

TANZANIA / JUDGMENT

yasmin haji vs kenyata drive properties ltd another 2023 tzhccomd 25 13 february 2023

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TZHCCOMDDECIDED
13 February 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA COMMERCIAL DIVISION AT
DAR ES SALAAM MISCELLANEOUS COMMERCIAL CASE NO. 14 OF 2022 IN THE MATTER OF
THE COMPANIES ACT NO. 12 OF 2002 AND IN THE MATTER OF PETITION BY MEMBER FOR
RECTIFICATION OF REGISTER TO REFLECT THE SHARES OF THE PETITIONER AND IN THE
MATTER OF PETITION BY MEMBER FOR AN UNFAIR PREJUDICE BETWEEN YASMIN HAJI
.....PETITIONER AND KENYATTA DRIVE PROPERTIES
LIMITED1ST RESPONDENT ANTONY AMIN HAJI.....2ND
RESPONDENT

RULING

Date of last order: 23/11/2022 Date of ruling: 17/02/2023 AGATHO, J.: This ruling emanates from the petition brought by the Petitioner inviting the Court to grant the prayers she has advanced in her petition. She thus prayed for orders that:

- (1) The Court declare that is unfair prejudice in the conduct of the affairs of the 1st Respondent company against the Petitioner's interests.
- (2) That the Petitioner is a lawful shareholder in the 1st Respondent Company. 1
- (3) That the 1st Respondent rectify her registers by including the 100 shares of the Petitioner and notify BRELA.
- (4) That BRELA reflect in her records the changes pursuant to above order. Both parties were under legal representation. Whereas the Petitioner was represented by Jovinson Kagirwa, learned counsel, the Respondents were represented by Juventus Katikiro, learned advocate. The hearing of the petition was done by way of written submissions. The parties filed their submissions as per Court schedule. In this ruling reference is made to the law, evidence in the affidavits of the parties as well as the submissions for clarity. However, these submissions will not be reproduced. From the outset this case is to certain extent like Shirin Moosajee v Juzer Zakiuddin Mohanmedali & 2 Others, Misc. Commercial Application No. 2

of 2021 HCCD in which allegation of unfair prejudice was held in affirmation. The forfeiture of shares was held to be illegal. But it is worth noting that in the present petition, the Company secretary as per BRELA records of 03/01/2017 was not legally appointed. The document does not show who were the shareholders or directors. A preliminary question is, can rectification of register of companies in the context of this petition be done without the Business, Registration and Licensing Agency (BRELA) being heard or being impleaded? There are two schools of thought on this. First, there is no need of impleading BRELA because in a fit situation, the Court can order or directs BRELA (registrar of companies to rectify the register). Second, a contrasting view is that BRELA is a necessary party that must be impleaded to accord the registrar 2 of companies the right to be heard. The Court cannot order rectification of the register without hearing the BRELA's side. In my view the latter resonates with the fundamental right of audi alterem partem (the right to be heard). Hence BRELA was a necessary party. In the case at hand neither BRELA nor the Registrar of Companies have been impleaded as necessary party. There is a conspicuous risk that BRELA may be condemned unheard. However, a test in such scenario is, can there be executable decree without involving BRELA. One may be tempted to say, no BRELA will have to be involved. On the issue of "a necessary party" though cropped out from the submission, there is no need to reinvent a wheel. *Ngerengere Estate Company Limited v Edina William Sitta*, Civil Appeal No. 209 of 2016 CAT, and *Abdullatif Mohamed Hamis v Yusuf Osman and Another*, Civil Revision No.6 of 2007 CAT both cases dealt with the concept of "a necessary party." They also laid down criteria for determining whether a party is a necessary one. Another case relied upon is *Stanslaus Masunga Nkola & 2 Others v The Board of Directors, Nyarugusu Mine Company Limited & Others*, Misc. Civil Cause No. 1 of 2021 HCT Mwanza District Registry at pages 16-18. In my view and as will unfold later, the BRELA's right to be heard would have been of relevancy if the register concerned could have been the Companies' register maintained by the Registrar of Companies at BRELA. But the register referred in this case is the 1st Respondent's register of members as per Section 115 of the Companies Act [Cap 212 R.E. 2002]. The said register is kept by the Company itself. It is not the register of 3 companies under the custody of the Registrar of Companies. For that reason, the preliminary objection that the petition is incompetent for not joining BRELA as a necessary party is unfounded let alone the reality that that preliminary objection was raised in the submissions which is contrary to crystalized procedures governing raising of preliminary objections. See the case of *Manasori Kotani v Restrut Tanzania Limited*, Civil Cause No. 6 of 2022 HCT. Having rejected the Respondents' counsel preliminary objection (PO) because he raised in the submission, the test remaining is, can the Court pass an effective decree without BRELA being impleaded as a necessary party? From the provisions of Sections 115 to 121 of the Companies Act [Cap 212 R.E. 2002] it seems that is possible. There is no risk of BRELA being condemned unheard. After all, what is sought is the Court order directing the 1st Respondent to rectify her register of members. Indeed, at some point that must involve BRELA. The latter should be notified and approve such rectification. Section 121(1)(a) and (3) of the Companies Act [Cap 212 R.E. 2002] gives power to the Court to order rectification of the company's register of members if the name of any person is

without sufficient cause entered or omitted from the register of members of a company. On reading of Section 121(3) of the Companies Act, it is conspicuous that the mandate extended to the Court on rectification of register may relate to the entering or omission of the name of the person in the register or questions arising between the members or alleged members or between members on the one hand and the company on the other hand as with regards to the register. The Court may decide any question regarding rectification of the register. Therefore, the 4 Respondent's argument that the Petitioner lacks locus standi is misleading considering that the provision of Section 121 of the Companies Act [Cap 212 R.E. 2002] covers even alleged members. Moreover, it is common ground that there is BRELA letter dated 18/01/2022, referring to Deed of transfer of shares, that the said transfer of shares was illegal as the Petitioner was not notified. On this see Shirin Moosajee's case (supra). It was an irregular share transfer committed by the 1st Respondent. Moreover, there was an issue of forgery which BRELA advised the parties that it be reported to the authorities for criminal investigation. This was not done. Further, it is on record that BRELA rectified the register by correcting shareholding structure in which the Petitioner is seen as a shareholder with 100 shares as per BRELA's letter dated 18/05/2021 to the 1st Respondent company. As that is not enough BRELA wrote another letter dated 24/09/2021 on a subsisting conflict in the 1st Respondent company. Interestingly, BRELA noted irregularities in share transfer done in 2018 citing lack of board resolution sanctioning it. According to BRELA, there was only tax clearance and other documents to support transfer of shares. BRELA also stated that the status of the 1st Respondent company including the shares will be or is as shown in BRELA letter with Reference No. MIT/BRELA/47611/38 dated 28/06/2021. Surprisingly, this letter is not found in the Court file. BRELA wrote several letters to the 1st Respondent, and to the lawyers of the Petitioner. One of the letters concerned the meetings between the 5 parties and BRELA to resolve the conflicts in the running of the affairs of the 1st Respondent. All these confirms that there were problems in the management of the company. BRELA also in one of its letters stated that share transfer done in 2016 was irregular and hence illegal. As for the Petitioner's allegation of unfair prejudice committed by the Respondents, the law requires that he who alleges must prove. See section 110 of the Evidence Act [Cap 6 R.E. 2019]. The unfair prejudice is covered by Section 233(1),(2) and (3) of the Companies Act [Cap 12 of 2002]. Being a critical point, the said provision is reproduced below: Section 233(1) " Any member of a company may make an application to the Court by petition for an order on the ground that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of its members generally or of some part its members (including at least himself) or that any actual or proposed act or omission of the company (including an act or omission on its behalf is or would be so prejudicial. If the court is satisfied that the petition is well founded, it may make such interim or final order as it see fit for giving relief of the matters complained of.

- (2) This section shall apply to a person who is not a member of a company but to whom shares in the company have been transferred by operation of law, as those provisions apply to a member of a company; and references to a member or members are to be construed accordingly.
- (3) Without prejudice to the generality of Subsection (1), the Court's order may:
- (a) regulate conduct of the company's affair in the future
 - (b) require the company to refrain from doing or continuing an act complained of by the petitioner or to do an act which the petitioner has complained it has omitted to do.
 - (c) Authorize civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct;
 - (d) Probed for the purchase of any member of the company by other members of the company or by the company and, in case of purchase by the company, for the reduction according to the company's capital, or otherwise." The unfair prejudice doctrine has its own elements as echoed in *Velisas Elizabeth Deflose* (petitioning as legal representative under the Power of Attorney of Gordon McClymont) v *Joseph Ignatius Noronha*, Misc. Commercial Cause No. 20 of 2021, HCCD at pages 23-26. The elements ought to exist are namely, that (1) the conduct of the company's affairs, (2) has prejudiced; (3) unfairly; (4) the petitioner's interest as a member of the company. The importance of unfair prejudice petition was underscored by My learned brother Nangela J in *Velisas'* case (supra) at page 25 where he held that: "Essentially, an unfair prejudice petition stands out as an important legal arsenal in the hands of those shareholders who, for some reasons, may lack sufficient power or influence over decision touching the affairs of the company or critical matters affecting the business of the company. Instances 7 regarding abuse of the power or breaches of the articles of association or exclusion of shareholder from management or decision making over the affairs of the company in instances where there is a legitimate expectation of being involved, all attracts complaints based on unfair prejudice." Now in the case at hand, even if BRELA said the 2016 transfer of 100 shares to the Petitioner was illegal, then it ought to notify her. Failure to notify her is as good as condemning her unheard. It was prejudicial of the Petitioner's interest. It is equally unclear why the 1st Respondent did not inform the Petitioner on BRELA's stand. Events pointing to unfair prejudice in the case at hand are not hard to find, such as the alleged share transfer by the petitioner to 1st respondent in 2010 dated 15/11/2010. The transfer instruments were stamped on 26/11/2021. That is eleven years later. That is not only indicating fraud but also contravenes Section 25 of the Stamp Duty Act [Cap 189 R.E. 2019]. The latter Section provides: "All chargeable instruments executed by any person in Tanzania Mainland shall be stamped within thirty days of execution." Another share transfer done in 2016 where the 2nd Respondent purported to have transferred 100 shares to the petitioner was in contravention of the MEMART of the 1st Respondent company. On 30/11/2016 there was shareholders meeting in which the petitioner attended. The Respondents 8 are contending that the meeting was illegal because it was attended by

the petitioner who was not a shareholder as she has transferred her shares in 2010. The 2016 share transfer was questioned by BRELA too. What is intriguing though is that the 2nd Respondent filed documents that suggested that the petitioner transferred her 20 and 80 shares to the 2nd Respondent's spouse and the 1st Respondent respectively in 2018. Tax clearance was issued to that effect without any share transfer documents and board resolution being tendered. The circus never ended there. The 2nd Respondent claims that the tax clearance certificates were cancelled after discovering the errors in transfer for want of shares on the side of transferors. One could easily see how the Respondents were attempting to conceal fraud and mismanagement in the 1st Respondent company. Moreover, there were allegations of forgery, and that prompted BRELA to advise that the same be reported to the authorities for criminal investigation. In Tanzania shares transfers are regulated by the Companies Act [Cap 212 R.E. 2002] and a particular company's MEMARTS. In the present case the 1st Respondent's MEMARTS provide under clause 5(b) and (c) how share transfer is to be done. They include the shareholder intending to transfer his shares to give notice to the directors. Thereafter, the board of directors will give notice to other shareholders stating the number of shares and price of such shares and inviting the person (shareholder) to whom the notice is sent to state within 21 days from the date of such notice whether he is willing to purchase any, and if so what maximum number of shares he would like to purchase. 9 This Court has never been provided with any notice by the shareholder desiring to transfer his or her shares nor any notice issued by the 1st Respondent's board of directors to other shareholders who could purchase the shares. This applies to both share transfer transactions in 2010 and that of 2018. Therefore, there is violation of 1st Respondent's MEMARTS. In *Shirin Moosajee v Juzer Zakiuddin Mohamedali & 2 Others*, Misc.Commercial Application No. 2 of 2021 at pages 9 -10 his Lordship Magoiga J, held inter alia that: "I have with a very serious legal eye considered and perused the contents of FJM-1 in which the 2nd Respondent claim to have been made director and shareholder of the 3rd Respondent but with due respect to both the 2nd and Mr. Koisange, I find annexure FJM-1 legally devoid of legal back up of taking the Petitioner's shares. The reasons I am taking the above stance are abound. One, Form No. 21b which terminated the directorship of the Petitioner was against clauses 2, 3 and 4 of the Articles of Association of the Company which in mandatory terms restricts the transfer of shares unless all the conditions set out there are complied with. These conditions are, prohibition of any invitation to the public to subscribe for shares, veto to refuse transfer of any shares, any new member must be selected by directors, notice in writing to sale or transfer of shares and agreed prices. All these legal requirements were missing, hence making Form No 21b of no effect. " 10 In the case at hand Annexure A-3 of the Answer/reply to the petition carries conditions governing among other things how share transfer in 1st Respondent company can legally be done. The purported share transfers failed to comply with the MEMARTS. The transfers were thus non-starter. Before signing off, it is sensible to consider the elements of unfair prejudice as stated in *Velisas'* case (supra). The elements are: (1) the conduct of the company's affairs; (2) has prejudiced (3) unfair; (4) the Petitioner's interests as a member of the company. Applying the above elements, we ask: (1) was there a conduct of company's affairs? (2) were the said

conduct of affair prejudicial? (3) were they unfair? (4) if (1), (2) and (3) exists, then were the interests of Petitioner as a member of company unfairly prejudiced? A conduct may be prejudicial but not necessarily unfair. For instance, the Court may decline Petitioner's claim of unfair prejudice due to Respondent's act of removing him in his directorship position in a company if the Respondent managed to prove that he was acquiring shares in a competitor's company. Thus, a test whether prejudice is unfair is an objective one. To begin with the (1) conduct of company affairs. Transferring of shares in the 1st Respondent's company, and exclusion of the Petitioner while she was the shareholder of the 1st Respondent are the conduct of company's affairs. That is the managing of company affairs. As for (2) it is about prejudice. Were the conducts of the 1st Respondent's company prejudicial? Certainly yes, the prejudice is observed in failure to comply with the MEMARTS and denying the Petitioner to participate in managing affairs of the company. (3) unfairly, indeed the prejudice was unfair 11 because there was no lawful justification to support what the Respondents did. Turning to (4) interests of the petitioner as the member of the 1st Respondent. Truly, the Petitioner had interests in the 1st Respondent company. She had shares in the company. But the conduct of affairs of 1st Respondents had inter alia indication of fraud in the transfer of shares that constituted unfair prejudice affecting the interest of the Petitioner. For the foregoing reasons the petition has merit. The orders sought are granted. And hence it is declared and ordered as follows:

- (5) There was indeed unfair prejudice in the conduct of the affairs of the 1st Respondent company against the Petitioner's interests.
- (6) The Petitioner is a lawful shareholder in the 1st Respondent Company.
- (7) The 1st Respondent shall rectify her registers by including the 100 shares of the Petitioner and notify BRELA.
- (8) BRELA shall reflect in her records the changes pursuant to above order. In civil litigation a winner takes all including grant of costs is a known Common Law practice unless s/he committed misconduct in the conduct of the case. But since the parties involved in this case are relatives, I decline to make any orders as to costs. It is so ordered. 12 DATED at DAR ES SALAAM this 17th Day of February 2023. U. J. AGATHO JUDGE 17/02/2023 Date: 17/02/2023 Coram: Hon. U.J. Agatho J. For Petitioner: Jovinson Kagirwa, Advocate. For Respondents: Deus Tarimo, Advocate. C/Clerk: Edith Kanju Court: Ruling delivered today, this 17th February 2023 in the presence of Jovison Kagirwa, learned counsel for the Petitioner, and Deus Tarimo, Advocate for Respondents. U. J. AGATHO JUDGE 17/02/2023 13

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