DALIAN TIANCHENG MINERAL RESOURCES (PVT) LTD
and
BOAQUAN HUANG
and
BAOMING HUANG
versus
BCA FORENSIC AUDIT SERVICES
and
BUDHAMA CHIKAMHI
and
ZHIQIANG GAO
and
GUIBIAO ZHANG

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 23, 25 February and 5 May 2022

Urgent Chamber Application

G Dzitiro, for 1st, 2nd and 3rd applicants
A Borerwe, for 1st and 2nd respondents
T Rusinahama, for 3rd and 4th respondents

MUTEVEDZI J: On 25 February 2022, I granted the applicants a provisional interdict restraining the respondents from proceeding with an on-going forensic audit of the first applicant. My reasons were *ex tempore.* The third and fourth respondents filed an appeal in the Supreme Court against that decision. I am obliged to provide my full reasons. Below, I do so.

The Parties

The first applicant Dalian Tiancheng Mineral Resources (Pvt) Ltd, is a company duly incorporated in terms of the laws of Zimbabwe. The second and third applicants presented themselves as the only shareholders and directors of the first applicant. The first respondent is BCA Forensic Audit Services, a firm of accountants. The reason for its joinder to these proceedings will become clearer in the discussions which follow. The second respondent, Budhama Chikamhi is the Chief Forensic Auditor of the first respondent. The third and fourth respondents are individuals who also claimed to be the shareholders and directors of the first applicant to the exclusion of the second and third applicants.

Background

The second and third applicants on one hand and the third and fourth respondents on the other are involved in a shareholding dogfight over the control of the first applicant company. They are all of Chinese nationality. The turf war between them has become so acrimonious that there is a continuum of prolonged disputes pitting the parties against each other. This application and the opposing papers reveal a string of other cases between the same parties which are pending before various judges of this court. These matters in addition to the current one, include case numbers **HC2480/20, HC 2942/20, HC 4303/21 and HC6026/20**. To their eternal credit however, some semblance of reality appears to have dawned on either side that when brothers fight each other to death, a stranger will inherit their father's estate. The hiatus in their legal brawls saw them agreeing to consolidate their matters. In that way they will avoid the misery which usually comes with temporary victories attained from winning one instalment of a protracted wrangle. I mention that fact this early in the proceedings because it has a significant bearing on the decision I will make in this application.

The genesis of the current dispute can be summarized as follows:

As a result of the struggle for the control of the first applicant (herein after "the company"), the second and third applicants (herein after the "Huang brothers") allege that they got wind that first and second respondent (herein after "the auditors") were conducting an illegal audit on the company. This was sometime in September 2021. The allegation that the audit is illegal is premised on the Huang brothers' belief that the authority from which the third and fourth respondents gave the auditors the mandate to carry out the audit is derived from company documents which this court invalidated in case number **HC3272/20**. As such, they alleged that the third and fourth respondents are not directors of the company and had no authority to assign the auditors to carry out the audit. On that basis, the company by letter dated 23 September 2021 warned the auditors not to proceed with the audit and not to be hoodwinked by a disgruntled former director of the company. They equally alerted the auditors that the directorship of the third and fourth respondents who had given them the audit mandate was being contested in a matter pending litigation in the High Court under cases **HC2942/20** and **HC2480/20**. The same letter reminded the auditors that they owed a duty of care and diligence to the public before proceeding with an unauthorized audit and consequently an intrusion into the company's private affairs. In addition, the company through the Huang brothers demanded the auditors to furnish it with the auditors' company profile, a copy of the publication of the tender in terms of which they were selected to be the company's auditors

among other details. The Company thereafter assumed that the auditors had discontinued the intended audit as their letter went without reply until now.

The Huang brothers allege that to their surprise, on 16 February 2022, they established that the auditors had in fact resumed the illegal audit process after receiving a telephone call from ZIMASCO alerting the company that there were inquiries related to an on-going audit which were being made at ZIMASCO by the auditors. They without delay instructed their attorneys to notify ZIMASCO that the so-called audit was illegal.

The Company and the Huang brothers allege that the audit is not only illegal but is a brazen violation of the company's right to privacy. Any findings by the auditors would be inaccurate and misleading because only them hold the authentic records of the company. They contended that the audit lacks impartiality as required by law because its terms of reference were not disclosed to anyone. It is premised on contrived documents designed to achieve a predetermined outcome to their prejudice. They fear that the exercise is a sham intended to result in false findings which the third and fourth respondents intend to use as a basis for instituting criminal allegations against them and their employees who are perceived as resisting the third and fourth respondents' hostile bid to take over the company.

After the events of 16 February 2022, the applicants say it became necessary to approach the court for urgent relief which they subsequently resolved to do through a company resolution.

The third and fourth respondents resisted the application on the basis that the Huang brothers lacked *locus standi* to approach the court because they could not represent the company. The allegation was that they are not the directors of the company. Alternatively, they argued that the matter was not urgent; that the application could not succeed because it was tainted with serious material non-disclosure; and that the relief sought was incompetent because it sought to interdict a lawful process.

The first and second respondents did not raise any preliminary objections.

On the merits, whilst the first and second respondents stated that they would abide by any decision that the court would make in the matter they actively opposed the application. Despite the available references that the directorship of the company is disputed, the first and second respondents took it upon themselves to positively swear that the third and fourth respondents were the rightful directors of the company. They went to the extent of searching records at the Companies Registry to support their belief that the third and fourth respondents were directors of the Company. Further, they speculated that a person who had called them

and professed to be a director in the Central Intelligence Organization had been given the second respondent's number by the applicants. More alarmingly, they indicated that they had simply ignored the letter written to them by the first applicant alerting the first respondent to the possibility that the persons who had given them the mandate to audit the first applicant's affairs were disgruntled former directors of the company. I wish to point out from the onset that the decision by the first and second respondent that they would abide by whatever decision the court arrived at would have been the more professional approach. To subsequently allow themselves to be drawn into the dispute and to actively support one side against the other removes the veil of neutrality on their part. It only served to vindicate the applicants' claim that the audit process may be biased against them.

The third and fourth respondents opposed the application substantively on various grounds. From the beginning, they conceded that there is a protracted dispute regarding the shareholding of the company. That dispute which is in the High Court emanated from the second and third applicants' attempt to unlawfully remove third respondent from the shareholding of the company yet in reality he is the majority shareholder. The third and fourth respondents equally conceded that whilst the shareholding dispute raged on, the second and third applicants remained in unilateral occupation and control of the company. They, in respect for court processes underway, had accepted to sit back and allow the law to take its course.

The respondents further alleged that in flagrant disregard of their good will to let the courts settle the shareholding dispute the Huang brothers commenced a mission to dissipate the assets of the company in various ways which they enumerated. It was at that stage that it became apparent that there was a need for a forensic audit so that the financial position and the status of the assets of the company could be established. In pursuance of that, a meeting of the current board of the company's directors resolved to appoint an experienced and reputable forensic auditor to carry out the exercise. The audit commenced but when it was underway, the allegations that the second and third applicants were dissipating the company's assets were heightened. The third respondent reported the matter to the police and lodged an urgent chamber application under case number HC4303/21. The order sought was meant to preserve the assets of the company. In addition, the respondents also sought to increase security at the mine by deploying security guards in terms of the order they had obtained under case number HC4303/21. Those activities resulted in the second applicant filing a police report alleging that at the time the respondents were deploying the guards his cash amounting to US$80 000 had been stolen.

Responding to the specific averments in the applicants' founding affidavit, the third and fourth respondents made numerous general observations. As required by law, they sought to controvert every averment in the applicants' founding affidavit. They specifically disputed that the Huang brothers were directors of the company, alleged that the CR 14 tendered in support of their directorship and which sought to misrepresent that the third respondent had resigned from the company was fraudulent. The second respondent reiterated that he had never resigned, that he was the founding director of the first applicant and remained so. They further alleged that besides being a nullity, the CR14 filed by the applicants was not the last one filed with the registrar of companies. The correct directorship of the company was as indicated on the CR6 form dated May 2021.

From this synopsis a number of issues arise. The objections in *limine* are that:

a) The applicants have no locus standi to bring the application
b) The matter is not urgent
c) The applicants are guilty of material non-disclosure
d) The order sought is incompetent

As already alluded to, I dismissed each of the preliminary objections as follows:

1. ***Locus Standi***

The third and fourth respondents took the preliminary point that the second and third applicants have no *locus standi* to bring this matter to court on behalf of the company because they are not sitting directors of the company. They attacked the company's CR14 attached to the application as a fraudulent document. The third and fourth respondents further alleged that the Huang brothers did not even have capacity to bring the application in their personal capacities. As such the company's founding affidavit was a document *pro non scripto.*

Locus standi is a doctrine that has been explained by our courts in various cases. It is now settled that courts must adopt a fairly generous approach to standing. The analogus dicta in *Mawarire* v *Mugabe* 2013 (1) ZLR 469 at p 477D is apt. In the case of *Allied Bank Limited* v *Celeb Dengu & Wilson Tendai Nyabonda* SC 56/16 the Supreme Court held that:

> "The principle of *locus standi* is concerned with the relationship between the cause of action and the relief sought. Once a party establishes that there is a cause of action and that he/she is entitled to the relief sought, he or she has *locus standi*. The plaintiff or applicant only has to show that he or she has direct and substantial interest in the right which is the subject-matter of the cause of action".

In other words a litigant possesses *locus standi* where he/she/it has direct and material interest in the right which forms the subject matter of the litigation and the outcome of that

suit. It is the special reason which gives a litigant the right to institute legal proceedings. See also the case of *Stevenson* v *Minister of Local Government and National Housing & Ors* SC 38-02.

In this case, the concession by the third and fourth respondents in para 30 of their opposing affidavit resolves the question of the applicants' *locus standi* to bring the application. Therein they accept that the second and third applicants have unilateral control of the company and that the respondents have resigned to that reality until the shareholding dispute pending before the courts is resolved. The second and third applicants clearly hold themselves out as shareholders and directors of the company. They have *prima facie* authentic documents such as a CR6 form, a CR14 form, certificates of shareholding and incorporation relating to the same company depicting them as such. The third and fourth respondents equally hold documents which also appear *prima facie* authentic. There can be little doubt that until that dispute is resolved both sides have a direct and substantial interest in the first applicant. It is that realisation which drives both the applicants and the respondents to trade accusations and counter accusations relating to the control of the company. It is the reason why either side has filed litigation against the other in several other cases before the High Court without their *locus standi* being impugned. The determination of the shareholding dispute is not necessary for the resolution of the issue at hand. It is pending in another case before the High Court. The parties cannot sneak in nuggets of that dispute in the hope that this court would be hoodwinked into determining who is the rightful director or shareholder of the company in this application. For these reasons I find the challenge that the applicants have no *locus standi* to be without merit. Once that is accepted, the argument that the applicants' founding affidavit is a document *pro non scripto* also falls off. The preliminary objection is therefore dismissed.

2. **Non-urgency**

The third and fourth respondents argued that the matter cannot be heard on an urgent basis because the forensic audit had been ongoing since May 2021 with the knowledge of the Huang brothers. In addition the Huang brothers from their own narration accepted that they became aware of the audit sometime in September 2021. That their subsequent communication was ignored by the auditors is also an indication that the auditors did not find the communication worth their attention. They had no reason to stop the audit after verifying with the companies' registry that both the third and fourth respondents were sitting directors of the company.

The law regarding urgency is so well settled in our jurisdiction that authorities are barely required for it. If any is needed one can easily turn to the cases of (i) *Kuvarega* v *Registrar General Anor* 1998 1 ZLR 188; (2) *Document Support Centre (Pvt) Ltd* v *Mapuvire* 2006 (2) ZLR for guidance. What is indisputable is that urgency means that if when the cause of action arises resulting in the need for action, the injury incurred or imperilled must be remedied or stopped without delay. It cannot wait to be resolved in the normal course of the administration of justice because if it did, the offended party would have irredeemably lost the right or legal interest that it was approaching the court to vindicate. Attempts to beseech the court for protection thereafter will be of no practical significance. The important consideration in cases of urgency is therefore the time when the cause of action arises. Yet cause of action appears to be a dilatory concept. The time when it arises is difficult to point with precision. In the case of *Mukahlera* v *Clerk of Parliament & Ors* 2005 (2) ZLR 365 (SC) at p 4 the Supreme Court defined cause of action to mean:

> "…the entire set of facts which gives rise to an enforceable claim and includes every act which is material to be proved to entitle a plaintiff to succeed in his claim."

In my view, the need to act particularly in urgent applications must not be imagined to mean that every time a transgression occurs or is threatened the aggrieved party must sprint to court within the next hour after that happens. The dicta of MATHONSI J (as he then was) in the case of *The National Prosecuting Authority* v *Busangabanye & Anor* HH 427/15 at p 3 is apposite. He held that:

> "In my view this issue of self-created urgency has been blown out of proportion. Surely a delay of 22 days cannot be said to be inordinate as to constitute self-created urgency. Quite often in recent history we are subjected to endless points *in limine centred* on urgency which should not be made at all. Courts appreciate that litigants do not eat, move and have their being in filing court process. There are other issues they attend to and where they have managed to bring their matters within a reasonable time they should be accorded audience. It is no good to expect a litigant to drop everything and rush to court even when the subject matter is clearly not a holocaust".

In the case of *Telecel Zimbabwe (Pvt) Ltd* v *POTRAZ & Ors* 2015(1) ZLR 651 (H) at p 658B-E this court emphasised that point and said:

> "…raising the issue of urgency by respondents finding themselves faced with an urgent application is now a matter of routine. Invariably when one opens a notice of opposition these days, he is confronted by a point *in limine* challenging the urgency of the application which should not be made at all. We are spending a lot of time determining points *in limine* which do not have the remotest chance of success at the expense of the substance of a dispute. Legal practitioners should be reminded that it is an exercise in futility to raise points *in limine* simply as a matter of fashion. A preliminary point should only be taken where firstly it is meritable and secondly it is likely to dispose of the matter. The time has come to discourage such waste of court time by the making of endless points *in limine* by litigants afraid of the merits of the

> matter or legal practitioners who have no confidence in their client's defence *viz-a-viz* the substance of the dispute, in the hope that by chance the court may find in their favour. If an opposition has no merit it should not be made at all. As points *in limine* are usually raised on points of law and procedure, they are the product of the ingenuity of legal practitioners. In future, it may be necessary to rein in the legal practitioners who abuse the court in that way, by ordering them to pay costs *de bonis propiis."*

In the instant case, the third and fourth respondents argue that the applicants had been aware of the audit since May 2021. That however cannot possibly be correct because if they were they would not have waited until September 2021 to attempt to fend off the process. An affidavit of one of the employees allegedly interviewed in connection with the audit one Xing Feng was attached to the applicants' papers. She denied having been informed of or participating in the audit. The Huang brothers accept that they became aware that there was a planned audit in September 2021. When they did, there is no dispute that they wrote a letter to first and second respondents alerting them of the possible illegality of the audit because of the alleged illegitimacy of the third respondent's position in the company. They advised the auditors to immediately discontinue their plans to audit the company. Thereafter, it appeared that the letter had indeed worked. There was no indication that the audit would continue. All the respondents in fact accept that they did not respond to the letter. The applicants were entitled to assume that after making the issues clear to the auditors the plan to proceed with the audit had been shelved.

What legal practitioners must bear in mind is that it is not every dispute which must come to court. The failure to appreciate that reality of life is significantly contributing to the rise in the backlog of cases in our system. More often than not when a dispute arises the people involved attempt to resolve it between themselves before turning to third parties and adjudicating authorities. A litigant cannot therefore be penalised for genuinely attempting to resolve a dispute with his/her/its adversary before having recourse to litigation. In this case, the applicants saw and utilised the window of opportunity which existed to resolve the impasse before approaching the courts. That was encouraged by the hiatus which existed from September 2021 to February 2022. When it did not work and it became clear that the respondents were unrelenting in their determination to audit the company the possibility of an out of court resolution of the dispute became bleaker. That realisation came to the attention of the applicants on 16 February 2022 in the form of the communication from ZIMASCO. I find therefore that it was only then and not in September 2021 or earlier that the need to act arose. The challenge that the matter is not urgent is thus unsustainable and is dismissed.

3. **Material non-disclosure**

The third and fourth respondents further argued that the application could not succeed because there was material non-disclosure by the applicants. The non-disclosure related to the fact that the Huang brothers had failed to advise the court that the company's CR6 form lodged with the registrar of companies indicated that both of them were not sitting directors of the company. Further they alleged that the Huang brothers had also not disclosed the existence of a court order which recognized their (respondents) rights as directors of the company; that mining operations at the company had been stopped in the early months of 2021; that they (the Huang brothers) were under investigation for fraud and theft of property worth millions of dollars from the mine. That, so the respondents argued, was the background why the forensic audit became necessary. In their view, if the applicants were innocent, they should have been the ones pushing for the forensic audit to clear their names.

In the case of *Graspeak Investments (Pvt) Ltd* v *Delta Operations (Pvt) Ltd & Anor* 2001 (2) ZLR 551 (H) at p 555 B-C this court summed up the rationale behind the rule regarding full disclosure in urgent applications. It held that:

> "an urgent application is an exception to the *audi alteram partem* and, as such, the applicant is expected to disclose fully and fairly all material facts known to him or her. Legal practitioners should always bear this in mind before certifying that a matter is urgent. Although the court has discretion to grant or dismiss an application even where there is material non-disclosure, the court should discourage urgent applications, whether *ex parte* or not, which are characterised by material non-disclosure, *mala fides* or dishonesty…"

The above sentiments illustrate a few issues. To begin with the non-disclosure must not just be ordinary non-disclosure. It must be material to the issue before the court. In other words the non-disclosure must be significant or weighty in relation to the issues the court is set to determine. In addition, the question whether the court should not proceed to hear the case on the basis that there is non-disclosure is an exercise of that court's discretion. It can still hear the application despite the material non-disclosure. Given that position, the questions to ask are: was there any non-disclosure by the applicants? If there was, was the alleged non-disclosure material in the circumstances?

In their answering affidavit the applicants pointed out that the alleged non-disclosures are issues that are disputed by the applicants and which in any event are disputed. That averment is correct. I have already indicated that both sides hold papers that appear and which they genuinely believe are authentic because they were issued out of the registrar of companies'

office. Each side disputes the other's papers. It was not possible to expect the applicants to disclose that they were not sitting directors of the company when they had a basis to and indeed held themselves as such. If anything that was a dispute pending before the courts. The applicants disclosed that there was a shareholder dispute between them on one hand and the third and fourth respondents on the other. Certainly that should be the end of the argument about disclosure of the CR6 forms and the directorship of the company. In relation to the allegations of theft which the applicants are alleged to be facing their papers are replete with allegations that the audit process which they seek to be halted is aimed at creating a basis for the institution of criminal allegations against them and their employees. They allude to that having happened in the past. In my view that is disclosure that there have been such criminal allegations against them. These and rest of the allegations about non-disclosure sadly address the dispute about the shareholding and directorship of the company. As repeatedly said that dispute is not the one before me. I therefore find that in the instances indicated above, there was no material non-disclosure or where there could have been the non-disclosure was not material to the issues before me. As a result I exercised my discretion in hearing the application despite those allegations of non-disclosure. The preliminary objection is dismissed.

4. **Incompetent Relief Sought**

A further point raised by the respondents was that the order which was prayed for by the applicants was incompetent because it sought to interdict a lawful act. As already alluded to, the third and fourth respondents held themselves out as the *bona fide* directors of the company. They therefore had the right to assign auditors to investigate the affairs of the company. Every company enjoys the right to cause the investigation of its affairs through its directors. It goes without saying that a lawful process cannot be interdicted. See the case of *Airfield Investments (Pvt) Ltd* v *Minister of Lands & Ors* 2004 (1) ZLR 511 (S) at p 516 – 517 for the proposition that an interim interdict cannot be and is not a remedy for prohibiting lawful conduct. That in this case however, is as far as it goes. The legality of the audit is questionable on the basis of all that has been said. It is impossible for the third and fourth respondents to hold out that the audit they seek to carry out on the affairs of the company is lawful given all the disputes surrounding the ownership and directorship of the company. The audit of a company is a process which must be duly authorised by the shareholders and or the directors of the company. In instances such as this, where that ownership and directorship is seriously in dispute a party with direct and substantial interest can successfully seek to interdict any such

purported audit. The applicants have shown that and are therefore entitled to seek the relief prayed for. The respondents' objection in that regard cannot succeed.

The Merits

The requirements which an applicant has to meet for the grant of a provisional interdict are largely common cause. They have been discussed in innumerable cases by the courts. The more prominent ones are cases such as *Blue Rangers Estate* v *Muduvuri* 2009(1) ZLR 368(S); and *Airfield Investments* v *Minister of Lands* (supra). The common thread which runs through the precedents is that courts must always be alive to the fact that a provisional interdict is an extraordinary remedy aimed at prohibiting all *prima facie* illegitimate activities. The four basic prerequisites for the grant of a provisional interdict are that the applicant must establish:

a. **A *prima facie* right**

The applicant must show that the right which is the subject matter of the main action which he/she/it seeks to protect by means of a provisional interdict is clear and where it is not clear that it is *prima facie* established though it remains open to some doubt. In this case I have already alluded to the concession made by the third and fourth respondents that the Huang brothers are in unilateral occupation and control of the company. I have also alluded to the documents issued by the office of the registrar of companies which unless and until properly impugned remain *prima facie* authentic which the applicants hold as proof of their shareholding in the company. The documents also illustrate the basis of their claim to the directorship of the company. I have also accepted that the second and third applicants have *locus standi* to bring this application. That finding was based on the acceptance that on the papers before me they are directors of the company. The third and fourth respondents persisted with their argument that the presumption of regularity of company documents provided by s 24 of the Companies and Other Business Entities Act [*Chapter 24:31*] makes the CR6 form which they hold the only authentic one. My reading of that provision however shows that the section's objective is not to protect feuding directors of that company but other people dealing with it. Where the directors are battling against each other they cannot rely on that law to elbow each other from control of the company. The situation in this case is compounded by the fact that both the Huang brothers on one hand and the third and fourth respondents on the other hold such documents. I am therefore unable to agree with the argument that the applicants have not shown a *prima facie* right. They have. In the case of *MDC-T & 2 Ors* v *Timveos & 4 Ors* SC 9/22 the Supreme Court held that:

> "A *prima facie* case … does not have to be established on a balance of probabilities but can be granted even though open to doubt. A provisional order granted on the basis of a *prima facie* case affords the parties opportunity to fully argue their case on the return date."

Those comments apply in equal measure in the dispute at hand.

b. **Apprehension of irreparable harm**

To prove this requirement the applicants alleged several issues. They argued that the mooted audit is an unwarranted intrusion into the company's privacy; that it is an unauthorized exercise which is not legally supervised; is harmful to applicant's goodwill amongst stakeholders; that it is a hoax initiated to establish grounds for persecuting the company's directors and employees. They further alleged that the apprehension of harm is reasonable because in the past the second applicant has been subjected to persecution using false criminal charges emanating from malicious allegations. On the other hand the third and fourth respondents are adamant that the Huang brothers' fear is unreasonable. They cannot and must not fear an audit report if they have no skeletons to hide. Their fear actually suggests that they are afraid that their criminal activities will be exposed.

The question of what reasonable apprehension of irreparable harm is was dealt with by this court in the case of *Turfwall Mining (Pvt) Ltd t/a Beenset Investments* v *Dube* HB 102/17 at p 17. It said:-

> "The test for apprehension is an objective one. Essentially, the applicant must show objectivity that his apprehensions are well grounded. A reasonable man faced with facts in *casu* might entertain a reasonable apprehension of injury."

Put differently, the apprehension of harm is not dependent on the applicant's personal prejudices. It is measured against the standard of a reasonable person. While a timid applicant may fear harm where it does not exist or where it is very unlikely a headstrong one may also fail to discern danger where it is apparent. It is the reason why the law is reluctant to use the yardstick of these extremes and opts for the middle approach of the reasonable man.

In this instance, the third and fourth respondents appear to be oblivious to the applicants' point of view. The applicants are not opposed to the mooted audit for the sake of it. They oppose it on the basis that it may lack objectivity. The, fear it is contrived given that the auditors were appointed by people whom they allege are not part of the company whose affairs will be audited. In the applicants' view, the audit is a contrived process with foregone conclusions. In the past the applicants have been subjected to criminal allegations which they allege were based on unfounded allegations. The respondents confirm that the Huang brothers are facing criminal allegations although they do not disclose how the allegations came about.

Given the above it is not unreasonable for the applicants to apprehend that danger. The first applicant is a company in the business of mining. The second and third applicants are its directors albeit disputed ones. If an improperly initiated audit process were to make adverse inferences about the financial affairs of the company there is little doubt that such findings could have serious ramifications on the operations of the company and the suitability of the Huang brothers as its directors. Earlier on I pointed out the partisan involvement of the auditors in this dispute. It was uncalled for and further points to the reality of the applicants' fears that the audit process may be stage managed to their prejudice. Further, if on the return date, it were to be conclusively found that the third and fourth respondents are not entitled to assign an audit of the company the process will be a calamitous intrusion into the privacy of both the company and the Huang brothers as its directors. In both instances, it would not be possible to undo the harm done. It would be irreparable.

It is for these reasons that I find that the applicants satisfied this requirement.

c. **Balance of Convenience**

At the beginning of this judgment I indicated that the parties have seen sense and agreed to consolidate their disputes to resolve the shareholding disputes. If the contested audit is allowed to proceed, the harm described above will be occasioned on the applicants. If on the other hand it is true that the Huang brothers have already pillaged the company, halting the audit will not change that fact. There will therefore be little if any prejudice to the third and fourth respondents and none at all to the first and second respondents. I find therefore that in this case, the balance of convenience favours the grant of the interdict.

d. **Availability of Alternative Remedies**

An application for a provisional interdict will not succeed in circumstances where an applicant has at his/her/its disposal a suitable alternative remedy. Put differently it is an applicant's obligation to plead and demonstrate that he/she/it has no alternative remedy. Where a remedy is available the applicant must show that it will not be adequate. Van Winsen & Herbstein in *The Civil Practice of the Supreme Courts of South Africa,* 5th ed Volume 2 at p 1467, emphasise the point that the alternative remedy which is contemplated here is one which is – (a) adequate in the circumstances; (b) be ordinary and reasonable; (c) be a legal remedy; (d) grant similar protection. In my view the remedy must be one which an applicant can pursue without hindrance.

In this case the applicant pleaded that there is no suitable alternative remedy. The third and fourth respondents argued that there is and that the applicants must simply provide what

they allege is the correct and authentic company information to the auditors. Unfortunately, that argument again fails to recognise that the applicants are challenging the appointment of the auditors in the first place. If they wanted to cooperate with the auditors there would not have been any need for them to file this application. They further argued that the applicants must resort to challenging any adverse findings by the auditors. Needless to say, that clearly is an armchair approach to the issue. Acting after being prejudiced is not an alternative and adequate remedy. In the circumstances the applicants have shown that they do not have any alternative remedy other than to approach this court seeking the interim prohibitory interdict.

Disposition

Having been satisfied that the applicants have satisfactorily made their case for the grant of a provisional interdict it is ordered that such be granted in terms of the draft order.

G Dzitiro Attorneys, first, second and third applicants' legal practitioners
Ngwerume Attorneys at Law, first and second respondents' legal practitioners
Rusinahama-Rabvukwa Attorneys, third and fourth respondents' legal practitioners