

TANZANIA / JUDGMENT

korduni meliyo vs arusha aviation services limited 2023 tzhc 18124 16 june 2023

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TZHCDECIDED
16 June 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA DA ES SALAAM DISTRICT
REGISTRY AT DAR ES SALAAM MISC CIVIL CAUSE NO. 816 OF 2017 KORDUNI
MELIYO..... PETITIONER VERSUS ARUSHA AVIATION SERVICES
LIMITED..... RESPONDENT

RULING

28 th April & 16 th June, 2023 MKWIZU, J. Respondent, ARUSHA AVIATION SERVICES Limited is a private company incorporated with limited liability with its offices at Kisongo in Arusha – Airport premises. The main object of the respondent was to undertake business related to Aircraft Maintenance and overhaul, training of Aviation Personnel Calibration services, Airport Calibration Services, General Consultancies, Stockbrokers, Dealer’s underwriters, promoters, and any other business relating to aviation. To acquire, purchase, maintain, restore, preserve, use, operate, and display aircraft and any item of aeronautical interest. The petitioner is a shareholder and initial subscriber to the shares of the respondent company and a holder of 5000 ordinary shares. It is deposed in the petitioner’s affidavit that up to the date of filing this petition, the respondent’s company has not commenced the intended business but rather it had accumulated debts which could only be paid by selling the respondent’s available assets. The petitioner has petitioned for orders 1 under section 233 (1) of the Company Act on the grounds that the conduct of the affairs of the respondent is prejudicial to his interests and complaining of their illegal removal from their positions as directors, an attempt by one of the directors to sell the only remaining assets of the company hence this, that few Directors passed a resolution to amend the memorandum and articles of Association of the company introducing an organ called Board of Trustees which is unknown in law, refusal by the respondent to issue the petitioners with the copies of the Member registers, Books of Accounts and Audited, and the Board of Directors meeting. The petition is essentially for orders that:

- i. The initial subscribers to the Memorandum and Articles of Association be declared the only rightful members of the company. ii. All the resolutions purporting to appoint the new directors and secretaries (ies) without passing a proper resolution be nullified. iii. The wrongful removal of the first Director to the company be declared illegal and void iv. All the changes made on the memorandum and articles of association be declared void and consequently struck off
- v. Officers appointed on the basis of the amended articles of the association be disqualified with effect from the date of their respective appointment. vi. Any other relief that the court may deem just. The petition was ordered to proceed ex-parte after the failure of the respondents to enter an appearance in court. An order was made again to the effect that the petition be disposed of by way of written submissions 2 and Ms. Magdalena Shayo leaned advocate filed her written submissions on 31/3/2023 as per the filing schedule. In her submissions in support of the petitioner Ms. Benadetha submitted that the petitioner is a member and initial subscriber of the respondent company holding 5000 shares as per the certificate of incorporation dated 11th November 2015 and the memorandum and articles of association attached to the petitioner's affidavit. And that their termination was illegally carried out without a company's resolution and contrary to clauses 10 (a) (b) and (c) of the Articles of Association and sections 193(1) and
- (2) of the Companies Act Cap 212 of 2002. The petitioner's counsel accuses one of the directors by the name of SIARA of attempting to sell the only assets of the company (HANGER) without involving /consulting the other members or any compensation to them despite their monetary and timely contribution to its construction. She was of the view that the company affairs are being conducted in a manner that is unfairly prejudicial to the interest of its members, the petitioner inclusive. She thus prayed for the reliefs prayed in the petition with an additional prayer to serve the Registrar of the company with the order for the reinstatement of the removed directors into their positions. I have considered the matter. The petition was brought under the provisions of section 233 of the company's Act which is categorical that: 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 3 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 sees fit for giving relief of the matters complained of. Construed plainly, the above provisions require the petitioner to establish that he has an interest in the company affairs and that the comportment of the affairs of the company is prejudicial to his rights or interests. And this being a civil matter the burden of proof is shouldered on the petitioner as per the provisions of section 110 of the Evidence Act, Cap 6 RE 2022. Thus, the issue for resolution is whether the petitioner has satisfactorily established the two ingredients of an unfair prejudice petition. The petitioner's interest in the company affairs is well demonstrated under paragraph 2 of the supporting affidavit

exhibited by the memorandum and articles of association (Annexure KM2) in which the petitioner is listed on page 4 as a founder member and a shareholder of the Respondent. There is no doubt therefore that the first element is well established. The list of events of unfair prejudice is also transparent in the petition namely (1) the Unfair termination of the petitioner and three others from their position as directors; (2) an attempt by one of the existing directors to sell the main property of the company without following the procedure; (3) an illegal introduction in the Memorandum and Articles of Associations of the Board of Trustees which is not known in law and (4) 4 the denial of the petitioner's request for copies of the Member's registers, Books of accounts, and Audited Reports and Board of Directors Meeting. A comprehensive review of the petition and the affidavit in support thereof however has failed to find out evidence in support of the alleged attempt by one of the existing directors to sell the property of the company. The attached document in paragraph 7 of the affidavit is a land lease and a concession agreement between the respondent and the Tanzania Port Authority entered on 1st January 2007 before the removal of the Petitioner from the directorship. There is nothing in the affidavit suggesting the alleged sale. In essence, this point is short of material evidence for further consideration. The evidence brought before the court is in relation to the petitioner's complaints of the unfair removal of himself and three others from their position as Director's contrary to the law and the Memorandum and Articles of Association. I have revisited Article 10 of the Respondent's Memorandum and Articles of Association attached to the petition referred to by the petitioner's counsel. It caters to the cessation of membership in the company and not the removal of a director. The appropriate provisions would be clause 71 of the Memorandum and Article of Association which is couched thus: "71. The provisions of the Ordinance or any other law which disqualify a person from being a director shall apply". The procedures for the removal of a director in our jurisdiction are governed by the company's Act. Section 193 authorizes the company to 5 remove a director from his position due to dissatisfaction with that director's performance in the company regardless of what the company's articles of association provide, or any agreement between the company and that director. The section reads: "193.-(1) A company may by ordinary resolution remove a director before the expiration of his period of office, notwithstanding anything in its articles or in any agreement between it and him: Provided that, this subsection shall not authorise the removal of a director holding office for life at the commencement of this Act, whether or not subject to retirement under an age limit by virtue of the articles or otherwise.

- (2) Special notice shall be required of any resolution to remove a director under this section or to appoint somebody instead of a director so removed at the meeting at which he is removed, and on receipt of notice of an intended resolution to remove a director under this section, the company shall immediately send a copy thereof to the director concerned, and the director (whether or not he is a member of the company) shall be entitled to be heard on the resolution at the meeting." To have the procedure above fulfilled, three things are key. There must be a special notice of the intended resolution to remove a director, the notice must be served to the director concerned, and more importantly, the intended director is to

be afforded the right to be heard on the resolution at the meeting. This is the law. 6 There is no indication in this application that the above procedure was followed. I have carefully read the outcome of the meetings held to remove the named directors from their positions as claimed in annexure KM4. The document is partly phrased: "AT THE MEETING OF THE BOARD OF DIRECTORS HELD AT ARUSHA ON THE 6th DAY OF July 2011 AT 4.30 PM P R ESENT W ERE:

1. LAZARO RITTY SIARA
2. EDWARD MUTASHOBYA
3. LT.COL.CHRISTOPHER NAIGISA
4. PANTALEO KIBONGE
5. ALOYCE LYARUU.

1. The chairman, there being a quorum present, stated that the meeting had been convened to consider the removal of the following directors:

1. KORDUNI MELIYO
2. YUSUFU MAKAMULA
3. FREDY LYIMO
4. JACOB SANDET

2. The meeting carefully considered that the above directors have been officially discontinued from the company after having been absent since 10th February 2007 from the board meetings without the permission of the other directors held during that period up to date.
3. The meeting carefully considered the discontinuation of the above directors is in the best interest of the company due to the fact that since the establishment of the company, they have never paid their share capital.
4. Accordingly, I T W AS UNANI M OUSLY R ESOLVED THAT: Pursuant to the 1 st SCHEDULE of TABLE A, P ART 1, Regulation 83 (e) of the Companies Act Cap 212 R.E. 2002, The above Directors have been officially disqualified from being directors of AR USHA AVI ATI ON SER VI CES LI M I TED and 7 thus their office be VACATED for being absent from meetings for more than six consecutive months without permission of the other directors from meetings of the directors held during the period. R ESOLVED FUR THER THAT: The prescribed form be filled and submitted to the Registrar for Notification of the charges." The details of the above document are silent on the participation of the petitioners and his fellow in that resolution either prior to, during, or even after the said meeting. The only viable conclusion is that the running of the respondent is prejudicial to the petitioner. I am strongly of the view that, the denial of the petitioner and his fellow a right to be heard before the termination of their directorship echoes nothing but unfair prejudice as described in section

233 of the Company's Act tainting all the following decisions made after their illegal removal. That apart, Annexure KM4 in the supporting affidavit exhibits the complained decision by the respondent to introduce in the Memorandum and Articles of Associations of the Board of Trustees which is not known to law. In its meeting dated 6th May 2011 at 2.30, the five director's petitioners exclusively convened a meeting to discuss various things, one being the alteration of the company's Articles of Association. where articles 75, 76, 77, and 78 were amended to establish a Board of Trustees of the company designated to perform all duties originally done by the Board of Directors. This is a serious mess to the detriment of the petitioners' interest. It is also in the supporting affidavit that the current directors and the removed directors cannot meet for a discussion, and this is exhibited by 8 the denial of the petitioner's request for copies of the Member's registers, Books of accounts, Audited Reports, and Board of Directors Meeting demonstrated in paragraph 8 of the affidavit. In the absence of any evidence to the contrary, I also find this point proved. As a result, the petition is granted as follows:

- i. The wrongful removal of the four initial directors namely Korduni Meliyo, Yusufu Makamula, Fredy Lyimo, and Jacob Sandet from the company is null and void. ii. All the resolutions purporting to appoint the new directors without passing a proper resolution are hereby nullified. iii. The changes made to the original memorandum and articles of association and all decisions made in the absence of the petitioner are declared null and void. iv. The Registrar of the companies is to be served with this order for his necessary steps.
- v. Costs to follow the events as usual. Order accordingly. DATED at ES SALAAM this 16th day of March 2023. E.Y. MKWIZU JUDGE 16/6/2023 9

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