court was not urgent. The applicant allowed the matters which he said threatened his interests in the fifth respondent to take a standstill position for thirty consecutive days. He was not proactive when he should have been. He, on each occasion, waited for the first respondent's next move and reacted to it. He did so with all the knowledge on his part of what he was entitled to as his rights in terms of the Shareholders Agreement as well as the law of contract which binds parties to observe each other's rights and obligations under sanction of the law.

The first and fifth respondent submitted that the present application was improperly before the court. They stated that the Labour Court did have the mechanism to address the concerns of the applicant. They, in this regard, referred the court to the proviso which is in r 21(1) of the Labour Court Rules, 2006. This deals with set down of matters in the Labour Court. It reads:

“21 SET DOWN OF MATTERS

- (1) Save where a President of the court has directed otherwise, the registrar shall as far as reasonably possible set down matters on a first come first served basis:  
Provided that in urgent cases or for other good cause shown the registrar may, at the request of one or more of the parties and in consultation with the Senior President allocate a fixed date for the hearing of a case, whether in or out of term” [emphasis added].

The respondents were, to the extent of the cited proviso, correct in their submissions. All the applicant required to have done was to show good cause to the registrar of the Labour Court as regards the urgency or otherwise of his application for review. Whilst the registrar has a discretion to have the application placed before him jump the queue ahead of all other matters which may have been filed before it, the registrar would not exercise his discretion in an unreasonable manner. If he were to do so, that would, in the court's view, defeat the purpose for which the proviso was inserted in r 21(1) of the Labour Court Rules. The applicant would, however, have faced an insurmountable difficulty if he had no good cause which he was to show to the registrar to enable him to have his matter heard on an urgent basis. The fact that his case

fell into what are normally referred to as self-created urgent applications would most probably have militated against him in the mentioned regard.

Parties are, in general terms, encouraged to allow proceedings which are before any court, tribunal or forum to proceed to their final conclusion before the same become the subject of a review or an appeal process. The applicant challenged the jurisdiction of the disciplinary authority to hear and determine his case. He, however, submitted to the jurisdiction of the same when he appeared before the authority on 7 January, 2016. One, therefore, fails to appreciate what he was challenging under the stated circumstances.

The applicant exhibited a certain degree of confusion in so far as the present case was concerned. He stated categorically that he would ignore the contents of the letter which suspended him from going to work. He, in the same vein, fell into the trap of the letter. He threatened to institute legal action against the first respondent if the latter did not withdraw the letter of suspension, in writing, by close of business of the day that he responded to the same. He inexplicably did not take any action. He protested being made to appear before the authority which he said did not have jurisdiction over him. He, at the same time, submitted to the jurisdiction of the Authority. One could not, and cannot, tell what the applicant was driving home to when he, as it were, decided to, and did actually, blow both hot and cold as he did.

The application which he filed with the court was devoid of merit. He was fire-fighting, as it were. He cannot succeed under the circumstances of this case.

The court considered all the merits and demerits of this case. It is satisfied that the applicant failed to prove his case on a balance of probabilities. The application is, accordingly, dismissed with costs.

*Mutamangira & Associates*, applicant's legal practitioners  
*Atherstone & Cook*, respondent's legal practitioners