

PITEN PETROLEUM DISTRIBUTORS (PRIVATE) LIMITED
versus
RIVERFLOW ENERGY (PRIVATE) LIMITED
and
MAXWELL CHISEWE
and
THE DEPUTY SHERIFF

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE, 20 October 2010 and 10 November 2010

R Dembure, for the applicant
P Nhokwara, for the first respondent
B Mugomeza for the second respondent

GOWORA J: The applicant filed an urgent application wherein it seeks an order in the following terms:

TERMS OF INTERIM ORDER

1. Pending the determination of case number 6909/10, the respondents be and are hereby ordered to give the applicant forthwith vacant possession of its business premises at number 1 Manchester Road, Industrial Area, Chinhoyi and all its property thereat.
2. If the respondents fail to comply with (1) above, the third respondent or the police be and is hereby authorized to assist the applicant recover possession thereof.
3. The respondents be and are hereby ordered to refrain from interfering with the applicant's business operations in any way pending the determination of case number HC 6909/10.

TERMS OF FINAL ORDER SOUGHT

1. The applicant shall have vacant possession of its business premises at number 1 Manchester Road, Chinhoyi, as well as all its other assets thereat.
2. The respondents have no right to interfere in anyway with the applicant's business.

The founding affidavit attached to the application was deposed to by one Patrick Tembo who is a director of the applicant. The basic allegations are as follows:

The second respondent, Patrick Tembo, Lameck Chinyemba, Stanford Makore and John Nyamujara are all share holders in the applicant, with each of them holding a 20% shareholding of the issued shares. It is common cause that sometime in about June 2010, the second respondent, sold the entire shareholding in the applicant to the first respondent. The sale was unauthorised. A report was made to the police and a docket was opened for fraud charges.

The board of directors then resolved to suspend the second respondent from the board pending the finalization of the issue of the unauthorised sale. The deponent averred that “they” became aware of the fraudulent sale sometime in August 2010. An application has since been filed with the Registrar of this court to have the sale declared void under case number HC 6909/10. The deponent avers further that despite being advised of the attitude of the applicant towards the sale of the shares and its assets, one of the first respondent had with the connivance of the second respondent illegally occupied the applicant’s premises at number 1 Manchester Road, Industrial Area, Chinhoyi on 7 October 2010. The first respondent had claimed a right to occupy the premises based on the alleged sale concluded with the second respondent.

The deponent further alleged that Mtetwa and the second respondent had forcibly divested him of the keys to the depot on the premise that the first respondent had now taken control of the applicant. A report was made to the police who attempted to remonstrate with the respondents to no avail.

On 8 October 2010 the deponent and others regained temporary control of the depot in the morning and changed locks. Around midday the respondents had allegedly forced themselves back onto the premises by breaking locks to the gate. The first respondent has been in occupation since then and has also assumed control of the fuel depot. After an initial attempt at conciliation, the police have refused to get involved claiming that the dispute is a civil matter.

The respondents have opposed the relief being sought and have advanced points *in limine*.

Mr *Mugomeza* for the second respondent has put in issue the authority of Patrick Tembo to institute these proceedings on behalf of the applicant.

In his affidavit, the second respondent avers that the deponent seeks to derive authority to act on behalf of the applicant premised on a resolution of the board dated 12 October 2010. The second respondent states in his affidavit that he was the managing director of the applicant but denies that there was a board meeting on the date in question. He contended that if Patrick Tembo and Lameck Chinyemba, who signed the resolution, met on the day in question, they did not constitute a quorum and could therefore not pass a valid resolution. It is common cause that the other two directors do not live in the country.

The applicant admits that the notice of the meeting was not sent to the second respondent because he had been suspended from the board. The applicant contends further that the other two board members had given their proxies to Messrs Tembo and Chinyemba and that in the circumstances these two had acted as alternate directors for the absent board members. In effect the applicant contends that there was therefore a properly constituted board meeting which passed a valid resolution authorising Patrick Tembo to institute proceedings on behalf of the applicant.

A number of issues arise for determination, the first being the suspension of the second respondent from sitting on the board of directors. The minutes from the meeting held by the board on 26 August 2010 have been produced by the applicant. Only three people attended the meeting, P Tembo as chairman, the second respondent and L Chinyemba who was also taking minutes. It is also recorded in the minutes that P Tembo was alternate for J Nyamujara and S Makore. The minutes attached to the urgent chamber application do not show that a valid resolution was moved on that day for the suspension of the second respondent. The portion of the minutes dealing with that aspect is to the following effect:

“At this juncture, the chairman was forced to declare the meeting closed because there was no order, but before doing so, he told Mr Chiseme that he breached the shareholders agreement and as such will be suspended by the board, further to that, a letter will (*sic*) be written to BP informing them of this new development.

The board resolved to do the following:

1. Suspend Mr Chiseme as a director of the company with immediate effect.
2. Report Mr Chiseme to police for fraud.
3. Write to BP and Shell advising them about Mr Chiseme’s suspension.
4. Appoint Mabulala and Motsi as our legal representatives in this case”.

The minutes are signed by the chairman and the minute taker. The contention by the applicant is that Messrs Nyamujara and Makore had appointed Mr Tembo to be an alternate

director for each or them and that therefore at any meeting of the board there would be a quorum. The minutes do indeed show that Mr Tembo did attend the meetings not only as himself but as an alternate for both Nyamujara and Makore. The question is whether the articles and memorandum of association provide for an appointment such as this?

The applicant did not find it necessary to attach the articles to its papers in confirmation of the appointment of Tembo as an alternate for Nyamujara and Makore. For as Gower-Modern Company Law 4th ed states at 143:

“Sometimes the articles entitle a director to appoint an alternate director to act for him at board meeting that he is unable to attend. The extent of the alternate’s promise and the answer to such questions as to whether he is entitled to remuneration from the company or from the director appointing him will depend on the terms of the relevant article”.

This legal position is also confirmed in *Willie & Millin’s Mercantile Law of South Africa* 17 ed which states at p 720:

“A director cannot delegate the powers, i.e. appoint another person in his place unless authorised to do so by the articles. This the articles usually do and such a director is called an alternate director”.

I have accordingly no evidence before me confirming the validity of the appointment of Tembo as an alternate for both Nyamujara and Makore. The applicant’s problems are further compounded by the manner of suspension of the second respondent from the board of directors. It seems to me that this may be an issue that may arise for substantive determination before this court, but this matter cannot be resolved without an examination of the manner of suspension of the second respondent from the board of directors. I will however just adhere on the legal requirements pertaining to the removal of a director.

On the suspension of a director, the legal practitioners referred me to the authority of *James North (Zimbabwe) (Pvt) Ltd & Ors v Mathinson* 1989 (1) ZLR 322, in which reference was made to *Van Tonder v Pienaa & Ors* 1982 (2) SA 336. At 341 D-F KANNEMEYER J stated:

“In my view the first respondent approach is not correct. In terms of article 72 the directors are charged with the management of the second respondent’s affairs. There is no suggestion that there has been a delegation by the directors of any of their powers to the first respondent.”

In *Shaw and Sons (Salford) Ltd v Shaw (1935) 2 KB 113 (A)* at 134 GEER LJ is reported as saying:

“A company is an entity distinct alike from its shareholders and directors some of its powers may, according to its articles, be exercised by directors, certain other powers may be reserved for the shareholders in general meeting. If powers of management are vested in the directors, they and they alone can exercise those powers”.

In the absence of delegation, the powers vested in the directors are exercised through resolutions passed by them at meetings and notice of a meeting must be given to all directors present and able to attend. See *Mafola Investments (Pty) Ltd v Uitzigt Properties (Pty) 1961 (4) SA 705*. In *casu*, no resolution has been produced in which the suspension of the second respondent as a director of the applicant was voted on and passed. Going by the minutes of the meeting of 26 August 2010 there is no suggestion that the required number of directors agreed to the suspension of the second defendant. The reference to the suspension was a statement by the chairman that the second respondent had breached the shareholders agreement and as such would be suspended by the board and that further a letter would be written to BP informing them of this new development. There is no indication that the matter was put to the vote and that even the second respondent was given an opportunity to resist the suspension.

For the acts of a majority to bind a minority, it is essential that the minority should at least have been given an opportunity of stating their views, and to this again that the minority should have been given time to consider the matter and furnished with or had access to whatever information may be necessary. See *Robinson v Imroth & Ors 1917 WLD 159 at 179 per DE VILLIERS CJ*.

It seems to me that there was no proper resolution to suspend the second respondent and that therefore he should have been given notice of the meeting of 12 October 2010 where the resolution to institute these proceedings was made. He was not given notice and therefore did not attend. Messrs Nyamujara and Makore also were not present. There is no indication that they had been given notice to attend the meeting.

The general rule is that directors of a company can only act validly at a board meeting, unless the articles provide otherwise. See *Silver Garbus & Co (Pty) Ltd v Terchart, 1954 (2) SA 98*, but it is clear that a board meeting may be dispensed with if all directors agree to what is to be done. A meeting is therefore not a necessity provided all the board members what the matters to be decided are and the requisite number indicate their agreement to the decision. In *African Organic Fertilizers and Associated Industries Ltd v Premier Fertilizers Ltd 148 (3)*

233 it was accepted that notice of a director's meeting must be sent to every director who is within reach. If any director who is able to attend is not sent notice of a meeting, then such meeting is not valid. In this instance, there was no notice to directors who were within reach and there was no quorum.

It is also a generally accepted principle that a resolution passed at an irregularly constituted meeting is invalid and ineffective. See *Bursten v Yale* 1958 (1) SA 768. The resolution in *casu* was signed by two directors when a quorum is constituted by three directors. I need not to deal with the question of urgency as the applicant's representative has failed to establish that he was properly authorised to institute these proceedings by the board of directors of the applicant.

In the premises, the point *in limine* raised by the second respondent is upheld and the application is dismissed with costs.

Mabulala & Motsi, applicant's legal practitioners

Mambosasa, first respondent's legal practitioners

Mutezo and Company, second respondent's legal practitioners