

TANZANIA / JUDGMENT

Sisti Sylvester Mganga vs China Dragon International Co Ltd

2023 TZHCComD 171 29 July 2024

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29 July 2024

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IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA (COMMERCIAL DIVISION) AT PAR
ES SALAAM COMMERCIAL PETITION NO. 47 OF 2023 IN THE MATTER OF COMPANIES ACT NO.
12 OF 2002 IN THE MATTER OF PETITION FOR UNFAIR PREJUDICE ORDER AND IN THE
MATTER OF SECTION 233(1) AND (3) OF THE COMPANIES ACT OF 2002 BETWEEN SISTI
SYLVESTER MGANGA..... PETITIONER VERSUS CHINA DRAGON
INTERNATIONAL CO. LTD..... RESPONDENT

RULING

Date of last Order: 05th July, 2024 Date of Ruling: 29th July, 2024 GONZI, J. Under section 233(1)
(3) of the Companies Act No. 12 of 2002, the petitioner prayed for orders that:

- (i) An order that the Respondent's affairs are being conducted in a manner which is unfairly prejudicial to the interest of the petitioner and contrary to the Companies Act No. 12 of 2002.
 - 1 (ii) A declaration that the Respondent is in total breach of petitioner's rights as minority shareholder in the Respondent and from that the petitioner is entitled to payment of general damages amounting to tzs.500,000,000 (Five Hundred Million). (iii) Order the Respondent to pay or compute and pay the petitioner his share of revenues and benefits generated by the respondent from 2020, to the period of this petition. (iv) A declaration that all contracts, subcontracts, agreement projects emanating from Respondent's meetings, decisions and resolutions from 2020 are null and void;
 - (v) Costs of this suit; (vi) Any other relief that this Honourable Court deems fit and just to grant including regulating the affairs of the Respondent as the Honourable Court shall deem fit.
- Upon the Respondent being served with this petition, the Respondent filed her reply to petition refuting all the allegations by the Petitioner. The brief facts of this matter as can be gathered from the petition are that the petitioner is a minority member and shareholder in the Respondent Company owning one thousand five hundred (1500) ordinary shares out of the total number of Thirty Thousand (30,000) shares. The 2 remaining shares are held by Wentao Tian (12,900 ordinary shares) and Chen Feng Tian (15,600) ordinary shares. The

Memorandum and Articles of Association and extract from the Registrar of Companies at BRELA constituting the Register of Companies Detailed Information, was attached Annexure M-1. The violations complained of by the Petitioner arise from a series of acts and omissions that allegedly have been deliberately occasioned by the Respondent through its directors against the petitioner leading to prejudice, suffering, losses and torment on the part of the petitioner. It was alleged that the Petitioner and the Respondent and its directors / shareholders worked together from January 2013 to December 2020 in creating and building a joint venture project in phases. The projects phases were regulated according to the agreements between them, but all along they maintained and serviced the same core objectives of their partnership and joint venture mission hence original plan of executing the projects through specific duties and responsibilities contracted to each party as contained in the agreements. The agreements between the Petitioner and the Respondent were attached and collectively marked as annexure M-2 to M-6 to the petition. 3 It was, amongst other things, agreed that upon qualifying and transferring his Mining License No.ML 572/2017 to the Respondent, the Petitioner would become a member of the Respondent Company by being allotted with 1500 shares in the Respondent Company as a consideration for the transfer of his Mining Licence and that and thereafter the parties would continue with the objectives of the agreements signed between them, with the petitioner also being a member of the Respondent Company. This process was achieved in 2020 and the Petitioner became a member. Following the inclusion of the Petitioner as a member of the Respondent Company and after the Respondent had ownership and title to the Mining Licence No.ML 572/2017, things began to take a twist whereby the Respondent ousted the Petitioner from company proceedings, meetings and any other financial gains that the Respondent was transacting. The differences and disputes led to the petitioner's successfully instituting Commercial Case number 145 of 2021 before this Honourable Court against the Respondent Company. Judgement was entered in favour of the Petitioner against the Respondent Company for breach of contract by the Respondent and its Directors. Copy of the Judgment in Commercial Case number 145 of 2021 was attached as annexure M-7 to the petition. 4 The Petitioner alleged that he was invited to become a member in the Board of Directors on 25th January 2021. (Copy of the invitation letter and agenda for the meeting were attached collectively as annexure M-8 to the petition. The petitioner responded to the invitation by a letter dated 29/01/2021 in which, among other things, he questioned a number of things including whether the respondent Company had officially appointed him as a director. He asked also who the board members were and what was the organizational structure of the respondent company? These questions were meant to obtain information on the roles vested to the petitioner and demanding an inclusion as a member of the Respondent Company. Copy of the reply by the petitioner to the invitation letter was attached as annexure M-9 to the petition. The petitioner also stated that his reply letter was also written to remind the respondent company of the pending and abandoned obligations that as a joint venture, they still had with TRA, NEMC, Mining Commission and the local authorities which included tax liabilities, royalty liabilities, NEMC regulations obligations and Mining Commission's default penalties that arose from their agreements before the

Petitioner became a member of the respondent. The Petitioner attached copies of value added tax assessment Invoice of TZS 881,205,776.90, default notices, and outstanding tax liability of TZS 4,117,451.25 collectively as annexure M-I(i-iii) to the petition. 5 The petitioner alleged that despite being made a shareholder, he has not yet been issued with a share certificate in reflection of his membership to the respondent company. Also, that the petitioner has not been receiving notices of meetings called by the Respondent and that he has been denied right to participate in ordinary, extra ordinary or annual general meetings held by the respondent company from 2020 to date. The other allegation was that the petitioner has never been involved in any voting in any company decisions by any poll whether by himself casting votes in the respondent's decisions or by proxy. The petitioner has never been served or availed with any members resolution nor any minutes of any Company's meetings whereas he is entitled to participate as member of the respondent company. The petitioner also complained that he has never been furnished with any copies of annual accounts, or auditors' reports or directors' reports from 2020 despite his making multiple demands to the directors of the respondent company. The petitioner alleged that, furthermore, the respondent Company has started to neglect to perform its obligations and duties arising from the previous agreements it entered with the petitioners thereby leading to accumulation of penalties, liabilities and defaults, which in all cases affect the petitioner. 6 It was further complained by the Petitioner that the Respondent Company, on 16th March 2020 purportedly passed a special resolution for the Respondent Company to purchase the shares held by the Petitioner under the Mining Licence NO.ML572/2017 in an attempt to unlawfully remove the petitioner from the company. The special board resolution and blank share transfer agreement were submitted to TRA so as to facilitate share transfer from the Petitioner to the Respondent Company. A copy of the blank share transfer documents and the special Board resolution were attached as annexure M-II to the petition. The petitioner alleged that after being notified of that incident, he reported the matter to Police and TRA and wrote to the respondent company to condemn the attempted removal of the petitioner from the company. Letters by the Petitioner to the Respondent and TRA and a copy of the police RB were attached as Annexure M-12 and M-13 respectively to the petition. The Petitioner alleged that after acquiring the Mining License from the Petitioner, contrary to their previous agreement and the purpose of the Petitioner becoming a member of the company, the respondent started processing the project minerals that were stocked in the joint project sites and unlawfully sold them using another account (Account 7 of China Dragon International Co. Ltd) hence unlawfully gaining about or more than TZS. 1,870,000,000/= through this sale from November 2020 to April 2021. The petitioner despite being a member of the Respondent company was never included in any decision making or any distribution of dividends, profit or any income generated by the respondent company from 2020, despite his continued input in the Respondent's operations. In the reply to the petition, the Respondent refuted all the claims and allegations by the Petitioner. The Respondent stated that the Petitioner caused his own exclusion from the affairs of the company due to his misconducts which made the mining project at the Itiso Village impossible for failure to timely transfer the Mining License in his name to the name of the

Respondent Company despite the authorization by the Mining Commission. That led to frustration of the Itiso Village Mining Project and made the Respondent to stop operations and relocate to another site. The Respondent attached the Consent from Mining Commission for the Petitioner to transfer his Mining License to the Respondent as annexure CD 1 to the Reply to the Petition. The respondent stated that despite losing the Commercial Case No. 145/2021 to the Petitioner, the Respondent has already lodged an 8 appeal to the Court of Appeal of Tanzania vide Civil Appeal No. 184/2023 which is still pending. The Respondent stated that the Respondent was invited to become a member of the Board of Directors but he refused by writing the reply letter pausing a number of questions. If he had attended the Board of Directors meetings, he could have asked those questions in the Board and get the answers but he declined the invitation. The Respondent alleged that the petitioner engineered his own exclusion by his conducts and actions from the company, but he has not been alienated nor denied access to the company. The Respondent stated that all the liabilities and default notices from the various government authorities, were addressed to the Petitioner and are solely the responsibility of the petitioner and not the Respondent. On the attempted transfer of shares of the Petitioner to the Respondent on 16th March 2020, the Respondent stated that the petitioner had earlier on agreed to transfer his shares to the Respondent company but had later on changed mind and alleged fraud and forgery which are serious criminal allegation which he has not proved. The Respondent concluded by stating that the Petitioner is a member of the Respondent company and as such he has access to the 9 company and to the company's documents at his own capacity as a member. The Respondent alleged that the Respondent Company is operating under loss due to operational costs. The Respondent prayed that the petition be dismissed with costs. With leave of the Court, the hearing of this application proceeded by way of written submissions whereby the petitioner was represented by Mr. Mathew Yonika Ngaga, learned Advocate, while the Respondent company was represented by Mr. Benson Kitangi'ta Kisamarwa, learned Advocate. I thank the learned counsel for both sides for their insightful

submissions.

Mr. Mathew Ngaga, learned Advocate premised his written submissions on Witness statement filed by the Petitioner. I will not consider it in this Ruling because petitions are proved by affidavits and not by witness statements. The parties file affidavits verifying petitions which convert the statements and facts in the petitions and their accompanying annextures into evidence before the Court. It is the evidence in the Petition and reply to Petition as well as an answer to the reply to petition, verified by supporting affidavits which the Court relies upon to decide the petition. Parties are at liberty to call the deponents of the affidavits for cross examination, if they wish. 10 Back to the gist of the written submissions by Mr. Ngaga, learned Advocate, he submitted that this petition has been brought under Section 233(1) & 233(3) of the Companies Act, CAR 212 [R.E. 2002. He argued that two issues arise in this case that is to say firstly whether the Respondent's affairs have been and are being conducted in a manner which is

unfairly prejudicial to the interests of the Petitioner and secondly that to what reliefs are parties entitled. On the first issue, Mr. Mathew Ngaga, learned Advocate, submitted that the Respondent's affairs have been and are being conducted in a manner which is unfairly prejudicial to the interests of the Petitioner who is a member of the Respondent company holding One Thousand Five Hundred Ordinary Shares (1500) out of the total number of 30,000 shares. Mr. Mathew Ngaga, learned Advocate, submitted that there are four elements that have been outlined by Courts, as being requisites to substantiate Unfair Prejudice to the interests of a minority shareholder, as explained in *Elly Mwaijande v. Petros Majinyori & 4 others*; Misc. Commercial Cause No. 18 of 2023, TANZLII, TZHCCoMD 369, at page 4, at the 1st Paragraph, to wit; (i) conduct of Company affairs; (ii) unfairly conducted; (iii) prejudice the petitioner; (iv) affected interests of the petitioner as a member of the Company. 11 On the first element of conduct of company affairs, Mr. Ngaga, learned counsel submitted that the phrase 'Conduct of Company Affairs' was described in *Elly Mwaijande v. Petros Majinyori & 4 others*; (supra), at page 10 that; "... a phrase "company's affairs" imply multitude of things and need to be understood within the context in which it is considered. It may include decision reached by directors, removal or exclusion of a member from participation in the management of the affairs of a company and any actions taken by directors contrary to articles of association of a company may amount to unfair prejudice." Mr. Ngaga, argued that since the Petitioner became a member of the Company in 2020, the Respondent has continued to transact her business as per the objectives but in total exclusion of the Petitioner. That the Respondent has ever only once, on 25 January 2021 invited the Petitioner to a meeting of the Board of Directors. As per Annexure M8 annexed to the Petition. That for all other mandatory company meetings from the respective date, no notice has been communicated to the petitioner in any manner required by law and by the Articles of Association. He argued that section 136(a) of the Companies Act, 12 CAP. 212 requires that notice to company meetings be issued to all members as such for private companies. He also reproduced Articles 67 of the Articles of Association of the Respondent Company thus: "Save as herein expressly provided, no member other than a member duly registered who shall have paid everything for the time being due from and payable to the company in respect of his shares shall be entitled to vote on any question either personally or by proxy, or to be reckoned in a quorum at any General Meeting." Mr. Ngaga, learned Advocate, submitted that contrary to the above provision and contrary to Article 52 of the Articles of Association of the Respondent company, the Petitioner does not receive any notices to any meetings called by the Respondent other than on notice dated 25 January

2021. By that, the Petitioner was denied further from participating in ordinary, extra-ordinary or annual general meeting held by the Respondent. The petitioner referred this Court to the case of *Velisas Elizabeth Deflosse Ingleton* (petitioning as legal representative under the power of Attorney of Gordon McClymont) v. *Japhet Ignatius Noronha and Others*, Mi sc. Commercial Cause No. 20 of 2021 [2022] TZHCCoMD 233 (26 August 2022) TANZLII, at page 32 that; 13 "As part of the business and company owners, the petitioner, as one of the shareholders, [has] the right to participate in a business and company's affairs and profitability as long she owns the shares and contributed to the capital and growth of the

business. It should be noted that as the shareholder and contributor to the business and company capital, the petitioner has inalienable rights to be consulted or informed before the company takes a particular action." He argued that the Respondent Company has violated, Section 142(l)(a), (b) & (2) of the Companies Act, CAR 212, which requires that all companies comply with the requirement of circulating to its members, notice of resolutions and statements of such resolutions to be passed at General Meetings. Mr. Ngaga, further argued that whereas section 158(1) of the Companies Act, CAR 212, requires that Companies' Annual Accounts be approved by the Board of Directors to which by virtue of Annexure M8, the Petitioner is part of; and that section 160(1) of the Companies Act, CAR 212, requires that Directors' Report be approved by Board of Directors and by virtue of 160(2) such Reports be tabled before General meetings or alternatively circulated to Directors for approval, the 14 Petitioner has never approved any Report or any Accounts, has never been furnished any Copies of Annual Accounts, any copy of Auditor's Reports, any copy of Director's Report from 2020. This has continued despite multiple requisitions made by the petitioner to the Directors of the Respondent. Mr. Ngaga, learned Advocate, referred this Court to the case of Elly Mwaijande v. Petros Majinyori & 4 others;(supra), at page 10, that the essence of Unfair Prejudice to Minority Shareholder Petition, is to protect minority shareholders from among other things, exclusion from management, decisions in instances where there is legitimate expectation of being involved. On prejudice to the petitioner, Mr. Mathew Ngaga, learned Advocate submitted that the word 'Prejudice' has been defined by Black's Law Dictionary, 2nd Edn, (available at www.thelawdictionary.org) to mean 'Injury, Loss or Danification'. Mr. Ngaga, learned Advocate, referred this Court to the case of Velisas Elizabeth Deflosse Ingleton (petitioning as legal representative under the power of Attorney of Gordon McClymont) vs Japhet Ignatius Noronha and Others, (supra), at page 25, where it was stated that: "Instances regarding abuse of power or breaches of the articles of association or exclusion of a shareholder from the management or decision making over the affairs in instances where there is a legitimate expectation of being involved, all attract complaints based on unfair prejudice." The learned counsel for the petitioner submitted that in the present Petition, management and decision making of the Respondent company has been conducted in total exclusion of the Petitioner as signified above. Meetings and Voting are integral parts of running any company and the same has been conducted to the deliberate and unfair exclusion of the Petitioner. That neglect or omission of the Respondent to issue notice of meetings to the Petitioner in the manner prescribed by law, has deprived the Petitioner from the right of information and participation in the management and conduct of the affairs of the company. The learned counsel for the Petitioner referred this Court to the case of Velisas Elizabeth Deflosse Ingleton (petitioning as legal representative under the power of Attorney of Gordon McClymont) vs Japhet Ignatius Noronha and Others, (supra), at page 31, it reads that "... any particular company carries out its management functions by its directors; and that the directors must act collectively...." On the basis of the above case, the learned counsel for the petitioner argued that the deliberate exclusion from Petitioner's 16 participation in the Board of Directors for approval of Company Accounts and Directors' Reports, has

undermined the Petitioner's rights and interests in the company. It has denied the Petitioner from financial information of the company and has thus deprived the Petitioner from Director's remuneration contrary to Article 76 of Articles of Association of the company and has further deprived the Petitioner's right to dividends contrary to Article 96 of Articles of Association of the company. That the Unfairness of the Prejudice to the Petitioner. On the effect of such unfair prejudice to the interests of the Petitioner as a member, the learned counsel for the petitioner submitted that in contravention to Item 8, Table A of the Schedule to the Companies Act, CAP. 212, read together with Article 9 of the Articles of Association, the Respondent has denied the Petitioner's right to hold a Share Certificate. Also the unfair conducts have deprived the Petitioner from participation in company meetings and decision making which are key interests to the former as a member. Further that the unfair conduct has deprived the interests of the Petitioner with regard to company's accounts and company information which has both legal and equitable interests to the Petitioner as member. He submitted further that the Petitioner has underlying contractual arrangements with the Respondent such as profit sharing and salary payment as signified under Page 3 of Annexure M3. 17 On the reliefs the parties are entitled to, the petitioner's learned counsel submitted that all reliefs sought for in the petition be granted in their entirety and any other relief encompassed under section 233 (1) & 233 (3) of the companies act, cap. 212 [R.E 2002]. Mr. Benson Kisamarwa, learned Advocate for the Respondent filed his reply submissions. He started with whether the Respondent's affairs have been and are being conducted in a manner which is unfairly prejudicial to the interests of the Petitioner. He submitted that the Respondent wishes to acknowledge that the Petitioner is a Shareholder and Member of the Respondent Company holding One Thousand Five Hundred Ordinary Shares (1,500) as per annexure M1 annexed to petition. Also, Mr. Kisamarwa submitted that, the Petitioner entered into different and separate agreements with the Respondent between the year 2013 to 2020 for creation of Joint and interrelated projects in mining, processing and marketing dimension stones and other quarry products for building materials minerals in various parts of Tanzania. Mr. Kisamarwa, learned Advocate submitted that by 2020, the Respondent had performed all the tasks under the contracts, but the Petitioner breached the contracts by not transferring to the Respondent all other Mining Licenses as agreed. The Petitioner only transferred Mining License No. 17/2017. By the same year the Petitioner started causing chaos to the Respondent which indeed 18 damaged the image of the Respondent's business before the villagers around the project. That the Petitioner further issued different notices to the Respondent to stop mining, processing, transporting and selling stone products from the project site of which the Respondent complied despite that the project was the Respondent's project. Mr. Kisamarwa, learned Advocate submitted that the suspension by the Petitioner, made the Respondent to start searching for new sites where they could continue with the core business of Mining and Quarrying projects as the Respondent could not tolerate the chaos from the Petitioner and neither could the Respondent continue incurring losses by the acts caused by the Petitioner. Therefore, the Respondent decided to move its equipment's from the site to another site as all tools and equipment belonged to

the Respondent, so as to continue with the operations as the company had to take all reasonable steps to secure its business. Mr. Kisamarwa, learned Advocate argued that the Petitioner's claim of unfair prejudice under section 233(1) and (3) of the Companies Act No. 12 of 2002 is unfounded and without merit as the petitioner's submission fails to demonstrate any concrete actions or decision that constitute unfair prejudice as defined in the case *Elly Mwaijande V. Petros Majinyori 19 & 4 others*; Misc. Commercial Cause No. 18 of 2023, TZHCCoMD 369 at page 4, at the 1st Paragraph thus; (i) conduct of company Affairs; (ii) prejudice to the petitioner; (iii) unfairly conducted; (iv) Affected Interest of the Petitioner as a member of the company. The learned counsel for the Respondent referred this Court to the case of *Morogoro Hunting Safaris Limited vs Halima Mohamed Mamuya* (Civil Appeal 117 of 2011) [2017] TZCA 227 (8 June

2017) (at page 16) where the Court emphasized on the importance of Board meetings and the duty to serve notice that: "At this stage, we would like to seize this opportunity to expound the point that Board Meetings are an integral part of the business of the company, as they inform the Board Members about the condition, strategy and/or failures of the company. On that basis, it is crucial for the directors to be served with notice on when and where the meeting will take place to give them opportunity to attend such meetings....." Mr. Kisamarwa, learned Advocate argued that on 25th January, 2021 the Respondent Company issued Notice of Board of Directors meeting to the Petitioner to attend which was scheduled to take place on 24th February 2021 as per Annexure M8 of the Petition. Despite receiving the 20 Notice, the Petitioner replied to the letter on 28 January 2021 and stated that the Notice was un-informative, unstructured, incompetent and irresponsible. The Petitioner's response was Annexure M9 of the Petition. Mr. Kisamarwa, learned Advocate, submitted that all that the notice required was for the Petitioner to appear in the meeting and if he had any query, he had a chance to submit the same in the meeting rather than challenging the structure of the letter. He argued that by issuing the Notice of the meeting, the Respondent complied with section 136 (a) and 142(1) (a), (b) & (c) of the Companies Act, No. 12 of 2002 which mandates companies to circulate notices of resolutions and statements to be passed at general meetings to their members. Mr. Kisamarwa, learned Advocate, relied upon *MBOWE HOTELS LIMITED VERSUS NATIONAL HOUSING CORPORATION AND ANOTHER*; Miscellaneous Land Application No. 722 of 2016 where it was held at page 8 that: - "The governing principle is that, whenever a party who, as an actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience or good faith, or other equitable principle in his prior conduct, then the doors of the Court will be shut against him in Hminine. The Court will interfere on his behalf, to acknowledge his right or to award him any 21 remedy. To aid party in such a case, would make the Court the abettor of finequity". Mr. Kisamarwa, learned Advocate submitted that it was in the meeting held on 25th February 2021 that the Company passed a Special Resolution to transfer 5% shares of the Petitioner to another Shareholder of the Company namely Wentao Tian at a consideration of Tanzania Shillings One Million and Five Hundred Thousand (TZS 1,500,000). The Resolution was passed by majority Shareholders

owning 95%. He argued that it was after the Petitioner was notified and served with the draft Shareholders Agreement for review and signing but the Petitioner has never signed the said contract and therefore the Share transfer process never proceeded to the next stage. Mr. Kisamarwa, relied on section 143

- (1) of the Companies Act which provides that: "A resolution shall be a special resolution when it has been passed by majority of not less than three-fourths of such members as being entitled so to do..." He argued that the fact that, Chenfeng Tian, holds 52% and Wentao Tian holding 43% of the shares, they rightfully possessed the controlling votes in the Company. He argued therefore that the Respondent Company conducted its activities fairly. He argued that the fact that the Respondent company properly constituted meetings justifies that the Company did not 22 exclude the Petitioner from voting or making decisions concerning the Company, but rather, his own actions led to his exclusion. It was further submitted that the Petitioner is the one who nominated and assigned the Tax Consultant for the Company to prepare its Accounts and therefore the Petitioner being the Director and Shareholder he had access to cross check all Company's Audited Accounts without limitations but he decided to neglect the same. He is therefore "estopped by acquiescence". As held in the case of Sabri Muslim Karim (formally known as Sabri Ally Saad) vs Muslim Shivji Karim & 3 Others (Commercial Cause No. 54 of 2022 [2023] TZHCComD 83 pg. 20. It was held in this case that where a party, being fully aware of a fact or claim by another party, fails to challenge that fact or report that claim within a reasonable time he is deemed to have acquiesced to it. Mr. Kisamarwa, learned Advocate, submitted that despite the Petitioner's failure to exercise his rights as it relates to participation in decision making process of the Company, he still had a right to access information of the Company through Public/Government domains as provided for under section 148 (1), 150 and 151 (3) of the Companies Act, but he also decided to ignore the same. By way of emphasis, the learned counsel for the Respondent submitted that the Respondent has 23 never issued notice nor any statement preventing the Petitioner from participating in any meeting or getting information from the Company. As regards the profit sharing agreement and salary, the respondent's counsel argued that since its incorporation the Respondent company has never made any profit, rather, it has been operating under loss as a lot of capital has been invested in the projects, the running costs are high and the company has been passing through hardship caused by the petitioner in its business thus not making profit. As regards to salaries, the Respondent's counsel argued that the respondent paid the petitioner all his entitlements under the joint venture agreement; and that after the petitioner becoming a shareholder, the respondent had no further obligations to pay the petitioner. On the second issue to what reliefs are the parties entitled, Mr. Kisamarwa, learned Advocate submitted that the petitioner's case be dismissed in its entirety with costs. By way of rejoinder, Mr. Mathew Ngaga, learned Advocate reiterated the submissions in chief and added that the allegations that the Petitioner caused chaos, tarnished the reputation of the Respondent, and suspended mining activities for the Respondent's project have not been backed up by 24 any proof in the spirit of the burden of proof which requires that a party who alleges a certain fact must prove or substantiate it.

Regarding the invitation to attend the meeting of Board of Directors in 2021, it was argued by Mr. Ngaga, learned Advocate that the Petitioner was already a member since 2020 and had since the inception of his membership, been isolated and ousted from the company until the letter of invitation informing him that he was a Director. No instrument of appointment was shared and signed by the Petitioner, however. At the beginning of my determination of this matter, I wish to set the matter in its proper perspective in law. This is crucial as I have found that the submissions by the learned counsel transcended beyond the scope of a petition for unfair prejudice under section 233(1) and (3) of the Companies Act, CAP 212 of the Laws of Tanzania. There have been raised claims of breach of joint venture contracts between the Petitioner and the Respondent Company which were signed prior to the Petitioner being a shareholder and member of the Respondent Company. Also there have been raised claims of salaries due to the Petitioner from the Respondent Company either before and or after the Petitioner joined the Respondent Company as a member and shareholder. In my settled view, those claims are contractual or employment-based claims and do not emanate from and are not incidental to Petitioner's membership in the Respondent company as a member. The remedy under section 233(1) and (3) of the Companies Act, CAP 212 of the Laws of Tanzania, is exclusively available to members of the company, especially minority members, who must have suffered prejudice "as members" of the particular company on account of the unfair conduct of the affair of the company. I reproduce the relevant part of section 233(1) of the Companies Act, CAP 212 thus: "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 of 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 in respect 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." This provision shows the petition should be brought by a member of the company. The provision also requires that the affected interests due to the unfair conduct of the company's affairs, should be the interests of its members generally or of some part of its members. However, where the petitioner complains of the unfair conduct as affecting some part of the company's members, the law requires the petitioner himself to be within that "part of its members" who are thereby prejudiced by the unfair conduct. The phrase "including at least himself" is significant. It demands that the petitioner for unfair prejudice should always himself have locus standi as a member to bring the petition for unfair prejudice, regardless of whether the prejudicial conduct affects the minority or the majority members. The petitioner should belong to the category of affected members before he can bring a petition for unfair prejudice. The words "would be so prejudicial" relate back to

membership of the person or persons thereby suffering from the unfair prejudicial conduct. He or they should have suffered as (a) member(s). The only exception where a non-member can apply under section 233(1) of the 27 Companies Act, CAP 212 is where a legal personal representative of the deceased member of the company holds shares in the company without himself being a member but he is a shareholder by virtue of share transmission. The emphasis here is on the phrase "although the persona! representative is not himself a member of the company. This provision underscores the fact that, ordinarily, unfair prejudice petition is the domain of members of the company as a general rule, but, as an exception to the rule, a legal personal representative of a deceased member may have locus standi in the same way like a member in the company. There is no other exception to membership criteria for petitioning under section 233(1) of the Companies Act, CAP 212. The locus standi under section 233(1) of the Companies Act, CAP 212 is deeply rooted in "membership". The duty of the Court to ascertain membership of the petitioner under section 233(1) of the Companies Act, CAP 212 was emphasized in the case of in Re HLHP Oriental Food Ltd (also known as Maggie Otto v Inner Mongolia Happy Lamb Catering Management Company Ltd) [2024] EWHC 497 (Ch. It is a case that has dealt with determination of locus standi for unfair prejudice applications under the UK Companies Act, 2006. For the purpose of the present petition, the relevant portion of section 994 of the UK Companies Act 2006, provides: 28 "(1)A member of a company may apply to the Court by petition for an order under this Part on the ground—

- (a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or
- (b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial. (2)The provisions of this Part apply to a person who is not a member of a company but to whom shares in the company have been transferred or transmitted by operation of law as they apply to a member of a company." In Re HLHP Oriental Food Ltd (supra), in the judgment of the Court that was handed down on 5th March 2024, the brief facts were that the Respondents on the first day of the trial of the Unfair Prejudice Petition, applied to amend the Defence to challenge three of the Petitioners' standing. The challenge was made on the basis that the 3 Petitioners' names did not appear on the register of members and, further, that they were unable to establish that they had received shares by way of valid transfers pursuant to duly executed instruments of transfer. It transpired, in fact, that the relevant registers of members had been included within the Petitioners' disclosure, albeit within a sub-group of documents, but had only come to the attention of the parties shortly before the trial of the Petition was listed to begin. As a result of this discovery, the Respondent challenged three of the Petitioners' standing. In determining the objection on lack of locus standing, it was held, in particular, that: it is for the Petitioners to establish standing and that the Court would have to be satisfied that there is standing irrespective of what was said in the Defence, since this is a 'gateway' requirement for the purposes of the statutory jurisdiction under section 994 of the

Companies Act 2006.¹ quote verbatim paragraphs 26 and 28 of the decision thus: "First, it is for the Petitioners to establish standing. In preparing the Petition they ought to have considered how they could prove that they were entitled to petition. They wholly failed to do so. As I have noted, the register was in their possession all along, and it was incumbent on them — or their legal advisers—to be satisfied that they were indeed members of the company. That failure was neither caused by nor contributed to in any way by the Respondents' later admissions. The Court must be satisfied that the Petitioners have standing with regard to the 'gateway' 30 requirements that a Petitioner must fall within s 994(1) or (2) CA 2006. Therefore, irrespective of the fact the Respondents conceded in their Defence that they believed (erroneously) the Petitioners to be members, the Court must independently verify that the Petitioners have such standing". In *Miscellaneous Commercial Case No. 14 of 2022, Yasmin Haji versus Kenyatta Drive Properties Limited and Antony Amin Haji, Hon Agatho, J.*, held: "The unfair prejudice doctrine has its own elements as echoed in *Veiisas Elizabeth Deflose* (petitioning as legal representative under the Power of Attorney of *Gordon McCiymont*) 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". Consistently, the above cited authorities insist on membership as a prerequisite before a person may bring a petition for unfair prejudice. It is on account of the above requirement that the Court must independently verify the petitioner's standing, as I have already stated 31 above. In this case the Register of Companies as maintained by the Registrar of Companies at BRELA disclose that the Petitioner is a member of the Respondent Company and therefore has the requisite locus standi to bring the petition in Court. It must be remembered that locus standi is a crucial issue that touches on jurisdiction. Ascertaining the locus standi of the petitioner is tantamount to ascertaining jurisdiction of the Court. In *Peter Mpalanzi vs Christina Mbaruku* (Civil Appeal 153 of 2019) [2021] TZCA 510 (23 September 2021), it was held by the Court of Appeal that: "Locus standi is a rule of equity that a person cannot maintain a suit or action unless he has an interest in the subject matter. Unless a person stands in a sufficient dose relation to the subject matter so as to give a right which requires protection or infringement of which he brings the action, he cannot sue on it- see *Godbiess Lerna v. Mussa Hamis Mkanga and 2 Others*, Civil Appeal No. 47 of 2012 (unreported). Further, locus standi is a point of law rooted into jurisdiction. It is for that reason that it must be considered by a Court at the earliest opportunity or once it is raised." (Emphasis supplied) 32 Having established that the Petitioner is a member of the Company, I must add that a member of a company by virtue being a member, regardless of the number of shares held by him, has the right to be involved in the affairs of the company to which he is a member. Perhaps, I should underscore the etymological reference of the words "company" and "member" in the context of the law of business associations. For Swahili speakers the name "Kampuni" seems to have lost the etymological reference or connection to the concept it seeks to convey its meaning. The word "company" is derived from two Latin words that are "com" & "panis" which means "together" & "bread" respectively. It originally described how merchants would gather, share stories, eat together

and trade. In Roman era, those who worked together shared the product of their labour among themselves; they shared "the bread" (panis) "with" each other (cum). Thus, the combined efforts towards any productive goal eventually gained the name "cumpanis", which ultimately developed in the English word "company". So it literally means that a company was an association of persons who worked together and took their meals together. The history of "company" is also traced from old French, meaning compaignie, or companionship. In this context, the inherent attributes of a company as entailing "companionship" or "togetherness" membership of a person in a company inherently entitles one to demand the "companionship" and "togetherness" of others by being involved in the running of the affairs of their company to which he is a member. Exclusion of a member or some members from participation in the affairs of the company, would therefore amount to gross violation of the very basis and understanding upon which their association was built. In other words, there would be no company, in absence of togetherness and companionship in the affairs of the company. In recognition of this element of togetherness and involvement of all members in the affairs of the company, the law grants members of private companies the right to decide who can and who cannot become a member of the company by virtue of pre-emption clause in the Articles of association of the company. The existing members have the right to decide whom they are ready to include in their group and are willing to act together with in the affairs of their company. If a member is not involved in the affairs of the company, it amounts to betrayal of the members' collective pact and pledge of their inclusion, involvement and participation in the affairs of their company. In absence of members' inclusion, involvement and participation in the affairs of their company, the very notion of there being a company in existence is defeated. This sense of companionship and togetherness of members of the company is not only entrenched in the statutes and articles of association of the company, but also it is a customary and equitable rule that stems from the historical context of emergence and development of a company as a mode of doing business that evolved through the guild system, partnerships to limited liability company. In *Ebrahimi v Westbourne Galleries* ([1973] AC 360, 379), Lord Wilberforce held that: "the Courts need not look exclusively at a company's constitution when deciding the nature of the obligations undertaken by its participants. What is important is the giving of effect to the full set of terms and understandings on which it has been agreed the company will operate, be they expressed or implied. Thus, for example, where there is a reasonable expectation that all shareholders will participate in the company's management, exclusion from management may be considered unfairly prejudicial, and a remedy will be available under s 241. This was the case in *Diligent! v RWMD Operations Keiowna Ltd* where the Court concluded that, in such circumstances, there are 'rights, expectations and obligations inter se', which are not submerged into the company structure, and these rights are enjoyed by a member as part of his status as a shareholder in the company ... Although [the applicant's] fellow members may be entitled, as a matter of strict law, to remove him as a director, for them to do so in fact is unjust and inequitable, and is a breach of the equitable rights which he in fact possesses as a member." In the present case, after excluding the claims and allegations

relating to joint venture agreements, transfer of Mining Licenses and salaries claims, there remain two major aspects of the claims advanced by the Petitioner against the Respondent company. The first is with regard to non-involvement in the management of the company as a member of the Board of Directors. The second one is non-involvement in the affairs of the company as a member of the company. With regard to the allegations on non-involvement in the affairs of the Respondent Company as a director, the Petitioner argued that as it was held in the case of Velisas Elizabeth Deflosse Ingleton (petitioning as legal representative under the power of Attorney of Gordon McClymont) vs Japhet Ignatius Noronha and Others, (supra), at page 31, that: "... any particular company carries out its management functions by its directors; and that the directors must act collectively...." On the basis of the above case, the learned counsel for the petitioner argued that the deliberate exclusion from Petitioner's 36 participation in the Board of Directors for approval of Company Accounts and Directors' Reports, has undermined the Petitioner's rights and interests in the company. To the above allegation, Mr. Kisamarwa, learned Advocate responded that on 25th January 2021, the Respondent Company issued Notice of Board of Directors meeting to the Petitioner to attend which was scheduled to take place on 24th February 2021 as per Annexure M8 of the Petition. Despite receiving the Notice, the Petitioner replied to the letter on 28 January 2021 and stated that the Notice was un-informative, unstructured, incompetent and irresponsible. The Petitioner's response was vide Annexure M9 of the Petition. Mr. Kisamarwa, learned Advocate, submitted that all that the notice required was for the Petitioner to appear in the meeting and if he had any query, he had a chance to submit the same in the meeting rather than challenging the structure of the letter. He argued that by issuing the Notice of the meeting, the Respondent complied with section 136 (a) and 142(1) (a), (b) & (c) of the Companies Act, No. 12 of 2002 which mandates companies to circulate notices of resolutions and statements to be passed at general meetings to their members. Mr. Kisamarwa, learned Advocate, relied upon MBOWE HOTELS LIMITED VERSUS NATIONAL HOUSING CORPORATION 37 AND ANOTHER; Miscellaneous Land Application No. 722 of 2016 where it was held at page 8 that:- "The governing principle is that, whenever a party who, as an actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience or good faith, or other equitable principle in his prior conduct, then the doors of the Court will be shut against him in iiminine. The Court will interfere on his behalf, to acknowledge his right or to award him any remedy. To aid party in such a case, would make the Court the abettor of finequity". I will readily agree with Mr. Kisamarwa learned Advocate on this point. I have two reasons. The first one is that advanced by Mr. Kisamarwa, learned Advocate from the above submissions by him. That is the Petitioner as a Director was given an opportunity to attend the Board of Directors meeting but he chose not to attend. He cannot be heard to complain of not being involved. There is no dispute that the Petitioner, even though he is a minority shareholder, was made a member of the Board of Directors of the Respondent Company. Further, the Petitioner was duly notified and invited to attend the Meeting of the Board of Directors on 25th January 2021, which was scheduled to take place on 24th February 2021 as per Annexure M8 of the Petition. The Petitioner, 38 himself a member of the Board of Directors with audience therein, chose to question the legality and

procedural conformity of his own directorship and of calling the meeting, from outside the meeting of the Board of Directors. That was so unbecoming of a reasonable member of a board of directors of a company. I find that the Petitioner was granted right and access to attend management of company's affairs but he excluded himself from participation, he cannot blame it on any one. He thereby waived his right. I have the second reason to rule against the Petitioner on the first head. This second reason also addresses the point raised by Mr. Mathew Ngaga, learned Advocate, in his rejoinder submissions when he hinted that the Petitioner was only once invited into the meetings of the Board of Directors. The complaint of non-involvement of the petitioner in the Board of Directors of the Respondent Company was brought in this case in a way that the Petitioner, as a director, is complaining of his non- involvement in the management of the company as a director. It was not brought as a complaint by a member of the company against the management of affairs of the company's board of directors which thereby affects him as a member. The Petitioner simply complained of his exclusion as a Director, not as a member. Although the Petitioner is both a member and a Director, he should have focused and aligned his claim in 39 such a way that it could fit under the locus standi and interest of a member qua member under section 233(1) and (3) of CAP 212. The petition was brought by the petitioner as a member not as a director. Therefore, even if the Petitioner was able to substantiate his exclusion from directorship, it would be still necessary to substantiate how that exclusion affected him as a "member" of the company. That was glaringly missing. The petitioner generalized membership and directorship and fused his claim in one and brought forward the claim of non-involvement in the board of directors, as a director. That was wrong. That claim or complaint does not fit under section 233 (1) of CAP 212. The second area of complaint was with regard to non-involvement of the petitioner as a member of the respondent company. The petitioner complained that despite being made a shareholder, he has not yet been issued with a share certificate in reflection of his membership to the respondent company. Also, that the petitioner has not been receiving notices of meetings called by the Respondent and that he has been denied right to participate in ordinary, extra ordinary or annual general meetings held by the respondent company from 2020 to date. The other allegation was that the petitioner has never been involved in any voting in any company decisions by any poll whether by himself casting votes in the respondent's decisions or by proxy. The petitioner has never been served 40 or availed with any members resolution nor any minutes of any Company's meetings whereas he is entitled to participate as member of the respondent company. The petitioner also complained that he has never been furnished with any copies of annual accounts, or auditors' reports or directors' reports from 2020 despite his making multiple demands to the directors of the respondent company. To those allegations the Respondent averred in the Reply to the Petition, that the petitioner engineered his own exclusion by his conducts and actions from the company, but he has not been alienated nor denied access to the company. Mr. Kisamarwa, learned counsel argued in further response that that on 25th January 2021, the Respondent Company issued Notice of Board of Directors meeting to the Petitioner to attend which was scheduled to take place on 24th February 2021 as per Annexure M8 of the Petition. Despite receiving the Notice, the

Petitioner replied to the letter on 28th January 2021 and stated that the Notice was un-informative, unstructured, incompetent and irresponsible. Now, in this complaint I find that the Respondent has not responded to the arguments by the Petitioner's learned counsel. The Respondent appears to have admitted on non-involvement of the Petitioner in the 41 affairs of the company, as a member. The Respondent appears to have attempted to justify the non-inclusion of the Petitioner as a member by the alleged wrongdoings of the petitioner. The respondent has not explained out the malpractices like non-issuance of share certificate, non- service of notices of members annual and extraordinary general meetings, denial of right to vote, access to member's resolution or minutes of any Company's meetings, right to be furnished with copies of annual accounts, or auditors' reports or directors' reports and the like. The only explanation given by Mr.Kisamarwa, was with regard to the invitation of the Petitioner to the Board of Directors meeting. That was not an invitation to the members' general meetings which is the subject of complaint under this head. It does not answer the complaints related to denial of the petitioner's rights as a member. It only substantiates an attempt to involve the Petitioner as a director and not as a member of the company. Members' rights are different from directors' rights. Not every director is a member. Section 233(1) and (3) of CAP 212 relate to violation of members' rights in their status as members. This petition is based on an unfair prejudice to a member not to a director. I find that non response by the Respondent to the allegations of unfair prejudicial practice towards the Petitioner as a member, have not been disputed and therefore admitted. I find that the Respondent, as a member, has been unfairly 42 prejudiced by the conduct of affairs of the Respondent company. I therefore, grant the petition in this regard only. As to the reliefs, section 233(1) and (3) provide that: "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 in respect of the matters complained of.

- (3) Without prejudice to the generality of subsection (1), the Court's order may:
- (a) regulate the conduct of the company's affairs 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) provide for the purchase of the shares of any members of the company by other members of the company or by the company and, in the case of a purchase by the company, for the reduction 43 accordingly of the company's capital, or otherwise." It is clear that the Companies Act, CAP 212 grants the Court broad powers to determine the appropriate remedy or relief upon the petition being allowed. The Act also prescribes the usual remedies in petitions for unfair prejudice. This means that ordinarily the remedies in section 233(3) above should be the starting point but where there is no ideal remedy under section 233(3) of the Companies Act that can suit the justice of the given case, the Court is not tied to or

limited by section 233(3) in finding the appropriate remedy. Although the Court is given wide discretion in determining the appropriate remedy, in my view, the discretion should be exercised judicially and the additional remedies which the Court has discretionary powers to impose, in my view, should bear resemblance to the ones prescribed by the Act under section 233(1). I rely on the rule of "noscitur a sociis" that is a thing is known by its associates. The rule requires that a word should be given meaning by its context or its association with surrounding words and phrases. In the circumstances of section 233(1) and (3), I take it that the envisaged interim or final order which the Court could grant as it sees it fit for giving relief in respect of the matters complained of, must be akin or germane to, or of the same species or having a similar effect and implications like, the other orders 44 prescribed under section 233(3) of the Companies Act CAP 212. In general, such a relief should be "fit in respect of the matters complained of." The Petitioner herein, as a member, has complained of his exclusion by the other members from the affairs of the company. His fit remedy in this case is giving him back his right to be fully involved in the affairs of their company. The fit remedy in my view is an order in the form of a specific performance for the Company, its members and directors to run the affairs of their company in conformity to the provisions of their mutually binding agreement or common pact of members as evidenced in the memorandum and articles of association of their company. Lord Selborne, LC in *Oakbank OH Co v Crum* (1882) 8 App Cas 65, 70, 71, held that: "Each party must be taken to have made himself acquainted with the terms of the written contract contained in the articles of association, and the Acts of Parliament, so far as they are important. He must also in law be taken (though that is sometimes different from what the fact may be) to have understood the terms of the contract according to their proper meaning; and that being so he must take the consequences, whatever they maybe, of the contract which he has made." 45 I therefore, find that the exclusion of the Petitioner from the affairs of the company, was an infraction from the terms of the written contract contained in the articles of association, and the Acts of Parliament (the Companies Act). The fit remedy in that scenario is to order the Respondent Company in conduct of its affairs, and in so far as the interests of the petitioner are concerned, to ensure compliance with the terms of the written contract contained in the articles of association, and the Acts of Parliament. This means that all the articles of association of the respondent Company which were breached as well elaborated by Mr. Mathew Ngaga, learned Advocate, should be complied with in the operations of the Respondent Company. Coming back to the case at hand, it appears that most of the reliefs specifically prayed for are extraneous and totally unrelated to the scope of section 233(1) and (3) of CAP 212. The relief for payment by the Respondent Company of general damages amounting to TZS.500, 000,000/= (Five Hundred Million) the Petitioner is unreasonable. It must be noted that in this case there was only one Respondent, namely the Company itself. The other members and or Directors were not impleaded. Adverse orders cannot be made against strangers to the case. In this case, all the orders were exclusively sought by the Petitioner as against the Company itself only even where the alleged wrongs were proved to have 46 been committed by other members and or directors of the Respondent Company. As the company being an artificial person could not personally commit any wrongs, and as the

wrongs complained of were done in violation of the articles of the association of the company, this claim being preferred by a member of the same company, ought to have been brought against both the company as well as the individual directors and or members responsible for the unfair prejudicial conduct. The Respondent Company is owned by the Petitioner as one of its members. The term 'members' is more inclusive. Members describe the owners of the company rather than shareholders who may just be investors. In an article by Corporate Finance Institute, (CFI) available at <https://corporatefinanceinstitute.com/about-cfi/> titled "Limited Liability Company (LLC), Combining the aspects of both partnerships and corporations, it was observed that: "Rather than shareholders, business owners of limited liability companies are referred to as members." It follows therefore that, in effect, the Petitioner herein is claiming for general damages from his own business for the unfair prejudice done towards him by his own business without impleading any other person who might have abused the form of that business against the petitioner. 47 It is unequitable to grant such a prayer. Much as general damages are granted at the discretion of the Court, I find it highly objectionable and inequitable to grant the remedy of general damages as prayed for in the circumstances of this case. General damages might have been relevant in respect of the other claims relating to breach of joint venture agreements and incurrance of penalties and charges in respect of relationship between the Petitioner and the Respondent prior to the Petitioner becoming a shareholder and member of the respondent company. I have already excluded those claims from the ambit of section 233(1) of the Companies Act, CAP 212 under which the present Petition was brought. The prayer for general damages is therefore unfounded and is hereby declined. The Petitioner is, essentially, seeking the restoration and enforcement of the right to be involved in the affairs of the company in which he is a member. He is petitioning for specific performance of the terms of the contract in the form of Memorandum and Articles of association. The other relief sought was for payment and or computation of petitioner's share of revenues and benefits generated by the respondent company from 2020, to the period of this petition. This prayer is also unfounded. Members of the Company are not partners who can share the profits and losses of the company between or among them rateably. The 48 revenues and profits or losses of the company are solely of that company as a legal person. When the company is formed (i.e. incorporated) a new legal person is thereby created. That legal entity has all of the attributes of an individual - a human, except that the company attains maturity on its birth. There is no period of minority - no interval of incapacity. Just like a natural person, the company can own property; buy, sell and own land and any other asset such as shares; just like an individual it can sue and be sued; when legal threats are made, they are made against the company. When legal claims are made, they are made by the company. The company can borrow money: i.e. incur debts. The question of members reaping the fruits of their investment in the capital of the company by subscribing to its shares, may arise where the company makes profits and dividends are declared. Ascertaining the profits for the purpose of declaring dividends is the duty of the Management of the Company (Directors) after going through the accounts and audited reports of the company to ascertain the profits made, if any. Declaration and distribution of

dividends cannot be ordered by the Court. Even where there is profit made by the Company, the members may wish to capitalize the yielded profits for further reinvestment in the business of the company aiming for more profits in the future. Therefore, distribution of profits in a private company like the Respondent Company, is an entirely indoor management issue within the company. It is the realm of members' general meeting upon receiving a report and proposal from the board of directors of the company. Section 180 (1) and (2) of the Companies Act, CAP 212 provides: n180.-(1) Subject to this section, a company may, in general meeting, declare dividends in respect of any accounting period or other period.

- (2) Where the recommendation of the directors of a company with respect to the declaration of a dividend is rejected or varied by the company in general meeting, a statement to that effect shall be included in the relevant directors' annual report and in the relevant annual return." (Emphasis supplied). The Petitioner is one of the directors of the Respondent Company and a member thereof entitled to attend the general meetings. It is his duty, mandate and right, in collaboration with the other directors and members, to ascertain profits made, if any, after going through the books of account and declare dividends, if any. The Court cannot step in the shoes of the board of directors of the company and the annual general meeting of the company and order payment and or computation of petitioner's share of revenues and benefits generated by the respondent from 2020, to the period of this petition without even having at its disposal the particulars on revenues and benefits generated from 2020 to the institution of the petition. In a further analysis of the Petitioner's prayer for payment of dividends, it must be noted that all the shares in the Respondent Company are ordinary or equity shares and therefore no shareholder thereof is entitled as a matter of law to mandatory payment of dividends. This is because all the shares in the Respondent Company are ordinary or equity shares. Equity shares have voting rights at all general meetings of the company. These votes have the effect of controlling the management of the company. I have already held that the Petitioner as a member of the Respondent company, holding equity shares, was unfairly prejudiced for not being involved in the affairs of the company including voting in the general meetings directly or by proxy as a member. Equity shares also have the right to share the profits of the company in the form of dividend (cash) and bonus shares. However, equity shareholders cannot demand declaration of dividend by the company. This matter is left to the discretion of the Board of Directors and decision of the members in their annual general meeting in terms of section 180 of the Companies Act. The Respondent Company has stated that it has never made any profit since its incorporation. If that statement is to be believed, the question is from which source and on what basis could the petitioner be ordered to pay dividends if there is no profit making in the company? Section 180(3) of the Companies Act CAP 212 provides that:

- (3) A company may pay a dividend:
- (a) out of its realized profits less its realized losses, or

(b) out of its realized revenue profits less its revenue losses, whether realized or unrealized, provided the directors reasonably believe that immediately after the dividend has been paid the company will be able to discharge its liabilities as they fall due, and the realizable value of the company's assets will not be less than the amount of its liabilities. It is on testimony of the petitioner that the Petitioner started to transact business with the Respondent Company in the form of Joint Venture, which is essentially a form of partnership, there might have been sharing of profits prorate between the Petitioner and the Respondent Company. Upon becoming a member and therefore owner of the respondent company, it appears that the Petitioner has not realized the consequence that all the profits and losses belong to the company and that shareholders are only entitled to dividends if profit is made and if the directors and ultimately annual general meeting approves distribution of 52 dividends. To alter this state of affairs, the Petitioner should have insisted on entering into shareholders' agreement so as to alter the natural course of events to the extent which would have thereby been agreed upon. The claim for payment of dividends would hold water if the Petitioner was a holder of cumulative preference shares in the respondent company. Under cumulative preference shares, the dividend payable every year becomes a first claim while declaring dividend by the company. In case the company does not have adequate profit or for some reason the company does not want to pay preference dividend, it gets accumulated for being paid subsequently. Such arrears of preference dividend will be carried forward and paid out of the profits of the subsequent years, before payment of equity dividend. However, if a company goes into the liquidation no arrears of preference dividend will be payable unless the Articles of Association of the issuing company contains a specific provision to make such payment even in winding up. In this case, the petitioner is a holder of equity shares like the rest of the company's shareholders in the Respondent Company. The other prayer was for declaration that all contracts, sub-contracts and agreement projects emanating from Respondent's meetings, decisions and resolutions from 2020 are null and void. This prayer is 53 impracticable and therefore is hereby declined. Granting such a prayer would offend the rights of undisclosed other persons who are not parties to the case at hand and who might have entered into the alleged contracts, subcontracts, agreement and projects emanating from the Respondent's meetings, decisions and resolutions from 2020 to date in

2024. Also, the order would be so vague hence not capable of being implemented. The particulars of "all contracts, subcontracts, agreement and projects emanating from Respondent's meetings, decisions and resolutions from 2020", were not provided. It would be a blanket order susceptible to abuse and causing chaos in the Respondent Company as well as to innocent persons who might have dealt with the company in that period. Which meetings, decisions and resolutions in particular, did the Petitioner have in mind? Meetings, decisions and resolutions of which organ in the Respondent Company, as between the Members" and Directors'? Which contracts, sub-contracts, agreement and projects did the petitioner intend? Who are the exact persons who might have transacted the contracts, subcontracts, agreement and projects with the Respondent company and the same have reached which levels of performance? These are among the nagging questions

which make the prayer impracticable and inequitable to grant. I therefore decline to make the order nullifying the unknown contracts, sub-contracts, agreements 54 and projects emanating from Respondent's meetings, decisions and resolutions from 2020. I am settled that once the Petitioner is re- integrated in the affairs of the respondent company as a member, and as a director, he will have the right to access all the records of the alleged contracts, sub-contracts, agreements and projects emanating from Respondent's meetings, decisions and resolutions from 2020 and their financial implications to the respondent company. In fine, I partially grant the petition and order that:

- (i) It is hereby declared that the Respondent's affairs are being conducted in a manner which is unfairly prejudicial to the interest of the petitioner as a member of the company and contrary to the Companies Act No. 12 of 2002. (ii) I order the Respondent Company to give the Petitioner access to all the records of the contracts, sub-contracts, agreements and projects emanating from the Respondent's meetings, decisions and resolutions from 2020 as well as copies of minutes and resolutions of all such meetings, decisions and resolutions of the Board of Directors and of the Members' General Meetings from the date he joined the company as a member. 55 (iii) The Respondent is ordered to conduct its affairs in a manner which is not unfairly prejudicial to the interests of the petitioner as a member of the company. (iv) The Petition is granted with Costs. It is so ordered. Ruling is delivered this Court today on 29th day of July, 2024 before Hon. J. M. Minde Deputy Registrar, in the presence of Mr. Mathew Ngaga, learned Advocate for the Petitioner also represent in person and Mr. Sharif Abdallah Advocate for the Respondent. DEPUTY REGISTRAR 29/07/2024 56

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