NEHANDA HOUSING CO-OPERATIVE SOCIETY
and
NEVER KOWO
and
KERI MHUTE
and
ANDREW MARAUKA
and
CHARLES MATAPO
and
JOTAMU NKALA
versus
SIMBA MOYO
and
ENESIA GUTU
and
ELIZABETH GUTU
and
LLOYD HAMAMUTI
and
AUSTIN HOVE

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 20 & 24 November 2015; 4 & 30 December 2015

Opposed application

W. Chinamhora, for the applicants
S. Mpofu, for the respondents

MAFUSIRE J: The first applicant was a duly registered co-operative society. The parties to this matter were two factions of its membership. The one faction comprised applicants 2 to 6. The other was respondents 1 to 5. Both sides were fighting for the control of the first applicant. Both claimed to be the legitimate management committee of the first applicant. Both claimed to have been duly installed in office following due process. For applicants 2 to 6, their claim to office was an alleged election allegedly won by them in September 2014. For the respondents, their claim to office was an alleged vote of no confidence against applicants 2 to 6 allegedly passed by the majority of the first applicant’s

members in April 2015. The case before me was the return date of a provisional order issued by this court [per Tagu J] on 27 June 2015. It read [words in parenthesis added to somewhat straighten it out]:

> "**TERMS OF [FINAL] ORDER SOUGHT**
> That you show cause to this Honourable Court why a final order should not be made on the following terms:-
>
> 1. That 1st to 5th respondents be and are hereby interdicted, restrained and barred from conducting themselves as the managing committee of the 1st applicant pending the finalization of the Supreme [Court] Case No. SC 267/15.
>
> 2. The 1st to 5th respondents jointly and severally with [the] one paying [and] the other[s] to be absolved be and are hereby ordered to pay [the] cost[s] of this application [on an] attorney and client scale.
>
> **INTERIM RELIEF GRANTED**
> 1. Pending the finalization of this provisional order, the 1st to 5th respondents be and are hereby interdicted, barred and restrained from holding any meetings for the purposes of running or deliberating on the management / or affairs of the applicants."

During argument, it was apparent to me that the fight had nothing to do with the interests of the first applicant *per se*. It had everything to do with the protection of individual interests and the preservation of egos. The interests of the first applicant seemed to have been consigned to the periphery. Even though both sides purported to canvass the requirements for an interdict, namely a *prima facie* or clear right; a well-grounded apprehension of an irreparable harm; an absence of an alternative remedy and the balance of convenience should the interdict be granted or refused [see *Setlogelo* v *Setlogelo*[1]; *Tribac (Pvt) Ltd* v *Tobacco Marketing Board*[2] and *Universal Merchant Bank Zimbabwe Ltd* v *The Zimbabwe Independent & Anor*[3]], it was clear to me that this was a mere perfunctory exercise. I wondered how, if the focus of the legal contest was really the first applicant, either of the parties could legitimately claim ***a right*** that could be ***harmed irreparably***, with no other ***alternative remedy*** and how the ***balance of convenience*** could be said to favour either of them were I to confirm or discharge the provisional order. It was just not adding up. But the protagonists having come to court, the outcome would have to be either win or lose, for one or other of them.

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[1] 1914 AD 221, at p 227
[2] 1996 [1] ZLR 289 [SC] at p 391
[3] 2000 [1] ZLR 234 [H] at p238

However, before reaching that point of finality, I suggested an alternative course of action, which, if acceptable and followed through, could produce an outcome that should be acceptable or binding to all. It was this. Could both sides consider going back and hold a fresh election within a reasonable period of time - say ten days from the date of any directive that I might give - and the winners of such an election be accepted as the legitimate management committee of the first applicant? The modalities of running such an election could always be worked out later on if the suggestion was acceptable in principle.

At first my suggestion was, through counsel, enthusiastically accepted by both sides. So the matter was adjourned to another day to allow for further consultations and the crafting of an order by consent. On resumption, a further postponement was sought and granted for the purposes of putting final touches to the deed of settlement and the draft consent order. However, as a precautionary measure, I insisted on a deadline for the filing of the draft order by consent failing which I would hand down my decision on the merits. I told the parties that I had come to a decision on the merits but that I would much rather defer it to their deed of settlement. It is always preferable for litigants to settle their disputes amicably rather than through a court order which neither party might find palatable. Thus, it was agreed that unless the deed of settlement was filed by 4 December 2015, I would proceed to hand down my judgment. However, well before that date, I received communication to the effect that there was no chance of an out of court settlement as the parties were wide apart from each other and that therefore they would be most happy to receive my judgment on the merits.

So this here is my judgment on the merits.

I found the conduct of the applicants unacceptable. I am referring to the applicants 2 to 5. The first applicant, the soul for which both sides were fighting to control, had nothing to do with this wrangle.

The applicants’ conduct that I found unacceptable was that they were guilty of forum-shopping and material non-disclosure. The provisional order by Tagu J on 27 June 2015, the confirmation for which was before me, was the second in a space of twenty-two or so days. On 4 May 2015 this court, per Matanda-moyo J, had dismissed the same application. The applicants did not disclose this in their founding papers. So the learned Tagu J must obviously have been unaware of this information when he granted the provisional order. I was told that the respondents were by then not represented. They had filed no opposing papers. They only did so afterwards when they were opposing the confirmation.

In my view, a party that conceals material information must be unworthy of the protection or assistance of the court. If you seek relief, you must take the court into your confidence, laying bare all the relevant facts on the matter, even those that you may perceive to be adverse to the relief that you seek.

As long ago as 1849, an English judge, WIGRAM V - C, put it this way in a case[4] that was cited with approval in the English case of *Rex* v *Kensington Income Tax Commissioners: Ex Parte Princes Edmond de Polignac* (1917) 1 KB 486, at p 514:

> "A plaintiff applying ex parte comes … under a contract with the Court that he will state the whole case fully and fairly to the Court. If he fails to do that, and the Court finds, when the other party applies to dissolve the injunction, that any material fact has been suppressed or not properly brought forward, the plaintiff is told that the Court will not decide on the merits, and that, as he has broken faith with the Court, the injunction must go."

In the *Ex Parte Princes Edmond de Polignac* case above, the applicant, a wealthy American lady who had been twice married to French subjects and was domiciled in France, had obtained an injunction against the collectors of revenue in Kensington, one of the parishes in England. The basis of the injunction had been that she was neither domiciled nor ordinarily resident in England, but Paris, France, and that the house, in a certain locality in that parish, which she frequently visited as her brother's guest for very short periods of time, allegedly not exceeding six months per any one visit, and upon which the local collectors of revenue had based her liability for income tax, was, in fact, owned by her brother. However, a former employee of her solicitors who had been disgruntled for having lost his job, hit back by supplying the collectors of revenue with information and documents showing that the house was practically owned by the lady and that the brother was no more than a mere front.

The information that subsequently came to light, and which the lady was subsequently forced to admit, was that, among other things, she had been the one that had provided the purchase price for the house; she had been the one that had bought the furniture in it; she had been the one that had paid all the rates and taxes for the property; she had been the one that maintained it on a regular basis and that she had been the one that received the rentals from it.

On the return date, the King's Bench Division refused to hear the matter on the merits and discharged the rule *nisi* on the basis that the lady had concealed material facts when she

[4] *Castelli* v *Cook* (1849) 7 Hare 89, 94

had obtained the injunction *ex parte*. Viscount Reading CJ, delivering the judgment of the court said[5]:

> "Where an ex parte application has been made to this Court for a rule *nisi* or other process, if the court comes to the conclusion that the affidavit in support of the application was not candid and did not fairly state the facts, but stated them in such a way as to mislead the Court as to the facts, the Court ought, for its own protection and to prevent an abuse of its process, to refuse to proceed any further with the examination of the merits. This is a power inherent in the Court, but one which should only be used in cases which bring conviction to the mind of the Court that it has been deceived. Before coming to this conclusion a careful examination will be made of the facts as they are and as they have been stated in the applicant's affidavit, and everything will be heard that can be urged to influence the view of the Court when it reads the affidavit and knows the true facts. But if the result of this examination and hearing is to leave no doubt that the Court has been deceived, then it will refuse to hear anything further from the applicant in a proceeding which has only been set in motion by means of a misleading affidavit."

The applicant appealed. But she lost. The decision of the King's Bench Division was confirmed. It was stressed by the Court of Appeal that it was incumbent in an *ex parte* application that the applicant should make the fullest possible disclosure of all relevant facts, failing which he cannot obtain any advantage from the proceedings and that he will be deprived of any advantage he may have already obtained. The court further said that an application for a special injunction is governed by the same principles which govern insurances. Both are matters that require the utmost degree of good faith, or *uberrima fides*. In the case of insurance, if the insured should conceal anything that may influence the rate of premium, whether or not he is conscious of it, the policy is entirely vitiated. The same applies to applications for injunctions made *ex parte*. Failure to disclose material facts disentitles the applicant to the relief which he seeks, or disentitles him to keep the one he had already obtained. The court will not go into the merits.

It is also the law in South Africa that the utmost good faith must be observed by litigants making *ex parte* applications by placing before the court material facts that might affect the granting of the provisional order: see HERBSTEIN & VAN WINSEN *The Civil Practice of the High Courts of South Africa*[6]; *De Jager* v *Heilbron & Ors*[7]; *Schlesinger* v

[5] At p495 - 496
[6] 5th ed. Vol 1, at pp 441 - 442
[7] 1947 [2] SA 415

Schlesinger[8] and *MV Rizcun Trader [4] MV Rizcun Trader* v *Manley Appledore Shipping Ltd*[9].

In casu, the applicants do not seem to have learnt a lesson. Matanda-Moyo J dismissed their first urgent chamber application for non-disclosure of material facts. They had concealed the fact that the respondents' claim to office was on the basis of the vote of no confidence of April 2015. At p 3 of the cyclostyled judgment, Her Ladyship said this:

> "The applicants have not been candid with this court in the present application. They distorted the facts. The applicants were aware that an emergency meeting was called for, on 24 April 2015 where a vote of no confidence was passed on the second to the sixth applicants but decided to mislead this court by submitting that the first to fifth respondents 'unlawfully declared themselves the new management committee for the first applicant.' Such facts were not correct. In the hearing it also became apparent that the second to the sixth applicants were advised of the meeting but decided not to attend."

It seems the learned judge found nothing wrong with the vote of no confidence. Among other things, she found that the meeting that passed it had been properly convened and properly constituted in terms of the Co-operative Societies Act, [*Chapter 24: 05*]. She then concluded as follows:

> "The withholding of such information by the applicants was a ploy to mislead this court and to keep this court in the dark and trying to make this court believe that the first to the fifth respondents simply woke up and declared themselves the new management committee of the first applicant through a newspaper article of 29 April 2015. It is settled law that a person who approaches the court for relief ought to be candid with the court. Such an applicant ought to disclose all the material or important facts and refrain from suppressing facts within his knowledge. Once found out such an applicant ought to be denied the relief sought."

The learned judge then cited the case of *Rex* v *Kensington Income Tax Commissioners* above as authority for her decision to dispense with the merits of the dispute.

However, with all due respect to my learned sister judge, the principle laid down in the English authority aforesaid related to *ex parte* applications, not ordinary court applications or chamber applications on notice of motion. An *ex parte* application is one made in the absence of the party who will be affected by the order that the court is asked to grant. It is in respect of such applications that the *uberrima fides* rule was said to apply.

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[8] 1979 [4] 342, at p 349

[9] 2000 [3] SA 776 [C]

In *Schlesinger*, (*supra)*, it was said[10] there are three principles of the *uberrima fides* rule as they apply to *ex parte* applications, namely [1] that all the material facts which might influence the court in coming to a decision must be disclosed; [2] that non-disclosure, or suppression of such facts need not be wilful or *mala fide* to incur the penalty of rescission of the order obtained *ex parte*, and [3] that the court, on being apprised of the true facts, has a discretion to confirm or discharge the provisional order.

In *Trakman NO* v *Livshitz*[11] the South African Appellate Division refused to extend the *uberrima fides* rule of *ex parte* applications to ordinary opposed motion proceedings on the basis there was no authority for such an extension and that there was no sound reason for doing so. The court said opposed motion proceedings could not be dismissed solely on the ground that the applicant had failed to disclose fully or fairly all material facts. Delivering the judgment of the five judges of the Appellate Division, Smalberger JA said[12]:

> "It is trite law that in *ex parte* applications the utmost good faith must be observed by an applicant. A failure to disclose fully and fairly all material facts known to him (or her) may lead, in the exercise of the Court's discretion, to the dismissal of the application on that ground alone (see for example, *Estate Logie* v *Priest* 1926 AD 312; *Schlesinger* v *Schlesinger* 1979 [4] SA 342 [W] at 348E – 350B]. I know of no authority, and Mr *Pincus* was unable to refer us to any, which extends that principle to motion proceedings and would justify the dismissal of an opposed application [irrespective of the merits thereof] for the reasons given by the Judge *a quo*[13]. Nor is there any sound reason for so extending the principle. Material non-disclosure, *mala fides*, dishonesty and the like in relation to motion proceedings may, and in most instances, should be dealt with by making an adverse or punitive order as to costs but cannot, in my view, serve to deny a litigant relief to which he would otherwise have been entitled. No justification therefore existed for the dismissal of the application on the alternative basis."

In that case the court *a quo* had dismissed an application for review on the ground that the applicant lacked *locus standi* because he had already ceded his rights of action to

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[10] At p 349
[11] 1995 [1] SA 282 [A]
[12] At p 288E - H
[13] The reasons given by the Judge a quo – ROUX J – were, at p 286H – I of the Appellate Division's judgment: **'There is a further consideration which relates to both the facts of the review and costs. Since May 1986 the applicant [appellant] and his attorney Kruger have had intimate and, as far as the other litigants are concerned, exclusive knowledge of the cession. On his own or on Kruger's advice, the applicant has misled this Court by his silence. This silence becomes all the more sinister when the delaying tactics of the applicant, as plaintiff, are taken into account. I need not list all the procrastinations. There is ample evidence before me to show sinister motives. The failure to disclose the cession for six years is inexcusable. This failure is only consistent with dishonesty. When dishonesty is harnessed to mislead the Court, to harass the other litigants and to obtain undue advantage it will be met with the sternest disapproval. Because of his behaviour I would also dismiss the application. ……………'**

someone else. His argument that there had been a re-cession of the cause of action back to him had been dismissed by the court as a lie. The court had also dismissed, as shown above, the application on the alternative basis of non-disclosure of material facts, namely the cession of rights aforesaid.

With due respect, I have found the approach of the South African Appellate Division in *Trakman's* case non-persuasive. I am mindful that it was a decision of five judges of appeal. But, with all due respect, I have found no cogent justification for restricting the *uberrima fides* rule strictly to *ex parte* applications only. The appellate court said there was no sound reason to extend the principle to ordinary motion proceedings. But I also find none for not extending it either.

In my view, the underlying reason why an applicant may be non-suited where he conceals material information from the court, as Viscount Reading CJ said in *Ex Parte Edmond de Polignac*, *supra*, is to protect the court itself. That is, in my view, to protect its integrity. It is to prevent an abuse of its process. There are several instances when a litigant's infraction or misconduct is so gross as to warrant the court withdrawing its jurisdiction altogether, in spite of the inherent power reposed in it to punish such misconduct by a punitive order of costs. For example, a litigant coming to court with dirty hands has no right of audience. A litigant guilty of contempt of court may not be heard. A litigant that continuously overburdens the courts with endless frivolous or spurious suits may be silenced perpetually. In my view, the court's decision to refuse to entertain a matter on the merits because of some wrong done by the petitioning litigant must, to a large extent, depend on the nature of the litigant's misconduct and the circumstances surrounding it.

In *Trakman*, it turned out that the issue of the cession, although not disclosed in the court *a quo*, had been common knowledge, not only to the litigants themselves, but also to virtually all the other interested parties. That the cession had not been disclosed had not been an issue for contest. It had not been fully debated. Only the aspect of *locus standi* had been an issue. Thus, in my view, the non-disclosure of the cession had not been such a material aspect as would have forfeited the applicant's right to be heard on the merits.

In contrast, in the present matter, not only did the applicants conceal before Tagu J the question of the vote of no confidence against them, but also, and crucially, the fact that some twenty two days before, this same court, per Matanda Moyo J, had dismissed the same application on the basis, it seems, of the same failure to disclose the aspect of the vote of no

confidence. Because of that non-disclosure, what the applicants had initially failed to get before Matanda-Moyo J they had subsequently got before Tagu J. This, to me, amounted to forum-shopping. It was conduct that, in my view, was so culpably iniquitous as to forfeit the applicants' right to be heard on the merits. It was conduct that gnawed right at the heart of the integrity of the court.

Furthermore, in an urgent chamber application under Order 32 of the Rules of this court, particularly one accompanied by a certificate of urgency as prescribed by r 242[2][b], a judge may well decide the case solely on the basis of the applicant's papers if he is satisfied that the matter is indeed urgent and that a *prima facie* case for relief has been made out. The respondent's right to be heard in terms of the *audi alteram partem* rule of natural justice may be deferred to the return date. But immeasurable damage may be caused if the applicant's papers are misleading by reason of, for example, a material non-disclosure. The almost inflexible rule of practice by the judges of this court to invariably insist on service of the urgent chamber application on the respondent before the matter is heard does not absolve the applicant from disclosing all the material facts surrounding the dispute.

Therefore, I would discharge the provisional order of this court on 27 June 2015 on the basis of non-disclosure of material facts by the applicant and without going into the merits.

However, in case I should be wrong to dismiss the application without deciding the merits, I also consider that, on those merits, the applicants had no case. None of the requirements for an interdict was established.

This judgment is not about whether the vote of no confidence was right or wrong; procedural or unprocedural. That issue was not before me. So until the vote of no confidence by the respondents against applicants 2 to 6 is found to have been unlawful and is set aside, the applicants 2 to 6 cannot make claim to any right to be the legitimate management committee of the first applicant.

The applicants' justification for bringing the same application before another judge [Tagu J] in a space of less than a month was that, as I understood it, and in my own words, they had appealed to the Supreme Court against the decision of Matanda-Moyo J. It was argued that, in accordance with the common law rule that an appeal suspends the decision appealed against, the judgment of Her Ladyship had automatically been suspended and that the status *quo ante* obtained. Mr *Chinamhora*, for the applicants, submitted that the pendency

of an appeal finds a *prima facie* right. For support, he referred to the case of *Timothy Sean White* v *Zenzo Ntuliki* HB 147/15. The applicants' position was that unless the respondents were barred, they would continue to purport to run the affairs of the first applicant, yet the judgment of Matanda-Moyo J had been suspended by the appeal. Unless they obtained leave to execute, the argument concluded, the respondents had no business purporting to be the management committee of the first applicant.

The applicants' argument on this point was manifestly scrambled. The respondents' claim to office was not by virtue of the judgment of Matanda-Moyo J. It was by virtue of the vote of no confidence on 25 April 2015. The learned judge Tagu J did not decide the issue. Neither have I. It was simply not before us. I accept that in paragraph 7 of their notice of opposition, the respondents stated unequivocally that they had been voted into office following the passing of the vote of no confidence. I am also aware that the applicants purported to refute that claim in their answering affidavit. But they merely made a fleeting reference to it. Through the fourth applicant [***Mr Marauka***"], here is how the applicants responded:

> "4. AD PARA 7 – 12
> The purported mandate of the 1st to 5th respondents was later revoked at a meeting of 1st Respondent's [*sic*] members, see **Annexure A** and this position remains the true position to date and unchallenged clearly putting pad [*sic*] to the issue of whether or not the Respondents have a mandate to run 1st Applicant's affairs."

But there was no Annexure A attached. There was nothing more said about the so-called meeting of "***… the 1st Respondent's members …***" that allegedly had revoked the respondents' mandate and had put paid to respondents' ambition to control the affairs of the first applicant. But most importantly, an application stands or falls by its founding papers. In *Bayat* v *Hansa*[14] the principle was summarised as follows[15]:

> "[A]n applicant for relief must [save in exceptional circumstances] make his case and produce all the evidence he desires to use in support of it, in his affidavits filed with the notice of motion, whether he is moving *ex parte* or on notice to the respondent, and is not permitted to supplement it in his replying affidavits [the purpose of which is to reply to averments made by the respondent in his answering affidavits], still less make a new case in his replying affidavits."

[14] 1955 [3] SA 547 [N]
[15] At p 553C - E

It is quite clear that the applicants in this case had no interest in the court prying into the propriety of the vote of no confidence.

The case of *Timothy Sean White* that Mr *Chinamhora* referred to was irrelevant. The issue there was quite different. Therein the respondents had wanted to execute a certain order of the magistrate's court despite an appeal that was pending against it. This court barred them pending the determination of the appeal. In *casu*, the respondents were not at all trying to execute any court order.

Even if one accepts that the operation of the judgment of Matanda-Moyo J was automatically suspended by the appeal against it, and that the status *quo ante* obtained, the question is: what was this status *quo ante*? Mr *Chinamhora* conceded, quite correctly, that it was the vote of no confidence. When the parties appeared before Her Ladyship, the vote of no confidence was the one obtaining. Evidently, the applicants did not wish to have it adjudicated upon. They concealed it from the court. However, the court picked it up, and, on the basis that it existed, but that it had been deliberately concealed, the urgent chamber application was dismissed. So the appeal, and the resultant suspension of Her Ladyship's judgment, had no practical effect on the status *quo ante*.

On this basis alone, namely that even if it were to be accepted that one's election into the management committee of a co-operative society is a right accruing to oneself in one's personal capacity for the purposes of an interdict, I would dismiss the application because no such right has been established.

The second requirement for an interdict is **a reasonable apprehension of an irreparable harm or injury**.

In my view, it was somewhat preposterous to suggest that there was a reasonable apprehension of an irreparable harm if an interdict was not granted to restrain the respondents from holding themselves out as the management committee of the first applicant. The fear of an irreparable harm or injury should have been in relation to the first applicant, the juristic person, not the applicants 2 to 5 personally. The nature of the harm was not identified, let alone the manner in which it could be said to be irreparable.

If the fear of harm was in relation to the applicants 2 to 5 personally, then all the more reason why the application had to fail. Firstly, the dispute could not have been about themselves personally. Secondly, and as I have already said, the nature of such harm, and the respects in which it would be irreparable, were not at all spelt out. Thirdly, it was the

respondents that actually adverted to some form of harm to the first applicant if the applicants 2 to 5 remained in office. The respondents averred in their notice of opposition, attaching the minutes of the meeting of 25 April 2015, that the applicants 2 to 5 had been removed from office because of their repeated mismanagement of the funds, assets and affairs of the first applicant. They argued that returning the applicants 2 to 5 to office would be a licence for them to continue embezzling the first applicant's funds.

So, on this second ground again, there was no basis for the applicants 2 to 5 seeking an interdict against the respondents.

The third requirement for an interdict is **the absence of an alternative remedy**.

In casu there was an alternative remedy. Co-operative societies are governed by the Co-operative Societies Act, *supra*. There is a dispute resolution mechanism set up by that Act. Section 115 of the Act reads as follows:

"115 Settlement of disputes

[1] If any dispute concerning the business of a registered society arises—

[a] within the society, whether between the society and any member, past member or representative of a deceased member, or between members of the society or the management or any supervisory committee; or

[b ………………………………………………..;

and no settlement is reached within the society …, the dispute shall be referred to the Registrar for decision.

[2] ………………………………………………………..

[3] Where a dispute has been referred to him in terms of subsection [1], the Registrar may—

[*a*] settle the dispute himself; or

[*b*] refer the dispute for settlement to an arbitrator or arbitrators appointed by him; or

[*c*] refer the dispute to the Minister for decision.

[4] For the purpose of settling a dispute in terms of paragraph (*a*) of subsection (3), the Registrar may exercise any of the powers conferred on him under section *one hundred and fourteen*.

[5] The Arbitration Act [*Chapter 7:02*] shall apply in relation to any reference of a dispute to an arbitrator or arbitrators in terms of paragraph (*b*) of subsection (3).

[6] Any person aggrieved by a decision made by—

[*a*] the Registrar in settling a dispute in terms of paragraph (*a*) of subsection (3); or

[*b*] an arbitrator or arbitrators appointed in terms of paragraph (*b*) of subsection (3);

may appeal to the Minister within sixty days after being notified of the decision, and the Minister may confirm, vary or set aside the decision appealed against or make such other order in the matter as he thinks appropriate.

116 Appeals to Administrative Court

[1] Any person aggrieved by a decision made by the Minister in terms of this Act may appeal against it to the Administrative Court within two months after being notified of the decision.

[2] For the purpose of hearing appeals in terms of this Act, the Administrative Court shall consist of a President of the Court and two assessors appointed by the Minister from a list of not fewer than ten persons who have been nominated by apex organizations and who are suitable for appointment from their experience in co-operative matters.

[3] Subject to the Administrative Court Act [*Chapter 7:01*] the Administrative Court may in any appeal confirm, vary or set aside the decision appealed against or make such other order in the matter as the Court thinks just."

With such an elaborate dispute resolution mechanism, it could not possibly lie in the mouth of the applicants to say that there was no other alternative remedy.

So, on this third ground again, the application for an interdict could not succeed.

The fourth requirement for an interdict is for an applicant to establish **that the balance of convenience lies in its favour if the interdict is granted**. *In casu*, the applicants failed to show this. Both sides claimed to be the legitimate management committee of the first applicant. In their opposing affidavit the respondents claimed that they were effectively in control since the alleged passing of the vote of no confidence in April 2015. In the answering affidavit the applicants strenuously denied this. In para 4[ii] of Marauka's affidavit they said:

"…. [A]t no stage did the Respondents occupy the offices of the 1st Applicant or attempt to run its affairs as alleged. It is further denied that the respondents are the sitting management committee of the 1st Applicant and whatever meeting they hold purporting to represent the interest of the 1st Applicant are a nullity."

This was rather confusing. If the respondents had at no stage occupied the offices of the first applicant, or **even attempted to run its affairs**, then what had been all the fuss about? What reasonable apprehension of an irreparable injury had the applicants perceived? Why on earth had they ever come to court?

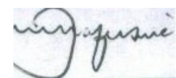
But on the contrary, it seemed to me that on a balance of probabilities, the respondents must have assumed effective control of the first applicant's affairs. That must have been what had stung the applicants into action. If that was the case, then the balance of convenience favoured the status *quo* remaining until the applicants' appeal had been determined by the Supreme Court. But even if that was not the case, the applicants could still not succeed on this ground because it was not established. The onus lay on them.

Therefore, on all the grounds for an interdict, the applicants came short.

DISPOSITION

The provisional order granted by this court on 27 June 2015 is hereby discharged with costs against the applicants 2 to 5, jointly and severally, the one paying the others to be absolved.

30 December 2015



C Chinyama & Partners, applicants' legal practitioners
Munangati & Associates, respondents' legal practitioners