

CFI HOLDINGS LIMITED
versus
STALAP INVESTMENTS [PVT] LTD
and
NICOZ DIAMOND INSURANCE LIMITED
and
RICHMOND LOUIS HAMILTON
and
FIRST TRANSFER SECRETARIES
and
SECURITIES AND EXCHANGE COMMISSION

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 31 January 2024

Date of *ex tempore judgment* and order: 31 January 2024
Date of written judgment: 23 April 2024

T. Mpofu, for the applicant
T. Magwaliba, for the first respondent
No appearance for second, third, fourth and fifth respondents

Opposed application – condonation and upliftment of bar

MAFUSIRE J

- [1] This was a chamber application for condonation and upliftment of bar. The applicant, CFI Holdings Limited [*“CFI Holdings”*] is one of five defendants sued by the first respondent, Stalap Investments [Private] Limited [*“Stalap Investments”*], in the main action under the case reference number HC 1855-20 [*“the main action”*].
- [2] Before an amendment, Stalap Investments’ claim in the main action impeached a certain agreement of sale of shares between the second respondent herein, Nicoz Diamond Insurance Limited [*“Nicoz Diamond”*], and the third respondent herein, Richmond Louis Hamilton [*“Louis Hamilton”*] in respect of 1 867 841 ordinary shares in CFI Holdings, which is the third defendant in the main action. It is so much easier to refer to the parties by their actual names or monikers.

- [3] The rest of the defendants were First Transfer Secretaries [Private] Limited [***First Transfer Secretaries***] and the Securities and Exchange Commission of Zimbabwe [***SEC***]. Other than describing First Transfer Secretaries as a duly registered company, and SEC as the regulator of transactions on the Zimbabwe Stock Exchange, nothing else was said about their relevance to the suit.
- [4] Briefly, and in rudimentary diction, Stalap Investments' cause of action in the main action was this. At all material times it held 43 414 577 ordinary shares in CFI Holdings. Of these, 1 848 644 shares were held through Nicoz Diamond as its nominee. Nicoz Diamond sold 1 867 841 shares in CFI Holding to Louis Hamilton. The sale included the 1 848 644 shares belonging to Stalap Investments. Nicoz Diamond is said to have done this without Stalap Investments' consent or knowledge.
- [5] Stalap Investments sought a declaration of nullity against the sale of its shares by Diamond Nicoz to Louis Hamilton. It also sought another declaratory order confirming its ownership of those shares. Costs of suit were claimed against Nicoz Diamond and Louis Hamilton only.
- [6] Nicoz Diamond entered an appearance to defend. However, it filed no further pleadings. Louis Hamilton not only entered an appearance to defend too, but also filed an exception to the claim, which it prosecuted right up to judgment. None of the rest of the defendants, including CFI Holdings, filed any papers.
- [7] The exception by Louis Hamilton was upheld. The details are not important. Stalap Investments amended its claim. The amendment relevant to the present application was that the plaintiff's declaration now expressly alleged that notwithstanding its full knowledge of the ownership of the impeached shares by Stalap Investments, CFI Holdings went on to reduce Stalap Investments' shareholding by the number of the impeached shares, and to increase Louis Hamilton's stake by the same quantum. In its amended prayer, Stalap Investments sought that CFI Holdings' register of shares be rectified by restoring Stalap Investments' original shareholding.
- [8] To the amendment, only Louis Hamilton reacted. He filed a second exception. However, he did not pursue it. He then pleaded over to the merits. CFI Holdings in

particular filed nothing. The main action was prosecuted all the way to trial before me. A couple of case management and case mapping sessions were held in my Chambers. CFI Holdings was represented but took no active role.

- [9] Case management and case mapping sessions are designed to achieve a settlement of the matter altogether as the first port of call, failing which, streamlining the issues that remain for trial. Case mapping in particular, involves, among other things, the interrogation of the nature of the claim or defence, the identity of the witnesses to be called, an assessment of their evidence, *visa vis*, among other things, relevance, the likely trajectory of the trial process, an estimate of the date of completion, and any other aspect of the matter as may assist in the speedier settlement of a case.
- [10] Case management and case mapping discussion are made off the cuff, with most utterances made without prejudice. It was in one such session that I raised a number of queries or concerns regarding Stalap Investments' claim against Louis Hamilton and its apparent inaction against the rest of the defendants.
- [11] By and by, Stalap Investments withdrew its claim against Louis Hamilton. Soon thereafter, it applied for a default judgment allegedly in default by CFI Holdings, First Transfer Secretaries and SEC. The prayer was for an order that CFI Holdings rectified its register [of shares] to reflect Stalap Investments as the holder of 43 415 577. Despite the inelegant drafting, the intention was simply to have the disputed shares restored to Stalap Investments. The application is still pending and is on hold owing to an appeal filed by CFI Holdings. The detail on this particular aspect shall emerge later.
- [12] About two weeks after the application for a default judgment by Stalap Investments, CFI Holdings launched this application. It alleged that the reason why it did not enter an appearance to defend was because Stalap Investments' claim in the main action was to all intents and purposes a contest against Nicoz Diamond and Louis Hamilton. It alleged that even though it maintained a watching brief throughout the proceedings, no real relief was being claimed against it even after the amendment.

- [13] CFI Holdings further claimed that it was after Stalap Investments' withdrawal of its claim against Louis Hamilton that it became seriously exposed. The rectification of its share register would result in the diminution of the shareholding by its other shareholders who not only were not before the court but also had never been cited in the first place. This would be highly prejudicially as the shares sought to be restored to Stalap Investments would only come from the stock held by these other shareholders. It concluded by saying that justice demanded that its failure to enter an appearance to defend be condoned and that the automatic bar operating against it be uplifted to enable it to place its case before the court.
- [14] Stalap Investments vigorously opposed the application. After oral argument on 31 January 2024, I dismissed the application and gave brief reasons *ex tempore*. CFI Holdings appealed. The appeal is pending. That partly accounts for the delay in the further processing of the application for a default judgment by Stalap Investments.
- [15] An application for condonation is an elementary and foundational procedure. In *Read v Gardiner & Anor* 2019 (3) 575 (S) the factors to be considered were summarized as follows:
- the extent of the delay;
 - the reasonableness of the explanation for the delay;
 - the prospects of success on the merits should condonation be granted;
 - the degree of prejudice to the other party;
 - the need for finality to litigation and the need to avoid unnecessary delays in the administration of justice;
 - the importance of the case; and
 - the convenience of the court;
- [16] Obviously the above list is not exhaustive. The factors are considered cumulatively and conjunctively, not disjunctively. No one factor is exclusively decisive. Some may be more relevant in some cases than they may be in others. For example, the existence

of strong prospects of success may compensate for any inadequacy in the explanation for the reasons for the delay, and vice versa. The court has a wide discretion. It exercises it judiciously. It should endeavour to be fair to all the parties.

[17] I dismissed CFI Holdings' application because I found the delay extensively inordinate and the explanation for the delay quite unreasonable. It now wants to start defending Stalap Investments' claim more than three years out of time. The summons was served in March 2020. The application for condonation was filed in July 2023.

[18] Undoubtedly CFI Holdings took a conscious decision not to defend. This was despite the fact that not only had it been cited as a party, but also that the relief sought, even before the amendment, would materially affect its share register. It was the company over whose shares Stalap Investments was fighting Nicoz Diamond and Louis Hamilton.

[19] Even before the amendment, it was implicit, if not apparent, that should the claim by Stalap Investment succeed the share register would have to be altered materially. CFI Holdings did not even extend the courtesy to advise, as most litigants in its position then would normally do, that it would abide by the order of court. Whatever defence it now wishes to proffer could have been proffered then.

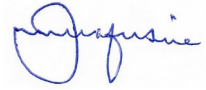
[21] But the amendment of the claim put matters beyond any doubt. Stalap Investments was now blaming CFI Holdings for the alteration of the register by reducing its shareholding. Not only did Stalap Investments specifically pray for the rectification of the share register by restoring its shareholding to the position before the impeached sale, but the basis for this relief was the blame it placed on, among others, CFI Holdings. If that could not jolt CFI Holdings into some action, nothing ever would. Indeed nothing did. The amendment was filed. As explained before, only Louis Hamilton reacted. The claim was prosecuted right up to trial. CFI Holdings remained a spectator.

[22] Stalap Investments' withdrawal of its claim against Louis Hamilton was of no moment in as far as CFI Holding's position was concerned. Stalap Investments did not seek to amend its claim any further. It relied, and still does, on the cause of action

as pleaded before and after the amendment. The exposure that CFI Holdings has apparently wized up to now, if any, had always been there from the beginning. There has been no change in circumstances in regards to what Stalap Investments has consistently sought as against CFI Holdings.

- [22] Furthermore, it was not explicitly explained in the application what the nature of the defence that CFI Holdings intended to proffer was should condonation succeed. It made reference to some prejudice other shareholders would suffer should Stalap Investments succeed. With due respect, it is all wishy washy. Stalap Investments complained that CFI Holdings has no mandate to speak on behalf of nameless shareholders. The point is, other than pointing to these other shareholders, CFI Holdings should have stated its own defence as the party cited in the pleadings. Alternatively, it could have simply opted to abide by any order the court would make.
- [23] In fact, my concerns throughout the pre-trial and case management conferences centred around the cause of action as pleaded by Stalap Investments and the silence by Nicoz Diamond and CFI Holdings. The trial was meant to establish, at the very least, who wronged who and what harm might have eventuated. With the withdrawal of the claim against Louis Hamilton no trial would happen because there was no other defendant before the court.
- [24] But having said that, Stalap Investments' application for a default judgment is still to be considered, depending on the outcome of the appeal. Without in any way making any pre-judgment, it is not a foregone conclusion that a default judgment will or will not be granted. Every aspect of the claim will have to be considered.
- [25] The balance of convenience favoured dismissal of the application. It was too late for CFI Holdings to force its way back into court. There must be finality in litigation. The prejudice that it might suffer would not come about as a result of the dismissal of its claim. It must consider carefully where the source of its potential prejudice lies.
- [26] It was because of these reasons that the application for condonation and uplifting of bar was dismissed with costs.

23 April 2024



Nyawo Ruzive Attorneys, applicant's legal practitioners
Diza Attorneys, first respondent's legal practitioners