SOPHIA MUDYANADZO **1ST APPLICANT**

AND

DICTATOR MAPHOSA **2ND APPLICANT**

AND

WISEMAN NCUBE **1ST RESPONDENT**

AND

NOMBULELO MAPHOSA **2ND RESPONDENT**

IN THE HIGH COURT OF ZIMBABWE
DUBE J
BULAWAYO 18 SEPTEMBER 2024 & 10 APRIL 2025

Urgent Court Application.

Mr T. Tavengwa for the Applicants
Mr N. Mazibuko for the Respondents

Introduction.

DUBE J: This is an urgent court application for a declaratory order in terms of Section 14 of the High Court Act [*Chapter 7:06*] as read with Rule 59(6) of the High Court Rules, 2021.

At the hearing of the matter counsel for the Respondents raised 6 preliminary points:

(a) That the Applicants failed to file proof of service with the Registrar of this court within 5 days of service of such application on the other parties in violation of Rule 58 (14) of the High court Rules, 2021. That the matter should now be deemed abandoned per sub rule 15 of the same rule.
(b) That the Applicants gave a shorter *dies induciae*, than that specified by the rules i.e 10 days.
(c) That the matter lacks urgency.
(d) That the Applicants approached the wrong forum as the parties have a binding agreement part of which is an arbitration clause.

(e) That the applicants are approaching the court with dirty hands as they have failed to comply with an earlier extant court order and;
(f) That there are material disputes of fact rendering the matter incapable of resolution on the papers.

Needles to say the Applicants resisted the preliminary points raised. While admitting the failure to file proof of service as required by the rule the Applicants sought condonation. I am willing to grant such condonation for the simple reason that the Respondents duly filed their opposing papers and are present in court. I shall deliberately omit to dwell on the implications of failure to comply with peremptory provisions of the rules and shelve it for another day. I find this matter to be one deserving to dealt with and disposed of on the merits once and for all.

On the shorter than usual dice, I subscribe to the reasoning of my brother Dube-Banda J in the matter of *Tendai Bonde v National Foods Limited and Anor* HB 103-23 where he held that;

> "To my mind a litigant cannot file an urgent application, serve it on the respondents and give a dies induciae of ten days, and expect the matter to be set down prior to the expiring of the ten days. In fact, it amounts to a contradiction in terms to contend that the matter is urgent and cannot wait…"

I find no fault in the alleged grounds of urgency. Unfortunately, due to some administrative glitch, this matter despite being filed on the 18th June 2024, during the 2nd Term of this court it was only allocated to me in the third term. That naturally cooled the proverbial hot iron not per fault of the applicant nor the respondents. The matter however remained unresolved.

It was further argued that the applicants approached the wrong forum. A quick perusal of the attached purported partnership agreement reveals that the 1st applicant is not privy to that agreement. It is therefore correct that she can not be bound by the contents thereof. Her rights and interests therefore deserve to be addressed before this court. The same fate befalls the argument on dirty hands. The 1st applicant has no extant court order against her.

From the facts contained in the affidavits filed of record, even thought there is a dispute of fact, it does not appear to me to be material.

It is for the above reasons that I dismiss all the preliminary points raised as incapable of disposing of the matter at hand. I shall proceed to deal with the merits.

FACTUAL BACKGROUND.

The facts on the merits are short and mischievous. 1st applicant was in an illicit love affair with 2nd applicant, a married man. This fact both applicants do not deny in many words. 2nd applicant being an educator of note, at least academically, opened an educational facility which he named Educand Academy. He formed and registered this institution alone using his expertise and good standing as a teacher. He however soon fell upon hard times financially. He sought the help of his in laws, ie a couple comprising of his wife's sister and her husband. These are the respondents in this matter. They executed a separate agreement between 2nd applicant and the respondents. On the strength of that agreement 2nd applicant was advanced with funding. His bankrupt institution was renamed Concepts Learning Academy in line with the new partnership. With capital injection the fortunes of the former ailing institution changed, so were the fortunes of 2nd applicant. He is alleged to have breached the agreement he executed with the respondents. In all these dealings, 1st applicant remains just but a shadow. She is only mentioned as a director in the minutes of a private meeting with potential lessors to premises later used by Educand Academy and in some private letter addressed to the lessors' lawyers. She is not even a signatory to the subsequent lease agreement. Her claim to fame is via an opening prayer she gave when the lease was being negotiated with Astrix Giltex who later became the lessor. Whether indeed the prayer was Godly is an issue for religion and not for this court.

When a new deed of partnership was executed with the respondents, quite conspicuously again 1st applicant's name does not appear. The best explanation given is that the respondents, with the connivance of 2nd applicant deliberately executed such document to hoodwink the 1st applicant and resultantly take away her rights in Educand Academy. The 2nd applicant in his founding affidavit admits to personally being dishonest to his mistress. He expects the court to now believe that probity has now somehow found him.

The Law

In the matter of *Munn Publishing (Pvt) Ltd v Zimbabwe Broadcasting Corporation* 1994 (1) ZLR 337 (S) Gubbay CJ (as he then was) pronounced the remedy available in terms of section 14 of the High Court Act (*Chapter 7.06*) as follows:

> "The condition precedent to the grant of a declaratory order is that the applicant must be an interested party, in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court. The interest may relate to an existing, future or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated to such interest."

I am of the respectful view that the 1st Applicant herein has not proven having a substantial interest in the former Educand Academy nor in Concepts Learning Academy. Her only interest appears to be her "betrothal" to the 2nd applicant. It is the finding of this court that the 1st applicant has failed to even coming closer to proving directorship in Educand Academy let alone Concepts Learning Academy. If she had made any monetary or emotional investment it is not laid bare in her pleadings. For whatever prejudice she stands to suffer, she has the 2nd applicant to blame.

As for the 2nd applicant, by signing a deed of partnership with the respondents, he made his bed and must lie in it. Should he be aggrieved surely, he should refer his matter for arbitration as provided for in the said deed. This court cannot re-write the agreement for the parties.

Disposition

In the circumstances, it is ordered as follows:

1. The application for a declaratory order be and is hereby dismissed with costs.

Mutuso, Mhiribhidi and Taruvinga Law Chambers Applicants' legal practitioners
Calderwood, Bryce Hendrie and Partners Respondents' legal practitioners