ATRICEPTS (PVT) LTD

Versus

BYRON SENGWENI N.O.
(in his official capacity as the trustee of Security Mills (Pvt) Ltd under a scheme of arrangement)

AND

SECURITY MILLS (PVT) LTD
(A company duly registered in terms of the Laws of Zimbabwe)

And

STEPHANIE ZLATTNER

IN THE HIGH COURT OF ZIMBABWE
MABHIKWA J
BULAWAYO 16 & 17 NOVEMBER 2020 & 18 MARCH 2021

Urgent Chamber Application

N. Sibanda for the applicant
W. Madzikura, for 1st & 2nd respondents
Ms A. S. Ndlovu for the 3rd respondent

MABHIKWA J: This matter appeared before me where the applicant was seeking simply an order that respondent be ordered to release funds that were due to applicant which funds should be used to operationalize the business of Security Mills.

The applicant's claim in simple terms, was that 1st respondent (Mr B. Sengweni) is a trustee of the 2nd respondent company as constituted in terms of a court order granted under cover of case number HC 2839/18. He is in charge of the matters of the said 2nd respondent company which is under a scheme of arrangement.

It was also claimed that in terms of the said scheme of arrangement, Mr Sengweni is obliged to fund Atricepts (Pvt) Ltd from the funds received from creditors or sale of company properties. Mr Sengweni allegedly has not released the said funds hence the application for an order to compel him to release them.

I wish to state herein that the applicant's draft order does not specify what figure or amount of funds should be disbursed. It also refers to respondent where there are two respondents. It is however from the founding affidavit and from the 1st and 2nd respondent's responses that the order refers to 1st respondent.

The 1st respondent in his notice of opposition did not in effect oppose the granting of the order sought. What he opposed or objected to was the claim that he refused or neglected

to release the said funds. He stated in his founding affidavit that he did not refuse or neglect to release the funds. The funds are held in trust by Messrs Joel Pincus, Konson and Wolhuter Legal Practitioners. He said he had already instructed the said legal practitioners to release an amount of US$40 000,00, to the applicant. He gave this instruction by email message dated 30 October 2020. The 2nd respondent did not oppose or file any papers in opposition. 1st respondent adds that the only other reason why the funds were not released timeously to the applicant was because of a disagreement between Stephanie Zlattner (3rd respondent) and her son Lawrence Eugene Zlattner both of whom are in fact suspended members of the second respondent company.

On the date of set down on 16 November 2020, a legal practitioner a *Ms A. S. Ndlovu*. appeared and insisted that the 3rd respondent be joined in the matter. After initial resistance from *Mr N. Sibanda* for the applicant, the parties however finally agreed that 3rd respondent be joined and be allowed to file her notice of opposition within a stipulated period. Thereafter, the parties would then file further submissions and or heads of argument if any, for the court to make a determination.

In her notice of opposition and in her heads of argument, the 3rd respondent starts off by chronicling the history that her late father in law started and set up the 2nd respondent company around 1939. It was later inherited by her late husband and his sister. She says that the shares in the company later evolved and were placed under a trust. She states in paragraph 4 of her disputed founding affidavit that the beneficiaries of the said trust are herself and her 3 children. She says that the eldest of the 3 children is the said son, Lawrence Zlattner and the other two (girls) are currently resident in Australia. I am saying "disputed affidavit" because as will be shown below, the applicant and 1st respondent argue that the affidavit is improperly before the court.

Surprisingly 3rd respondent says she is the sole remaining trustee in terms of the deed.

Let me come to the preliminary point of the answering affidavit. In its answering affidavit deposed to by Lawrence Zlattner, the 1st respondent contends that papers filed by the 3rd respondent are irregular. They do not comply with the court rules as they <u>are not signed.</u> The applicant argues further that in applications, moreso such as the current one, the court deals with the papers bearing the litigants' signature. The bar is even higher herein because a party's case and averments are founded on the founding affidavit. *In casu*, the 3rd respondent's affidavit should have been properly sworn to, signed and notarised. Applicant then prayed that 3rd respondent's papers be expunged from the record and that means that there is no valid opposition by 3rd respondent.

Importantly, I note that at paragraph 4 of her own submissions done and filed on 20 November 2020, 1st respondent states the following that:

> **"The background of this matter appears in 3rd respondent's opposition. <u>However, at the time of filing these submissions an original notarised copy of the affidavit has not been furnished to the court as the 3rd respondent is in South Africa and courier services are restricted due to Covid-19 regulations.</u> An original copy will be tendered as soon as it becomes available. A copy of such affidavit has been served on all parties and the facts shall be stated herein for the convenience of the court."**

Clearly therefore, there is no dispute and 3rd respondent herself confirms that her opposing affidavit had not been signed and notorised at the time it was filed on 19 November 2020 and even when the submissions were filed the following day on 20 November 2020, hence the objections by the applicant.

I do not know of any law which allows a party, without consent from the other parties and leave of the court, to file an unsigned and unnotarised founding affidavit and have the matter heard on the promise that an authentic once will be filed later.

Be that as it may, there has been no notice of filing and the authentic founding affidavit still has "not been filed". Surprisingly however, the unsigned affidavit referred to above is no longer in the court record as I write this judgment. What now appears at page 3 of the opposing papers by 3rd respondent is a signed and notoaised founding affidavit. It now appears as if it was properly filed together with the rest of the papers on 19 November 2020, the same day that a letter was written to the other parties and the court notifying that a properly signed affidavit was unlikely to be available until Friday. So, where is the unsigned affidavit now and how did the current one come into the record? What appears to have happened is that the 3rd respondent has been improperly or at least unprocedurally withdrawing documents and smuggling others from and into the court record. That is improper.

From the above, I agree that the 3rd respondent's opposing papers are improperly before the court. Secondly, the 3rd respondent is not clear exactly in what capacity she has opposed the matter. It is not clear whether she claims to be a "beneficiary" a "shareholder" or a trustee. She uses the 3 terms interchangeably as if they mean the same thing and has not shown exactly what entitles her or on whose behalf and authority she has filed papers in opposition *in casu*. 1st respondent says both she and her son are suspended shareholders.

As already shown above, she claims to be a beneficiary together with 3 others. But at paragraph 8 of her submissions, she claims to be a beneficiary and a trustees at the same time in terms of a Trust Deed. Legally, she cannot be both. Unfortunately, she has filed a very unreadable, faintly photocopied copy of a deed to prove that point. Unfortunately also, the issue of whether she is a trustee or beneficiary is irrelevant in this application.

I am further inclined to agree with *Mr Sibanda* for the applicant that as stated in *Chiremba* vs *Supt Chirodza & Anor* HH-163-18, a litigant cannot have it both way and "approbate" and "reprobate" as and when it suits him or her. She cannot blow hot and cold when claiming that she is the only trustee and that Mr B. Sengweni (1st respondent) is not a trustee. The 3rd respondent appears to accept in paragraphs 6 of her disputed founding affidavit as well as paragraphs (10) and (25) of her submissions that the 1st respondent is a trustee of the 2nd respondent, and that she has communicated with him in that capacity via whats app. She says that the 1st respondent has kept her updated on the affairs of the company from the time she decided to get more involved after the death of her husband. She makes this point clear even in paragraph 11 of her own submissions. This is the same point that 1st respondent makes in paragraph 5 of his submissions. However, elsewhere in her papers, she argues that 1st respondent is not a trustee of the 2nd respondent company.

Similarly, the 3rd respondent cannot blow hot and cold on the issue of the scheme of arrangement. The applicant states in its founding affidavit at paragraph 2 that:

> "2. The 1st respondent is a trustee constituted when in terms of the court order granted under cover number HC 2839/18 In charge of Security Mills which is under a scheme of arrangement …"

In paragraph 4 of his submissions 2nd respondent submits that it is common cause that the scheme of arrangement came into life through a court order under case number HC 565/17 and remains extent.

In her own submissions at paragraph 9, 3rd respondent acknowledges the existence of the scheme of arrangement in that;

> **Due to a number of factors, the 2nd respondent has been financially distressed and unable to perform well since as far back as 1994. In this regard, the company has been in and out of liquidation, judicial management and all sorts of measures to try and present it from winding up. The most recent being the scheme of arrangement order under cover of case number HC 565/17".**

3rd respondent also acknowledges and makes reference to the said scheme of arrangement in paragraphs (10) and (25) as already shown above. Surprisingly, in her grounds of opposing this application or paragraph 2:4; she states;

> "2.4 The applicant has no *prima facie* right as there is no scheme of arrangement."

This is completely contradictory to the above acknowledgments. Indeed, this and other grounds seem to me to have simply been thrown into a cocktail of "grounds" in order to oppose the application with no bona fide consideration of the same. 2nd respondent again dedicates a whole point *in limine* headed, "THERE IS NO VALID SCHEME OF ARRANGEMENT". In a whole section from paragraphs 38 to 43, she argues that there is no scheme of arrangement at all and that the application should therefore be dismissed on that point. This is baffling when she has admitted elsewhere the existence of the scheme of arrangement.

I have no doubt that the 3rd respondent's opposing papers are improperly before the court and therefore there is no valid opposition.

In any event, I am convinced also from the totality of the 3rd respondent's papers that the issues raised therein are issues that have nothing to do with this application. Whatever concerns and queries that the 3rd respondent may have had should, and can still be raised in a different forum against her son Lawrence, Byron Sengweni or whoever she so wishes. She cannot take advantage of this application to divert the court's focus and attention to then deal with those issues. She has just thrown in a cocktail of issues in the hope that one of them may succeed, including the requirements of an interdict when this application is not for an interdict at all.

The issues raised have nothing to do with the scheme of arrangement. It is important also to remember the rights and obligations of shareholders, creditors and debtors under a scheme of arrangement.

Having ruled that there is no valid opposition by 3rd respondent, I have no reason to deny the order agreed to by the other remaining three (3) parties. The court will however not grant an unspecified figure in the interim but the specific amount that the 1st respondent had already authorised for release as was also agreed in court by the 3 parties.

Accordingly it is ordered in the interim that;

1. The 1st respondent is hereby ordered to release to the applicant the amount of US$40 000,00 within forty-eight (48) hours of granting of this order.
2. No order for costs.

Tanaka Law Chambers, applicant's legal practitioners
T. Hara & Partners, 1st and 2nd respondents' legal practitioners
Webb Low & Barry, 3rd respondent's legal practitioners